

International **Comparative** Legal Guides



Public Procurement **2020**

A practical cross-border insight into public procurement

12th Edition

Featuring contributions from:

A&L Goodbody
Advokatfirmaet Berngaard AS
AKD
ALFARO, FERRER & RAMIREZ
Allen & Gledhill LLP
Anderson Mōri & Tomotsune
Ashurst LLP
Bignon Lebray Avocats
Blake, Cassels & Graydon LLP
BLOMSTEIN

Borenus Attorneys Ltd
BTG Legal
Fried, Frank, Harris, Shriver & Jacobson LLP
FSM Rechtsanwälte
Holding Redlich
JCLegal
Law Firm Neffat
Legance – Avvocati Associati
Mamo TCV Advocates
Mannheimer Swartling Advokatbyrå AB

Michailopoulos & Associates Law Firm
Morais Leitão, Galvão Teles, Soares da Silva & Associados
Olaniwun Ajayi LP
Pinheiro Neto Advogados
Rahmat Lim & Partners
Stibbe
VASS Lawyers

ICLG.com



ISBN 978-1-83918-022-4
ISSN 1757-2789

Published by

glg global legal group

59 Tanner Street

London SE1 3PL

United Kingdom

+44 207 367 0720

info@glgroup.co.uk

www.iclg.com

Group Publisher

Rory Smith

Publisher

Jon Martin

Senior Editors

Rachel Williams

Suzie Levy

Editor

Oliver Chang

Creative Director

Fraser Allan

Printed by

Ashford Colour Press Ltd.

Cover image

www.istockphoto.com

International **Comparative** Legal Guides

Public Procurement **2020**

12th Edition

Contributing Editors:

Euan Burrows & Edward McNeill

Ashurst LLP

Strategic Partners



©2020 Global Legal Group Limited.

All rights reserved. Unauthorised reproduction by any means, digital or analogue, in whole or in part, is strictly forbidden.

Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication.

This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

Expert Chapters

- 1** **EU Public Procurement Rules**
Euan Burrows & Edward McNeill, Ashurst LLP
- 9** **Procurement Rules and Trends in India**
Prashant Mara & Devina Deshpande, BTG Legal

Q&A Chapters

- 13** **Australia**
Holding Redlich: Andrew Hynd & Olivia Fielding
- 20** **Austria**
FSM Rechtsanwälte: Sebastian Feuchtmüller & Karlheinz Moick
- 28** **Belgium**
Stibbe: David D'Hooghe & Lieselotte Schellekens
- 35** **Brazil**
Pinheiro Neto Advogados: Ricardo Pagliari Levy & Heloisa Figueiredo Ferraz
- 41** **Canada**
Blake, Cassels & Graydon LLP: Clémentine Sallée & Marianne Smith
- 48** **England & Wales**
Ashurst LLP: Euan Burrows & Edward McNeill
- 60** **Finland**
Borenius Attorneys Ltd: Ilkka Aalto-Setälä & Henrik Koivuniemi
- 68** **France**
Bignon Lebray Avocats: Kévin Holterbach & Jean-Baptiste Dubrulle
- 77** **Germany**
BLOMSTEIN: Dr. Pascal Friton & Rita Zuppke
- 85** **Greece**
Michailopoulos & Associates Law Firm: Greg Michailopoulos & Marios Markatos
- 95** **Ireland**
A&L Goodbody: Anna-Marie Curran & Jessica Egan
- 104** **Italy**
Legance – Avvocati Associati: Filippo Pacciani & Ada Esposito
- 119** **Japan**
Anderson Mōri & Tomotsune: Reiji Takahashi & Makoto Terazaki
- 127** **Luxembourg**
Stibbe: Benjamin Marthoz
- 135** **Malaysia**
Rahmat Lim & Partners: Kamilah Kasim
- 142** **Malta**
Mamo TCV Advocates: Joseph Camilleri & Matthew Cutajar
- 151** **Netherlands**
AKD: Prof. Dr. Pieter Kuypers & Tom Binder
- 159** **Nigeria**
Olaniwun Ajayi LP: Ogunmuyiwa Balogun
- 166** **Norway**
Advokatfirmaet Berngaard AS: Mari Benkow & Inger Roll-Matthiesen
- 173** **Panama**
ALFARO, FERRER & RAMIREZ: Annette Bárcenas Olivardía & Paulette Michineau T.
- 179** **Portugal**
Morais Leitão, Galvão Teles, Soares da Silva & Associados: Margarida Olazabal Cabral & Ana Robin de Andrade
- 188** **Romania**
VASS Lawyers: Iulia Vass & Bianca Bello
- 200** **Serbia**
JCLegal: Jovan Crnogorčević
- 207** **Singapore**
Allen & Gledhill LLP: Kelvin Wong & Tan Wee Meng
- 215** **Slovenia**
Law Firm Neffat: Njives Prelog Neffat
- 225** **Sweden**
Mannheimer Swartling Advokatbyrå AB: Johan Carle & Sven Vaxenbäck
- 231** **USA**
Fried, Frank, Harris, Shriver & Jacobson LLP: James J. McCullough & Michael J. Anstett

Portugal

Morais Leitão, Galvão Teles, Soares da Silva & Associados



Margarida Olazabal Cabral



Ana Robin de Andrade

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” (“PCC”), approved by Decree-Law no. 18/2008 of 29 January, amended by Law 59/2008 of 11 September, Decree-Law no. 223/2009 of 11 September, 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, Decree-Law no. 149/2012 of 12 July, Decree-Law no. 214-G/2015 of 2 October, Decree-Law no. 111-B/2017 of 31 August, Decree-Law no. 33/2018 of 15 May and, most recently, Decree-Law no. 179/2019 of 4 December. The PCC, which transposed EU Directives 2014/23/EU, 2014/24/EU, 2014/25/EU and 2014/55 EU, 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) (“APC”), which contains the general rules on administrative procedures; and
- the Procedural Code of the Administrative Courts (approved by Law no. 15/2002 of 22 February and amended by Law no. 118/2019 of 17 September) (“PCAC”), which contains the rules on litigation regarding pre-contractual procedures and public contracts.

1.2 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 legality, public interest, impartiality, proportionality, good faith, protection of legitimate expectations, sustainability and responsibility, as well as those of competition, publicity and transparency, equal treatment and non-discrimination.

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.

1.3 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, which 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.

1.4 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 APC) apply on a subsidiary basis to public procurement, and certain transparency rules are contained therein.

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

The PCC transposes EU Directive nos. 2014/23/EU, 2014/24/EU and 2014/25/EU of 26 February and EU Directive no. 2014/55/EU of 16 April.

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

2 Application of the Law to Entities and Contracts

2.1 Which categories/types of entities are covered by the relevant legislation as purchasers?

Article 2 of the PCC considers as awarding entities:

- The Portuguese State.
- Autonomous Regions.
- Local authorities.
- Public institutes.
- Independent administrative authorities.
- The Bank of Portugal.
- Public foundations.
- Public associations or associations financed or 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, namely due to its non-profit nature or non-covering losses resulting from its activity, and that are mainly financed or controlled, or

whose management or supervisory board members have been, in majority, appointed by the entities referred to above or by other bodies governed by public law).

- Legal entities which are mainly financed or controlled, or whose management or supervisory board members have been, in majority, 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 is a part of, as long as it is mainly financed, controlled or has the majority of the members of its 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 (works contracts or services contracts related to works contracts) are to be subsidised by more than 50% by an awarding entity.

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 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.

2.3 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 €5,548,000.

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 €144,000 and €221,000 depending on the awarding entity.

As for other types of contracts – excluding concession of public works and services and company incorporation contracts – the open and restricted tender procedures may be adopted, irrespective of the contract value if the notice is published in the OJEU.

Urgent public tender

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

- the award criteria must be the price or costs; and
- the contract value is less than €144,000, €221,000 for the lease and purchase of goods or services (depending on the type of awarding entity) and less than €300,000 for public works.

Direct award

For public works, the contract value must be less than €30,000.

For the supply and lease of goods, as well as service contracts, the contract value must be less than €20,000.

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 less than €50,000.

Nevertheless, in some cases, (if prior consultation is not possible) 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 €5,548,000.
- Regarding leasing or supply of goods and acquisition of services, contracts equal to or above €443,000.
- Regarding acquisition of social services or other services specified in Annex IX to the PCC, contracts equal to or above €1,000,000.
- Regarding public works concessions and public service concessions, all contracts.

Prior consultation

In this procedure at least three entities are invited to bid.

For public works, the contract value must be less than €150,000.

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

As for other types of contracts – excluding concession of public works and services and company incorporation contracts – the prior consultation procedure can only be chosen if the

contract value is less than €100,000. A prior consultation may also be adopted irrespective of the contract value in the cases referred above (see in this regard, the direct award section).

2.4 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.

The PCC establishes that the value of the contract may not be fractionated with the intention of avoiding any rules established in the PCC.

Moreover, the PCC also 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 corresponding award procedure, had only one contract been signed.

2.5 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, by a negotiation procedure or by a competitive dialogue 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.

2.6 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 2.3 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.

2.7 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 subject to more than one procedure, the choice of the procedure must take into account:

- (a) the sum of the value of all procedures, when formation of all the contracts to be entered into occurs simultaneously; or
- (b) the sum of all contractual prices regarding contracts which are already entered into and the value of all procedures still in course, whenever the formation of these contracts takes place within one year, and as long as the awarding entity had foreseen the need for the launching of subsequent procedures at the time of the launch of the first procedure.

There are some exceptions to the above-mentioned rule.

As an incentive for small and medium-sized companies, the decision of not dividing the contract into lots must be justified by the awarding entity when related to:

- Lease or supply of goods and rendering of services contracts, when the contract value exceeds €135,000.
- Public works contracts, when the contract value exceeds €500,000.

Furthermore, it is also possible to limit the number of lots to be awarded to the same bidder.

2.8 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.

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; (v) competitive dialogue; (vi) prior consultation; and (vii) partnership for innovation.

- (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 entity to present its bid.
- (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.
- (vi) Prior consultation: a procedure whereby the awarding entity invites at least three potential bidders to present their bids. The awarding entity may negotiate with the bidders the aspects regarding the execution of the contract to be entered into.
- (vii) Partnership for innovation: a procedure intended for the development and acquisition of innovative works, products and services. This procedure integrates three stages, which can be adapted according to the complexity and financial relevance of the partnership to be celebrated. Therefore, it has the: (i) submission of applications stage; (ii) submission of proposals for research and development projects stage; and (iii) analysis of proposals for research projects stage and agreement of the partnership.

The cases where an open tender (and urgent open tender), a restricted tender (by previous qualification), prior consultation and a direct award can be chosen are referred to in question 2.3 above.

The negotiation procedure and the competitive dialogue may be adopted by the awarding entity when:

- Its needs cannot be met without the adaptation of easily available solutions.
- The goods or services include the design of innovative solutions.
- It is not objectively possible to award the contract without prior negotiation due to specific circumstances relating to its nature, complexity, legal and financial montage or due to the risks associated with it.
- It is not objectively possible to precisely define the technical specifications by reference to a standard, European technical approval, common technical specifications or technical reference.

The partnership for innovation may be adopted when the award entity intends to carry out research activities and the development of innovative works, products and services, irrespective of their nature and areas of activity, with a view to their subsequent acquisition, provided that these correspond to the levels of performance and maximum prices previously agreed between it and the participants in the partnership.

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 six days, unless the proceeding concerns the formation of public works contracts, in which case the time limit is 14 days. If the works are clearly simple, the 14-day time limit can be reduced by six days. If the notice is subject to publication in the OJEU, the minimum time limit is 30 days, which can be reduced to 15 days in cases of urgency duly grounded by the awarding entity. In the cases of urgent open tender, the time limit is 24 hours on working days (for purchase or leasing of movable property or purchase of services) and 72 hours on working days (for public works).
- Restricted tender: if the notice of the tender is not subject to publication in the OJEU, the minimum time limit for presenting the application is six days. If the notice needs to be published in the OJEU, the minimum time limit to present the application is 30 days, which can be reduced to 15 days in case of urgency duly grounded by the awarding entity. Once selection of the applicants is made, the minimum time limit to submit bids is, where no notice is published in the OJEU, six days (14 days for public works) after the invitation is sent. When the notice is published in the OJEU, the time limit to submit bids is 25 days after the invitation is sent.
- Direct award: no minimum timescale.
- Prior consultation: no minimum timescale.
- Negotiation procedure: the minimum time limit for presenting the applications is 30 days. This time limit may be reduced by seven days if the notice is sent electronically to publication.
- 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.

- Partnership for innovation: the negotiation procedure regime shall be subsidiary applicable to the partnership for innovation.

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 he has social security or tax debts, 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, if the tenderer has unduly tried to influence the decision of the awarding entity, tried to obtain confidential information susceptible to grant him/her any advantage, or provided misleading information relevant to the exclusion, qualification or awarding of the tender, if the tenderer is subject to conflict of interests, or if the tenderer has proved relevant deficiencies regarding the execution of at least one public contract in the previous three years).

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 prior consultation procedure. Also, there is no short-listing in the direct award procedure, since the awarding entity only invites one entity to present its bid.

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)?

The award criterion is the most economically advantageous tender, which can be determined based on one of the following:

- The best price-quality ratio (where the awarding criterion is composed of several factors regarding several aspects subject to competition).
- Lowest price or costs (only aspect subject to competition).

The best price-quality ratio involves a mandatory evaluation model, whereby only the factors subject to competition are reflected. Except from specific cases regarding organisation, qualifications and experience of personnel, 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 duly justified cases, the awarding entity may choose not to submit the price or costs to competition but, instead, to establish a fixed or maximum price in the tender documents.

3.5 What are the rules on the evaluation of abnormally low tenders?

Awarding entities may determine, in the tender documents, the situations in which a price or a cost is considered to be abnormally low, with regard to the price deviation from average or other criteria deemed suitable. The awarding entity must justify the need to establish the fixing of the abnormally low price or cost, as well as the criteria that presided to such definition.

Awarding entities must justify the decision to exclude any abnormally low tenders and, previous to that decision, it is mandatory to request tenderers to provide clarifications, in writing.

3.6 What are the rules on awarding the contract?

Please see question 3.4 above.

3.7 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.

3.8 What methods are available for joint procurements?

The PCC provides for four methods.

Awarding entities may form a group of awarding entities in order to enter into a contract whose performance is of their interest or a framework agreement that all may benefit from. It is also possible for awarding entities to jointly manage dynamic purchasing systems as well as to perform joint purchases through the use of electronic catalogues.

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.

3.9 What are the rules on alternative/variant bids?

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

3.10 What are the rules on conflicts of interest?

The APC 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 its 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 APC 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.

3.11 What are the rules on market engagement and the involvement of potential bidders in the preparation of a procurement procedure?

Prior to the opening of a public contract formation procedure, the awarding entity may engage in informal consultations with the market, namely requesting the opinion of experts, independent authorities or economic agents. Market engagement may not subvert the logic of market competition or violate the principles of transparency and non-discrimination. In this regard, the awarding entity must take adequate measures to avoid any distortion of competition, namely, to disclose to other bidders any relevant information exchanged with another bidder in the preparation of the tender (by publicising such information in the tender documents). It is also important to mention that any assistance in the preparation of tender documents may constitute an impediment to bid, if such assistance granted the interested party an advantage that distorts competition.

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.
- Contracts signed pursuant to rules applicable to public procurement determined by an international organisation or an international financial institution where the contracts in question are financed in full by that organisation or institution.
- Contracts signed pursuant to development cooperation instruments, with an entity based in one of its signatory States and for the benefit of that State, provided that it is not a signatory to the Agreement on the European Economic Area.
- Contracts signed pursuant to the provisions of Article 346 of the Treaty on the Functioning of the European Union.
- Contracts signed pursuant to an international agreement or arrangement relating to the parking of troops and involving undertakings from a Member State to a third country.
- 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 audiovisual media services and broadcasting by audiovisual media and broadcasting entities and supply contracts of broadcasting programmes.
- Contracts for peripheral services or certain delegations of the awarding entities referred to in Article 2 located outside the national territory.
- 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 direct or indirect control, alone or

together with other awarding entities, over such an entity, which is similar to the control over its own services; (ii) such an entity carries more than 80% of its activity in the benefit of one or several awarding entities that have such control over it; and (iii) there is no direct participation of private capital in the controlled entity, except in what concerns participation without control or blocking powers and with no decisive influence over the controlled entity).

- Contracts that have to be entered into with an awarding entity holding special rights.
- Grant and subsidy agreements.
- Incorporation of company contracts, whose capital is to be held exclusively by awarding entities referred to in Article 2, paragraph 1.
- Contracts for the acquisition of financial services related to the issuance, purchase, sale or transfer of securities or other financial instruments and their ancillary services, as well as contracts to be executed in pursuance of monetary and exchange rate policies or of reserves management.
- Contracts for the acquisition of financial services of issuance and management of public debt and State treasury management.
- Contracts between awarding entities and public purchase centres for the rendering of services regarding centralised purchases.
- Contracts concluded under the provisions of the legal regime for public contracts in the field of defence and security.
- Contracts which, under the terms of the law, are declared secret or whose execution must be accompanied by special security measures and when the essential defence and security interests of the State so require.
- Contracts for the acquisition of research and development services.

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 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, if filed within 10 working days after the notification of the act, 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. Such request must be granted 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, Article 283 of the PCC, which addresses annulment of the contract based on procedural defects, provides 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. It is not possible to change membership of bidding consortia on a pre-contract award stage.

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.

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, the object of the contract and the initial economic balance of the contract (the economic balance may not be altered to put the awarded entity in a more favourable situation). Also, changes to the contract may not cause a change of price that exceeds 25% (if the contract is changed as a consequence of a change in circumstances) or 10% (if the contract is changed on public interest grounds) of the initial price.

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 the 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, if that possibility is expressly provided for in the contract, and subject to authorisation by the awarding entity. Authorisation also 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.

Please note that the contract may also refer that in case of default of the contracted party, an assignment to the subsequent bidder may take place as an alternative to termination by decision of the contracting authority.

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, as amended by Decree-Law no. 84/2019, of 28 June and, recently, by Decree-Law no. 170/2019, of 4 December, defines the applicable rules to State PPPs.

The launch and awarding of each PPP depends on certain requirements to be defined by resolution of the Council of Ministers.

In terms of contractual framework:

- (i) The different risks of the PPP should be allocated between the parties in accordance to the respective capacity to manage such risks.

- (ii) There should be an effective and significative transfer of risk to the private sector.
- (iii) The risk of financial unsustainability of the PPP, for reasons not imputable to default or unilateral modification by the public partner, or to *force majeure* events, should, to the extent possible, be transferred to the private partner.

There is an administrative entity (*Unidade Técnica de Acompanhamento de Projetos*), which depends on the Minister of Finance, that holds several attributions in the launching and management of PPP contracts. The diploma also rules the renegotiation of PPPs as well as the creation of negotiation committees.

8 The Future

8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

No. The PCC has recently been amended by Decree-Law no. 170/2019, of 4 December.

8.2 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?

No, there have not.



Margarida Olazabal Cabral joined the firm in 1998 and became a salary partner in 2010. She is a member of the administrative and public procurement and urban planning and environment teams. Margarida is highly specialised in administrative law, mainly in areas related to public contracts. She has experience with pre-contractual matters (public tenders), as well as with the execution of public contracts on behalf of public entities and private companies. In recent years, a major part of her activity has been dedicated to public-private partnerships. She is listed in the *International Who's Who of Public Procurement Lawyers* and as a leading Public Procurement specialist by *Chambers Global*. She teaches at the Portuguese Catholic University LL.M. programme. Margarida is the author of several publications and books on public procurement and is often invited to participate as a main speaker in lectures on the scope of administrative law (public procurement and administrative litigation).

Morais Leitão, Galvão Teles, Soares da Silva & Associados
Rua Castilho, 165
1070-050 Lisboa
Portugal

Tel: +351 213 817 443
Email: mocabral@mlgts.pt
URL: www.mlgts.pt



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 *Morais Leitão 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.

Morais Leitão, Galvão Teles, Soares da Silva & Associados
Rua Castilho, 165
1070-050 Lisboa
Portugal

Tel: +351 213 817 443
Email: anarandrade@mlgts.pt
URL: www.mlgts.pt

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 *Morais Leitão 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, Macau and Hong Kong. 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).

www.mlgts.pt

MORAIS LEITÃO
GALVÃO TELES, SOARES DA SILVA
& ASSOCIADOS

ICLG.com

Current titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Finance & Leasing
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Recovery & Insolvency
Corporate Tax
Cybersecurity
Data Protection
Digital Health

Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Family Law
Financial Services Disputes
Fintech
Foreign Direct Investment Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law

Oil & Gas Regulation
Outsourcing
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Sanctions
Securitisation
Shipping Law
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms