

# ICLG

## The International Comparative Legal Guide to: **Public Procurement 2016**

### **8th Edition**

A practical cross-border insight into public procurement

Published by Global Legal Group, with contributions from:

Anderson Mōri & Tomotsune

Allen & Gledhill LLP

Ashurst LLP

Baker & McKenzie

CGM | Chaves, Gelman, Machado, Gilberto e Barboza  
Sociedade de Advogados

CMS Cameron McKenna LLP

Debarliev, Dameski & Kelesoska, Attorneys at Law

DeHeng Law Offices

Dentons

Earth Avocats

Fernandois & Cía.

Fried, Frank, Harris, Shriver & Jacobson LLP

Gürlich & Co., attorneys-at-law

Ibáñez Parkman Abogados

KALO & ASSOCIATES

Kvale Law Firm DA

Kyriakides Georgopoulos Law Firm

Ledwaba Mazwai Attorneys

Legaltree

Legance – Avvocati Associati

Lenz & Staehelin

Mamo TCV Advocates

Mannheimer Swartling Advokatbyrå AB

Morais Leitão, Galvão Teles, Soares da Silva & Associados

Norton Rose Fulbright Canada LLP

PAREJA & ASSOCIATS, ADVOCATS

Stibbe

TPLA – Taciana Peão Lopes & Advogados Associados

VASS Lawyers

Vieira de Almeida & Associados

**GLG**

Global Legal Group

**Contributing Editors**  
Euan Burrows & Edward McNeill, Ashurst LLP

**Head of Business Development**  
Dror Levy

**Sales Director**  
Florian Osmani

**Account Directors**  
Oliver Smith, Rory Smith

**Senior Account Manager**  
Maria Lopez

**Sales Support Manager**  
Toni Hayward

**Sub Editor**  
Hannah Yip

**Senior Editor**  
Suzie Levy

**Group Consulting Editor**  
Alan Falach

**Group Publisher**  
Richard Firth

**Published by**  
Global Legal Group Ltd.  
59 Tanner Street  
London SE1 3PL, UK  
Tel: +44 20 7367 0720  
Fax: +44 20 7407 5255  
Email: info@glgroup.co.uk  
URL: www.glgroup.co.uk

**GLG Cover Design**  
F&F Studio Design

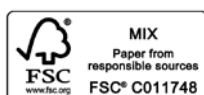
**GLG Cover Image Source**  
iStockphoto

**Printed by**  
Ashford Colour Press Ltd.  
December 2015

Copyright © 2015  
Global Legal Group Ltd.  
All rights reserved  
No photocopying

ISBN 978-1-910083-75-8  
ISSN 1757-2789

**Strategic Partners**



## General Chapters:

1	<b>EU Public Procurement Rules</b> – Euan Burrows & Edward McNeill, Ashurst LLP	1
---	---	---

## Country Question and Answer Chapters:

2	<b>Albania</b>	KALO & ASSOCIATES: Elira Hroni	10
3	<b>Australia</b>	Baker & McKenzie: Geoff Wood & Anne Petterd	18
4	<b>Belgium</b>	Stibbe: David D’Hooghe & Arne Carton	25
5	<b>Brazil</b>	CGM   Chaves, Gelman, Machado, Gilberto e Barboza Sociedade de Advogados: André Marques Gilberto & Álvaro Adelino Marques Bayeux	32
6	<b>Bulgaria</b>	CMS Cameron McKenna LLP: Kostadin Sirleshtov & Angel Bangachev	39
7	<b>Canada</b>	Norton Rose Fulbright Canada LLP: Martin Masse & Erin Brown	48
8	<b>Cape Verde</b>	Vieira de Almeida & Associados: Rodrigo Esteves de Oliveira & Catarina Pinto Correia	55
9	<b>Chile</b>	Fernandois & Cía.: Arturo Fernandois Vöhringer & Luis Hevia Campusano	62
10	<b>China</b>	DeHeng Law Offices: Ding Liang & Li Hongyuan	68
11	<b>Czech Republic</b>	Gürlich & Co., attorneys-at-law: Richard Gürlich, Ph.D. & Jan Bárta	77
12	<b>England &amp; Wales</b>	Ashurst LLP: Euan Burrows & Edward McNeill	84
13	<b>France</b>	Earth Avocats: Thomas Laffargue & Yves-René Guillou	97
14	<b>Germany</b>	Dentons: Dr. Maria Brakalova	104
15	<b>Greece</b>	Kyriakides Georgopoulos Law Firm: Elisabeth Eleftheriades & Gus J. Papamichalopoulos	113
16	<b>Italy</b>	Legance – Avvocati Associati: Filippo Pacciani & Alessandra Palatini	122
17	<b>Japan</b>	Anderson Mōri & Tomotsune: Reiji Takahashi & Makoto Terazaki	133
18	<b>Macedonia</b>	Debarliev, Dameski & Kelesoska, Attorneys at Law: Jasmina Ilieva Jovanovik & Dragan Dameski	140
19	<b>Malta</b>	Mamo TCV Advocates: Dr. Franco B. Vassallo & Dr. Joseph Camilleri	148
20	<b>Mexico</b>	Ibáñez Parkman Abogados: Juan Fernando Ibáñez Montaña & José Álvarez Márquez	157
21	<b>Mozambique</b>	TPLA – Taciana Peão Lopes & Advogados Associados: Taciana Peão Lopes & André Cristiano José	162
22	<b>Netherlands</b>	Legaltree: Willemijn Ritsema van Eck	171
23	<b>Norway</b>	Kvale Law Firm DA: Henrik Svane & Charlotte Bang-Hansen	177
24	<b>Portugal</b>	Morais Leitão, Galvão Teles, Soares da Silva & Associados: Margarida Olazabal Cabral & Ana Robin de Andrade	184
25	<b>Romania</b>	VASS Lawyers: Iulia Vass & Bianca Bello	192
26	<b>Singapore</b>	Allen & Gledhill LLP: Kelvin Wong & Tan Wee Meng	203
27	<b>South Africa</b>	Ledwaba Mazwai Attorneys: Metja Ledwaba & Lungile Mazwai	211
28	<b>Spain</b>	PAREJA & ASSOCIATS, ADVOCATS: Carles Pareja i Lozano & Norma Munné Forgas	218
29	<b>Sweden</b>	Mannheimer Swartling Advokatbyrå AB: Sven Vaxenbäck & Johanna Jonsson	224
30	<b>Switzerland</b>	Lenz & Staehelin: Dr. Astrid Waser & Dr. Benoît Merkt	230
31	<b>USA</b>	Fried, Frank, Harris, Shriver & Jacobson LLP: James J. McCullough & Michael J. Anstett	237

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

### Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

# Cape Verde

Rodrigo Esteves de Oliveira



Vieira de Almeida &amp; Associados

Catarina Pinto Correia



## 1 Relevant Legislation

### 1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

The most relevant pieces of legislation are the “Public Procurement Code” (“PPC”), approved by Law nr. 88/VIII/2015, of April 14, and the “Legal Regime of Administrative Contracts”, approved by Decree-Law nr. 50/2015, of September 23 (“LRAC”). The PPC covers public procurement rules. The LFAC covers the contracts’ execution framework.

There are other relevant diplomas, namely Decree-Laws nr. 2/95, of June 30, and nr. 15/97 and nr. 16/97, of November 10, which provide jointly the general framework for administrative procedure, acts and regulations.

### 1.2 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

The general rules on administrative procedures apply on a subsidiary basis to public procurement, and they contain some transparency rules.

### 1.3 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

Pursuant to the Constitution, international agreements prevail over national law. EU rules do not apply in Cape Verde.

### 1.4 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

The basic underlying principles are public interest, good faith, competition, equality, proportionality, transparency, impartiality, economy and efficiency. These principles are relevant since they provide guidelines to rule interpretation and, as a result, offer effective limits to the activity of the contracting authorities.

### 1.5 Are there special rules in relation to procurement in specific sectors or areas?

There are no special rules.

## 2 Application of the Law to Entities and Contracts

### 2.1 Which public entities are covered by the law (as purchasers)?

Article 5 of the PPC classifies the following as awarding entities:

- The State and services of Direct Administration.
- Municipalities.
- Public institutes, including public foundations and regulatory authorities.
- Public associations, associations of public entities and associations of public and private entities which are financed for the most part or subject to management control of the public entities referred to above.
- Concessionaires of public works or services, within the concession’s scope.

### 2.2 Which private entities are covered by the law (as purchasers)?

Associations of public and private entities which are financed for the most part, or which are subject to management control of public entities as detailed in question 2.1, and concessionaires of public works or services.

### 2.3 Which types of contracts are covered?

Public works contracts, lease and acquisition of goods, acquisition of services, acquisition of consultancy services, concessions of public works and concessions of public services.

### 2.4 What obligations do purchasers owe to suppliers established outside your jurisdiction?

While the PPC does not provide specific rules on this, it does allow that procedures are restricted to tenderers or candidates registered or headquartered in Cape Verde.

Notwithstanding, the PPC sets out a principle – and, therefore, an obligation – of non-discrimination, which fully applies to international procedures (where tenderers and candidates registered outside of Cape Verde are allowed to tender).

## 2.5 Are there financial thresholds for determining individual contract coverage?

Yes. For purposes of the choice of the award procedure, there are specific financial thresholds for individual contract coverage (see Articles 30 and 31 of the PPC).

Public tenders must be adopted for public works contracts whose value is equal to or exceeds \$10,000,000 (ten million escudos), and for lease or purchase of goods or services contracts whose value is equal to or exceeds \$5,000,000 (five million escudos).

Restricted tenders should be adopted for public works contracts worth between \$3,500,000 (three million, five hundred thousand escudos) and \$10,000,000 (ten million escudos), and for lease or purchase of goods or services contracts worth between \$2,000,000 (two million escudos) and \$5,000,000 (five million escudos).

The direct award procedure may only be adopted if the contract value is lower than the restricted tender thresholds for each of the relevant contracts.

In certain conditions, however, certain procedures (such as the public tender with two phases, the limited tender with prior qualification, the restricted tender or the direct award) may be adopted regardless of contract value, based on certain material criteria, defined in Article 34 *ff.* of the PPC).

## 2.6 Are there aggregation and/or anti-avoidance rules?

Yes. In order to prevent avoidance, the main criterion of award procedure choice is contract value. In an effort to narrow the chances of avoidance, the PPC has a very inclusive definition of contract value. Additionally, the PPC specifically provides that awards cannot be divided into lots for avoidance purposes.

## 2.7 Are there special rules for concession contracts and, if so, how are such contracts defined?

Concession contracts should, as a rule, be awarded through public tender with two phases or limited tender with pre-qualification.

A public works concession is a contract whereby a party undertakes to build, or design and build, a public work, receiving, in consideration, the right to exploit it for a certain period of time and, if so determined, through additional consideration.

Public services concession is a contract whereby a party undertakes to manage, on its own behalf and under its responsibility, an activity of public service during a certain period of time, and is paid through the financial results of the said management and, if so determined, through additional consideration.

## 2.8 Are there special rules for the conclusion of framework agreements?

General rules apply to the conclusion of framework agreements.

Notwithstanding, there are specific provisions for choice of procedure. In a framework agreement, the choice of procedure (in accordance with question 2.4 above) only allows the execution of contracts under the framework agreement, as long as the sum of the contractual prices

of all contracts to be executed under the framework agreement is below the thresholds applicable to the choice of each procedure.

## 2.9 Are there special rules on the division of contracts into lots?

Yes. Contracts may only be divided into lots when their scope is divisible and the division is harmless to the joint award. In the case of division into lots of contracts executed within a one-year term, the value to be considered for purposes of the choice of the procedure for each lot is the value resulting from the sum of the lots' values.

## 3 Award Procedures

### 3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

The PPC sets forth the following award procedures: public tender; public tender with two phases; limited tender with prior qualification; restricted tender; and direct award.

The public tender kicks-off with the publication of a notice following which any interested party is entitled to submit a bid. Within the first third of the deadline set forth for submitting the bid, any interested party may request clarification of any aspects concerning the tender documents.

The bids are opened in a public ceremony, after which the admitted bids will be assessed by the jury. The jury will verify if there are any grounds for excluding the bids. The bids which should not be excluded are evaluated in light of the applicable award criterion.

The jury's analysis and evaluation of the bids is registered in a preliminary report, which is notified to the bidders for prior hearing.

The final report is forwarded to the awarding entity for the purpose of adoption of the award decision.

The award decision should be notified to the awardee and to the other bidders together with the final report.

Simultaneously with the award decision, the awardee is notified for submitting the qualification documents (that is, documents which confirm that the awardee is not impeded from entering into a public contract) and any other documents foreseen in the tender documents. If applicable, the awardee should provide evidence of the bond.

The public tender with the two-phase procedure follows the rules stipulated for the public tender with the specificities set forth in the PPC.

In this procedure, the bidders submit an initial version of the technical bid.

The awarding authority may decide to amend the tender specifications or the tender programme in accordance with the initial versions of the technical bids.

The successful bidders are invited to submit the final versions of the technical bids and the financial bid, which are mandatorily analysed and evaluated in accordance with the most economically advantageous bid criterion.

The limited tender with prior qualification has two phases – the qualification of candidates phase and the selection of bids phase.

In what concerns the second phase – the submission of bids, evaluation of bids and award phase – it follows the rules stipulated for the public tender with the specificities set forth in the PPC. However, prior to the submission of the bid, there is a prior qualification stage for assessing the financial and technical capacity



of the candidates. The candidates that comply with the financial and technical capacity criteria are invited to submit their bids.

The restricted tender procedure follows the rules stipulated for the public tender with the specificities set forth in the PPC.

In this procedure, the awarding entity may directly invite at least three entities for submitting a bid.

Lastly, the direct award procedure follows the rules stipulated for the restricted tender, with the specification that in this procedure, the awarding entity may directly invite a single operator for submitting a bid.

The PPC also provides a special regime for the award of consultancy services. For consultancy contracts with an estimated value exceeding \$4,000,000, it starts with publication of a notice, and there is a prior qualification of the bidders.

As referred to in question 2.5 above, the selection of each of these procedures is based, as a rule, on financial thresholds that correspond with the contract value. In some specified cases, such a selection – of the public tender with two phases, the limited tender with prior qualification, the restricted tender, and the direct award procedures – may be based, regardless of the contract value, on material criteria. All such criteria are described in Article 34 *ff.* of the PPC.

The award of contracts for the concession of public works and the concession of public services contracts should follow a public tender with two phases or a limited tender with pre-qualification.

### 3.2 What are the minimum timescales?

The PPC sets forth minimum timescales for submitting the bid, as follows:

- Public tender: for a national public tender, the minimum deadline (counting from the date of publication of the notice) for submitting the bid is: (i) 35 days for the award of contracts for public works, concession of public works and concession of public services; and (ii) 20 days for the award of contracts for acquisition or lease of movable property or acquisition of services.

For an international public tender, the said deadlines are respectively 45 days and 30 days.

To the public tender with two phases, the rules which are applicable to the public tender apply.

- Limited tender by prior qualification: The deadline (counting from the date of publication of the notice) for submitting pre-qualification is freely defined in the tender documents, but should not be fewer than 15 days.

For a national limited tender, the minimum deadline (counting after the invitation is sent) for submitting the bid is: (i) 30 days for the award of contracts for public works, concession of public works and concession of public services; and (ii) 15 days for the award of contracts for acquisition or lease of movable property or acquisition of services.

For international limited tenders, the aforementioned deadlines are, respectively, 40 days and 25 days.

- Restricted tender and direct award: the minimum deadline for submitting the bids is 10 days after the invitation is sent.

In the special procedure for consultancy services, the minimum deadline for submitting the bids is 15 days counting from the publication of the notice or from the date on which the invitation is sent, depending on the adopted procedure.

In general, after receiving the preliminary report concerning analysis and evaluation of the bids and a proposed decision on the exclusion of bids and on the awardee, the bidders have a deadline of five to 10 days to exercise the right of prior hearing, after which the final report and award decision will be issued. The same right is given

to bidders in the pre-qualification phase of the limited tender with pre-qualification within no less than five days.

In 10 working days from the award decision, the awardee is required to submit all documents required by the tender documents – namely, evidence that he is not prevented from entering the contract, documents which prove that he is entitled and habilitated to enter into the contract, and a guarantee.

The contract should be signed within a maximum term of 30 days after the award decision.

### 3.3 What are the rules on excluding/short-listing tenderers?

Article 70 of the PPC sets forth requirements that condition the participation in tenders, meaning that if a candidate or a bidder does not comply with the same, it may not submit a pre-qualification or a bid and, if it does, it will be excluded from the tender.

Such requirements are, for example, related to insolvency or similar, conviction for crimes affecting professional reputation or non-payment of tax or social security obligations. These have the nature of impediments, and they prevent entities from bidding.

On the other hand, some award procedures allow for a prior qualification stage in which the tenderers' technical and/or financial capacity is assessed. This is the case in the limited tender with prior qualification, and it may be the case in the special procedure for awarding consultancy services. If they fulfil the technical and capacity criteria, they will be short-listed to submit bids. If they do not, they are excluded from the tender.

The technical and financial capacity may also be analysed on other procedures, the bidders being bound to present qualification documents, along with the bid. Moreover, in this case, if any bidder does not fulfil all the technical or financial capacity requirements, it will be excluded and its bid will not be analysed and evaluated.

The PPC foresees in Section II, Chapter III that a joint pre-qualification system may be settled for future award procedures.

For admitted bidders, the respective bids will be analysed and evaluated. The said analysis starts with an assessment of whether any of the exclusion criteria are verified. The criteria of exclusion of bids are those set forth in Article 98, and include bids submitted after due time, incomplete bids, bids that breach maximum price or imperative conditions of the tender, bids lacking reference to any of the bid evaluation factors, among others.

### 3.4 What are the rules on evaluation of tenders?

The evaluation of tenders may be based on two possible criteria: (i) the lowest price; or (ii) the most advantageous bid.

The lowest price criterion may only be used when the tender documents contain all of the specifications concerning the future contract and the only aspect subject to competition is the price.

The most economically advantageous bid criterion may be based on factors connected with the execution of the contract (such as price, technical merit of the bid, technical assistance or customer service) or with the valorisation of goods manufactured in Cape Verde or services rendered by the citizens of Cape Verde or by entities established in the country.

Within the context of the special regime for the award of consultancy services, the methods to evaluate and select bids are different. One of the following methods may be adopted: (i) quality and price; (ii) quality only; (iii) fixed budget; (iv) price only; and (v) the background of the consultants.

### 3.5 What are the rules on awarding the contract?

Please refer to question 3.4 above. The award of the contract is based on the evaluation of the bids, as per one of the criteria mentioned above.

The awardee will be bound to, prior signature of the contract, demonstrate that it fulfils all the professional qualification requirements necessary for the execution of the contract, as well as the requirements that condition the participation in tenders, referred to above. If the awardee does not demonstrate compliance with all these requirements, the award will expire (see Articles 100 and 101 of the PPC).

### 3.6 What are the rules on debriefing unsuccessful bidders?

The award decision should be notified to all the bidders, including the unsuccessful bidders.

The preliminary evaluation report, including the proposed award decision, should be notified to everyone, including both unsuccessful and successful bidders. They have the right to prior hearing, after which the final evaluation report and award decision is issued and notified to all bidders.

### 3.7 What methods are available for joint procurements?

In light of Article 62, the awarding entities should centralise in a single procedure the award of public works, acquisition or lease of movable property or acquisition of services, provided that they have the same nature and purpose.

Each awarding entity should prepare an annual procurement plan. Those awarding entities representing part of the Central Public Administration should submit to the entity responsible for the conduct of the joint procurement (Centralised Acquisition management Unit – UGAC) their annual plans, and the said entity is responsible for the preparation of the joint procurement procedure, defining the awarding entities, the global amount and the date for launch of the procedure.

### 3.8 What are the rules on alternative/variant bids?

Variant bids may be submitted only if duly authorised by the procedure notice or by the tender specifications.

Submission of variant bids, when they are the same, is not allowed in the tender documents, or if a number of variant bids that exceed the number set forth in the tender documents leads to the exclusion of the submitted variant bids.

### 3.9 What are the rules on conflicts of interest?

Members or staff of the awarding entities, of the entities responsible for conducting the procedure, of the jury, or of any other entities involved in a procurement procedure, must comply with the general rules regarding conflicts of interest of holders and agents of the Public Administration.

In addition, members or staff of entities involved in a procurement procedure should disclose any personal interest towards a bidder or potential bidder and, in this particular case, request the suspension of his/her involvement in the procedure.

## 4 Exclusions and Exemptions (including in-house arrangements)

### 4.1 What are the principal exclusions/exemptions?

The PPC does not apply to some contracts, as follows:

- contracts signed between Cape Verde and third countries, foreign governments or inter-governmental institutions under an international agreement for the implementation of a joint project, if subject to specific procedural rules;
- contracts signed pursuant to the rules applicable to an international organisation in which Cape Verde participates, if subject to specific procedural rules;
- contracts for acquisition of arbitration and conciliation services;
- contracts for acquisition of financial services concerning the issuance, acquisition, sale or transfer of securities or other financial services as well as any services to be rendered by the Bank of Cape Verde;
- contracts to be entered with a supplier of movable property or services which is an awarding entity, in light of the PPC, holding an exclusive right for that purpose;
- contracts under special security measures or relevant for the protection of security interests of Cape Verde, as acknowledged by decree of the relevant minister;
- programme-contracts as regulated in special legislation; and
- contracts to be entered with skilled professionals for the performance of continuous intellectual work.

### 4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

As stated in question 4.1, the PPC does not apply to contracts to be entered with a supplier of movable property or services which is an awarding entity, in light of the PPC, and which holds an exclusive right for that purpose.

No other provisions are set forth concerning "in-house" arrangements.

## 5 Remedies

### 5.1 Does the legislation provide for remedies and if so what is the general outline of this?

Articles 181 to 188 of the PPC allow administrative challenges of the decisions taken during the award procedure, as well as of the tender documents. Administrative challenges can be either a claim to the author of the challenged act, or an appeal to either the Conflict Resolution Committee or the Public Acquisition Regulatory Authority (ARAP).

Claims against the jury's decisions during the bid which opens the public act are submitted during the said act. Other claims are submitted within five working days upon notification. Appeals to the ARAP are submitted within 10 working days upon notification, except appeals against the jury's decisions during the bid which opens the public act, which are submitted within five working days.

Administrative challenges do not suspend the procedure, except in what concerns the following acts: negotiation of the contract, award decision and execution of the contract. For judicial remedies, please see question 5.2 below.

## 5.2 Can remedies be sought in other types of proceedings or applications outside the legislation?

Decree-Law nr. 14-A/83, of March 22, provides for judicial remedies: the challenge of administrative acts regarding pre-contractual procedure. Currently, judicial challenge is of mere annulment. Court action requires that the interested party administratively challenges the act before bringing it to Court. The suit must be filed within 45 days after notification of the decision on the administrative challenge. If the authority fails to reply, the suit must be filed within 45 days after the expiry of the term to decide the administrative challenge.

## 5.3 Before which body or bodies can remedies be sought?

Non-judicial remedies (administrative challenges) are sought; claims before the author of the act (jury or awarding entities), and appeals before the ARAP, while judicial remedies are sought before the Courts.

## 5.4 What are the limitation periods for applying for remedies?

Please refer to questions 5.1 and 5.2 above.

## 5.5 What measures can be taken to shorten limitation periods?

No such measures are foreseen in the law.

## 5.6 What remedies are available after contract signature?

Judicial remedies are also available against the contract itself – against its validity or claiming for damages arising from the contract's execution.

## 5.7 What is the likely timescale if an application for remedies is made?

The timescale may vary according to the complexity of the case, or the Court of submission itself.

## 5.8 What are the leading examples of cases in which remedies measures have been obtained?

The PPC brought forth significant changes and came into force very recently. It is too soon to draw the relevant conclusions in this regard.

## 5.9 What mitigation measures, if any, are available to contracting authorities?

The awarding entities may be exempted from executing the Court judgment when it is objectively impossible to do so, and when compliance would cause severe damages to the public interest.

In addition, Articles 41 and 42 of the LRAC provide mitigation measures in case of contract annulment due to procedural flaws. The

annulment may be warded off by the Court when, considering the private and public interests at stake and the severity of the breach, the annulment of the contract proves disproportional or contrary to good faith; or when it is clear that the fault is not liable to change the award decision or the contract's content substantially.

## 6 Changes During a Procedure and After a Procedure

### 6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) and changes to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

In general, the tender documents may be amended before the deadline of submission of bids. If the amendments are substantial, the deadline for submission of bids should be extended.

The stability principle applies to the procedures (see Article 17 of the PPC), in general, with some exceptions. It applies objectively – regarding the terms of the tender documents – and subjectively – regarding the bidders.

In the context of a public tender with two phases, after the bids have been submitted, the awarding entity may decide to amend the tender specifications or the tender programme in accordance with the initial versions of the technical bids (as explained in question 3.1 above).

The special procedure for the award of consultancy services foresees a negotiation stage upon which some aspects of the contract specifications may be amended (see Article 170 of the PPC).

The identity of the bidders, as well as the membership of bidding consortia, cannot be changed at a pre-contractual stage, as per the principle of stability.

### 6.2 What is the scope for negotiation with the preferred bidder following the submission of a final tender?

Please refer to question 6.1.

Within the context of the procedure for the award of consultancy services, the exclusive negotiation for the first classified bidder before the execution of the contract cannot concern any aspects which have been previously subject to evaluation.

### 6.3 To what extent are changes permitted post-contract signature?

In light of the LRAC, the contract may be amended: (i) by mutual agreement of the contracting parties; (ii) by means of a judicial or arbitral decision; or (iii) by means of an administrative act to be issued by the awarding entity based upon grounds of public interest.

The amendment of the contract may occur in result: (i) of an abnormal change of the circumstances under which the contract was signed, provided that such a change is not covered by the private party's contractual risk; or (ii) for grounds of public interest, due to the emergence of new needs, or due to a different assessment of the circumstances.

The amendment of the contract cannot be carried out in such a way as to prevent or distort competition, or to change the subject matter of the contract.

#### 6.4 To what extent does the legislation permit the transfer of a contract to another entity post-contract signature?

Title VI of the LRAC governs the subjective modifications of administrative contracts.

Pursuant to the provisions of the said diploma, the transfer of the private party's contractual position should be subject to the prior consent of the public party. In this context, (i) the prior submission of the qualification documents concerning the potential transferee, and (ii) the fulfilment by the potential transferee of the minimum technical or financial capacity requirements (if such requirements had been subject to scrutiny in the award procedure) is required.

The private party may only reject the transfer of the public party's contractual position, in the event of an increased risk of contractual breach by the potential transferee or a degradation of the guarantees provided.

Additionally, LRAC contains a step-in and step-out rule under which, in the case of severe violation of the contractual obligations by the private party (and subject to the public party's authorisation), the financing entities may 'step-in' to the private party's contractual position, in order to guarantee the execution of the contract.

### 7 Privatisations and PPPs

#### 7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

Privatisations are not subject to the PPC or the LRAC. They are governed by Law nr. 47/IV/92, of July 6, and amended by Law nr. 1/VII/2006, of August 3, and by Law nr. 41/V/97, of November 11. Privatisations may be carried out through public or restricted procedures.

#### 7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

Yes. Decree-Law nr. 63/2015, of November 13, governs the procedure and award of PPPs. The new framework sets out the legal competences of each public authority in PPP processes. This is particularly relevant for UPPPP (the PPP and Privatisation Unit), whose monitoring and support role is now clearly defined.

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

Launching and awarding a PPP depends on compliance with certain requirements, such as: (i) budget availability, as well as budget rules and regulations; (ii) clear proclamation of the partnership's purposes and the private partnership's expected results, allowing adequate sharing of burdens among parties; (iii) a partnership model that allows a fair trade-off between private and public party risk and consideration; (iv) previous assessment and compliance with the applicable rules and formalities, allowing full transmission of the performance risk to the private party; (v) avoidance of models assuming long-term compensation clauses in favour of private parties; (vi) term adequacy; and (vii) detailed identification of the risks assumed by each party, allocating risks according to the parties' ability to deal with them.

In addition, PPPs are now divided into defined stages: (i) preliminary offer and expression of interest; (ii) preliminary viability check; (iii) exhaustive viability check; (iv) public hearing; (v) public procurement procedure; and (vi) contract management, monitoring and supervision.

### 8 Enforcement

#### 8.1 Is there a culture of enforcement either by public or private bodies?

Public procurement and administrative justice are at an early stage of development. The Public Acquisitions Regulatory Authority (ARAP) has been assuming an important role on proposing legislative measures, informing and preparing public and private entities to implement the public procurement procedures in accordance with the law. It has created a Conflict Resolution Committee which will contribute to the increase of the enforcement of the law. However, a generalised culture of enforcement will only occur once the system has had the chance to consolidate its position.

#### 8.2 What national cases in the last 12 months have confirmed/clarified an important point of public procurement law?

As far as we know, no significant cases took place within the last 12 months.

### 9 The Future

#### 9.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

Privatisations and Administrative Justice laws have undergone extensive review. We expect that these laws will be published and will enter into force shortly. These changes are part of a wide public sector legislation review and are likely to significantly impact procedure transparency, simplicity and flexibility, and are expected to improve and diversify judicial remedies. Enforcement is likely to improve and become enhanced.

#### 9.2 Are any measures being taken to increase access to public procurement markets for small and medium-sized enterprises and other underrepresented categories of bidders?

Yes. Recent improvements in openness and transparency of the procedures are expected to generate this outcome on their own.

In addition, the PPC sets out that award criteria are allowed to favour goods extracted from Cape Verde, as well as services provided by Cape Verdean companies. PPC's provision of national tenders (i.e. tenders restricted to tenderers, or candidates registered or headquartered in Cape Verde) is also likely to bring about the same effect, increasing access of national companies (normally SMEs) to public procurement.

Additionally, some rules may ease the increased participation of SMEs in procurement procedures, such as: the possibility of awarding contracts divided into lots; the possibility that, in the case of a consortium or group of companies bidding together, the criteria of technical or financial capacity may be fulfilled by one of the grouped companies only, or by two or more of the grouped companies cumulatively; and the obligation to submit a bond only in cases of contracts of high value.



**Rodrigo Esteves de Oliveira**

Vieira de Almeida & Associados  
Av. Duarte Pacheco, 26  
1070-110 Lisbon  
Portugal

Tel: +351 21 311 3566

Email: [reo@vda.pt](mailto:reo@vda.pt)

URL: [www.vda.pt](http://www.vda.pt)

Rodrigo Esteves de Oliveira has been a Partner since 2006 at the Public Law practice group, where he has been actively involved in several fields of administrative law, mostly in public regulations, administrative concessions, public procurement, and litigation & arbitration. He has been involved in several transactions in the energy, transport (road and airport) sectors, being responsible for the ongoing assistance of some of the leading clients in these fields. He is an arbitrator in several arbitrations. Rodrigo is admitted to the Portuguese Bar Association and holds the title of Specialist Lawyer in Administrative Law.

**Catarina Pinto Correia**

Vieira de Almeida & Associados  
Av. Duarte Pacheco, 26  
1070-110 Lisbon  
Portugal

Tel: +351 21 311 3566

Email: [cpc@vda.pt](mailto:cpc@vda.pt)

URL: [www.vda.pt](http://www.vda.pt)

Catarina Pinto Correia joined Vieira de Almeida & Associados in 1996, where she is currently the Managing Associate in the Public Law practice group. In such a capacity, she has been involved in several matters of administrative law (general and specific), including areas of public procurement, administrative concessions and public-private partnerships, and public regulations. She has participated in several transactions, mainly focused on the energy, postal, transport (including rail) and road and rail infrastructure sectors. She advises clients on projects supported by EU funds. Catarina is admitted to the Portuguese Bar Association.



**VIEIRA DE ALMEIDA**  
& Associados Sociedade de Advogados, R.L.

Vieira de Almeida & Associados ("VdA") is a Portuguese independent law firm with over 290 staff and 19 practices, which has been involved in many ground-breaking transactions in Portugal and abroad within almost the last 40 years, maintaining privileged relations with most of the top international law firms around the world.

We work as a team with our clients, making their objectives our own. Based on our experience, we strive to deliver innovative and solid solutions, under the highest standards of performance with only one aim in view: the clients' success.

Our values have led us to the recognition of our clients and peers, as well as to several accomplishments, such as the "Financial Times Game-Changing Law Firm 2015 in Continental Europe" award, the "Portuguese Law Firm of the Years 2014 and 2015" by *IFLR*, the "Law Firm of the Year: Iberia 2014" by *The Lawyer*, "Most Active Law Firm in Bonds 2014" by *Euronext*, and the "Financial Times Innovative Lawyer 2013 in Continental Europe" award, all of which enables VdA to consolidate its position as a high-profile business law firm.

VdA has offices in Lisbon and Porto and, through its network of law firms VdAtlas, extends its legal capabilities in other Portuguese-speaking countries and francophone Africa, namely in Cape Verde with CWV, a leading Cape Verdean law firm which gathers four highly regarded partners, acknowledged both locally and internationally.

## Current titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks



59 Tanner Street, London SE1 3PL, United Kingdom  
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255  
Email: [sales@glgroup.co.uk](mailto:sales@glgroup.co.uk)

[www.iclg.co.uk](http://www.iclg.co.uk)