

# Portugal

João Amaral e Almeida and Paula Bordalo Faustino

Sérvulo & Associados

## Legislative framework

### 1 What is the relevant legislation and who enforces it?

The most relevant piece of legislation is the Public Contracts Code (PCC), approved by Decree-Law No. 18/2008, 29 January 2008. Contracting authorities (not only public administration entities but also 'bodies governed by public law') are responsible for the implementation of the Code. Whenever there is litigation over public procurement procedures, administrative courts take part in enforcing it. Furthermore, there are two regulation authorities competent for imposing sanctions on bidders who do not comply with public procurement rules (InCI for public works and ASAE for goods and services).

### 2 In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

The PCC implements European Union Directives 2004/18/EC, on the coordination of procedures for the award of public works contracts, public supply contracts and public services contracts; and 2004/17/EC, on the coordination of procurement procedures of entities operating in the water, energy, transport and postal service sector. Despite that, the PCC scope goes far beyond these directives: it creates a complete set of rules on public procurement procedures (including those not covered by EC Directives, for example: concessions contracts and memorandum of association) along with a comprehensive regime of public contracts performance.

### 3 Are there proposals to change the legislation?

Because the PCC has been recently approved and came into force at the end of July 2008, there are no proposals to change it yet. However, a task force has been created to verify how PCC procedures and rules will be carried out in order to suggest the introduction of some changes in two or three years' time.

### 4 What is the relevant legislation for the procurement of military equipment?

The relevant legislation for the procurement of military equipment is Decree-Law No. 33/99, 5 February 1999.

## Applicability of procurement law

### 5 Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

All entities that are ruled as contracting authorities by the European Union Directives 2004/18/EC and 2004/17/EC are also considered contracting authorities according to PCC, which means: public

administration entities, 'bodies governed by public law' (despite their private nature) and utilities. PCC provides for the kinds of contracting authorities that are subject to its rules, instead of ruling out those that are not.

### 6 For which, or what kinds of, entities is the status as a contracting authority in dispute?

All of those that are ruled as contracting authorities by the European Union Directives 2004/18/EC and 2004/17/EC: public administration entities, 'bodies governed by public law' (despite their private nature) and utilities (operating in the water, energy, transport and postal service sector).

### 7 Are there specific domestic rules relating to the calculation of the threshold value of contracts?

According to the PCC, the choice of a public procurement procedure limits the contract's value, instead of the contract's estimated value limiting the choice of a public procurement procedure. Thus, the contract value is not an estimated value but the maximum value the contracting authority is allowed to pay for the contract regarding the chosen procedure.

When choosing the negotiated procedure without prior notice, public administration entities are allowed to conclude contracts under €75,000 (goods and services) or €150,000 (public works), whereas 'bodies governed by public law' are allowed to conclude contracts under the respective European threshold (goods and services) or €1 million (public works). Contracts concluded by utilities (operating in the water, energy, transport and postal service sector) are excluded from the scope of the PCC, provided their value is under the respective European threshold.

The open and the restricted procedures whose notice is published only in the national official journal (and not in the European journal) allow all contracting authorities to conclude contracts up to the respective European threshold.

### 8 Does the extension of an existing contract require a new procurement procedure?

Not always. It depends whether that extension has already been provided for in the existing contract or not. In the first case, there is no need for a new procurement procedure. In the second case, nevertheless, there may be certain situations that allow for an extension of an existing contract without requiring a new procurement procedure such as additional works, services or goods (provided that contracting authorities comply with EC Directives rules on these matters).

- 9 Does the amendment of an existing contract require a new procurement procedure?

As long as the amendment does not change the competition conditions set out in the procurement procedure that led to the conclusion of the existing contract, it does not require a new procurement procedure. The prevalence of public interest, on the other hand, may determine contract amendments, which also do not require a new procurement procedure.

- 10 May an existing contract be transferred to another supplier or provider without a new procurement procedure?

Only when that transfer is provided for in the existing contract or when it is authorised by the contracting entity during the contract performance. In either case, this transfer is illegal when it aims to subvert the competition conditions set out in the procurement procedure that led to the conclusion of the existing contract.

- 11 In which circumstances do privatisations require a procurement procedure?

As a rule, privatisations require a procurement procedure.

- 12 In which circumstances do public-private partnerships (PPPs) require a procurement procedure?

As a rule, PPPs require a procurement procedure.

- 13 What are the rules and requirements for the award of services concessions?

The rules and requirements for the award of services concessions are the same as those applicable to the award of works concessions – namely, it requires a procurement procedure with prior notice (open, restricted or negotiated procedure).

- 14 What are the rules and requirements for the award of an in-house contract without a procurement procedure?

In-house contracts are excluded from the scope of the PCC provided that the contracting authority controls the contracting partner (as if the contracting partner were part of the same legal entity) and the contracting partner carries out the essential part of its activity in benefit of the contracting authority.

PCC does not set as an in-house requirement that a private entity is not involved as part of the contracting authority or that a private company does not participate in the contracting partner. However, this second limit (no private participation in the contracting partner) is often considered by European case law as a condition to the compliance with the 'control' requirement mentioned above.

#### The procurement procedures

- 15 Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency, competition?

Yes.

- 16 Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

Yes.

- 17 How are conflicts of interest dealt with?

As a rule, conflict of interest prevents contracting authorities from awarding a certain tender. This rule is a general one (provided for in the Administrative Procedure Code) applicable to all decision processes by public entities, including procurement procedures.

- 18 How is the involvement of a bidder in the preparation of a tender procedure dealt with?

Whenever a potential bidder is involved in the drafting of tender documents or discussing possible specifications, its participation in the bid is always prohibited.

- 19 What is the prevailing type of procurement procedure used by contracting authorities?

The open procedure (and the restricted one in case there is the need to sort out the bidders according to their technical or financial skills).

- 20 Are there special rules or requirements determining the conduct of a negotiated procedure?

Articles 30 and 31 from Directive 2004/18/EC were implemented in the PCC. The negotiated procedure is subjected to roughly the same rules as the open procedure (when the negotiated procedure has no prior notice) or the restricted procedure (when the negotiated procedure has prior notice) – the difference lies in the tender negotiating opportunity.

- 21 When and how may the competitive dialogue be used?

Only in the circumstances provided for in article 29 from Directive 2004/18/EC, which was implemented in the PCC.

- 22 What are the requirements for the conclusion of a framework agreement?

Following Directive 2004/18/EC, the PCC allows the conclusion of a framework agreement with only one supplier or with several suppliers. It is up to each framework agreement to determine its contractual force, namely whether the 'attachment' of the contracting authority to the framework agreement will be mandatory. PCC enables not only contracting authorities but also central purchasing bodies to conclude framework agreements.

- 23 May several framework agreements be concluded? If yes, does the award of a contract under the framework agreement require an additional competitive procedure?

A framework agreement may be concluded with several suppliers at the same time. When this is the case, an additional competitive procedure is required to allow the contracting authority to choose between those suppliers every time a purchase is made throughout the term of the agreement.

- 24 Under which conditions may consortium members be changed in the course of a procurement procedure?

As a rule, consortium members cannot be changed in the course of a procurement procedure. During the contract performance, this change depends on the contracting authority's authorisation.

**25** Are unduly burdensome or risky requirements in tender specifications prohibited?

Tender specifications should not provide for unduly burdensome or risky requirements. However, they are only prohibited as part of the contracting authority's obligations.

**26** What are the legal limitations on the discretion of contracting authorities in assessing the qualifications of tenderers?

The referred discretion is somewhat limited, taking into account that the qualifications and the respective documents or proof must be set out in advance in the tender specifications (besides those qualifications and respective documents or proof that are determined by the PCC). Furthermore, contracting authorities are prevented from using the referred discretion in order to restrict the competition conditions.

**27** Are there specific mechanisms to further the participation of small and medium enterprises in the procurement procedure?

No.

**28** What are the requirements for the admissibility of alternative bids?

Alternative bids are only admissible when the tender specifications say so, and must comply with the terms set out in those specifications. An alternative bid cannot be provided of a bidder's own volition.

**29** Must a contracting authority take alternative bids into account?

Only if the tender specifications consider alternative bids admissible.

**30** What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

As a rule, their bids must be excluded from the tender.

**31** What are the award criteria provided for in the relevant legislation?

The lowest price and MEAT (most economically advantageous tender).

**32** What constitutes an 'abnormally low' bid?

Whatever the contracting authority considers as being abnormally low. However, if a maximum price is set out in the tender

specifications, a bid is considered abnormally low when its price is at least 50 per cent (goods and services) or 40 per cent (public works) under that maximum price.

**33** What is the required process for dealing with abnormally low tenders?

The bidders are always allowed a chance to justify their abnormally low bids. If they do not provide any justification or a valid one (according to the contracting authority's opinion), their bids are excluded from the tender.

**34** How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is 'self-cleansing' an established and recognised way of regaining reliability?

Reliability may be regained after passing a certain period of time (the length of time varies according to the type of past irregularities). Self-cleansing is admitted when past irregularities are due to debts owed to the state.

**Review proceedings and judicial proceedings**

**35** Which authorities may rule on review applications?

Review proceedings and judicial proceedings are ruled by the PCC and in the Administrative Courts Law, respectively.

**36** How long does a review proceeding or judicial proceeding for review take?

A review proceeding takes about three weeks, whereas a judicial proceeding may take from two to four months.

**37** What are the admissibility requirements?

Not only bidders but also all persons potentially interested in the contract may submit a review application. As a rule, every step of a procurement procedure (including the contract itself) is justiciable.

**38** What are the deadlines for a review application and an appeal?

Five days for a review proceeding, 30 days for a judicial proceeding and 15 days for an appeal.



Sérvulo & Associados | Sociedade de Advogados, RL

**Maria Roquette Cardoso**

**mrc@servulo.com**

Rua Garrett 64  
1200-204 Lisbon  
Portugal

Tel: +35 121 0933 000  
Fax: +35 121 0933 001/2  
www.servulo.com

39 Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure?

As a rule, the suspensive effect is not automatic, but the applicant may ask for it.

40 Must unsuccessful bidders be notified before the contract with the successful bidder is concluded?

Yes, and a standstill period of 10 days must be observed.

41 Is access to the procurement file granted to an applicant?

It is a constitutional right.

42 Is it customary for disadvantaged bidders to file review applications?

Yes, it often occurs.

43 May a contract be cancelled or terminated if the procurement procedure that led to its conclusion violated procurement law?

Yes, though it may not occur in certain circumstances, such as in those cases when the contract has already been totally performed.

44 Is legal protection available in cases of a de facto award of a contract, namely, an award without any procurement procedure?

Yes.