

The International Comparative Legal Guide to: Public Procurement 2010

A practical insight to cross-border Public Procurement



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1 Relevant Legislation

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

The most relevant legislation in this area is the Public Contracts Code (hereinafter the PCC), approved by the Decree-Law n° 18/2008 on the 29 January 2008 and in force since 29 July 2008.

The PCC implemented the Directives 2004/18/CE, on the coordination of procedures for the award of public work contracts, public supply contracts and public service contracts; and 2004/17/CE, coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

The PCC establishes the legal framework applicable to public procurement procedures including those not covered by EC Directives (for example: concessions contracts). On the other hand, the PCC also establishes the legal aspects of public contracts that have the nature of administrative contracts.

Together with the PCC, other relevant pieces of legislation in this matter are:

- The Administrative Procedure Code (Decree-Law no. 442/91 of 15 November 1991), applicable on a subsidiary basis.
- The Administrative Courts Law (Law no. 15/2002 of 22 February 2002), applicable to litigation related with public contracts.

1.2 How does the regime relate to supra-national regimes including the GPA and/or EC rules?

As mentioned above, the regime established by the PCC transposes European Directives 2004/18/CE and 2004/17/CE into the Portuguese legal system.

1.3 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 of the regime are the following:

- Transparency and publicity of procedures.
- Freedom of access to public biddings for all interested parties (on open procedures).
- Equal treatment of tenderers.

1.4 Are there special rules in relation to military equipment or any other area?

Yes. Military equipment procurement contracts are regulated by Decree-Law no. 33/99 of 5 February 1999.

It is also important to mention that according to Portuguese law (Law no. 49/2009 of 5 August), a special registry with the Ministry of National Defence is mandatory for the supply of equipment or technologies with a military purpose. In fact, a company that intends to carry out an activity that includes the manufacture/production or the commercialisation of military equipment and technologies must obtain an authorisation from the MDN to include this activity in its corporate purpose. Thereafter such company will be included in a list of suppliers for military equipment/technology.

2 Application of the Law to Entities and Contracts

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

The public authorities which are covered by the PCC are the following:

- General Administration of the State (the Government, the local and central bodies and administration services under his instructions and also independent bodies).
- Autonomous communities.
- Municipalities.
- Public institutions.
- Public foundations.
- Public associations.
- Bodies governed by public law.

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

The private entities which are covered by the PCC are the following:

- Private associations that are part of one or more public entities or public law bodies and are mainly financed or controlled by said entities.
- Commercial companies wholly-owned or with majority share capital held by public entities, when created for the specific purpose of meeting needs in the general interest, not

having an industrial or commercial character and are mainly financed or controlled by another public entity.

- Any other private entities when created for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character and mainly financed or controlled by another public entity or by a public law body.
- Private companies operating in the water, energy, transport and postal services sectors.
- Entities whose public works contracts or services contracts are directly financed in more than 50% by any of the contracting authorities pursuant to the PCC.

2.3 Which types of contracts are covered?

The PCC shall be applicable to contracts the performance of which may be subject to market competition. Pursuant to article 16 (2) of the PCC, the following contracts shall always be covered by the PCC:

- Public works contracts.
- Public works concessions.
- Services concessions.
- Public supply contracts.
- Public services contracts.
- Company contracts.

2.4 Are there threshold values for determining individual contract coverage?

The PCC establishes that certain contracts shall only be subject to the provisions set therein, in the event that the value of such contract is equal to or exceeds the thresholds indicated below.

Contracts to be entered into by *E.P.E.* Hospitals (public companies), by private law associations that pursue scientific and technological purposes when mainly financed and controlled by a public entity and by public institutions that pursue scientific and technological purposes:

- Euros 5,150,000 for public works contracts.
- Euros 206,000 for supply or services contracts.

Contracts entered into by the entities mentioned in article 7 of the PCC, operating in the water, energy, transport and postal services' sectors:

- Euros 5,150,000 for public works contracts.
- Euros 412,000 for supply or services contracts.

Contracts entered into by private entities which are financed by more than 50% by contracting authorities (pursuant to article 2 of the PCC):

- Euros 5,150,000 for public works contracts.
- Euros 206,000 for service contracts.

According to the PCC the contracting authorities may choose the direct award procedure in the event that the contract value is below the following amounts:

- Euros 150,000 for public works contracts.
- Euros 1,000,000 for public works contracts, in case the contracting authority is the Bank of Portugal or one of the entities referred on article 2 (2) of the PCC.
- Euros 75,000 for supply or services contracts.
- Euros 206,000 for supply or services contracts, if the contracting authority is the Bank of Portugal or one of the entities referred on article 2 (2) of the PCC.
- Euros 25,000 in case of plans, projects or conceptual creations acquisitions contracts on the architecture or

engineering domain by public entities.

- Euros 100,000 for any other contracts with the exception of public works concessions, public services concession and company contracts.

Finally, the PCC also establishes that the contracting authorities may choose an open or a restricted procedure without prior notice on the Official Journal of the European Union in the event that the contract value is below the following amounts:

- Euros 5,150,000 for public works contracts.
- Euros 206,000 for supply or services contracts.
- Euros 133,000 for supply or services contracts awarded by the State, except for the cases referred on paragraphs a) and b) of article 20 (2) of the PCC.

2.5 Are there aggregation and/or anti-avoidance rules?

There are some rules of this type:

- The contract value is the maximum economic benefit that according to the chosen procedure can be obtained by the contracting partner upon the performance of all obligations under the contract. In addition to the price to be paid to the contracting partner, the economic benefit shall include any kind of compensation or consideration received by the latter arising from the performance of the contract.
- On public works contracts, the value of the contract also includes the total value of the supplies necessary for executing the works and placed at the contractor's disposal by the contracting authorities.
- In the case of works contracts, supply contracts and service contracts which may result in contracts being awarded at the same time in the form of separate lots, the estimated aggregate value of all relevant lots. However, the choice of the direct award procedure, the open or restricted procedure without publication of a prior notice on the Official Journal of the European Union allows the execution of contracts regarding lots the estimated value of which is less than Euros 1,000,000 for works or Euros 80,000 for supplies and services (even if the sum of lots is equal or superior to the threshold values established on articles 19 and 20 of the PCC), provided that the aggregate value of those lots does not exceed 20% of the aggregate value of the lots as a whole.

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

As previously mentioned in question 2.3, the PCC shall be applicable to the public works concessions and the public service concessions entered into by any of the contracting authorities (public or private) indicated in the PCC. PCC rules are applicable to these contracts irrespective of their value.

As for the procedures for the award of these types of contracts, the open procedure, the restricted procedure or the negotiated procedures may be used alternatively.

In the open procedure the contracting authority may choose a period for the negotiation of proposals.

3 Procedures

3.1 What procedures can be followed, how do they operate and is there a free choice amongst them?

There are five procedures that can be followed: open procedure; restricted procedure; negotiated procedure; direct award; and

competitive dialogue.

In the open procedure, any interested economic operator may submit a tender. There is no negotiation in this procedure.

The restricted procedure comprises two phases. During the first phase, the contracting authorities shall select the economic operators that will be invited to submit a tender. In the second phase, the contracting authority shall review the tenders and award the contract, following the same rules and procedure as in the open procedure.

In the direct award, the contracting authority invites one or several entities to present a proposal and freely negotiate aspects from the execution of the contract.

The choice of direct award procedure, open or restricted procedure determines the contract value. Open or restricted procedures may be used irrespective of contract values. In question 2.4 we've already mentioned the threshold values that determine when a direct award, open or restricted procedures without prior notice to the Official Journal of the European Union may be adopted.

Furthermore, the direct award may also be used in contracts of any value according to articles 24 and 27 of PCC.

In the negotiated procedure, the contracting authorities request one or more economic operators of their choice to submit a tender and negotiate the terms of contract to be entered into with said operators.

The cases in which the negotiated procedure can be adopted are the ones mentioned in article 29 of the PCC as follows:

- previous irregular or non acceptable tenders in another open or restricted procedure or competitive dialogue, provided that the original terms of the contract are not substantially altered;
- in exceptional cases, when the nature of the works, supplies or services or the risks attaching thereto do not permit prior overall pricing;
- in respect of public works contracts, for works which are performed solely for purposes of research, testing or development and not with the aim of ensuring profitability or recovering research and development costs;
- in the case of services, *inter alia*, services within category 6 of Annex II A of Directive 2004/18/CE, and intellectual services such as services involving the design of works, insofar as the nature of the services to be provided is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selection of the best tender according to the rules governing open or restricted procedures; and
- contracts whose celebration can be adopted either by way of the open procedure or the restricted procedure according to article 28 of the PCC.

Competitive dialogue is a procedure in which any economic operator may request to participate and whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and one the basis of which the candidates chosen are invited to tender. It is a procedure that is only applicable for particularly complex contracts. It should be used when contracting authorities consider that the open or the restricted procedure will not allow for an adequate award of the contract.

3.2 What are the rules on specifications?

The specifications of the procedures for contracts with an equal or superior value of Euros 25,000,000 should foresee the contractor's

obligation to prepare one or several investigation and development projects directly related with the performance of the contract.

The technical specifications should be set out in the contractual documents and are to be established so that they can allow all applicants to participate in the tender procedure in equal terms and to promote competition.

Technical specifications may be defined, without prejudice to mandatory instructions or technical regulations in one of the following manners:

- by reference, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or - when these do not exist - by reference to national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products. Each reference shall be accompanied by the words "or equivalent";
- in terms of performance or functional requirements, including environmental characteristics; or
- by combination of technical specifications and performance or functional requirements.

3.3 What are the rules on excluding tenderers?

Pursuant to article 55 of the PCC tenderers shall be excluded from the procedures if, without limitation, they:

- are declared bankrupt by a court, or is in dissolution or liquidation (wind up);
- have been convicted by a judgment which has the force of *res judicata* in accordance with the legal provisions of the country of any offence concerning his professional conduct;
- have been guilty of gross professional misconduct proven by any means which the contracting authorities can demonstrate; or
- have any outstanding tax obligations and social security obligations.

3.4 What are the rules on short-listing tenderers?

Short-listing of tenderers shall not apply in the open procedures.

In the restricted procedure, short-listing shall depend on the adopted model. In the simple qualification model the applicants are qualified when all the minimum requirements of technical and financial capability are fulfilled. In the complex model, the contractor authority establishes a minimum number of tenderers who shall be invited to submit their offers. That number cannot be below five. The contracting authority shall then check the qualification criteria and decide on which tenderers shall pass to the following phase.

Either in the negotiated procedure or in the competitive dialogue if the complex model of evaluation is followed, the number of qualified applicants may not be lower than three.

3.5 What are the rules on awarding the contract?

The criteria on which the contracting authorities shall base the award of public contracts shall be either:

- the most economically advantageous bid; or
- the lowest price only.

The lowest price criteria may only be adopted when the

specifications determine all the remaining aspects of the contract execution only submitting to competition the price the contractor authority will have to pay.

In order to determine the most economically advantageous bid, the contracting authority shall take into account various criteria linked to the subject-matter of the public contract in question, for example, 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.

The criteria should be determined by the contracting authority and must appear in the notices and in the specifications. When more than one criterion is taken into consideration, the contracting authority shall also specify the weighting assigned to each.

3.6 What methods are available for joint procurements?

Framework agreements, dynamic purchasing systems and central purchasing bodies are systems available in the PCC under the common heading of systems for the rationalisation of contracting by the Public Administration.

A framework agreement is a contract between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a specified period. In particular with regard to price and, where appropriate, the quantity envisaged. The maximum duration of these contracts may not exceed four years.

Dynamic purchasing systems are completely electronic processes that can be used for supplies or services of ordinary use and characteristics generally available on the market. Duration of these systems may not exceed four years, except in specific cases duly justified.

The contracting authorities (only those referred on article 2 of PCC) may establish central purchasing bodies to centralise the contracting of works, supplies or services. Central purchasing bodies may acquire supplies and/or services for other contracting authorities or award public contracts or conclude framework agreements for works, supplies or services destined to other contracting authorities.

3.7 What are the rules on alternative bids?

The admissibility of alternative bids depends on a provision on the tender specifications.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions and who determines their application?

There are certain contracts expressly excluded from the application of the PCC, *inter alia*, the following:

- contracts for the acquisition, development, production or co-production or programme material intended for broadcasting by broadcasters and contracts for broadcasting time;
- contracts for the acquisition, donation or rental of immovable property or similar contracts;
- contracts related to arbitration and conciliation services;
- contracts for the acquisition of financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, in particular

transactions by the contracting authorities to raise money or capital, and Bank of Portugal services;

- contracts awarded by contracting authorities in the field of defence, subject to Article 296 of the Treaty on European Union;
- contracts awarded pursuant to an international treaty or contracts related with international organisations;
- contracts pursuant to a concluded international agreement relating to the stationing of troops and concerning the undertakings of a Member State or a third country; and
- public service contracts awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty on European Union.

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

According to article 6 (1) of the PCC it applies to all contracts entered into between public entities - already mentioned in question 2.1.

In-house contracts are excluded from the application of the PCC provided that the contracting authority controls the contracting partner and the contracting partner carries out the essential part of its activity in the benefit of the contracting authority.

5 Remedies and Enforcement

5.1 Does the legislation provide for remedies/enforcement and if so what is the general outline of this, including as to *locus standi*?

The PCC foresees the possibility of interested parties to present an administrative appeal for any of the decisions made during a public tender procedure. It is also possible to directly appeal from the specification documents.

The appeals are presented before the authority that practices the act or before the competent body to decide on the cases of reviews of the jury of the procedure decisions.

The appeal must be filed within 5 business days as from the notification of the relevant acts. The appeal decision should be taken within 5 business days following the presentation; silence will be equivalent to rejection. The appeal does not suspend the procedure but until the term for deciding on the appeal is not completed, and depending on the cases, the following acts may not be undertaken: (i) qualification; (ii) beginning of the negotiation; and (iii) award of the contract.

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

According to the Administrative Courts Law the interested parties can also appeal to the Administrative Court for appeal of any acts related to public works, public works concessions, public supply contracts and service contracts, as well as related to the proceedings specifications.

These proceedings have an urgent character (they still run during the court's holiday periods) and should be filed within 1 month as from the notification of the relevant act.

During that period the parties may also request to the Administrative Court the application of interim measures with the aim of correcting an alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of these contracts or the implementation of any decision taken by the contracting authority.

5.3 Before which body or bodies can remedies/enforcement be sought?

As mentioned in questions 5.1 and 5.2, remedies can be sought before the contracting authorities and/or before the courts.

5.4 What are the legal and practical timing issues raised if a party wishes to make an application for remedies/enforcement?

We refer you to questions 5.1 and 5.2 above.

5.5 What remedies are available after contract signature?

After contract signature, the following remedies may be available:

- The judicial review of the award decision can be extended to the review of the contract.
- Any interested party that was damaged may claim to the courts the payment of compensation/indemnity from the contracting authority for the violation of a rule occurred during the formation procedure of the contract.
- Any interested party that has participated on the procedure can present a claim related to the interpretation, validity and execution of the contract.

5.6 What is the likely timescale if an application for remedies/enforcement is made?

This may vary very much and can only be answered on a case by case basis. Even on the judicial appeal procedures of acts related to the contract formation (that have urgent character), on average, a first instance judgment before Portuguese courts is not to be expected before one year after filing of the claim.

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

Remedies and enforcement measures are commonly used.

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

There are no specific examples of cases of public relevance in this respect.

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) or changes to contract terms post-signature? If not, what are the underlying principles governing these issues?

On certain circumstances, based on the public interest demands, the

award authority can propose the adjustment of the contents of the contract and these adjustments depend on the contractor acceptance.

After its celebration, the contract can be amended by agreement between the parties, by Administration imposition because of public interest reasons or by judicial or arbitral decision.

In public works contracts, the contractor is entitled to terminate the contract in the event the amendments exceed 20% of the contract price, when the conditions set out in article 354 of the PCC are met.

For certain types of contracts such as public works, public works concessions and public service contracts, the contract modification can cause the reinstatement of the economic balance of the contract.

6.2 In practice, how do purchasers and providers deal with these issues?

When the contracting authority intends to introduce changes into the contracts, contracting parties will try to negotiate the scope and the type of compensation to be received.

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?

The PCC is not applicable to privatisations.

The privatisations are regulated by Law no. 11/90, of 5 April 1990. According to that piece of legislation, the privatisations will occur preferably by open procedure, stock market offer or public subscription. Each privatisation is regulated by decree-law that determines its conditions.

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

The PPPs are regulated in general on the Decree-Law no. 86/2003, of 26 April 2003 (as amended by the Decree-Law no. 141/2006, of 27 June 2006). There is also a specific regime for the PPPs on the health area (Decree-Law no. 185/2002, of 20 August 2002, as amended by Decree-Law no. 86/2003).

PPP are contracts which create obligations from private entities before a public partner and which are entered into for the development of an activity with a collective purpose in which the financing and the investment responsibility is entrusted in a private partner. The public partner can be the State, funds or autonomous services or public company entities.

The PCC regulates some aspects of the PPPs, including without limitation, the performance of contracts or amendments thereto (articles 339 to 342 of the PCC).

8 Other Relevant Rules of Law

8.1 Are there any related bodies of law of relevance to procurement by public and other bodies, such as freedom of information or general contract law?

We refer you to question 1.1 above.

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?

A group has been created to verify how PCC procedures and rules will be implemented in order to suggest the introduction of some changes in two or three years.

The first amendments have been introduced by the Decree-Law no. 278/2009, of 2 October 2009.



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