
THE GOVERNMENT PROCUREMENT REVIEW

SECOND EDITION

EDITORS

JONATHAN DAVEY AND JAMES FALLE

LAW BUSINESS RESEARCH

THE GOVERNMENT PROCUREMENT REVIEW

The Government Procurement Review

Reproduced with permission from Law Business Research Ltd.

This article was first published in The Government Procurement Review, 2nd edition
(published in May 2014 – editors Jonathan Davey and James Falle).

For further information please email
Nick.Barette@lbresearch.com

THE
GOVERNMENT
PROCUREMENT
REVIEW

Second Edition

Editors

JONATHAN DAVEY AND JAMES FALLE

LAW BUSINESS RESEARCH LTD

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INTERNATIONAL INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

PUBLISHER
Gideon Robertson

BUSINESS DEVELOPMENT MANAGERS
Adam Sargent, Nick Barette

ACCOUNT MANAGERS
Katherine Jablonowska, Thomas Lee, James Spearing, Felicity Bown

PUBLISHING ASSISTANT
Lucy Brewer

MARKETING ASSISTANT
Chloe Mclauchlan

EDITORIAL ASSISTANT
Shani Bans

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Anne Borthwick

SUBEDITOR
Anna Andreoli

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2014 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients.

Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of May 2014, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-909830-03-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ADDLESHAW GODDARD LLP

AEQUITAS LEGAL

ALLEN & OVERY

ALLENDE & BREA

ARAP, NISHI & UYEDA ADVOGADOS

BAHAS, GRAMATIDIS & PARTNERS

BAKER & McKENZIE

BENTSI-ENCHILL, LETSA & ANKOMAH

BIRD & BIRD LLP

JAMES FALLE

LEE AND LI, ATTORNEYS-AT-LAW

LENZ & STAEHELIN

LIEDEKERKE

MAPLES AND CALDER

MNKS

NADER, HAYAUX & GOEBEL, SC

SETH DUA & ASSOCIATES

SETTERWALLS ADVOKATBYRÅ AB

SHEPPARD MULLIN RICHTER & HAMPTON LLP

ȚUCA ZBÂRCEA & ASOCIAȚII

VIEIRA DE ALMEIDA & ASSOCIADOS

CONTENTS

Editors' Prefacevii
	<i>Jonathan Davey and James Falle</i>
Chapter 1	ARGENTINA..... 1
	<i>María Morena del Río</i>
Chapter 2	AUSTRALIA..... 14
	<i>Geoff Wood and Anne Petterd</i>
Chapter 3	BELGIUM 27
	<i>Dirk Lindemans, Frank Judo, Aurélien Vandeburie and Stijn Maeyaert</i>
Chapter 4	BRAZIL 40
	<i>Massami Uyeda Junior and Rodnei Iazzetta</i>
Chapter 5	CANADA 53
	<i>Theo Ling and Jonathan Tam</i>
Chapter 6	EUROPEAN UNION 67
	<i>James Falle and Clare Dwyer</i>
Chapter 7	FRANCE..... 82
	<i>Romarc Lazerges</i>
Chapter 8	GERMANY..... 97
	<i>Olaf Otting and Udo H Olgemöller</i>
Chapter 9	GHANA..... 107
	<i>Divine Kwaku Duwose Letsa</i>

Chapter 10	GREECE 123 <i>Irene Economou</i>
Chapter 11	INDIA..... 141 <i>Sunil Seth and Vasanth Rajasekaran</i>
Chapter 12	IRELAND..... 152 <i>Mary Dunne</i>
Chapter 13	ITALY 163 <i>Filippo Bucchi, Alfonso Polillo and Maria Vittoria La Rosa</i>
Chapter 14	LUXEMBOURG 176 <i>Benjamin Marthoz</i>
Chapter 15	MALTA 193 <i>Adrian Delia and Matthew Paris</i>
Chapter 16	MEXICO 203 <i>Javier Arreola E and Vanessa Franyutti J</i>
Chapter 17	PORTUGAL..... 215 <i>Paulo Pinheiro, Rodrigo Esteves de Oliveira, Catarina Pinto Correia and Ana Marta Castro</i>
Chapter 18	ROMANIA 228 <i>Oana Gavrilă and Mariana Sturza</i>
Chapter 19	SPAIN 240 <i>Raquel Ballesteros</i>
Chapter 20	SWEDEN 253 <i>Ulf Djurberg and Natali Phalén</i>
Chapter 21	SWITZERLAND 263 <i>Astrid Waser, Marcel Meinhardt and Roman Kern</i>

Chapter 22	TAIWAN.....	274
	<i>Pauline Wang and Claire C Lin</i>	
Chapter 23	UNITED KINGDOM	289
	<i>James Falle and Clare Dwyer</i>	
Chapter 24	UNITED STATES	303
	<i>John W Chierichella</i>	
Appendix 1	ABOUT THE AUTHORS.....	333
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS ...	347

EDITORS' PREFACE

We are delighted to introduce this, the second edition of *The Government Procurement Review*. It brings even wider geographic coverage than the first edition, now covering six continents and 24 national chapters (including the EU chapter).

The political and economic significance of government procurement is plain. Government contracts are of considerable value and importance, often accounting for 10 to 20 per cent of GDP in any given state. Government spending is often high profile and has the capacity to shape the future lives of local residents.

While the economic climate has improved since we wrote the preface to the first edition, we are far from seeing a return to the boom years. In light of the economic climate, it is perhaps no surprise then that governments seek to demonstrate more effective, better value purchasing; nor that many suppliers view government contracts as a much-needed revenue stream with the relative certainty that they will be paid.

While economic downturns have in the past coincided with protectionist national measures, we are heartened to see some notable examples of free trade-oriented policy-making in the past year. In particular, the World Trade Organization's revised Agreement on Government Procurement (GPA) came into force on 6 April 2014, having received the requisite number of ratifications. With the new GPA, it is estimated that there will be new procurement opportunities worth US\$80-US\$100 billion per year for firms from other GPA states.

At the same time, 10 additional states are in negotiation with a view to accession to the GPA, including China, Ukraine and New Zealand. In addition to the pluralistic GPA, there is an increasing number of bilateral trade agreements covering procurement.

This is not to say that firms looking to supply foreign governments necessarily always enjoy perfect equality when bidding for contracts. We should mention that there are also potential new, protectionist clouds on the procurement horizon: in January 2014, the European Parliament approved measures that will prevent firms from bidding for larger public contracts unless their home country allows reciprocal access to EU firms. While the European Parliament views the measure as encouraging third countries to reciprocate in

opening markets, some fear it will have the opposite effect, provoking trade wars. We very much hope that the proposed EU measures do not have such a nefarious outcome.

Regardless of these possible difficulties, we expect that the principles of transparency, value for money and objectivity enshrined in the UNCITRAL Model Law on Public Procurement and in the national legislation of many states will continue gradually to have a positive effect. This will particularly be the case where international agreements (be it the GPA or bilateral treaties) offer equal access.

One sometimes overlooked beneficial side effect of transparency and objectivity is that opportunities for local suppliers may be opened up where previously they have struggled to compete with incumbent providers for new contracting opportunities. This in turn can drive value for money for the taxpaying public.

Some national authors have reported significant increases in challenges to contract award decisions. While it is clear that there are considerable variations between jurisdictions in the willingness or ability of suppliers to challenge, it seems to us that the increased risk of challenge can help hold awarding authorities to account and is likely to encourage greater compliance with national procurement rules.

When reading chapters regarding European Union Member States, it is worth remembering that the underlying rules are set at EU level. Readers may find it helpful to refer to both the European Union chapter and the relevant national chapter, to gain a fuller understanding of the relevant issues. As far as possible, the authors have sought to avoid duplication between the EU chapter and national chapters.

Finally, we wish to take this opportunity to acknowledge the tremendous efforts of the many contributors to the second edition as well as the tireless work of the publishers in ensuring a quality product is brought to your bookshelves in a timely fashion. We hope you will agree that it is even better than the first edition, and we trust you will find it to be a valued resource.

Jonathan Davey, Addleshaw Goddard LLP • James Falle, Solicitor (England & Wales)
London
May 2014

Chapter 17

PORTUGAL

*Paulo Pinheiro, Rodrigo Esteves de Oliveira,
Catarina Pinto Correia and Ana Marta Castro¹*

I INTRODUCTION

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

As an EU Member State, Portugal has implemented Directive 2004/17/EC and Directive 2004/18/EC.

These Directives were transposed into the Portuguese legal system through the Public Contracts Code (PCC), approved by Decree-Law No. 18/2008, of 29 January 2008.

In Portugal, the award of contracts is subject to compliance with the principles of the TFEU, in particular the free movement of goods, freedom of establishment and freedom to provide services, as well as with the principles deriving therefrom, such as the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

The coordination of procedures for the award of contracts in the fields of defence and security is ruled by Directive 2009/81/EC.

Through Decree-Law No. 104/2011, of 6 October 2011, Portugal transposed the said Directive into its legal system, which allows more flexibility and less transparency in procurement procedures in these sectors.

This Decree-Law also stipulates that, in line with Article 296 of the EC Treaty, certain contracts regarding both the defence and security sectors are excluded from its scope of application.

¹ Paulo Pinheiro and Rodrigo Esteves de Oliveira are partners and Catarina Pinto Correia and Ana Marta Castro are managing associates at Vieira de Almeida & Associados.

II YEAR IN REVIEW

2013 saw no relevant legislative changes that had an impact on the scope of the PCC, but only the approval of ministerial orders and regulatory aspects of minor importance, especially relating to the area of health.

Similarly, 2013 witnessed no rulings likely to change the case law paradigm, but only to case law related to the normal interpretation of the Portuguese rules.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

The PCC identifies the entities subject to the government procurement rules, as follows:

a the traditional public sector, including the central, regional and local authorities (Article 2/1), including:

- the state;
- autonomous regions;
- municipalities;
- public institutes;
- public foundations;
- public associations; and
- associations financed for the most part by the entities above, or subject to their management control or where the majority of the members of the administrative, managerial or supervisory board are, directly or indirectly, appointed by the entities above;

b bodies governed by public law, of a public or private nature, as those included in Directives 2004/17/EC and 2004/18/EC (Article 2/2); and

c utilities within the special sectors – the transport, energy, water and postal sectors (Article 7):

- public undertakings (i.e., those subject to the dominant influence, either directly or indirectly, of the entities referred to in (a) and (b) above, including by means of the holding of the majority of the share capital; the majority of the voting rights; management control; or the right to appoint the majority of the members of the administrative, managerial or supervisory board;
- entities holding special or exclusive rights, having not been granted within the scope of an internationally advertised pre-contractual procedure, the aim of which is to limit the exercise of activities included in the special sectors and that substantially affect the ability of other entities to carry out such activities; and
- companies incorporated exclusively by utilities referred to in clause 7/1 (point (c)) or financed by the same, subject to their management control or whose members of the administrative, managerial or supervisory board are appointed by the said entities, and destined to the common developing of activities in the water, energy, transport or postal sectors.

Some procurement rules may also apply to contracts executed by public works concessionaires or by entities holding special or exclusive rights for the undertaking of public service activities, under certain circumstances expressly defined in Articles 276 and 277 of the PCC.

ii Regulated contracts

The nature of contracts subject to public procurement rules is determined by the nature of the awarding entity that will conclude the contract.

For purposes of contracts executed by entities belonging to the traditional public sector, public procurement rules apply to any contracts, regardless of their name or nature, the scope of which is subject to competition in the market. This is a vague concept that is not determined or defined by the law. It has been interpreted in a very broad manner. The PCC determines that it includes, *inter alia*:

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

As to contracts being executed by the same awarding entities – public sector entities – with other awarding entities having the same nature, or by bodies governed by public law, public procurement rules apply only to the contracts referred to in (a) to (e) above.

Some specific contracts are expressly excluded from the scope of public procurement rules, such as those contracts that are excluded from the scope of Directives 2004/17/EC and 2004/18/EC, or contracts for the acquisition of real estate.

Special rules are established concerning the procurement procedures adopted for the award of utilities contracts. The PCC adopts more flexible rules, such as the possibility to freely choose from a broader range of types of procedures, including an open procedure, restricted procedure with pre-qualification or negotiation procedure; the lower minimum delays for submission of bids; or the applicability of special procedures such as the qualification systems.

As to defence procurement contracts, Decree-Law No. 104/2011, of 6 October 2011 established more flexible rules concerning, for example, the adoption of special procedures, such as:

- a* negotiation procedure without publication of a notice;
- b* rules concerning qualitative selection including quality or environment management;
- c* confidential proceedings;
- d* protection of confidential information or security of the supplies;
- e* extension to a seven-year term for framework agreements duration; and
- f* publicity and transparency rules.

As a general rule, the contracts mentioned above are subject to the applicable procurement rules, regardless of the contract's value. However, contracts under the special utilities

sectors are only subject to the rules if the respective contract values equal or exceed the thresholds set forth in Directive 2007/17/EC, Article 16 (a) and (b).

The awarding entities may award contracts by means of a direct award procedure (not advertised and non-competitive) regardless of the contract value, if some material criteria are verified. These material criteria concern:

- a* for all kind of contracts:
 - failed procurement (under certain conditions);
 - extreme urgency arising from unforeseeable events not imputable to the awarding entity;
 - contracts destined to the provision of telecommunication services;
 - existence of an exclusive co-contractor due to technical, artistic or exclusive rights reasons; and
 - contracts under secrecy or under special security measures;
- b* for public works contracts:
 - new repeated works similar to works previously awarded, subject to the conditions set forth in the law; and
 - works contracts under a determined threshold destined only to I&D, not-for-profit study or experimental purposes;
- c* for contracts for the acquisition or lease of goods:
 - goods destined to replace or broaden previous supplies awarded to the same entity, provided different goods would cause incompatibility or disproportionate technical difficulties of use or maintenance;
 - goods produced for I&D, not-for-profit study or experimental purposes only;
 - goods quoted in the Raw Materials and Commodities Exchange;
 - special advantageous acquisitions;
 - goods acquired under a framework agreement executed with one entity; and
 - the acquisition of water or energy by a utility acting in the water or energy special sectors; and
- d* regarding services contracts:
 - new repeated services similar to services previously awarded, subject to the conditions set forth in the law;
 - some services of an intellectual or financial nature indicated in category 6 of Annex ii.A of Directive 2004/18/EC;
 - services related to real estate acquisition or lease;
 - arbitral or conciliation services;
 - certain I&D services;
 - contracts executed following a conception tender as per the terms of reference; and
 - services acquired under a framework agreement executed with one entity.

Regarding variations of contracts, the contract may be amended without the need to submit the varied contract to a competitive tender, whenever the amendment does not affect the main scope of the contract and does not prevent, restrict or distort competition. Thus, an amendment shall be allowed only when it is objectively verifiable that the order of the evaluated bids in the tender procedure for the award of the initial contract would not be altered had the tender specifications contemplated this amendment.

Whenever the amendments breach the above-mentioned legal limits, the awarding authority must competitively tender the varied contract.

On the other hand, the alteration of the contracting parties will not imply the launching of a competitive tender if such alteration is provided for in the existing contract, or when it is authorised during the performance of the contract by the contracting authority and the new entity complies with all capacity, technical and financial qualification criteria required under the original tender.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

The public procurement regime set forth in the PCC deals with all special procedures – framework agreements and central purchasing, but also conception tenders, dynamic purchasing or qualification systems – and special rules set forth for the utilities sectors.

Framework agreements may be executed with one entity only or with several entities, depending on the tender specifications having been all or partially set forth in the tender documents, respectively.

The award of a framework agreement is subject to the adoption of competitive procedures, considering the global amount of contracts to be executed under the same.

A framework agreement binds the private contractor to the contracts executed under the same. However, the contracting authority may execute contracts outside the scope of the framework agreement.

The term of a framework agreement must not exceed four years.

Central purchasing may be created by contracting authorities other than utilities acting in the special sectors (i.e., only entities included in the traditional public sector and bodies governed by public law).

Central purchasing may be created for the purpose of awarding bids, leasing or acquiring goods or services, or executing framework agreements and centralising the procurement of several entities.

Central purchasing shall comply with the rules applicable to each contracting authority.

Procurement through central purchasing is purely optional.

The PCC also sets forth the special proceedings instruments, which include: concept tenders, for the selection of design works; dynamic acquisition systems intended to execute contracts for the acquisition or lease of goods or for the acquisition of services of current use, by means of a totally electronic system; and qualification systems. The latter may only be adopted in the context of executing contracts designed for activities in the special utilities sectors.

ii Joint ventures (JVs)

The public procurement rules do not apply to in-house relations between contracting authorities and publicly owned undertakings. The PCC has laid down the requirements for exclusion (as in-house entities) in accordance with ECJ case law – it requires the existence of a control exercised by the contracting authority over the contracted party

similar to the control exercised over its own departments; and the carrying out of the essential part of the contracted party's activity to the benefit of the contracting authority.

Accordingly, if a public-public JV complies with the criteria above, it may be contracted by its parent companies without even being subject to the public procurement rules.

Also excluded from the scope of public procurement rules is the award by a contracting authority of a public service contract to an undertaking that stands as a contracting authority itself, given the existence of an exclusive right.

For public-private partnerships, the PCC and Decree-Law No. 111/2012, of 23 May 2012, provide for a special legal framework. The private sector partner has to be competitively tendered and duly advertised. Only reasons related to public interest (as well as those mentioned in Section III.ii, *supra*) may justify adoption of a direct award procedure.

Special rules are set forth for special utilities sectors. JV companies may be deemed contracting entities provided they are incorporated exclusively by utilities referred to in clause 7/1 of the PCC or comply with the requirements set forth in Section III.i, *supra*.

V THE BIDDING PROCESS

i Notice

Prior to the formal opening of the pre-contractual procedures, the contracting authorities should disclose their annual procurement plan, thus acting in accordance with the transparency principle, by the prior information notice that complies with the model provided in Appendix I of EC Regulation No. 1564/2005 of 7 September 2005, for publication in the Official Journal of the European Union (OJEU).

Regarding agreements concerning utilities, the same must submit a periodic indicative notice, in accordance with the model in Appendix IV of Regulation 1564/2005, for publication in the OJEU.

Moreover, all competitive tenders must be launched through publication of a tender notice, which may be at a national – published in the Portuguese Official Gazette – or European level if the contract's value exceeds Community thresholds.

Contract award notices are also mandatory and are to be effected within 30 days following the award, in accordance with the model present in Appendix III or IV (as applicable) of Regulation 1564/2005. As to utilities, said notice obligation applies for contracts that amount to values that equal or exceed European thresholds.

Lastly, whenever the award is without notice at the European level, the contracting authority may submit a voluntary transparency notice disclosing its intention to execute the contract, pursuant to the model present in Appendix III of Regulation No. 1150/2009, of 10 November 2009, for publication in the OJEU.

Contract award information shall also take place by means of publication on the public procurement platform, for the purposes of control by competent national authorities.

ii Procedures

The PCC provides for the following procurement procedures:

- a* direct award – one or several bidders will be invited to submit bids;
- b* open procedure – any interested entity is free to submit bids;
- c* restricted procedure with pre-qualification – comprises two stages: one for submitting technical and financial qualification documents and selecting candidates, and one for submitting bids and evaluation;
- d* negotiated procedure – including the same two phases as the procedure in (c) and a third phase for the negotiation of bids; and
- e* competitive dialogue – intended to submit to competition a certain solution, whenever the contracting authority is not able to specify a definitive and concrete solution for the contract.

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 those two procedures or the negotiation procedure.

The only special procedure applying to utilities sectors only is the qualification system.

Regarding the defence and security sector, Decree-Law No. 104/2011 provides for three procedures: competitive dialogue, restricted procedure with pre-qualification (both governed by the rules of the PCC) and a third special procedure, the negotiation procedure, which may be preceded by a contract notice.

Further to the European directives stating the importance of simplifying and dematerialising procurement procedures with a view to ensuring greater efficiency and transparency, the PCC represents a clear option for electronic procurement. Awarding authorities are bound to adopt electronic procurement procedures. General PCC provisions on electronic procurement are materialised through different legal texts, namely Decree-Law 143-A/2008, 25 July 2008 and Ordinance 701-G/2008, 29 July 2008.

iii Amending bids

The general rule that applies to all cases is that tender documents and bids shall not be altered during the whole procedure. Exceptions are, however, expressly foreseen.

The tender documents may be rectified by the contracting authority during the deadline for the presentation of bids. Interested parties are given the opportunity to identify, during the same deadline, errors and omissions of the tender specifications, which shall then be subject to subsequent approval by the contracting authority.

Any rectification regarding errors and omissions shall not imply amendments to any of the tender documents' essential aspects. Whenever such amendments occur, the deadline for presentation of bids should be extended.

Furthermore, after the award decision and before signature of the contract, the contracting authority may propose changes to the contract's content, as long as such changes are imposed by public interest and it is objectively demonstrated that the bids' ranking would remain unchanged should the proposed adjustments be reflected on the

bids. Nonetheless, such proposed changes cannot violate any of the tender documents' imperative settings nor reflect the adoption of another bidder's bid.

Likewise, there are certain moments during the procedures when bids may be subject to amendments. Such is the case whenever bid negotiation occurs or, in the case of direct award with one bid, whenever the bidder is requested to improve its bid.

VI ELIGIBILITY

i Qualification to bid

The public procurement law sets forth requirements that condition the participation of interested parties to tenders, meaning that, if a bidder does not comply with the same, it will be disqualified and excluded from the tender. Said requirements differ from technical and financial capacity requirements, since the former certify the professional and personal suitability of bidders, while the latter assess all candidates' technical and financial capacity.

The suitability criteria include:

- a* insolvency or similar;
- b* condemnation for crimes affecting professional reputation;
- c* administrative sanction based on professional serious breach;
- d* non-payment of tax obligations;
- e* non-payment of social security obligations;
- f* sanction due to breach of labour law;
- g* sanction due to breach of legal obligations concerning use of employees subject to payment of taxes and social security obligations;
- h* condemnation for crimes concerning criminal organisations, corruption, fraud or money laundering; or
- i* direct or indirect participation in the preparation of tender documents, thus obtaining a special advantage.

On the other hand, in procedures allowing for a pre-qualification phase, contracting authorities may establish criteria to evaluate bidders' technical and financial capacity. These criteria may include factors linked to the bidder and not to the bid to be presented, as in the European directives.

ii Conflicts of interest

Contracting authorities are strictly prevented from awarding a public tender should a situation of conflict of interest arise. All public entities must comply with general rules regarding conflicts of interest, as established in the Administrative Procedure Code.

In general, such rules address situations where a member of the administrative authority has a special interest in the decision-making process, and comprise the following situations:

- a* cases of special interest in a given decision or tender as a result of some kind of involvement with a given bidder;
- b* family ties;
- c* a business interest in a similar question to the one under assessment; and

- d* the official or a relative's previous involvement in the same procedure, even though in a different capacity.

On the other hand, as referred to above, bidders who have participated, directly or indirectly, in the preparation of tender documents, thus obtaining a special advantage, shall be disqualified and excluded from the tender.

iii Foreign suppliers

Both foreign and national suppliers can and shall bid on a level playing field. Moreover, the free movement principle determines that foreign EU suppliers cannot be obliged to set up a local branch or subsidiary, or have local tax residence.

VII AWARD

i Evaluating tenders

There is a general provision in the PCC 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 criteria and their corresponding weight, as well as the evaluation methodology, the scoring system for every single criterion, and factors concerning the contract's execution, must be clearly specified.

The obligation to disclose the evaluation model in advance must be observed in all procurement procedures, with two exceptions: when the adopted criterion is the lowest price; and in the case of direct award, even when several bidders are invited to participate in a given procurement procedure and the award criterion is the most economically advantageous tender.

According to the PCC, contracting authorities can award public contracts based on two criteria: the lowest price only; and the most economically advantageous tender.

According to the first criterion, only the price of the proposals is evaluated. As per the latter, as far as there is a connection to the subject matter of the public contract in question, various factors can be taken into consideration, namely 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.

Once the proposals are submitted, the jury begins its evaluation and issues a preliminary evaluation report, which shall include a description of the analysis conducted in light of the legality assessment of the proposals submitted, namely in relation to their absolute compliance with the tender specifications, as well as to the concrete application of the evaluation criteria previously approved.

All bidders that submitted a proposal are notified and informed of the preliminary evaluation report, including the unsuccessful bidders.

At this stage, bidders are granted a brief period of time, usually of five working days, to comment on the analysis made by the jury. They have the opportunity to present a formal request for a previous hearing asking for the modification of the preliminary report in the event that they do not agree with its content.

Upon analysis of the request presented by the bidders, the jury has the opportunity to review its previous decision. In this case, if the changes introduced refer to the graduation of the proposals or if the jury decides to reject a proposal previously admitted and evaluated, a new preliminary evaluation report shall be issued and the bidder will be granted a new opportunity to review it.

However, if the jury decides to keep its previous decision, or even if only some minor changes are introduced to the content of the preliminary report, the jury issues a final evaluation report that encloses its final decision regarding the analysis and evaluation of the proposals submitted.

Once the final evaluation report is concluded, the jury transmits it along with all the documentation issued during the procedure to the competent department of the contracting authority, which, in most cases, confirms and approves the content of the jury's final evaluation report.

Nevertheless, although these situations are considerably rare, the contracting authority may also conclude that the final evaluation report lacks information, for instance, if the report is insufficiently grounded. In such cases, it can either address these insufficiencies itself, or resend the report to the jury for its rectification.

Another possibility is to deem the procedure well instructed but its conclusions illegal, in which case the contracting authority can alter them accordingly.

Finally, the contracting authority will award the contract to the successful bidder that has presented the best bid in light of the adopted criterion. The act of award shall be written and duly grounded (the specific factual and legal grounds on which the act is based shall be clearly stated) and, when the call for bids has been advertised at the OJEU, the act of award will also have to be advertised in this publication.

At this time, the selected bidder is requested to present to the contracting authority all the necessary documents that duly confirm that his or her personal situation does not prevent him or her from entering into a public contract.

ii National interest and public policy considerations

Procurement procedures may comprise criteria aiming to address certain social and environmental considerations, provided they are linked to the subject matter of the public contract, are clearly stated in the procedure documents, do not confer unrestricted freedom of choice to the contracting authority and comply with the fundamental principles of the EU (such as the principle of non-discrimination).

Such requirements must be fulfilled at the award phase, and some shall be observed during the contract performance. These can include fostering employment, fulfilment of health and safety requirements at work, social inclusion and human rights protection.

Contracting authorities cannot specify the provenance of goods and services, and thus must accept products that are of 'equivalent quality'. In fact, according to the principle of equal treatment, no bidder shall be discriminated against based on its nationality (or the location of its headquarters), and procurement procedures exclusively aimed at national bidders are strictly prohibited.

Accordingly, any criterion aimed at directly or indirectly favouring products or services of national origin, national bidders or the national market (e.g., favouring

bidders with their headquarters in Portugal) will be deemed illegal. The principle of non-discrimination plays a key role both in Portuguese and EU public procurement law.

As previously indicated, procurement legislation specific to the defence sector has been introduced by Decree-Law No. 104/2011, which is compliant with the standard Portuguese public procurement regime regarding the evaluation procedure and the national interest as well as public policy considerations.

According to what is specifically stipulated in this Decree-Law, contracting authorities in the defence sector must also award contracts based on the two above-mentioned criteria. Furthermore, the Decree-Law in question specifically refers to the duty to comply with the basic public procurement principles, namely the principle of non-discrimination, extending to the defence sector the general prohibition of favouring national interests.

Nevertheless, the above-mentioned Decree-Law shall not apply to some specific contracts in the defence sector, namely the ones that are declared to be secret, or that call for the protection of critical interests of the state. For this reason, the secrecy associated with the entering into force of these contracts may also lead to the conclusion that it would be preferable to buy national products in order to maintain national security.

VIII INFORMATION FLOW

According to the PCC and Directives 2004/18/EC and 2004/17/EC, contracting authorities shall act in a transparent way. Such general obligation is enshrined in the requirement to properly publicise public tender proceedings, and to make public all procedure documents, which shall have a clear content, so as to ensure a level playing field among bidders.

In addition, any relevant decisions by the jury or contracting authority shall be notified to all interested parties, including unsuccessful bidders.

Special attention is given in the PCC to the importance of the notification regarding the decision to award the contract. Besides the duty to notify all bidders that submitted a proposal of this final decision, the PCC also stipulates that there is a standstill period of 10 days between the time of notification of the award decision in writing to all tenderers and the conclusion of the contract, so that unsuccessful bidders are allowed to challenge that decision before the contract has been signed.

Further to the compulsory measure implemented by the PCC that obliges all public contracting authorities to use electronic platforms when launching public procurement procedures, transparency regarding this type of procedure has become absolute. The bidders have the opportunity to view and analyse their competitors' requests to participate as well as their bids on the day after the deadline for its submission, before the preliminary evaluation report of the jury is issued.

This obligation to disclose the content of the requests to participate or of the bids will be effective in most cases. Nonetheless, in certain situations, namely when candidates or tenderers request those documents to be treated as confidential, non-disclosure may be allowed.

The request for the confidentiality of documents must be fully grounded. The candidate or tenderer at stake must demonstrate the need to protect the secrecy of the commercial, industrial, military or other type of information contained therein.

Nevertheless, it is important to stress that if the contracting authorities consider, after analysis of the classified documents, that there is no ground for their classification, they may decide to disclose the document at stake.

Another situation where the PCC safeguards confidentiality is the competitive dialogue, where the proposed solutions may not be revealed by contracting authorities to other participants without prior agreement, in order to prevent bidders from being deterred from participating for fear that the entity might reveal confidential information and, in particular, details of its proposed solution that might be used by other tenderers.

Confidentiality rules are stricter in procedures concerning the defence sector, especially where classified and strategic information is at stake. Indeed, contracting authorities should in such situations impose special requirements on bidders and on the jury aimed at guaranteeing the confidentiality of certain information conveyed throughout the procedure.

In addition, when considered contrary to public interest or even contrary to the legitimate commercial interests of the tenderers, it may be thought preferable not to publicise certain information on the contract notice or the contract notice itself, provided such decision is duly grounded.

IX CHALLENGING AWARDS

i Procedures

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

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

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

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

As a general rule, judicial proceedings on pre-contractual litigation regarding proceedings for the award of public works contracts and concessions, public supply contracts and public service contracts follow a special proceeding laid down in Articles 100 and subsequent of the Procedural Code of Administrative Courts. Because of the importance of obtaining a swift ruling, this kind of proceeding usually takes no less than six months to obtain the first instance decision.

Portuguese law also provides for administrative courts to grant interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned. Included among these interim measures is a request for the suspension of the procedure for the award of a public contract, or a request to suspend the implementation of any decision taken by the contracting authority.

ii Grounds for challenge

Decisions of the contracting authority as well as procedure documents can be challenged on grounds of illegality or of breach of the applicable procurement rules, namely the PCC.

Challenges can address substantive or procedural issues. Furthermore, procedure documents can be challenged for, *inter alia*, violation of the principles of non-discrimination, transparency and competition, as well as for failure to fully comply with PCC rules.

Challenges concerning a procurement procedure are frequently brought before contracting authorities and courts by unsuccessful bidders. Chances of success will mainly depend on the grounds invoked by the challenge.

iii Remedies

Courts can award damages and even terminate a contract in some circumstances as long as the contract has not been fully performed. However, in such a case, it is still possible to award damages (e.g., costs for filing the protest and the bid's preparation costs).

Finally, courts can impose fines for breaches of the procurement procedure's rules.

X OUTLOOK

EU procurement law already strongly influences Portuguese procurement law.

The new Public Procurement Directives² were recently approved, and were published in the OJEU on 28 March 2014. They entered into force on 17 April 2014, and Portugal, in common with other EU Member States, now has 24 months to implement the provisions of the new rules into national law.

2 Directives 2014/24/EU, 2014/25/EU and 2014/23/EU.

Appendix 1

ABOUT THE AUTHORS

PAULO PINHEIRO

Vieira de Almeida & Associados

Paulo Pinheiro has a law degree from the University of Lisbon Faculty of Law and a postgraduate degree in European legal studies at the College of Europe in Bruges, Belgium.

He is an assistant professor at the University of Lisbon School of Law and at the Superior Management College.

He joined Vieira de Almeida & Associados in 1998. He is currently the partner in charge of the public law and health practice. In such capacity he has been involved in several transactions and projects in the following sectors: health, telecoms, energy and natural gas, transport, water and waste. He has also been actively working in regulation and public procurement matters involving such sectors and establishing public-private partnerships.

He is the author of various articles and publications on matters within his fields of expertise.

RODRIGO ESTEVES DE OLIVEIRA

Vieira de Almeida & Associados

Rodrigo Esteves de Oliveira has a law degree from the University of Coimbra Faculty of Law and a master's degree (LLM) in administrative law, Coimbra University Faculty of Law. He was admitted to pursue a PhD at the University of Coimbra Faculty of Law.

He is an assistant professor at University of Coimbra Faculty of Law. He is also a lecturer in postgraduate studies in law at the University of Coimbra Faculty of Law, the University of Lisbon Faculty of Law, the Portuguese Catholic University in Lisbon and the Portuguese Catholic University in Oporto.

He lectures regularly at the Centre for Judicial Studies (the centre for the training of judges and public prosecutors).

He joined Vieira de Almeida & Associados in 2006 and is currently a partner in the public law area of practice. In such capacity he has been involved in several projects and transactions, mainly in public procurement, public regulation and administrative concessions matters.

He is the author of various articles and publications on matters within his fields of expertise.

He is admitted to the Portuguese Bar Association.

CATARINA PINTO CORREIA

Vieira de Almeida & Associados

Catarina Pinto Correia has a law degree from the Catholic University of Lisbon, Faculty of Law and a master's in European community law, College of Europe, Bruges. She has a postgraduate degree in EC competition law from King's College London and a postgraduate degree in public procurement and concessions from the University of Lisbon, Faculty of Law.

She joined Vieira de Almeida & Associados in 1996. She is a managing associate in the public law practice. In such capacity she has been involved in several matters of administrative law (general and specific), including in the areas of public procurement, administrative concessions and public-private partnerships, and public regulation. She has participated in several transactions, mainly focused on the energy, postal, transport (including rail) and road and rail infrastructure sectors.

She is the author of various articles and publications on matters within her fields of expertise.

She is admitted to the Portuguese Bar Association.

ANA MARTA CASTRO

Vieira de Almeida & Associados

Ana Marta Castro has a law degree from the University of Lisbon, Faculty of Law. She has a postgraduate degree in administrative law from the University of Lisbon, Faculty of Law and a postgraduate degree in public procurement law and practice from the Portuguese Catholic University, Lisbon Faculty of Law, as well as a postgraduate degree in public procurement law and the new frontiers from the University of Lisbon, Faculty of Law.

She joined Vieira de Almeida & Associados in 2006. She is a managing associate in the public law practice, where she has been actively involved in several transactions, namely in the sectors of telecommunications, education, energy, public health, transport and roads. In such capacity, she has advised several leading clients, in Portugal and abroad, in the following areas: administrative law, public procurement, public regulation and administrative litigation.

She has delivered trainings in several courses and workshops on matters within her fields of expertise, including public procurement.

She is admitted to the Portuguese Bar Association.

VIEIRA DE ALMEIDA & ASSOCIADOS

Av Duarte Pacheco 26

1070 110 Lisbon

Portugal

Tel: +351 21 311 3400

Fax: +351 21 311 3406

lisboa@vda.pt

pp@vda.pt

reo@vda.pt

cpc@vda.pt

cma@vda.pt

www.vda.pt