THE GOVERNMENT PROCUREMENT REVIEW

Ninth Edition

Editors
Jonathan Davey and Amy Gatenby

THE LAWREVIEWS

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NINTH EDITION

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PREFACE

It is our pleasure to introduce the ninth edition of *The Government Procurement Review*.

Our geographical coverage this year remains impressive, covering 14 jurisdictions, including the European Union (EU), and the continued political and economic significance of government procurement remains clear. Government contracts, which are of considerable value and importance, often account for 10 to 20 per cent of gross domestic product in any given state, and government spending is often high profile, with the capacity to shape the future lives of local residents.

The past year has of course been dominated by the ongoing coronavirus crisis. In many cases, the tension between the need for urgent procurement of essential supplies clashes with the requirement to follow a structured procurement process. These issues are a subject of particular focus in the chapters for Brazil, Canada, the Dominican Republic, Germany, Greece and the United States. At EU level, the focus has been on identifying the ways in which such urgent procurement needs can be accommodated within the existing procurement rules. In the United Kingdom, the government has published several procurement policy notes during the pandemic, including advice on payments to struggling suppliers. In addition, the UK Green Paper on Transforming Public Procurement (referred to below) recognises the lessons of the covid-19 pandemic by proposing a new 'crisis' exemption to sit alongside the various urgency-related relaxations, with a proposal that a crisis could be declared by a minister, bringing with it the possibility of relaxations of the application of procurement law.

Another theme this year across a range of jurisdictions is legislative reform: for example, extensive reforms are proposed in Brazil, Greece, Saudi Arabia and Sweden. Portugal also had major reforms on track until shelved by the President. Switzerland is in the process of implementing recent legislative changes. Areas of focus for a number of these reforms include cybersecurity, prompt payment of suppliers, sustainability, the environment, whistle-blowing, modern slavery and supply chain management (see in particular the chapters for Austria, Australia, Canada, the United States and Germany).

As mentioned above, the UK government also published a Green Paper on reform of procurement law, taking advantage of the (limited) room for manoeuvre offered by the UK membership of the World Trade Organization's Agreement on Government Procurement and the boundaries set by the EU–UK Trade and Co-operation Agreement. While Brexit itself resulted in only minor changes to the UK procurement law regime, the Green Paper is very wide ranging: among its more notable proposals are a significant attempt at simplification and wider permitted use of negotiation; a move to provision of information to bidders throughout procurement processes; and a cap on damages for successful complainants, born

of recent significant damages payouts in high-profile cases. The latter proposal has been met with a largely negative response from practitioners. It will be interesting to see what the balance of responses to the Green Paper is, and how many of its radical proposals become law.

International trade agreements feature again: as well as the EU–UK TCA mentioned above, we now have the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (or CPTPP – superseding the Trans-Pacific Partnership) between Asia Pacific nations, and the Canada–United States–Mexico Agreement (or CUSMA – the replacement for NAFTA, applying, as regards procurement, only between the United States and Mexico). The United Kingdom and Canada have also signed a bilateral trade agreement, and various other free trade agreements are coming into force or are under negotiation.

There has also been some significant case law in the past year, most notably in the EU on public sector contracting and the issue of self-cleaning for contractors guilty of past failures.

The European Commission has been active on a number of fronts: the outcome of the process involving a White Paper looking at the potential distortive effects of foreign subsidies on the EU Internal Market, including a focus on these effects in the context of public procurement, is clearly one to watch.

When reading chapters regarding EU Member States, it is worth remembering that the underlying rules are set at EU level. Readers may find it helpful to refer to both the EU chapter and the relevant national chapter, to gain a fuller understanding of the relevant issues. So far as possible, the authors have sought to avoid duplication between the EU chapter and national chapters.

Finally, we wish to take this opportunity to acknowledge the tremendous efforts of the many contributors to this ninth edition as well as the tireless work of the publishers in ensuring that a quality product is brought to your bookshelves in a timely fashion, particularly given the effects of the pandemic and consequent lockdowns in most countries covered in this work. We trust you will find it to be a valued resource.

Jonathan Davey and Amy Gatenby
Addleshaw Goddard LLP
London
May 2021

Chapter 9

PORTUGAL

José Luís Moreira da Silva and João Filipe Graça[1]

I INTRODUCTION

The key legislation for public procurement in Portugal is the Public Contracts Code (PCC), approved by Decree-Law No. 18/2008 of 29 January. The most recent significant amendment to the PCC was approved by Decree-Law No. 111-B/2017 of 31 August, which transposed the 2014 Concession Contracts Directive,[2] the 2014 Public Contracts Directive[3] and the 2014 Utilities Contracts Directive[4] into the Portuguese legal system. The PCC applies to all kinds of procurement and public contracts, namely also to utilities and concessions.

Defence and security procurement contracts are regulated separately by Decree-Law No. 104/2011 of 6 October.

Also of note, the following pieces of legislation have relevance for the procurement regime:

a the Administrative Procedure Code, approved by Decree-Law No. 4/2015 of 7 January, as amended (APC), which contains the general rules on administrative procedures and is applicable subsidiarily to procurement; and

b the Procedural Code of the Administrative Courts, approved by Law No. 15/2002 of 22 February, as amended (PCAC), which contains the rules on remedies regarding pre-contractual procedures and public contracts.

Portugal is a member of the EU and is also a signatory to the World Trade Organization's (WTO) Agreement on Government Procurement (GPA), which provides for reciprocal market access commitments in procurement between the EU and other WTO members that are also signatories to the GPA. Consequently, all EU legislation applies directly in Portugal and the GPA is also applicable on grounds of reciprocity.

In Portugal, the Institute of Public Procurement, Real Estate and Construction (IMPIC) is the regulatory public body with responsibility for setting government purchasing procurement policy and enforcing compliance in public procurement and for electronic procurement platforms; it also regulates public and private construction.

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1 José Luís Moreira da Silva is a partner and João Filipe Graça is an associate at Sociedade Rebelo de Sousa & Advogados Associados, SP, RL.

2 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

3 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

4 Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

The basic underlying principles applicable in Portugal 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. In Portugal the general principles of procurement law, as stated by the European Court of Justice (ECJ) and the EU 2014 Procurement Directives, have been transposed to the PCC, but other general principles of administrative law also apply, as stated in the APC. These principles are relevant since they establish limits on the activity of contracting authorities, as well as guidelines on how the rules ought to be interpreted. Contractors can rely on these in the event of any abuse by a contracting authority.

II YEAR IN REVIEW

Law Proposal No. 41/XIV/1(a) was to be a major change in the Public Procurement Code, aiming to simplify procedures and specifically to accelerate procurement of contracts financed with European funds. The government wanted to allow contracts to be signed more quickly by cutting or speeding up some procedures to expedite the execution of public investments, especially those to be financed by European funds. In particular, the government was thinking of ways to have immediate access to the upcoming EU Resilience and Recuperation Facility, which has a very short time frame for execution (four years). Nevertheless, worries about lack of public scrutiny and transparency led the President to veto the proposal and it is currently pending review by Parliament.

Regarding case law, there have been notable decisions in relation to public procurement matters. In particular, in the Supreme Administrative Court decision of 11 September in case 0829/18.3BEAVR, the Court considered that failure to present a European Single Procurement Document (which is mandatory but in this case was not requested in the tender specifications) does not constitute a cause for the immediate exclusion of the candidate. The Court held that such an omission should lead only to the candidate being granted the opportunity to subsequently submit the missing document. In this case, the Court decided that only an illegality that renders the procedure invalid may lead to annulment and the subsequent repetition of the procedure.

III SCOPE OF PROCUREMENT REGULATION

i Regulated authorities

The PCC recognises three main categories of contracting authorities.

According to Article 2(1) of the PCC, the first group of entities is generally composed of traditional public sector bodies, namely:

a the Portuguese state (the government);
b the autonomous regions;
c local authorities;
d public institutes;
e independent administrative authorities;
f the central bank;
g public foundations;
h public associations; and

i associations mainly financed, or subject to management supervision, or where a majority of the members of the association's administrative, managerial or supervisory board is appointed, directly or indirectly, by the above-mentioned bodies.

The second group of entities, in accordance with Article 2(2) PCC, is comprised of other entities that are also governed by public law:

a Any legal entity, either public or private, specifically created to satisfy needs of a general public-interest nature, whose economic activity is not subject to the logic of market competition, namely because of its non-profit nature (or through not covering losses resulting from its activity); and that is mainly financed or controlled, or the majority of whose management or supervisory board members have been appointed, by the entities referred to above or by other bodies governed by public law.

b Legal entities that are mainly financed or controlled, or the majority of whose management or supervisory board members have been appointed, by a body governed by public law.

c Associations mainly financed or controlled by one or more bodies governed by public law or by one of the entities referred to in the previous two paragraphs, as long as it is mainly financed or controlled or the majority of the members of its board of directors or supervisory body are appointed, directly or indirectly, by such entities.

The third category of contracting authorities is established in Article 7 of the PCC and is composed of entities operating in the utilities sectors (water, energy, transport and postal services) that fall within three subcategories:

a legal entities not included in the above-mentioned Article 2 categories that operate in one of the utilities sectors and over which the entities referred to above may exercise, directly or indirectly, a dominant influence;

b legal entities not included in the above-mentioned Article 2 categories that hold special or exclusive rights that have not been granted by means of an internationally open and competitive procurement procedure, with the effect of reserving to an entity itself, or together with other entities, the exercise of activities in the utilities sector substantially affecting the ability of other entities to carry out the same activities; and

c legal entities exclusively incorporated by entities mentioned in the two paragraphs above and that are mainly financed or are subject to management supervision or have an administrative, managerial or supervisory board more than 50 per cent of whose members are directly or indirectly appointed by those entities, provided that they are destined to operate jointly in the utilities sectors.

The PCC also extends its scope of application to entities that enter into public works contracts or public service contracts where more than half the value of those contracts is directly financed by contracting authorities and the value of the contracts to be executed is equal to or greater than the relevant European thresholds, pursuant to Article 275 of the PCC.

Finally, the PCC also extends the application of certain specific public procurement rules to contracts to be carried out by public works concessionaires or by entities holding a special or exclusive right, under certain circumstances defined in Articles 276 and 277 of the PCC.

ii Regulated contracts

Contracts regulated by procurement rules are those whose scope is, or may be, subject to general market competition rules. In this sense, the PCC considers the following contracts, among others, to be subject to competition rules:

a public works contracts;
b public works concessions;
c public services concessions;
d acquisition or lease of goods;
e acquisition of services; and
f incorporation of company contracts.

The PCC is not applicable (except in a subsidiary way) to certain contracts, namely:

a contracts concluded under the provisions of the special legal regime in the field of defence and security; and
b contracts that 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.

Defence and security contracts are specially regulated in Portugal by Decree-Law No. 2014/2011 of 6 of October.

In addition, awarding entities referred to in Article 7 of the PCC (utilities contractors) are only subject to the procedures of the PCC in relation to the following contracts:

a regarding public works, contracts equal to or above €5,350,000;
b regarding lease or supply of goods and acquisition of services, contracts equal to or above €428,000.
c regarding acquisition of social services or other services specified in Annex IX to the PCC, contracts equal to or above €1 million.
d regarding public works concessions and public services concessions, all contracts.

All public contracts executed by contracting authorities pertaining to the traditional public sector or that are considered bodies governed by public law fall within the scope of the PCC rules.

However, in the utilities sector, if the financial thresholds are below the above-mentioned values, Part II of PCC is not applicable, therefore the procedure for choosing a contractor falls outside the scope of the PCC and instead general law is applicable (i.e., a special regulation enacted by the public body or even private law).

Contracts of a value below the relevant European threshold can be awarded through a non-competitive procedure (direct award) and their terms are regulated by the PCC; also, publication in the Official Journal of the EU (OJEU) is not necessary for contracts below the European threshold, even if an open procedure is chosen.

Direct award can be used:

a for public works of a value of less than €30,000;
b for the supply and lease of goods, and services contracts, with a value of less than €20,000; and

c for other types of contracts (excluding public works and services concessions and company incorporation contracts) the direct award procedure can only be chosen if the value of the contract is less than €50,000.

The scope of application of the direct award procedure was reduced by the 2017 amendment to the PCC with the inclusion of a new procurement procedure (prior consultation), which follows the direct award procedure but demands the consultation of at least three entities for the award of a contract.

Despite the threshold parameter, a direct award can be adopted in some material circumstances, namely the following:

a where there have been no competitor proposals or all proposals have been rejected in a previous open tender, provided that the specifications and the minimum technical requirements have not been substantially modified;
b in cases of urgency, where the deadlines for other open procedures cannot be met because of unforeseeable events, provided that those circumstances are not attributable to the contracting authority; and
c where for technical or artistic reasons, or for the protection of exclusive rights, the contract can only be granted to the entity specified.

Transfer of the awarded contract is allowed, as a general rule, provided that there is no clause in the contract prohibiting this, nor any incompatibility with the nature of the contract. However, transfer of the awarded contract is not possible when:

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

The modification of a contract is also possible, but with stringent limits regarding the jurisprudence of the ECJ and the application of the 2014 Procurement Directives, both of which have been transposed into the PCC.[5] A modification is only allowed if it does not imply a substantial modification of the contract and only if it is in the public interest or due to an alteration of circumstances. However, even in cases where a modification of the contract is allowed, certain value constraints have to be considered, depending on the type of contract. The violation of all and any of these limits renders the contract null and void and requires a new tender to be opened.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

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

5 Article 311(o) et seq.

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 System of Public Procurement. In any case, the choice of a procedure for the execution of a framework agreement pursuant to Articles 19 to 21 of the PCC only allows the execution of contracts pursuant to the framework agreement, as long as the sum of contract values of all contracts is inferior to the established value thresholds.

The defence and security special regime only specifies that the total amount to be taken into consideration is the estimated maximum value of the group of all contracts expected throughout the entire duration of the framework agreement.

ii Joint ventures

Part II of the PCC is not applicable to certain contracts, namely public–public joint-venture in-house procurements. Specifically, the Part II of the PCC is not applicable to contracts entered into between one awarding entity and another awarding entity in the following cases:

a where an awarding entity exercises direct or indirect control, alone or together with other awarding entities, over a second awarding entity and that control is similar to the control the first entity has over its own services;

b an awarding entity carries out more than 80 per cent of its activity for the benefit of one or several other awarding entities that have this level of control over it; and

c there is no direct participation of private capital in the controlled entity, except in relation to the participation without control or blocking powers, and with no decisive influence over the controlled entity.

In these cases, therefore, a tender is not mandatory.

Decree-Law No. 111/2012, of 23 May, as amended recently, by Decree-Law No. 170/2019 of 4 December, defines the rules applicable to PPPs. This legislation states the general standards applicable to state intervention in the definition, design, preparation, launch, award, notification, supervision and monitoring of PPPs.

The launch and award of each PPP depend on certain requirements to be defined by a resolution of the Council of Ministers.

Under Article 15(1) of the Decree-Law, the choice of the pre-contractual procedure must be in accordance with the rules of PCC, therefore the general rules on procurement apply.

In terms of contractual frameworks:

a the different risks of the PPP should be allocated between the parties in accordance with their respective capacities to manage such risks;

b there should be an effective and significant transfer of risk to the private sector;

c 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.

V THE BIDDING PROCESS

i Notice

Depending on the value and scope of the contract, contracting authorities are, as a rule, bound to advertise the award procedures. Except for the direct award and the prior consultation procedures, all public procurement procedures are required to be advertised in advance either only in the official gazette, the Journal of the Republic, or also in the OJEU.

The information to be included is provided for in Annex V of the 2014 Public Contracts Directive (for announcements to be published in the OJEU) or in Ministerial Order 371/2017 (for notices to be published in the Journal of the Republic) and varies according to the type of procedure.

Also, according to Article 34(1) of the PCC, prior to the formal opening of the pre-contractual procedures, and in accordance with the transparency principle, the contracting authorities should disclose for publication in the OJEU their annual procurement plan in a prior information notice that complies with the model provided in Article 48(1) of the 2014 Public Contracts Directive, provided that the aggregate contractual value of the contracts to be executed during the following 12 months equals or exceeds the European thresholds.

Contracting authorities may also send a prior information notice for publication in the OJEU that complies with the model provided in Article 31(2) and (3) of the 214 Concession Contracts Directive in the case of service contracts for social and other specific services listed in Appendix IV of that Directive.

Additionally, pursuant to Article 35 of the PCC, contracting authorities in the utilities sector may send an indicative periodic notice for publication in the OJEU, as provided for in Article 67 of the 2014 Utilities Contracts Directive and covering a period of 12 months.

In defence and security contracts, the awarding authorities must adopt a negotiation procedure with publication of the tender notice, or the restrictive tender (with previous qualification). However, in some cases, the parties may choose a negotiation procedure without publication of the tender, or the competitive dialogue procedure.

ii Procedures

The PCC provides for the following main award procedures:

a direct award: one bidder is invited to submit a bid;

b prior consultation: at least three entities are invited to submit a bid;

c open procedure: any interested entity is free to submit bids after the publication of a tender notice;

d restricted procedure with pre-qualification: similar to the open procedure but comprising two stages: submission of technical and financial qualification documents; and submission of bids;

e negotiation procedure: including the same two phases as the restricted procedure with pre-qualification, and a third phase for the negotiation of bids;

f competitive dialogue: when a contracting authority is unable to specify a definitive and concrete solution for the contract and launches a tender for which bidders submit solutions; and

g partnership for innovation: when a contracting authority seeks to contract the performance of activities of research and development of goods, services or innovative works, with the intention of then purchasing that performance.

Contracting authorities are bound to use electronic systems of procurement and auctions pursuant to Law No. 96/2015 of 17 August, which establishes the legal framework for the access and use of electronic platforms for public procurement purposes.

The security and defence contracts regime under Decree-Law 104/2011 provides only three procedures: competitive dialogue (governed by the rules of the PCC); restricted procedure with pre-qualification (governed by the rules of the PCC); and a negotiation procedure, which may or may not be preceded by a contract notice.

iii Amending bids

As a general rule, the option to amend bids is not available. However, this option is available in procedures that involve negotiation with bidders.

The PCC establishes the procedures that may involve negotiation with bidders: (1) the prior consultation, (2) the open procedure, (3) the competitive dialogue, (4) the partnership for innovation, and (5) the negotiation procedure. In all other procedures, a negotiation phase is not allowed and, therefore, modification of the bid is also prohibited.

It is not mandatory to have a negotiation phase in the prior consultation or the open procedure, but the contracting authority may include it in the tender specifications. In the open procedure the negotiation phase can only be included for concessions contracts and for public works and services, but only in these last two cases if the contact value is below the European threshold.

Currently, the PCC provides that the adoption of a competitive dialogue or a negotiation procedure may occur if:

a the contracting authority's needs cannot be fulfilled by adapting easily available solutions;
b the goods or services include the adoption of innovative solutions;
c it is not objectively possible for the contract award to occur without any previous negotiation because of the contract's specific legal or financial nature, complexity or risk; and
d it is not objectively possible to precisely define, in a detailed manner, the technical solution to be implemented by referring to a certain rule or standard.

VI ELIGIBILITY

i Qualification to bid

Public procurement law sets out conditions for interested parties to participate in tenders and if a bidder does not comply with these requirements it will be disqualified and excluded from the tender. These requirements certify the professional and personal suitability of bidders and are distinct from the technical and financial capacity requirements whereby candidates' technical and financial qualification is assessed.

The following professional and personal suitability criteria are grounds for disqualification or exclusion:

a insolvency or similar;
b conviction for crimes affecting professional reputation;
c administrative sanctions for a serious breach of professional conduct;
d non-payment of tax obligations;
e prohibition from participating in public tenders set out in special legislation;
f sanction for a breach of legal obligations in respect of employees subject to payment of taxes and social security obligations;

g conviction for crimes concerning criminal organisations, corruption, fraud or money laundering, as set out in the PCC;
h direct or indirect participation in the preparation of the tender documents, thus conferring a special advantage;
i unlawful influence on the body competent to make the decision to contract, or possession of confidential information granting undue advantages, or provision of misleading information;
j conflicts of interest; and
k responsibility for significant faults in the performance of a previous public contract in the past three years.

In accordance with the 2014 Procurement Directives, under the PCC the contracting authority may permit an interested party to present a bid even if it fails some of the professional and personal suitability criteria, provided that the bidder can prove it has taken appropriate measures to meet the criteria in future.

Notably, procedures with a pre-qualification phase (restricted procedure with pre-qualification, negotiation procedure and competitive dialogue) allow for participation to be restricted to a limited number of qualified interested parties. Following assessment of the interested parties and their compliance with the technical and financial qualification criteria, a limit may be imposed on the number of bidders. There are two different legal regimes for the selection of qualified interested parties with limitation of the number of entities invited to submit a bid (the qualification of bidders), and the awarding entity is free to choose either of these:

a Under the first regime, the simple system, all interested parties that comply with the minimum technical and financial criteria set out in the tender documents are invited to participate and submit their bids.
b Under the second regime, 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 highest-rated parties qualifying for the submission of bids.

ii Conflicts of interest

The PCC and the APC have rules on both conflicts of interest and guarantees of impartiality. Those rules state that any holder or agent of a public administration body that has an interest, whether personal or as a representative of other persons, in an administrative procedure (for example, a public tender) is prohibited from participating or intervening in that procedure.

Hence, a person who is subject to an impediment should communicate that fact and withdraw from the procedure, otherwise a serious disciplinary penalty will result and the procedure may be annulled. The members of a tender jury also have to abide by the rules on conflicts of interest.

iii Foreign suppliers

In general, foreign suppliers can bid. In the case of a concessions contract award, the setting up of a local branch or subsidiary is usually required.

Special requirements may only be imposed on non-EU and to non-WTO bidders.

VII AWARD

i Evaluating tenders

The PCC states that the contracting authorities must be transparent, hence they must disclose the award criteria and the evaluation methodology of the bidders and of the bids evaluated. These must be clearly specified in the tender documents at the beginning of the procedure.

The only award criterion admitted is the most economically advantageous bid, which may assume one of two forms:

a best price–quality ratio: where the award criteria is composed of a group of factors and sub-factors concerning several aspects of the performance of the contract to be executed; or

b evaluation of the price or of the cost: in which case, the tender documents shall set out all other aspects of the performance of the contract to be executed.

In security and defence contracts, the award criteria can be of two kinds: the most economically advantageous bid or the lowest price. However, the lowest price can only be adopted if the tender specification defines all the remaining aspects of the contract's execution, submitting only the price to competition.

ii National interest and public policy considerations

The evaluation methodology can vary greatly depending on the procurement procedure chosen, and various factors can be taken into consideration, such as quality, technical merit, environmental characteristics and social sustainability, among others.

In principle, domestic suppliers cannot be favoured since the EU Procurement Directives invoke the principle of non-discrimination between Member States. Therefore the evaluation methodology can consider various factors but not the nationality of the suppliers or products.

VIII INFORMATION FLOW

During the public procurement procedure, all bidders have access to the documents submitted by the other bidders and issued by the jury, as well as those of the contracting authority, except in relation to documents that bidders have requested to be classified.

Third parties may also have access to the procurement file, since the file is considered to be public. Nevertheless, applicants must demonstrate a legitimate interest in having access to procurement documents, and some personal and commercial information can be restricted.

All bidders are notified at the same time of the award decision and the contract can only be signed after 10 working days have elapsed following this notification. The PCC establishes this general standstill period so that unsuccessful bidders may challenge the decision before a court prior to the signing of the contract. However, this period does not apply when:

a the contract is executed under a prior consultation procedure or a direct award or, in other procedures, where the notice has not been published in the OJUE (i.e., below the European threshold);

b the contract pertains to a framework agreement executed with one entity only or to a framework agreement the terms of which cover all aspects related to the contract's performance; or

c only one bid has been submitted.

The contracting authorities may decide not to communicate certain information regarding the decision or elaborating the framework agreements applicable to security and defence contracts when that may violate the law or be contrary to the public interest, and particularly defence and security interests.

IX CHALLENGING AWARDS

It is normal for there to be many challenges in the administrative courts against award decisions or the exclusion of bidders, mainly by unsuccessful bidders, and their chances of success vary according to the circumstances of the particular case.

Because of the importance of obtaining a swift ruling, it usually takes between three and six months to obtain a decision at first instance in judicial proceedings. In accordance with the Remedies Directive, the Portuguese Court Procedure Code establishes an urgent procedure and an automatic suspension of the award decision if the challenge is made within the 10-day term of the standstill clause. The contracting authority can ask the court to lift this automatic suspension in an expedited procedure, normally decided in one to three months at first instance. The court decision will consider proportionally the interests of all the parties involved in the tender, and not only the public interest.

Suspension of the award is not automatic after the 10-day standstill period but can be requested of the court.

The administrative challenge of contracting authority decisions does not have any costs. For court challenges, there is a judicial fee of €204 at first instance, irrespective of the value of the contract. In the event of an appeal against the court's decision, a variable judicial fee will be charged according to the value of the contract.

i Procedures

In Portugal, it is possible to challenge all public procurement procedures decisions through administrative review proceedings or through judicial review by the administrative courts.

Appeal proceedings concerning procurement decisions are characterised by pressing urgency and aimed at avoiding excessive delays in the procurement procedure. An administrative appeal must be brought within five working days of the notification. Judicial proceedings regarding pre-contractual decisions must be filed within one moth of the relevant decision being issued and notified to the bidder, although automatic suspension of the award decision is only granted if the appeal is brought within 10 days.

ii Grounds for challenge

Any unsuccessful bidder can submit an application for review of a decision, of tender documents or of a contract, provided the bidder demonstrates it has been directly affected by the alleged infringement and that it will obtain an advantage through the review sought.

The PCAC provides for judicial remedies: the challenge of tender documents; and the challenge of administrative acts regarding a 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 covered by the EU Procurement Directives.

Judicial challenge is also possible in relation to other types of contracts, but this is done under the general regime of the PCAC. The PCAC also provides for specific injunctions.

iii Remedies

Articles 267 to 274 of the PCC provide for the administrative challenge of decisions taken within the contract procedure and of the tender documents. In the event of an administrative challenge in either case, the following acts cannot be performed without a decision on the challenge: (1) the qualification decision; (2) the beginning of the negotiation phase; and (3) the final award decision.

Note that the challenge of an award, if filed within 10 working days of the notification of the award, automatically suspends the effects of the award or the performance of the contract if it has been already concluded. The contracting authority and interested parties may request the judge to lift this suspensive effect. Such a request must be granted if the deferral of the execution of the award is disproportionately harmful to the public interest or to other interests.

There are cases in which the contracting authorities may not comply with the court judgment: (1) when it is objectively impossible to do so; or (2) when compliance would cause serious damage to the public interest.

In addition, Article 283 of the PCC, which addresses the annulment of contracts on the basis of procedural defects, provides measures to mitigate this effect. The court may disregard this effect where it considers the annulment of the contract to be disproportionate or contrary to good faith in the context of the private and public interests at stake and the gravity of the violation of the law.

If the court finds the award decision null and void, it can also rule on indemnities on request by the challenging party. The court cannot order the contracting authority to launch a new tender as this is for the authority to decide.

Fines can only be decided by the regulator IMPIC in cases of breach of competition and failure to abide by special determinations under the PCC.

X OUTLOOK

The Portuguese parliament recently approved special public procurement measures for projects financed or co-financed by European funds in the areas of housing and decentralisation, information and knowledge technologies, health and social support, implementation of the Economic and Social Stabilisation Programme and the Recovery and Resilience Plan, fuel management under the Integrated Rural Fire Management System and also agri-food goods. This reform will also significantly modify the PCC and PCAC, but the proposed changes are still pending final approval and publication.

Appendix 1

ABOUT THE AUTHORS

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José Luís Moreira da Silva has more than 30 years of experience and is regarded as one of Portugal's very few all-round public law lawyers. He benefits from his experience in both PPP/PFI (with bank experience) and government (as a member of parliament). He is held in high regard in the infrastructure and transport sectors and in relation to PPP/PFI and concessions in Portugal for his practice in high-profile administrative arbitration and litigation, public procurement and privatisation matters.

International recognition as a top lawyer in his areas of practice led to his appointment as President of the Administrative Law Commission and chair of the Portuguese National Committee of the International Association of Lawyers (UIA). In recognition of his standing, he was also elected President of the Portuguese Law Firm Association (ASAP) by his peers. ASAP encompasses all the major law firms in Portugal.

Jose Luis has been appointed as an arbitrator in domestic and international cases (ICC) in significant and major arbitrations. He is a member of several arbitrator panels, namely the Arbitration Centre of the Portuguese Chamber of Commerce and Industry (CAC).

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João Filipe Graça has been a lawyer in the public procurement practice at SRS Advogados since 2017. João Filipe provides legal advice to public entities and to national and international private companies. João assists and advises clients throughout the life cycle of any given project, including the setting up, financing, negotiation and implementation of the project.

João Filipe has a degree in law and also a master's degree in legal and political sciences, with a distinction in administrative law, from the University of Coimbra faculty of law. He was a member of the Public Procurement Group and a researcher at the Centre for Public Law and Regulatory Studies of the University of Coimbra faculty of law.

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