

# PORTUGAL

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## The context

### Question 1

Portuguese Public procurement law is founded not only in European Law but also in the Portuguese Constitution and in Constitutional Law, as is the case with some other EU Member States. In spite of there not being any express references to the Public Administration's pre-contractual activity, the Portuguese Constitution allows the detection of certain guidelines that the legislator can't ignore when constructing the legal framework related to public procurement.

Amongst these references we can find concrete legal principles that are in line with the Constitution and that must guide administrative activity (such as the principle of public interest, of efficiency, of proportionality, of transparency and of equality), and we can also find the assumption, on the part of the State, of the task to protect effective competition in the economic landscape and to safeguard the freedom of economic initiative.

Based on these constitutional provisions that are relevant in terms of public procurement, the legislator is forced to regulate in such a way as to effectively comply with said principles. However, it should be remembered that, given their density as principles and their reciprocal overlapping, these principles must be weighed up against each other and pondered contemporaneously, which means that the legislator cannot escape the need to resolve the conflicts amongst them, which, in turn, inevitably often leads to reducing the protection afforded to the principles (abstractly) in conflict.

Indeed, the main challenge faced by the national legislator in this area rightly lies in trying to find a balance between the various underlying inter-

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ests and objectives of public procurement law, especially with regards to the contracts not covered by European directives, and where, therefore, States' room to manoeuvre is, in principle, larger. Moreover, this challenge is all the greater when we consider the current crisis Portugal is going through.<sup>2</sup>

The national legislator (currently the legislator of the Public Procurement Code, approved by Decree-Law n. 18/2008, of January 29, hereinafter only referred to as the CCP) considering, on the one hand, the principle of public interest, especially in terms of administrative efficiency, and, on the other, that of competition, allows direct awards for contracts under a certain value, eliminating the need to publish a tender notice, on the understanding that the economic benefit does not justify an open competitive tender. And, in these cases, the legislator allows the contracting authorities to invite only one entity, thereby leaving to the discretion of the contracting authorities the selection of the invited entities.<sup>3</sup>

However, the jurisprudence of the TJUE has been invoked, especially by the Court of Auditors, in spite of some criticism on the part of the doctrine, for deeming illegal inviting only one entity to a direct award. It is in this context that a fog of legal insecurity falls on the contracting authorities, since, in spite of there being a legislative norm that clearly allows them to act in a certain way, at present they don't feel confident enough to choose the best procedure to be adopted.

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2. As a result of which, moreover, the value of concluded public contracts has been decreasing. For a statistical analysis of this matter see Relatório da Contratação Pública em Portugal, 2011, Instituto Nacional da Construção e do Imobiliário (InCi) – [http://www.base.gov.pt/base2/downloads/RelContr\\_Pub\\_2011.pdf](http://www.base.gov.pt/base2/downloads/RelContr_Pub_2011.pdf)
  3. This is, therefore, a vote of confidence in favour of contracting authorities, but it is also counterbalanced by some other rules, such as the restriction on inviting an entity with which other contracts of over a certain value have already been concluded. This rule is, in fact, a concretisation of the principles of competition and impartiality, although it could be argued that, in this case, the legislator excessively sacrificed the principle of public interest. About such rule of the CCP, cf. João Amaral e Almeida/Pedro Fernández Sánchez, 'O limite à contratação reiterada da mesma entidade no âmbito do procedimento de ajuste directo (n.º 2 do artigo 113.º do CCP)', in *Temas de Contratação Pública, I*, Coimbra Editora, Coimbra, 2011, pp. 291 ff..