

International **Comparative** Legal Guides



Public Procurement **2021**

A practical cross-border insight into public procurement

13th Edition

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Portugal

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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

The Public Contracts Code (“PCC”), approved by Decree-Law n.º 18/2008 of 29 January, amended several times (the last time by Decree-Law n.º 33/2018, of 15 May but the last relevant modification was by Decree-Law n.º 111-B/2017, of 31 August), is the most relevant legislation on general public procurement in Portugal, including in the utilities sectors. There are other special laws covering specific types of procurement, like defence, that we describe below.

Also worth emphasising is the relevance of the Administrative Procedural Code (“APC”), approved by Decree-Law n.º 4/2015 of 7 January, which contains the general regulation on administrative procedures and the Procedural Code of the Administrative Courts (“PCAC”), approved by Law n.º 15/2002 of 22 February, which contains namely the rules on dispute resolution regarding pre-contractual procedures and administrative and public contracts.

Finally, a very important piece of legislation is the legal framework for access to and use of electronic platforms for public procurement purposes (approved by Law n.º 96/2015 of 17 August).

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 PCC foresees, in its article 1-A, the main principles in force in public procurement. They are the following: legality; public interest; impartiality; proportionality; good faith; protection of legitimate expectations; sustainability; responsibility; competition; publicity; transparency; equal treatment; and non-discrimination.

They are relevant not only to the interpretation but also to the validity of a procurement procedure.

1.3 Are there special rules in relation to procurement in specific sectors or areas?

Contracting authorities in the water, energy, transport, and postal services sectors (utilities sectors) are covered by specific rules in the PCC.

Decree-Law n.º 104/2011 of 6 October provides a special legal framework for Defence and Security procurement.

The Azores have special rules that apply to such procurement (Regional Decree-Law n.º 27/2015/A, of 29 December, modified in 2017 by Regional Decree-Law n.º 3/2017/A, of 13 April). Madeira also has special rules on this matter (Regional Decree-Law n.º 34/2008/M, of 14 August, as modified – the latest modification was by Regional Decree-Law n.º 1-A/2020/M, of 31 January).

Each year, in the State Budget, some special regulation is approved. Because of the pandemic situation, some special regulation for the speedy acquisition of health goods and services has been passed.

1.4 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

The APC applies to public procurement and foresees transparency as a general principle that covers all activity of the Administration, including the impartiality principle that prevents family or friendship relations in procurement.

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

Portugal is a member of the European Union (“EU”) and is also a signatory to the World Trade Organization (“WTO”) Agreement on Government Procurement (“GPA”). The latter provides for reciprocal market access commitments on procurement between the EU and other WTO members that are also signatories to the GPA.

Therefore, all EU legislation applies in Portugal, and the GPA is also applicable on grounds of reciprocity.

2 Application of the Law to Entities and Contracts

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

The PCC currently recognises three main categories of awarding authorities.

Article 2(1) PCC enshrines the first group of awarding authorities. It is generally composed of the traditional public sector:

- the State (Government and other Central Administration Bodies);

- Autonomous Regions of Azores and of Madeira;
- local authorities (Municipalities);
- public institutes;
- independent administrative authorities (Regulatory Agencies);
- the Central Bank;
- public foundations;
- public associations; and
- associations financed or controlled by the above-mentioned entities or subject to management supervision of those aforementioned authorities or bodies, or where a major part of the members of their administrative, managerial or supervisory board is, directly or indirectly, appointed by the aforementioned entities.

The second group of awarding authorities is made up of bodies, either of a public or private nature, governed by public law, apart from those described in article 2(1) PCC, in accordance with article 2(2) PCC:

- bodies governed by public law that, regardless of their public or private nature, were established for the specific purpose of meeting needs in the general interest; do not have an industrial or commercial character; and are financed, for the most part, by any entity of the traditional public sector or by other bodies governed by public law, or are subject to their management supervision, or where more than half of the members of their administrative, managerial or supervisory board is, directly or indirectly, appointed by the aforementioned entities;
- any entities that are under the same situation set forth in the previous paragraph in relation to an entity that is a public contracting authority under the same paragraph; and
- associations financed, for the most part, by the previous entities; or subject to management supervision of those aforementioned authorities or bodies; or where the major part of the members of their administrative, managerial or supervisory board is, directly or indirectly, appointed by the aforementioned entities.

The third group of awarding authorities is foreseen in article 7 PCC and is composed of entities operating in the utilities sectors that fall within the following subcategories:

- legal entities that are not included in the categories of article 2 above, that operate in one of the utilities sectors and concerning which any of the entities referred to above may exercise, directly or indirectly, a dominant influence;
- legal entities that are not included in the categories of article 2 above and which hold special or exclusive rights that have not been granted by means of an internationally advertised competitive procedure, with the effects of reserving to itself or jointly with other entities the exercise of activities in the utilities sector and substantially affecting the ability of other entities to carry out such activities; and
- entities that were exclusively incorporated by the entities referred to in the two paragraphs above, that are financed by the same, for the most part, or are subject to the management supervision of said entities, or that have an administrative, managerial or supervisory board where more than half of its members are directly or indirectly appointed by said entities, provided that they have the aim of jointly operating in the utilities sectors.

Entities that do not qualify as awarding entities pursuant to articles 2 and 7 PCC may also be subject to PCC procurement rules. The PCC's scope of application extends to entities that enter into public works contracts or associated public service contracts, provided those contracts are directly financed, in

more than 50% of their contractual price, by contracting authorities and the values of the contracts to be executed are equal to or greater than the relevant thresholds (article 275 PCC).

Additionally, the PCC extends the application of certain specific public procurement transparency rules to contracts carried out by public works concessionaires or by entities holding special or exclusive rights, under specific circumstances expressly set out in articles 276 and 277 PCC.

2.2 Which types of contracts are covered?

Contracts regulated by procurement rules are those whose scope is, or may be, subject to general competition market rules.

In this sense, the PCC considers, among others, the following contracts subject to competition: public works contracts; public work concessions; public services concessions; acquisition or lease of goods; acquisition of services; and incorporation of company contracts.

2.3 Are there financial thresholds for determining individual contract coverage?

Contracts may be awarded by value, material, nature and other criteria. Notwithstanding, the value of the contract is one of the main criteria.

For awarding authorities within the traditional public sector or that are considered to be governed by public law, the value thresholds are:

- For provision of services contracts, goods supply or leasing contracts:
 - direct award may be adopted for contracts whose value is below €20,000;
 - prior consultation may be adopted for contracts whose value is below €75,000;
 - public tender or limited tender with prior qualification (or negotiation procedure or competitive dialogue when respective conditions are met) without notice in the Official Journal of the European Union ("OJEU") may be adopted for contracts whose value is below the European thresholds (€139,000 or €214,000, depending on whether the awarding authority is the State or other entities, respectively).
- For public works contracts:
 - direct award may be adopted for contracts whose value is below €30,000;
 - prior consultation may be adopted for contracts whose value is below €150,000 for prior consultations;
 - public tender or limited tender with prior qualification (or negotiation procedure or competitive dialogue when the respective conditions are met) without notice in the OJEU may be adopted for contracts whose value is below the European thresholds (€5,350,000).
- For other types of contract:
 - direct award may be adopted for contracts whose value is below €50,000; and
 - prior consultation may be adopted for contracts whose value is below €100,000 (€100,000 was also the previous threshold for direct award).

Regarding contracting authorities in the utilities sector, irrespective of the general application of the public procurement principles to all contracts carried out by such entities, the European thresholds apply and are currently as follows:

- for provision of services contracts, goods supply or leasing contracts: €428,000;
- for public works contracts: €5,350,000; and
- for service contracts for social and other specific services: €1 million.

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

In general, awarding authorities may freely choose to adopt an open procedure or a restricted procedure with pre-qualification. However, contract value is the main criterion for choosing the award procedure and there are some special rules regarding anti-avoidance, so as to prevent the unnatural separation of contracts or their artificial division in order to avoid an open procedure.

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

Our PCC has included regulation on concession contracts since 2008.

Usually, a concession contract should be awarded by a public or restricted procedure with pre-qualification, by a negotiation procedure or by a competitive dialogue procedure.

According to article 407(1) PCC, a public works concession is a *contract whereby a contracting party undertakes to carry out or design and carry out public works, acquiring in return the right to exploit them for a certain period and, if so stipulated, the right to the payment of a price.*

According to article 407(2) PCC, a public service concession is a *contract whereby a contracting party undertakes to manage, in his own name and under his responsibility, a public service activity, for a certain period of time, being remunerated for the financial results of that management or, directly, by the public contractor.*

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

Framework agreements may be concluded with one single entity if the specifications have all been set forth in the tender documents, or with several entities if the specifications have not all been set forth in the tender documents.

A public tender or a limited tender with prior qualification usually precedes the conclusion of a framework agreement, since those procurement procedures do not have any value threshold.

Prior authorisation is no longer required for the centralised acquisition of goods and services covered by a framework agreement for entities that fall within the National Public Acquisitions System. Articles 19 to 21 PCC only allow the execution of contracts pursuant to the framework agreement, as long as the sum of the contractual value of all contracts is lower than the value thresholds fixed in the PCC.

The defence and security special regimen only specifies that the total amount to be taken into consideration is the maximum value estimated for the group of contracts foreseen for the full duration of the framework agreement.

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

Awarding entities have the possibility to foresee in tender documents the awarding of contracts by lot. However, in the formation of provision of services contracts, goods supply or leasing

contracts with a value greater than €135,000, and public works contracts with a value greater than €500,000, the decision not to contract in lots must be justified.

The awarding authority may limit the maximum number of lots that may be awarded to each tenderer and must indicate these limitations in the invitation or in the tender procedure.

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

As Portugal is a member of the EU, it is mandatory to treat suppliers from EU members in the same way as Portuguese suppliers. As regards suppliers from outside the EU, reciprocity rules apply between Portugal and members of the GPA/WTO.

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 the following main award procedures:

- **Direct award**
One entity will be invited to submit a bid.
- **Prior consultation**
At least three entities will be invited to submit bids.
- **Open tender**
Any interested entity is free to submit bids after the publication of a tender notice.
- **Restricted procedure with pre-qualification**
Similar to an open procedure but comprising two stages: (i) submitting technical and financial qualification documents, and selecting candidates; and (ii) submission and evaluation of bids, and award of contract.
- **Negotiation procedure**
Including the same two phases as a restricted procedure with pre-qualification but with a third phase for the negotiation of the bids.
- **Competitive dialogue**
Whenever a contracting authority is not able to specify a definitive and concrete solution for the contract and launches a tender to which bidders submit solutions.
- **Partnership for innovation**
Whenever a contracting authority seeks to contract the performance of R&D into goods, services or innovative works, with the intention of then purchasing them.

As a general rule, awarding authorities may freely choose to adopt an open procedure or a restricted procedure with pre-qualification.

Other procedures are only allowed considering some legal criteria, such as the value of the contract, material considerations or the nature of the contract or of the public authority. Above the European threshold, the Directives (and our PCC) demand some specific procedures (open and restrictive tenders, negotiation, competitive dialogue or partnership for innovation) and public announcements. Only below those thresholds may Portugal choose non-open procedures or not to publicise the procedure.

3.2 What are the minimum timescales?

Pursuant to article 63(1) PCC, the awarding authority may broaden the timescales in the procedure documents. Amendments to the PCC have reduced the time limits.

Direct award

No minimum time limit (nevertheless, the courts consider that the time limit should not be less than the period considered reasonable for the submission of the proposal).

Prior consultation

The same timing considerations apply as for the direct award procedure.

Open tender

- a) If the notice is not required to be published in the OJEU, the PCC establishes a minimum time limit to submit bids of 6 days after notice is sent for publication, unless the proceedings concern the formation of a public works contract, in which case the time limit is 14 days but if the works are of significant simplicity, the time limit of 14 days can be reduced to 6 days.
- b) If the notice is publicised in the OJEU, the minimum time limit is 30 days, which can be reduced to 15 days in cases of urgency duly reasoned by the awarding authority or if a prior information notice has been published complying with certain conditions set forth in the law. In urgent open procedures, the time limit is: 24 hours, on working days, for acquisition or lease of goods or acquisition of services; and 72 hours, on working days, for public works contracts.

Restricted procedure with pre-qualification

- a) Submission of applications for technical and financial prequalification: if the notice is not required to be published in the OJEU, the minimum time limit for the presentation of the application is 6 days (14 days for public works contracts) after notice is sent to publication. If the notice is required to be published in the OJEU, the minimum time limit for presenting the application is 30 days (reduced to 15 days in case of urgency duly reasoned by the awarding authority, or for contracts in the utilities sectors).
- b) Submission of bids: the minimum time limit is 6 days after the invitation is sent if the notice is not required to be published in the OJEU, unless the proceeding concerns the formation of a public works contract, in which case the time limit is 14 days. If the works are of significant simplicity, the time limit of 14 days can be reduced to 6 days. If the notice is publicised in the OJEU, the minimum time limit is 25 days, which can be reduced to 10 days in cases of urgency duly reasoned by the awarding entity or if a prior information notice has been published complying with certain conditions set forth in the law, or for contracts in the utilities sectors.

Negotiation procedure

- a) The submission of applications for technical and financial prequalification: according to the PCC, the time limit for the presentation of the applications is 30 days after notice is sent to publication, or 25 days if a prior information notice has been published complying with certain conditions set forth in the law. If the notice is sent electronically for publication, this timescale may be reduced by 7 days.
- b) Regarding bid submission: the rules concerning restricted procedure apply.

Competitive dialogue

The minimum timescale to submit bids is 40 days after the invitation is sent.

Regarding prior phases for submission of applications for technical and financial prequalification and for submission of solutions, there are no minimum deadlines set forth in the law, the awarding entity being bound to indicate the same in the notice and in the invitation, respectively.

Partnership for innovation

- a) The submission of applications for technical and financial prequalification: the rules applicable to the negotiation procedure also apply to the partnership for innovation procedure.
- b) Regarding the submission of proposals for R&D projects: there are no minimum deadlines set forth in the law, the awarding entity being bound to indicate the same in the invitation.

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

There are many impediments for the bidders, according to article 55 PCC.

Namely, in case of: a) insolvency or similar; b) conviction for crimes affecting professional reputation; c) administrative sanctions for a serious professional breach; d) non-payment of tax obligations; e) non-payment of social security obligations; f) sanction of prohibition from participating in public tenders set forth in special legislation; g) sanction for a breach of legal obligations in respect of employees subject to payment of taxes and social security obligations; h) conviction for crimes concerning criminal organisations, corruption, fraud or money laundering, as set out in the PCC; i) direct or indirect participation in the preparation of tender documents, thus obtaining special advantage; j) unlawful influence on the competent body for the decision to contract, or obtainment of confidential information granting undue advantages, or provision of misleading information; k) conflict of interest; and l) significant faults in the performance of a previous public contract in the past 3 years.

In the situations mentioned at b), c), g), h) or l), the PCC allows bidders to show that enough measures have been implemented to demonstrate a bidder's probity for the performance of the contract.

Regarding the possibility to have a shortlist of bidders, the PCC permits in several cases, following the assessment of the interested parties and their compliance with the technical and financial qualification criteria, a limitation on the number of bidders to occur. This relates to restricted tenders, negotiation, competitive dialogue and partnership for innovation procedures.

There are two different legal systems for the selection and shortlisting of the qualified interested parties and limitation of the number of entities that will be invited to submit a bid ("qualification of bidders"), at the free choice of the awarding entity: (i) under the simple system, all interested parties that comply with the minimum technical and financial criteria set forth in the tender documents shall be invited to participate and submit their bids; and (ii) in accordance with the complex or selection system, the technical and financial qualification of the interested parties will be evaluated and ranked, with the criteria of the higher technical and financial capacity prevailing, and only the most highly qualified parties being allowed to submit bids, with a minimum of five (except if the bidders that qualify are less than five, in which case all are invited to present a bid as per the simple system).

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 only award criterion admitted is that of the most economically advantageous bid, and may take one of two forms: (i) best price-quality ratio, where the award criteria are made up of a group of factors and sub-factors concerning several aspects of the performance of the contract to be executed; or (ii) simple evaluation of the price or of the cost, in which case the tender documents shall set forth as mandatory all other aspects of the performance of the contract to be executed.

The factors and sub-factors of the evaluation criteria should have a connection to the subject matter of the public contract in question, comprising all, and only, the aspects of performance of the contract to be executed. They may include quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, and/or environmental or social sustainability.

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

According to article 71 PCC, awarding authorities can define, in tender procedure or in the invitation, the situations in which the price or cost of a bid is considered abnormally low, taking into account the percentage deviation in relation to the average of the prices of the bids to be admitted, or other criteria considered appropriate. If it is not fixed in the tender documents, there will be no abnormally low price and any price is admitted.

The contracting authority must justify the need for fixing the abnormally low price or cost, as well as the criteria that presided over such fixing, namely the average prices obtained in the preliminary market consultation. Competitors may justify an abnormally low tender by arguing efficiency of process in the provision of the requested services.

3.6 What are the rules on awarding the contract?

This matter is discussed under question 3.4 above.

3.7 What are the rules on debriefing unsuccessful bidders?

The PCC provides that all bidders participating in the procedure must be notified simultaneously of the award decision together with the final report prepared by the jury, which must also include the reasoning of the decision.

When procedures run on electronic platforms, the relevant entities are alerted through a notification in the electronic platform.

3.8 What methods are available for joint procurements?

According to article 39(1) PCC, awarding authorities may form a group of awarding authorities for the purposes of: (i) forming contracts whose execution is in the interest of all; (ii) forming a framework agreement from which all can benefit; (iii) joint management of dynamic procurement systems; and (iv) joint procurement using electronic catalogues.

3.9 What are the rules on alternative/variant bids?

Awarding authorities may allow for variant bids in the tender documents.

3.10 What are the rules on conflicts of interest?

The PCC foresees conflicts of interest as any situation in which the manager or employee of an awarding authority or of a service provider acting on behalf of the awarding authority, involved in the preparation and conduct of the public procurement training procedure or which may influence its outcome, has, directly or indirectly, a financial, economic, or other personal interest such as to compromise his impartiality and independence in the context of that procedure.

In addition, article 67(5) PCC establishes that before taking up their duties, the jury and all other persons involved in the tender evaluation process – in particular, experts – shall sign a statement of no conflicts of interest in accordance with the model set out in Annex XIII to the PCC.

Furthermore, the APC has general rules on guarantees of impartiality that are applicable to procurement procedures.

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

The 2017 amendment to the PCC added the new article 35-A, regarding “preliminary market consultations”. In this respect, the awarding authorities may conduct informal market consultations before the launch of the contract award procedure, namely requesting the opinion of experts, independent authorities, or economic operators.

In such situations, the contracting authority must take appropriate measures to avoid any distortion of competition as a result of such participation. Appropriate measures include the communication to the other candidates or competitors of all relevant information exchanged in connection with the participation of the candidate or competitor in the preparation of the contract formation procedure, with the inclusion of such information in the tender documents.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

According to article 4, the PCC is not applicable when entering into the following contracts:

- contracts entered into pursuant to an international convention previously communicated to the European Commission and concluded between the Portuguese Republic and one or more third States, in accordance with the European Union Treaties, concerning works, goods or services intended for the joint implementation or exploitation of a project by its signatories;
- contracts entered into through a specific procedure of an international organisation of which the Portuguese Republic is a member;
- contracts entered into within rules applicable to public contracts established by an international organisation or

international financial institution and 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 article 346 of the Treaty on the Functioning of the European Union;
- contracts pursuant to an international agreement for the establishment of troops;
- labour contracts;
- real estate contracts;
- donation contracts;
- contracts related to media; or
- contracts for public entities situated outside Portugal.

According to article 5, the PCC is also not applicable to: non-market-competitive contracts, such as contracts for the delegation or transfer of public powers without remuneration; and the following:

- in-house contracts;
- subsidies and subventions;
- incorporation contracts between contracting authorities;
- acquisition of financial services;
- contracts between contracting authorities and centralised public purchase centres;
- defence and security contracts;
- secret declared contracts;
- R&D contracts; and
- those entered into by the Central Bank, apart from a works, concession, services or supply contract.

According to article 6-A PCC, the rules of the PCC do not apply to contracts for the acquisition of social services below the European threshold, apart from the general principles of public procurement. The PCC only applies in a limited way to social services contracts above the European threshold (articles 250-A to 250-C).

Contracts that are excluded from the PCC have to abide by the general principles of public activity included in the Constitution and in the APC, and those that have an object equal to an administrative act also have to abide by the general procedural rules included in the APC, with the necessary adaptations.

4.2 How does the law apply to “in-house” arrangements, including contracts awarded within a single entity, within groups and between public bodies?

The PCC is not applicable to “in-house procurement”. The PCC defines in-house as contracts entered into by a contracting authority with another contracting authority whereby: (i) the contracting authority has direct or indirect control, alone or together with other contracting authorities, over such an entity, similar to the control over its own services; (ii) such an entity carries on more than 80% of its activity in the benefit of one or several contracting authorities that have such control over it; and (iii) there is no direct participation of private capital in the controlled entity, except as regards participation without control or blocking powers and with no decisive influence over the controlled entity.

Also, the PCC is not applicable to contracts between contracting authorities, provided that the cooperation established between them is of a public-interest nature and does not represent more than 20% of services in the free market.

5 Remedies

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

Challenges against contracting authority decisions are allowed by the PCC (administrative) and by the PCAC (judicial).

Administrative challenges need to be filed within 5 working days after the notification.

Judicial challenges need to be filed within 1 month for work, concession, supply and services contracts. If filed within 10 working days after the notification of an award decision it will be automatically suspended, including the implementation of the contract if it has been already executed. The contracting authority and interested parties may ask the Judge to lift such automatic suspensive effect. It is possible also to challenge the tender documents and some interim decisions (like an exclusion).

The PCAC also rules on judicial challenge to other types of contracts, but by application of general procedural rules, including general injunctions and remedies. The general rules allow for a challenge to be filed within 3 months of the notification of the decision.

5.2 Can remedies be sought in other types of proceedings or applications outside the legislation?

For other types of contracts and proceedings, judicial challenge is always possible, but under the general framework of the PCAC.

5.3 Before which body or bodies can remedies be sought?

Administrative challenges can be sought before the contracting authority or its hierarchical body.

Judicial challenges can be sought before special procurement administrative courts. Challenges to contracts in respect of implementation can also be sought before arbitral courts.

5.4 What are the limitation periods for applying for remedies?

The relevant timeframes are set out in question 5.1.

5.5 What measures can be taken to shorten limitation periods?

In public procurement there are no measures available for the shortening of limitation periods.

5.6 What remedies are available after contract signature?

It is possible to seek judicial remedies, including remedies against the contract itself, which concern its interpretation or validity before an administrative court or an arbitral court.

The general rules of the PCAC apply. The interested party has 6 months to file for the annulment of a contract.

5.7 What is the likely timescale if an application for remedies is made?

Within the special and urgent judicial procedure, applicable to work, concession, supply and service contracts, it usually takes no less than 3 to 6 months to obtain a first instance decision, but this can go up to one year in more complex cases.

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

A classic example is the absence of a qualified digital signature in a bid or candidature document. This is a common error that can be easily decided by a Judge, as we now have steady jurisprudence on this.

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

Pursuant to article 284(3) PCC, if it is not possible to reduce or convert the contract and the annulling effect proves to be disproportionate or contrary to good faith, it may be set aside by a court or by an arbitral decision, weighing up the public and private interests involved and the seriousness of the illegality in the contract in question.

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?

If an amendment to tender documents is substantial, pursuant to article 64(2) PCC there will be an extension of the deadline for submission of bids.

After the submission of bids and prior to the award decision, no substantial changes to the tender documents are allowed, namely because the competition rules could be violated. Nevertheless, amendments to the bids are possible in tenders with a negotiation phase.

Changes in membership of a bidding consortium at pre-contract award stage are not possible.

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

As a rule, the amendment of bids is not possible.

There is such possibility in procedures that involve negotiation with bidders, but no amendments are allowed after the negotiation phase and the submission of a final bid.

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

According to article 311 PCC, following European Court jurisprudence, the contract may only be changed after being signed on grounds of (i) public interest, or (ii) change of circumstances.

The modification can be made if both parties agree, by a court decision, or even by a unilateral administrative act motivated by public interest reasons.

Nevertheless, modification of a contract is limited:

- It may not lead to substantial modification of the scope of the contract.
- It may not configure a way to prevent, restrict or distort competition.
- It is not allowed when changes are made which, if they had been part of the tender specifications, would have led, in an objectively demonstrable manner, to a change in the ordering of the bids assessed or to the admission of other bidders.
- It may not change the economic equilibrium of the contract in favour of the contracting party in terms of placing it in a more favourable position than that resulting from the equilibrium initially established.

Other limitations, namely regarding a maximum threshold for the value of the contract, are set up for specific contracts.

In certain cases, a unilateral modification gives rise to a financial rebalancing of the contract. However, Decree-Law n.º 19-A/2020 of 30 April foresees that in contracts which expressly provide for the right of the contractor to be compensated for any diminishing of infrastructure utilisation or for a pandemic as a basis to claim a financial equilibrium, such compensation may only be granted by extending the term of the contract. This is an exceptional and temporary legal regime due to the current pandemic situation.

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

The transfer of the contractual position is allowed as a general rule if there is no clause in the contract preventing it or if there is no incompatibility regarding the nature of the contract (*intuitus personae* clause).

However, a transfer of the contractual position is not possible when:

- the choice of the contractor has been determined through a direct award, in cases where only one entity can be invited;
- entities are covered by any impediment, pursuant to article 55 PCC;
- there is strong evidence of acts, agreements or information that could distort the competition rules.

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?

There are special laws ruling privatisations. Law n.º 11/90 of 5 April, amended by Law n.º 50/2011 of 13 September, rules reprivatisation. Law n.º 71/88 of 24 May approves the general regime for the sale of shares owned by public entities.

Procedures regarding privatisation include open procedures, restricted procedures, and negotiation procedures.

The Government has to approve a special law choosing the conditions applicable to a particular privatisation followed by a resolution of the council of ministers approving the terms of reference of the procedure. The PCC is not applicable.

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

The rules applicable to public-private partnerships (“PPPs”) were approved by Decree-Law n.º 111/2012 of 23 May. This regulation foresees the general standards applicable to the intervention of the State and other public entities in the definition, design, preparation, launch, award, notification, supervision and monitoring of PPPs. The PCC also applies to the procurement, and to the implementation and modification, of PPPs.

The launch and awarding of each PPP are settled by resolution of the Council of Ministers and the choice of the pre-contractual procedure must comply with the general rules of the PCC.

There is a centralised Technical Unit for the Accompanying of Projects, created as an administrative entity, reporting directly to the member of the Government responsible for the area of finance, taking responsibility for the preparation, development, implementation and overall monitoring of a PPP procedure and providing specialised technical support to the Government – particularly the Ministry of Finance – in matters of an economic and financial nature. All modifications, financial equilibrium and conflicts are to be supervised by this Unit.

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?**

The Portuguese Parliament has recently approved some special public procurement measures for the following matters: projects financed or co-financed by European funds; housing and decentralisation; information and knowledge technologies; health and social support; implementation of the Economic and Social Stabilization Program and the Recovery and Resilience Plan; fuel management under the Integrated Rural Fire Management System (“SGIFR”); and agricultural goods. Such reform will also modify the PCC and the PCAC.

The abovementioned changes will enter into force in 2021.

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?

Please see question 8.1 above.



José Luís Moreira da Silva has more than 30 years of experience and is regarded as one of the very few all-round Public Law lawyers, with experience in PPPs/PFIs (including banking experience) and government (as a Member of Parliament). His practice stands out in both the infrastructure/transport sector and the field of PPPs/PFIs & concessions in Portugal, whether in high-profile administrative arbitration/litigation, public procurement or privatisation matters.

José Luis's international recognition as a top lawyer in his practice has led him to be appointed President of the Administrative Law Commission and President of the Portugal National Committee of the *Union Internationale des Avocats* (UIA). In recognition by his peers, he was also elected President of the Portuguese Law Firm Association (ASAP), which combines all the major law firms in Portugal.

José Luis has been appointed as an arbitrator in domestic and international cases (at the International Chamber of Commerce) in large and important arbitrations. He is a member of several panels of arbitrators, including the Portuguese Commercial Arbitration Centre.

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SRS Advogados is a frequent legal adviser to various national and international clients in the context of Public Law (Constitutional, Administrative, Regulatory, Dispute Resolution, Public Procurement, Concessions and PPPs) in Portugal.

Our Public Law practice stands out in the following industry sectors:

- Ports – The practice advises three of the main Port Authorities in Portugal (Lisbon, Sines and Setubal), namely on terminal concessions, public procurement, PPPs, public domain and administrative dispute resolution, including arbitration.
- Infrastructure and Transport – The Public Law Department is highly recognised in infrastructure, and has advised on several road PPPs and on several hospital PPPs, as well as advising several bidders on infrastructure procurement, public service obligations, transport concessions, airport concessions, urban public transport concessions (rail and road) and maritime transport.
- Energy – The Public Law practice handles mostly up/mid/downstream projects and renewable energy, as well as regulatory and procurement matters and dispute resolution.

- Telecom – Our practice covers regulatory sanctions procedures and telecommunication litigation.
- Life Sciences – The Public Law practice mostly handles regulatory disputes and public procurement in this sector.
- Water and Waste – The Public Law practice advises consistently on concessions and dispute resolution on water and waste matters for the major players in Portugal.

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