



# ICLG

The International Comparative Legal Guide to:

## Public Procurement 2014

**6th Edition**

A practical cross-border insight into public procurement

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# Portugal



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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 main relevant piece of legislation is the “Public Contracts Code” (hereinafter “PCC”), approved by Decree-Law no. 18/2008, of 29 January, amended by Decree-law no. 278/2009, of 20 October and Decree-Law no. 149/2012, of 12 July. The PCC, which transposed Directives 2004/18/CE and 2004/17/CE, covers public procurement rules and the material regime regarding public contracts.

There are other relevant diplomas, namely:

- Administrative Procedural Code (approved by Decree-Law no. 442/91, of 15 November), which contains the general rules on administrative procedures;
- Procedural Code of the Administrative Courts (approved by Law no. 15/2002, of 22 February), which contains the rules on litigation regarding pre-contractual procedures and public contracts; and
- Ordinance no. 701-A/2008, of 29 July to Ordinance 701-J/2008, of 29 July, which regulate several aspects referred in the PCC.

### 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 (comprised in the Administrative Procedural Code) apply on a subsidiary basis to public procurement and certain transparency rules are contained therein.

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

The PCC transposes EU Directives no. 2004/17/CE and 2004/18/CE, of 31 March.

Pursuant to the Constitution, EU law and international agreements prevail over national law.

### 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 those of transparency, equal

treatment and of competition. The referred principles are relevant since they constitute limits to the activity of the contracting authorities, as well as guidelines as to how the rules ought to be interpreted.

### 1.5 Are there special rules in relation to defence procurement or any other area?

Regarding defence procurement, a specific legal framework is provided by Decree-Law no. 104/2011, of 6 October. It transposed to Portuguese Law the EU Directive 2009/81/EC. This legal framework is applicable to purchase contracts for military and sensitive equipment, contracts for public works, supply contracts and contracts to provide services regarding military and sensitive equipment, as well as contracts for public works, supply contracts and contracts to provide services aiming to pursue military goals.

## 2 Application of the Law to Entities and Contracts

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

Article 2 of the PCC considers as awarding entities:

- The Portuguese State.
- Autonomous Regions.
- Local authorities.
- Public institutes.
- Public foundations.
- Public associations or associations financed and controlled by the above-mentioned entities.
- Bodies governed by public law (any legal entity, either public or private, specifically created to satisfy needs of general nature, whose economic activity is not subject to the logic of market competition and that are mainly financed or controlled or have the majority of the management or supervisory board members appointed by the entities referred above).
- Legal entities which are mainly financed or controlled or have the majority of the management or supervisory board members appointed by a body governed by public law.
- Associations where one or more body governed by public law or entity referred to in the previous paragraph are a part of, as long as they are mainly financed, controlled or have the majority of the members of their board of directors or supervisory body, directly or indirectly, appointed by such entities.

Article 7 of the PCC considers also as awarding entities:

- Any legal entities not included in article 2 that pursue their activity in the water, energy, transports or postal services sector, regarding which any of the entities referred to in article 2 may exercise, directly or indirectly, a dominant influence.
- Any legal entities not included in article 2 that enjoy special or exclusive rights, not granted through an international tender procedure, whereby such rights:
  - reserve to such entity, either solely or together with another entity, the exercise of one or several activities in the water, energy, transports or postal services sector; and
  - substantially affect the capacity of any other entity to exercise one or more of those activities.
- Any legal entities composed exclusively by awarding entities referred to in article 7 or that are mainly financed, controlled or have the majority of the members of their board of directors or supervisory body, directly or indirectly, appointed by the such entities, and exercise their activity in water, energy, transports or postal services sector.

Please note that entities that do not qualify as awarding entities pursuant to articles 2 and 7 of the PCC may be subject to PCC procurement rules if the contracts are to be subsidised by more than 50% by any of the entities referred in article 2.

Public work concessionaires that are not awarding entities may be subject to certain procurement rules when contracting public works contracts.

Entities not qualified as awarding entities that have special or exclusive rights in the exercise of public service activities granted by any of the awarding entities referred to in articles 2 and 7 of the PCC must respect the principle of non-discrimination in terms of nationality.

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

Please see previous question.

## 2.3 Which types of contracts are covered?

The PCC is applicable to all contracts whose object is or may be subject to competition. In that regard, the PCC specially states that the following contracts are considered to be subject to competition: public works contracts; concessions of public works; concessions of public services; the lease or supply of goods; rendering of services; and company incorporation contracts.

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

Yes. Depending on the choice of the award procedure, there may be a threshold for individual contract coverage.

- Open and restricted tender with pre-qualification

For public works, the open or restricted tender procedures may be adopted irrespective of the contract value if the notice is published in the Official Journal of the European Union (OJEU). If the notice is not published in the OJEU, the contract value cannot exceed €5,000,000.

The same applies to the lease and supply of goods contracts and services contracts. In this case, though, if the announcement is not published in the OJEU, the contract value cannot exceed €200,000. In addition, if the awarding entity is the State and, once again, the

notice is not published in the OJEU, the contract value cannot exceed €130,000.

- Urgent public tender

This procedure allows the awarding authority to purchase, as a matter of urgency, commonly used goods or services, the adoption of which depends on two issues:

- the award criteria must be the lowest price; and
- the contract value is inferior to €200,000, except if the awarding authority is the State, in which case the contract value cannot exceed €130,000.

- Direct award

For public works contracts, the direct award procedure may be chosen if the contract value is inferior to €150,000.

For the supply and lease of goods, as well as service contracts, the contract value must be inferior to €75,000.

As to other types of contracts – excluding concession of public works and services and company incorporation contracts – the direct award procedure can only be chosen if the contract value is inferior to €100,000.

Nevertheless, in some cases, a direct award may be adopted irrespective of the contract value, namely when:

- No competitor has presented any proposal or all proposals have been rejected in a previous open or restricted tender, as long as the specifications and the minimum technical requirements are not substantially altered.
- In cases of urgency, where the deadlines regarding other procedures cannot be met due to unforeseeable events, provided that the circumstances are not attributable to the awarding entity.
- For technical or artistic reasons or due to the protection of exclusive rights, the contract can only be granted to a determined entity.

Please note that the awarding entities referred to in article 7 of the PCC are only subject to the procedures of the PCC for what concerns the following contracts:

- Regarding public works, contracts equal or above €5,000,000.
- Regarding leasing or supply of goods, contracts equal or above of €400,000.
- Regarding acquisition of services, contracts equal or above €400,000.
- Regarding public works and public service concessions, all contracts.

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

Contract value is the main criteria for choosing the award procedure and the PCC has a very wide notion of contract value to prevent procurement avoidance.

Also, the PCC establishes, as a general rule, that when obligations of the same kind, which could be included in a single contract, are divided into several separate contracts, the total value of those contracts cannot exceed the value allowed by the correspondent award procedure had only one contract been signed.

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

As a general rule, these contracts should be awarded by a public or restricted tender by pre-qualification or a negotiation procedure.

Public works concession is defined as a contract whereby a



contracting party undertakes to build or to design and build a public work, receiving, in consideration, the right to exploit it for a certain period of time and, if so determined, the right to the payment of a price.

Public service concession is defined as a contract whereby a contracting party undertakes to manage, in its own name and under its responsibility, an activity of public service, during a certain period of time, being paid by the financial results of such management or directly by the grantor.

### 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 PCC provides for the following main award procedures: (i) open tender; (ii) restricted tender (by previous qualification); (iii) direct award; (iv) negotiation procedure; and (v) competitive dialogue.

- (i) Open tender: this procedure starts with a publication of a notice. Any interested party may submit a bid which shall be assessed pursuant to the award criteria established in the tender documents. In that regard, the Jury shall prepare a report, subject to comments by the bidders, which shall constitute the grounds for the awarding of the successful tenderer by the awarding entity.
- (ii) Restricted tender: contrary to the open tender, not all interested parties may submit a bid. Applications are presented and only the parties that are considered as qualified candidates pursuant to certain technical and financial requirements are invited to submit bids.
- (iii) Direct award: procedure whereby the awarding entity invites one or more potential bidders to present their bids.
- (iv) Negotiation procedure: it is similar to the restricted procedure, but the bids are negotiated between the bidders and the awarding entity.
- (v) Competitive dialogue: procedure whereby the awarding entity discusses the technical means, as well as the inherent legal and financial structure of the contract. It includes the following phases: submission of the applications together with the qualification of the candidates, the presentation of the solutions and dialogue with the qualified candidates, presentation and analysis of the proposals together with the award of the contract.

The cases where an open tender (and urgent open tender), a restricted tender with previous qualification and direct award can be chosen are referred to in question 2.4 above.

A negotiation procedure may be adopted for the following contracts:

- Public works contracts, lease or supply of goods and service contracts, when all the bids have been excluded on the basis of article 70, paragraph 2 in a previous open or restricted tender whose notice was published in the OJEU or in a competitive dialogue procedure, provided that the specifications are not substantially altered.
- Contracts whose nature does not allow prior overall maximum price fixing.
- Public works contracts whose object concerns investigation, experimentation or development, as long as its performance is not designed to ensure financial viability or refund investigation, experimentation or development costs.
- Acquisition of services contracts, namely intellectual or financial services set forth in category 6 of Annex II A of Directive 2004/18/CE, when the nature of such services does not allow the establishment of clear and precise contractual specifications.

- Contracts in which open or restricted tender without notice in the OJEU may be adopted.

The competitive dialogue is chosen in particular complex contracts, where the adoption of an open or restricted tender is impossible.

#### 3.2 What are the minimum timescales?

Minimum timescales to present applications or bids are established by the PCC. The awarding entity may broaden the timescales in the procedure documents, pursuant to article 63, paragraph 1 of the PCC.

Open tender: if the notice is not subject to publication in the OJEU, the minimum time limit to submit bids is 9 days, unless the proceeding concerns the formation of public works contracts, in which case the time limit is 20 days. If the works are clearly simple, the time limit can be reduced in 11 days. If the notice is subject to publication in the OJEU, the minimum time limit is 47 days. If the notice is sent electronically to publication, the timescale can be reduced by seven days. In the cases of urgent open tender, the time limit is 24 hours on weekdays.

Restricted tender: if the notice of the tender is not subject to publication, the time limit for presenting either the applications or the proposals is nine days, unless the proceeding concerns the formation of public works contracts. If the notice needs to be published in the OJEU, the time limit to present applications is 37 days, except if a concession of public works is involved. These time limits can be reduced by seven days if the notice is sent electronically to publication. The time limit to submit bids is 35 days after the invitation is sent.

Direct award: no minimum timescale.

Negotiation procedure: the minimum time limit for presenting the applications is 37 days. The time limit for presentation of the early versions of the proposals is that of the presentation of the proposals in the restricted tender.

Competitive dialogue: the time scale for presentation of the applications is the same as the restricted tender. As to the presentation of the solutions, no minimum time scale is defined in the PCC. The minimum time scale to present bids is 40 days.

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

The tenderers are excluded if any of the impediments to tender or submit an application, described under article 55 of the PCC, are verified (namely, if the tenderer is declared insolvent, if a member of the board of directors of the tenderer has been convicted of certain serious crimes or by a crime which affects his professional conduct, if the tenderer has been declared guilty of serious professional misconduct, if it has social security or tax debts, or if the tenderer rendered assistance to the awarding entity in the preparation of tender documents that granted it an advantage that distorts normal competition conditions).

In the restricted tender, the awarding entity may adopt one of two possible models to short-list tenderers: (i) the simple model, where qualification of the candidates is made by a simple pass or fail test on minimum technical or financial requirements; or (ii) the complex model, where selection of the candidates is made on the basis of the criteria of the larger technical and financial capacity, which implies an evaluation model. Short-listing in the negotiation procedure and in the competitive dialogue is the same as in the restricted procedure.

There is no short-listing of tenders in the open tender procedure or in the direct award.

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

There are two possible award criteria:

- The most economically advantageous tender.
- Lowest price.

The most economically advantageous tender criterion involves a mandatory evaluation model whereby only the factors subject to competition are reflected. The factors and sub-factors may not regard aspects, qualities, characteristics or other elements of facts regarding the bidders themselves. The model shall have a clear explanation of all the factors and sub-factors related to the contract execution subject to competition, the weight of each factor and sub-factor, the scoring scale to each elementary factor or sub-factor, as well as a mathematical expression or description of the ordered set of attributes that enable the granting of partial scores.

The lowest price criteria may only be adopted when price is the only item subjected to competition and the specifications rule all other aspects of the contract.

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

Please see question 3.4 above.

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

The decision of the contract award is notified simultaneously to all bidders of the procedure together with the Final Report prepared by the Jury.

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

The PCC provides for two methods.

Awarding entities may form a group of awarding entities in order to enter into a contract of their interest or into a framework agreement.

In addition, awarding entities referred in article 2 of the PCC may constitute purchasing centres in order to centralise the contracting of public works, supply of goods and services.

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

Variant bids may only be submitted if the tender documents allow such submission.

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

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

The PCC is not applicable to certain contracts, as follows:

- Certain contracts signed pursuant to international conventions to which the Portuguese State is a party or within specific procedural rules of an international organisation to which Portugal is a member.
- Labour administrative contracts and individual employment contracts.
- Contracts for the donation of movable property in favour of any awarding entity.
- Contracts for the acquisition, donation, barter, lease of immovable property or similar contracts.
- Contracts for the acquisition, development, production or co-

production of programmes aimed at broadcasting by broadcasting entities.

- Contracts whose object is not subject to market competition.
- “In-house” contracts (contracts entered into by an awarding entity with another entity whereby (i) the awarding entity has control, alone or together with other awarding entities, over such entity, which is similar to the control over its own services, and (ii) such entity carries the essential of its activity in benefit of one or several awarding entities that have such control over it).
- Contracts that have to be entered into with an awarding entity holding special rights.
- Sales contracts of movable property or of the supply of services by awarding entities referred to in article 2 no. 1, except when the other party is also an awarding entity.
- Grant and subsidy agreements.
- Incorporation of company contracts, whose capital is to be held exclusively by awarding entities referred in article 2, paragraph 1.
- Contracts of acquisition of financial services.
- Contracts of acquisition of health, social and educational services mentioned in appendix II-B of Directive no. 2004/18/CE.
- Contracts whose purpose is the satisfaction of the needs of an awarding entity whose services are located in a country which is not a party to the Agreement on the European Economic Area (EEA).
- Contracts signed pursuant to a development cooperation agreement with an entity located in a State party to such agreement, but not to the EEA, and in benefit of such State.
- Contracts covered by article 346 of the Treaty on the Functioning of the 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?

Please see question 4.1 with regards to what concerns “in-house” contracts.

## 5 Remedies

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

Articles 267 to 274 of the PCC provide for the administrative challenge of decisions taken within the contract formation procedure and of the tender documents. Administrative challenges must be presented in 5 working days and they do not have a stay effect on the procedure. In any case, until there is no decision on the administrative challenge, the following acts cannot be performed: a) qualification decision; b) beginning of the negotiation phase; and c) awarding decision. 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?

The Procedural Code of the Administrative Courts (PCAC) provides for judicial remedies: the challenge of tender documents and the challenge of administrative acts regarding pre-contractual procedure. These are urgent proceedings, only applicable to public works contracts, concessions of public works and supply of services

and goods. Judicial challenge under the PCAC must be filed within 1 month after the notification of the act or, in its absence, of the knowledge of such act. Regarding other types of contracts, judicial challenge is also possible, but under the general regime of the PCAC. The PCAC also provides for specific injunctions in the pre-contractual field.

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

The non-judicial remedies (administrative challenges) can be sought before the awarding entities, whilst the judicial remedies can be sought before the Administrative Courts.

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

Please see questions 5.1 and 5.2.

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

No measures can be taken to shorten limitation periods.

### 5.6 What remedies are available after contract signature?

Judicial remedies are also available against the contract itself. The following persons have legal standing for such purpose:

- a party that has been by jeopardised by the fact that legal pre-contractual procedure was not adopted;
- a party that has judicially challenged an administrative act regarding the formation of the contract;
- a party that, having participated in the pre-contractual procedure, considers that the contract does not correspond to the terms of the awarding; and
- a party that considers that the contract does not correspond to the specifications, which justifiably resulted in its non-participation in the procedure, although the necessary requirement for such effect were met.

### 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 and of the administrative court itself.

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

Remedies measures are usually easily obtained whenever the chosen pre-contractual procedure is not the legal procedure considering the estimated value of the contract and whenever there is flagrant violation of procedural rules.

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

There are cases in which the awarding entities may not comply with the Court judgment: (i) when it is objectively impossible to do so; or (ii) when compliance would cause severe damages to the public interest.

In addition, articles 283 and 283-A of the PCC, which address annulment of the contract based on procedural defects, provide mitigation measures. The annulment effect may be unapplied by

the Court when, considering the private and public interests at stake and the gravity of the violation of law, the annulment of the contract is considered by the Court as disproportional or contrary to good faith.

## 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) pre-contract award? If not, what are the underlying principles governing these issues?

The PCC allows amendment to the tender documents prior to the deadline for submission of tenders. If the amendment is substantial, there will be an extension of the deadline for submission of tenders.

After the submission of tenders and prior to the contract award, no substantial changes to the tender documents are allowed.

After the contract award, and before contract signature, some adjustments to the draft of the contract may be proposed by the awarding entity if:

- the adjustments are required for public interest reasons; and
- it is shown that the evaluation of tenders would have been the same had the adjustments been made before awarding the contract.

### 6.2 To what extent are changes permitted to final tenders (pre- and post-contract award)?

Please see question 6.1.

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

After the contract is signed, the contract may be changed if both parties so agree or by a court decision. The law also allows unilateral amendments of the contract by the awarding entity for public interest grounds.

The contract may be changed for public reason grounds or as a consequence of a change in circumstances. In any of the above referred cases, the changes of the contract must respect the pre-award competition and the object of the contract.

In certain cases, unilateral modification gives rise to the financial rebalancing 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 PCC. They are foreseen in Law no. 11/90, of 5 April, amended by the Law no. 50/2011, of 13 September, in case of “reprivatisations” (privatisation of an entity which was previously nationalised) and in Law no. 71/88, of 24 May, in the other cases. Both laws admit privatisations through open procedures, restricted procedures and public offerings pursuant to the Securities Markets Code (the terms of it are different in each diploma).

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

Decree-Law no. 111/2012, of 23 May, defines the applicable rules to State PPPs.

The main issues related to PPPs are budget impact and the need to evaluate the affordability of the contract, as well as the risk sharing between public and private parties.

The launch and awarding of a PPP depend on certain requirements, such as:

- i) The study of the predictable budget impacts.
- ii) The clear enunciation of the partnership goals to the public sector and of the private partnership's expected results.
- iii) The framing of partnership models and contractual structures that ensure, namely, that the financial effort of the public partner is divided with adequate terms and budget affordability.
- iv) The detailed identification of the risks to be assumed by each of the partners (the different risks of the partnership must be allocated between the parties in accordance with their ability to manage those risks).

The diploma also rules the renegotiation of PPPs.

## 8 Enforcement

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

The PCAC expressly determines the binding nature of Court judgments, stating that Court decisions are binding either to public or private entities and take precedence over any administrative act.

We think that there is a culture of enforcement, but it is hard to say the number of cases in which sentences are spontaneously fulfilled because there are no statistics of it.

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

The Portuguese Supreme Administrative Court has recently requested a preliminary ruling to the European Court of Justice on the possibility of a bid award criterion to include the evaluation of the team to be allocated to the performance of the contract (which may constitute a test to the *Lianakis* jurisprudence).

## 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?

There are no known public initiatives concerning a change to the public procurement law.





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Morais Leitão, Galvão Teles, Soares da Silva & Associados is an independent full-service law firm and one of the leading law firms in Portugal, with more than 160 lawyers and offices in Lisbon, Porto and Funchal (Madeira).

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