



ICLG

The International Comparative Legal Guide to: **Public Procurement 2017**

9th Edition

A practical cross-border insight into public procurement

Published by Global Legal Group, with contributions from:

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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@glggroup.co.uk
URL: www.glggroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd.
December 2016

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ISBN 978-1-911367-27-7
ISSN 1757-2789

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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 principal 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, Law no. 3/2010, of 27 April, Decree-Law no. 131/2010, of 14 December, Law 64-B/2011, of 30 December, 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:

- the Administrative Procedural Code (approved by Decree-Law no. 4/2015, of 7 January), which contains the general rules on administrative procedures;
- the Procedural Code of the Administrative Courts (approved by Law no. 15/2002, of 22 February, amended by Decree-Law 214-G/2015, of 2 October), 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 to 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 (listed within 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 nos. 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 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 procurement in specific sectors or areas?

Yes, the PCC has special rules regarding procurement by awarding entities in the water, energy, transport and postal services sectors.

Regarding defence, 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 for the purchase of 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 a 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 to 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 also considers as awarding entities:

- Any legal entities not included in Article 2 that pursue their activity in the water, energy, transport or postal services sectors, 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 which enjoy special or exclusive rights, not granted through an international tender procedure, whereby such rights:
 - reserve to such an entity, either solely or together with another entity, the exercise of one or several activities in the water, energy, transport or postal services sectors; 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 such entities, and exercise their activity in the water, energy, transport 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 to 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 the previous question.

2.3 Which types of contracts are covered?

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

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

Purchasers are subject to the principles of competition, equal treatment, non-discrimination and transparency.

2.5 Are there financial thresholds for determining individual contract coverage?

Yes. Depending upon the choice of the award procedure, there may be a threshold for individual contract coverage (Articles 19 to 21 of the PCC).

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 €5,186,000.

The same applies to the lease and supply of goods contracts and services contracts. However, in this case, if the announcement is not published in the OJEU, the contract value cannot exceed €207,000. 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 €134,000.

Urgent public tender

This procedure allows the awarding authority to lease and 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 €207,000, except if the awarding authority is the State, in which case the contract value cannot exceed €134,000.

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 for 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 to or above €5,186,000.
- Regarding leasing or supply of goods, contracts equal to or above €414,000.
- Regarding acquisition of services, contracts equal to or above €414,000.
- Regarding public works and public service concessions, all contracts.

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

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

Moreover, 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.

2.7 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 by a negotiation procedure.

A 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.

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

In broad terms, general rules on procurement are applicable to the conclusion of a framework agreement.

In any case, the choice of a procedure for the execution of a framework agreement pursuant to Articles 19 to 21 of the PCC (please see question 2.5 above) only allows the execution of contracts pursuant to the framework agreement, as long as the sum of contractual prices of all contracts are inferior to the thresholds set therein.

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

Yes. When obligations of the same kind, which could be included in a single contract, are divided into several lots, each one corresponding to a separate contract, the choice of the direct award, of public tender or restricted tender by previous qualification without publication of a notice in the OJEU, only enables the execution of a contract regarding each lot if:

- a) the sum of the maximum prices of all the contracts to be entered into, when formation of the same occurs simultaneously, is inferior to the amounts referred to in Articles 19, 20 and 21 of the PCC (see question 2.5 above); or
- b) the sum of all contractual prices regarding contracts which are already entered into and the maximum prices of all procedures still in course, whenever the formation of these contracts takes place within one year after the beginning of the first procedure, is inferior to the amounts referred to in articles 19, 20 and 21 of the PCC (see question 2.5 above).

There are some exceptions to the above-mentioned rule.

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 this 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. In certain cases, an urgent open tender may take place.
- (ii) Restricted tender (by previous qualification): 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: a procedure whereby the awarding entity invites one or more potential bidders to present their bids.
- (iv) Negotiation procedure: similar to the restricted tender; however, the bids are negotiated between the bidders and the awarding entity.
- (v) Competitive dialogue: a 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; and 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 (by previous qualification) and a direct award can be chosen are referred to in question 2.5 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 particularly 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 nine 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 20 days' 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 the presentation of the early versions of the proposals is that of the presentation of the proposals in the restricted tender.
- Competitive dialogue: the timescale for the presentation of the applications is the same as the restricted tender. As for the presentation of the solutions, no minimum timescale is defined in the PCC. The minimum timescale 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? In particular, to what extent are factors other than price taken into account (e.g. social value)?

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 relating to the execution of the contract subject to competition, the weight of each factor and sub-factor, the scoring scale of 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.

In this criterion, factors other than price are always taken into account.

The lowest-price criterion may only be adopted when price is the single 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 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 for such a submission.

3.9 What are the rules on conflicts of interest?

The Administrative Procedural Code has rules on the guarantees of impartiality (Articles 69 to 76). Such rules contain a provision stating that any holder or agent of a public administration body that has an interest, by himself or as a representative of other person, in an administrative procedure (namely, a public tender) is prohibited from participating or intervening in such a procedure. According to the law, the person who is subject of the impediment should

communicate it immediately and suspend his intervention in the procedure, otherwise a serious disciplinary penalty will result. The actions taken and the contracts concluded in violation of these rules are voidable under the law.

Please note that the Administrative Procedural Code also contains rules setting up impediments to the provision of consultancy services to public entities, whenever such services were provided in the last three years to private parties participating in the administrative procedure at hand.

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 an entity, which is similar to the control over its own services; and (ii) such an entity carries the essentials of its activity in the 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 regard 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 within five working days, and they do not have a stay effect on the procedure. In any case, if there is no decision on the administrative challenge, the following acts cannot be performed: a) a qualification decision; b) the beginning of the negotiation phase; and c) the awarding of the 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 services and supply of services and supply or lease of goods. Judicial challenge under the PCAC must be filed within one month after the notification of the act or, in its absence, of the knowledge of such act. Please note that the challenge of awarding acts automatically suspends the effects of such an act or the performance of the contract, if it has been already executed. The awarding entity and interested parties may ask the judge to lift such a suspensive effect, if the deferral of the execution of the awarding act is harmful to public interest or to other interests at a disproportionate level.

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 (or Arbitration Courts, if arbitration is referred in the tender documents).

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:

- the parties;
- a party that has been jeopardised by the fact that a 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 award; 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 requirements for such an 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 disapplied 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) and changes to the membership of bidding consortia 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 the signature of the contract, 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.

No changes to the membership of bidding consortia are allowed at the pre-contractual stage.

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

After the submission of a final tender, there is no scope for negotiation. It is only possible, after the award, for the awarding entity to propose some adjustments to the contents of the contract to be entered into if the same results from public interest requirements, and it is objectively shown that if the bid had included such adjustments, no alteration would exist in the ranking of the bids.

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 on the grounds of public reason, or as a consequence of a change in circumstances. In any of the cases referred to above, 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.

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

Transfer of the signed contract to another entity is not allowed:

- a) when the choice of the awarded entity was made by a direct award, where only one entity could be invited to bid;
- b) to entities included by impediments set forth in Article 55 of PPC; and
- c) where strong evidence exists that the transfer results from an act or agreement susceptible to falsified competition rules.

Except for the foregoing, transfer is possible, but it is subject to authorisation by the awarding entity. Authorisation depends upon:

- a) the previous submission by the potential transferee of all habilitation documents requested to the transferor; and
- b) the fulfilment, by the potential transferee, of minimum requirements regarding financial and technical capacity demanded of the transferor in the qualification phase, should that phase have occurred.

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 cases of “reprivatisations” (privatisation of an entity which was previously nationalised) and in Law no. 71/88, of 24 May, in 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 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 apportioned 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 believe that there is a culture of enforcement, but it is hard to say the number of cases in which sentences are spontaneously enforced as there are no statistics on the subject.

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

The Administrative Supreme Court has ruled that when the tender notice does not include all the mandatory elements required by European and national law (namely, the factors and sub-factors which clarify the criterion of the most economically advantageous tender and the corresponding weighting coefficients), it does not necessarily result in the invalidity of the award, but only in its mere irregularity. The Court concluded that, notwithstanding the lack of essential information of the tender notice, if the tenderers had access by other means to the missing information before drafting their proposals (namely by consulting the tender procedure), the annulment of the award for this reason would be disproportionate (Proc. 0870/16, dated 22 September 2016, of the Administrative Supreme Court).

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?

The transposition of the new procurement directives was due on April 18, 2016, but we expect that it will happen in the first semester of 2017. The project for the transposition of the new directives into national law – a review of the PCC – was in public discussion during August and September, and the government is now revising it, considering the comments received during the public discussion.

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?

The project of review of the PCC has some measures resulting from the new Procurement Directives (such as measures encouraging the contracting authorities to break contracts into lots), but we will have to wait for its final version.

9.3 Have there been any regulatory developments which are expected to impact on the law and if so what is the timescale for these and what is their likely impact?

The project review of the PCC establishes a Regulatory Authority for Public Contracts but again, we will have to wait for the final version.



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Ana Robin de Andrade joined the firm in 2000. She is a senior associate with the administrative and public procurement and urban planning and environment teams.

Ana also collaborates with the Africa Team – an internal structure that guarantees, on a permanent basis, and in close cooperation with the member firms of the MLGTS Legal Circle, personalised day-to-day assistance to clients on matters that involve the African Portuguese-speaking countries – in which she regularly assists clients in the areas of administrative and public procurement law. Ana practises mainly in the areas of public procurement and urban planning, as well as in procedural matters and administrative litigation. A major part of her practice is also dedicated to concession contracts under a project finance regime. Ana Robin de Andrade often participates in seminars and conferences related to public procurement and administrative litigation matters.

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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 180 lawyers and offices in Lisbon, Porto and Funchal (Madeira). We have a significant international practice in all major areas of law and represent multinational corporations, international financial institutions, sovereign governments and their agencies, as well as domestic corporations and financial institutions. To address the needs of our clients throughout the world, particularly in the Portuguese-speaking countries, the firm established the MLGTS Legal Circle, an international network based upon the sharing of values and common principles of action with the purpose of establishing a platform that delivers high quality legal services to clients around the globe. It encompasses a select set of jurisdictions, including Portugal, Angola, Mozambique and Macau (China). We also maintain close contacts with major law firms in Europe, the United States and South Africa, and are the sole Portuguese member of Lex Mundi, the world's leading association of independent law firms. Our Public Law team, based in Lisbon and Porto, is widely recognised for its in-depth knowledge in all aspects of administrative law and all matters related therewith. We seek to find the appropriate creative solutions to meet clients' needs both in the private and in the public sector. Regarding public procurement, our expertise in the field of pre-contract procedures and the implementation of agreements should be highlighted, as should our provision of specialised services on a day-to-day basis to private entities (ranging from drafting proposals to entering and implementing agreements) and contracting entities (ranging from designing agreements, and the appropriate procedure to adopt through to the termination of the agreement).

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