

International Comparative Legal Guides



Practical cross-border insights into public procurement

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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 latest relevant modification was made by Decree-Law n.º 30/2021 of 21 May), 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, such as 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 the rules on dispute resolution regarding award procedures and administrative and public contracts. Another 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).

The recent Decree-Law n.º 30/2021 of 21 May (“Decree-Law 30/2021”) has approved some special measures in the field of public procurement; namely, new special award procedures for contracts financed or co-financed by European funds.

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; and equal treatment and non-discrimination.

These principles 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?

Awarding 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.

Azores has special rules that apply to 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 regulations for the year are also approved.

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.

Decree-Law 30/2021 created an Independent Commission with powers to analyse the contractual performance of the contracts covered by Decree-Law 30/2021 as mentioned in question 2.3.

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 GPA provides for reciprocal market access commitments on procurement between the EU and other WTO members that are also signatories thereto.

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 comprised 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 authorities 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 company incorporation 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 award criteria.

For awarding authorities within the traditional public sector or 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; and
 - 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 another public entity, 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; and
 - 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.

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.

Decree-Law 30/2021 sets some special rules for the execution of award procedures for contracts financed or co-financed by European funds. In these cases, the awarding entities may use:

- a simplified public tender and a simplified restricted procedure with pre-qualification, when the contract's value is lower than the abovementioned thresholds;
- a simplified prior consultation, with the invitation of at least five entities, when the value of the contract is lower than the thresholds mentioned above, and, in any case, below €750,000; and
- a simplified direct award when the value of the contract is equal to or lower than €15,000.

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, 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?

The PCC has included regulation on concession contracts since 2008.

Usually, a concession contract should be awarded through a public or restricted procedure with pre-qualification, a negotiation procedure or 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 threshold value.

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, if the sum of the contractual value of all contracts is lower than the value thresholds fixed in the PCC.

The defence and security special regime 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 such 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 other 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 specific 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 research and development (“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.

Notwithstanding, Decree-Law 30/2021 has created three new award procedures:

- **Simplified public tender**
Any interested entity is free to submit bids after the publication of a tender notice.
- **Simplified 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.
- **Simplified prior consultation**
At least five entities will be invited to submit bids.

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.

The relevant timescales are as follows:

- **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 bid).
- **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 six days after the 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 six days.
 - b) If the notice is published 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 pre-qualification: if the notice is not required to be published in the OJEU, the minimum time limit for the presentation of the application is six days 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 six days after the invitation is sent if the notice is not required to be published in the OJEU, unless the proceedings concern 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 six days. If the notice is published 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 pre-qualification: 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 seven days.
- b) Regarding bid submission: the rules concerning restricted procedure apply.

■ Competitive dialogue

The minimum timescale to submit bids is 30 days after the invitation is sent.

Regarding prior phases for submission of applications for technical and financial pre-qualification 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 pre-qualification: 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 is bound to indicate the same in the invitation.

Pursuant to Decree-Law 30/2021, the awarding entities are allowed to reduce the minimum timescale to submit bids in public tenders and restricted procedures with pre-qualification.

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 advantage, or provision of misleading information; k) conflict of interest; and l) significant faults in the performance of a previous public contract in the past three 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 allows, in several cases, following the assessment of the interested parties and their compliance with the technical and financial qualification criteria, a limitation to be placed on the number of bidders. 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 (“bidders’ qualification”), 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).

According to Decree-Law 30/2021, entities that were already awarded by the awarding authority in the current financial year or the two preceding financial years, through a simplified prior consultation, cannot be invited to present bids for contracts with an accumulated contractual price that is:

- equal to or higher than €750,000, in work contracts or concessions of public services or public works; and
- equal or higher than the threshold mentioned in question 2.3.

Decree-Law 30/2021 also states that bidders with tax and social security debts can be admitted if their debts: (i) are a result of a temporary impossibility due to liquidity issues, properly certified by a public accountant or just a certified accountant; and (ii) do not exceed, jointly, €25,000.

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 criteria admitted are those of the most economically advantageous bid, and may take one of two forms: (i) multi-factor criteria, 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) single-factor criteria, where the award criteria are made up of a single aspect of the contract performance, namely the price.

The factors and sub-factors of the evaluation criteria should have a connection to the subject matter of the public contract in question, including 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 the tender procedure or in the invitation, the situations in which the price or cost of a bid is considered abnormally low. If the abnormally low tender is not fixed in the tender documents or in the notice, the contracting authority is free to consider a bid abnormally low, although it cannot exclude a bid without giving the bidder an opportunity to justify it.

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 are run on an electronic platform, the relevant entities are alerted through a notification on such 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) drawing up contracts whose execution is in the interest of all; (ii) drawing up 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 execution 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, 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 to 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 EU 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;
- secretly 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, Part II of the PCC does 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?

Part II of 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.

Furthermore, the PCC is not applicable to contracts between contracting authorities, provided that the cooperation established between them is of a public-interest nature and less than 20% of the services contracted are 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 the PCAC (judicial).

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

Judicial challenges need to be filed within one 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 also possible to challenge the tender documents and some interim decisions (e.g. an exclusion).

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

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 relevant 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 six 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 three to six 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 bids submission.

After the bids' submission and prior to the award decision, no substantial changes to the tender documents are allowed, 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 312 PCC, following European Court jurisprudence, the contract may only be changed after being signed on grounds of (i) contractual clauses, (ii) public interest, or (iii) change of circumstances.

A modification can be made (i) if both parties agree, (ii) by a court decision, or (iii) even by a unilateral administrative act motivated by public interest reasons.

Nevertheless, modification of a contract is limited, and may not lead to substantial modification of the scope of the contract.

As a general rule, a modification founded on reasons of public interest cannot take place if it would cause a substantial modification of the contract or would represent a form of preventing, restricting or distorting competition, namely by:

- a) introducing changes that, if initially foreseen in the specifications, would have caused, in the award procedure, in an objectively demonstrable manner: the modification of the candidate's qualification; a change in the ordering of the evaluated bids; or the non-exclusion or submission of other bids or candidatures;
- b) changing the financial rebalancing of the contract in favour of the co-contractor; or
- c) extending considerably the scope of the contract.

Other limitations, regarding a maximum threshold for the value of the contract, are set 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; or
- 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 privatisation. 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 must 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 award 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?

There have not been any recent proposals to change the PCC, PCAC or APC.

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?

The most recent regulatory development was Decree-Law 30/2021, which approved some special measures in public procurement. The law is aimed at speeding up certain award procedures due to their inherent urgency, as an impact of the pandemic, and for contracts financed or co-financed by European funds. Moreover, the pace of such procedures is overseen by a special Independent Committee that supervises the contracts covered by this special provision.



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 Luís'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 brings together all the major law firms in Portugal.

José Luís 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) on terminal concessions, public procurement, PPPs, public domain and administrative dispute resolution, including arbitration.
- Infrastructure and Transport – the Public Law Department is recognised particularly for its expertise on infrastructure, and has advised on several road PPPs and 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 mainly handles up/mid/downstream projects and renewable energy, as well as regulatory and procurement matters and dispute resolution.

- Telecoms – 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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