

PUBLIC PROCUREMENT

Portugal



Public Procurement

Consulting editors

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Quick reference guide enabling side-by-side comparison of local processes, including legislative framework, applicability of EU directives and the Agreement on Government Procurement; contracting authorities, contract value thresholds, contract amendment considerations, privatisation and public-private partnerships; advertisement and selection; procurement procedures, including independence, impartiality and conflicts of interest; negotiations with bidders; framework agreements; participation by small and medium-sized enterprises; award criteria and treatment of low tenders; competitive, administrative and judicial review; access to the procurement file; appeals, including typical costs; and recent trends.

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Table of contents

LEGISLATIVE FRAMEWORK

Relevant legislation

Sector-specific legislation

International legislation

Proposed amendments

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

Contract value

Amendment of concluded contracts

Privatisation

Public-private partnership

ADVERTISEMENT AND SELECTION

Publications

Participation criteria

Regaining status following exclusion

THE PROCUREMENT PROCEDURES

Fundamental principles

Independence and impartiality

Conflicts of interest

Bidder involvement in preparation

Procedure

Separate bids in one procedure

Negotiations with bidders

Framework agreements

Changing members of a bidding consortium

Participation of small and medium-sized enterprises

Variant tenders

Tender specifications

Award criteria

Abnormally low tenders

REVIEW PROCEEDINGS

Competent review bodies

Time frame and admissibility requirements

Suspensive effect

Notification of unsuccessful bidders

Access to procurement file

Challenges to contracting authority decisions

Violations of procurement law

Legal protection

Typical costs

UPDATE AND TRENDS

Emerging trends

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LEGISLATIVE FRAMEWORK

Relevant legislation

What is the relevant legislation regulating the award of public contracts?

The primary piece of Portuguese legislation is the Public Contracts Code (PCC), approved by Decree-Law No. 18/2008 of 29 January, last amended by Decree-Law No. 78/2022 of 7 November.

The following are also relevant:

- Decree-Law No. 36/2022 of 20 May, as amended (exceptional and temporary legal framework concerning price increase impacting on public contracts), in force until 30 June 2023;
- Decree-Law No. 67/2022 of 4 October (exceptional measures to support companies and the social economy, in order to mitigate the effects of inflation);
- article 42, Law No. 24-D/2022 of 30 December (regarding the extraordinary updating of the price of service procurement contracts);
- Ministerial Order No. 54/2023 of 24 February (establishes the extraordinary update of the price of contracts of acquisition of services with a multi-annual duration);
- Ministerial Order No. 74-A/2023 of 07 March (categories of public procurement contracts to which the exceptional and temporary regime applies in the context of price increases), in force until 30 June 2023;
- Law No. 30/2021 of 21 May, as amended (special measures for public procurement);
- Decree-Law No. 10-A/2020 of 13 March, as amended (exceptional and temporary measures concerning the epidemiological situation of the new coronavirus);
- Ministerial Order No. 72/2018 of 9 March (labels and test reports, certification and other means of proof);
- Decree-Law No. 72/2018 of 12 September (national state supplier portal);
- Ministerial Order No. 371/2017 of 14 December, as amended (model notice of pre-contractual procedures);
- Ministerial Order No. 372/2017 of 14 December (presentation of the tenderer's qualification documents);
- Law No. 96/2015 of 27 August (electronic platforms);
- Regional Legislative Decree No. 27/2015/A of 29 December (public procurement in the Autonomous Region of the Azores);
- Law No. 08/2012 of 21 February, as amended (commitments and late payments of public entities);
- Decree-Law No. 111/2012 of 23 May, as amended (public-private partnerships);
- Ministerial Order No. 959/2009 of 21 August (public works template specifications);
- Regional Legislative Decree No. 34/2008/M of 14 August, as amended (public procurement in the Autonomous Region of Madeira);
- Decree-Law No. 200/2008 of 9 October, as amended (central purchasing bodies);
- Ministerial Order No. 701-H/2008 of 29 July (content of the programme and of the execution project, instructions for preparing projects and classification of works by category); and
- Decree-Law No. 280/2007 of 7 August, as amended (public real estate).

Law stated - 05 June 2023

Sector-specific legislation

Is there any sector-specific procurement legislation supplementing the general regime (eg, specific rules for military equipment, public transport, utility procurement, or work or services concessions)?

Yes: Decree-Law No. 104/2011 of 6 October , which establishes the legal framework for public procurement regarding defence and security areas, which enacts Directive 2009/81/EC of 13 July , on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC .

Law stated - 05 June 2023

International legislation

In which respect does the relevant legislation supplement the EU procurement directives or the GPA (World Trade Organization Agreement on Government Procurement)?

Regarding public procurement, the relevant Portuguese legislation contains a more detailed regime than that provided for in the directives in some subjects, such as amendments and variations.

Law stated - 05 June 2023

Proposed amendments

Are there proposals to amend the legislation (eg, to comply with EU law requirements, and if so when?)?

On 18 May 2023, the Council of Ministers approved an amendment to the Public Contracts Code. As per the information made publicly available, percentage limitations on subcontracting are to be eliminated. Whether the amendment will become a law depends on the fulfilment of the applicable constitutional formalities, including promulgation by the President of the Republic. As far as public knowledge is concerned, there are no further proposals to amend the Public Contracts Code or legislation relevant to public procurement.

Law stated - 05 June 2023

APPLICABILITY OF PROCUREMENT LAW

Contracting authorities

Which, or what kinds of, entities are subject to procurement regulation? (For the purposes of this questionnaire, the term 'contracting authorities' refers to public bodies or entities as well as utilities (including private-sector utilities) which are subject to procurement regulation. In responding to this question, you may also specify whether relevant administrative or judicial authorities have ruled that certain entities do not constitute contracting authorities. For example, to the extent that EU procurement law applies to your jurisdiction, you may specify whether the carrying out of certain utility activities, otherwise regulated under Directive 2014/25, have been exempt from procurement regulation as a result of a European Commission decision under article 34 (or under article 30, Directive 2004/17?)

The Public Contracts Code (PCC) provides that the following entities are subject to its regulation:

1. the state;
2. the autonomous regions of Madeira and Azores;
3. local government;

4. public institutes;
5. independent administrative entities;
6. the Bank of Portugal;
7. public foundations governed by either public or private law;
8. public associations;
9. associations to which one or more of the legal persons in (1)–(8) belong, provided that they have a dominant influence (ie, are financed, for the most part, by them, are subject to their management control, or have an administrative, management or supervisory body, the majority of whose members are directly or indirectly appointed by them);
10. bodies governed by public law (ie, any legal person, irrespective of its public or private nature) that:

1. have been created specifically to meet needs in the general interest;
2. do not have an industrial or commercial nature (those whose economic activity is not subject to the competitive logic of the market, namely because they are non-profit-making or do not bear the losses resulting from their activity); and
3. are mainly financed by entities referred to in (1)–(9) or by other bodies governed by public law, their management is controlled by such entities or they have administrative, management or supervisory bodies, in which more than half of the members are appointed by such entities;

1. any legal person that is in the situation referred to in (iii) above in relation to an entity that is itself a contracting authority in accordance with the provisions of (iii);
2. associations to which one or more of the legal persons referred to in (1)–(11) belong, provided that they are majority financed by them, are subject to their management control, or have administrative, management or supervisory bodies in which more than half of the members are appointed by such entities;
3. any legal person not covered by (1) to (12), even if specifically created to meet needs in the general interest, having an industrial or commercial character, which pursues one or more activities in the utilities sectors (water, energy, transport and postal services) and in which any of the above-mentioned contracting authorities may exercise, directly or indirectly, a dominant influence (holding a majority of the share capital, a majority of the voting rights, management control or the right to appoint, directly or indirectly, a majority of the members of an administrative, management or supervisory body);
4. any legal person not covered by (1) to (13) that has been granted special or exclusive rights not attributed within the scope of a public procurement procedure with international publicity and that has the effect of:

1. reserving to them, alone or jointly with other entities, the exercise of one or more activities in the utilities sectors; and
2. substantially affect the ability of any other entities to carry out one or more of those activities; and

1. any legal person created exclusively by the contracting authorities referred to in (13) and (14) or mostly financed by them, subject to their management control, or having an administrative, management or supervisory board, in which more than half of the members are, directly or indirectly, appointed by such entities, and provided that they are intended to carry out a joint activity in the special sectors.

Law stated - 05 June 2023

Contract value

Are contracts under a certain value outside the scope of procurement regulation? What are these threshold values?

No, they are not. The PCC has a broader scope than that of the directives.

Law stated - 05 June 2023

Amendment of concluded contracts

Does the legislation permit the amendment of a concluded contract without a new contract award procedure? (If so, explain in what circumstances and whether some types of amendments are expressly prohibited.)

The objective and subjective modification of contracts without a new contract award procedure is permitted if the legal limits are respected. Failure to respect these limits determines the adoption of a new contract award procedure.

Regarding objective modification, the contract may be amended by agreement of the parties, judicial or arbitral decision or administrative act. The contract may also be amended in accordance with its own clauses, on grounds of an abnormal and unforeseeable change of circumstances, or for reasons of public interest.

The amendment of a contract on public interest grounds is allowed whenever the value of the modification is below the European thresholds and is less than 10 per cent of the contract price (with reference to the aggregate value of the modifications to date), or 15 per cent in the case of public works contracts. The amendment of a contract on public interest grounds is also allowed whenever the modification results from circumstances that a diligent contracting authority could not have foreseen (provided that the long-lasting nature of the contractual relationship and the passage of time justifies them) and the value of the modification does not exceed 50 per cent of the contract price (with reference to the value of each modification). An amendment on public interest grounds that exceeds these de minimis thresholds is not allowed whenever it entails a substantial modification of the contract or constitutes a way of preventing, restricting or distorting competition.

In any case, any amendment that results in the alteration of the overall nature of the contract is not allowed.

Particularly regarding public works contracts, the contracting authority may order the performance of additional works where a change of contractor cannot be made for technical reasons and would cause a considerable increase in costs for the contracting authority. However, the value of the additional works must not exceed 50 per cent of the contract price.

As regards subjective modifications, the replacement of the contractual parties is allowed in the following cases: assignment of the contractual position of both the contractor and the contracting authority, subcontracting, step-in and step-out rights and corporate changes.

The contract may prohibit the assignment of the contractor's contractual position and subcontracting, namely the subcontracting of certain contractual services or services whose aggregate value exceeds a percentage of the contract price.

The possibility of assignment of the contractor's contractual position must be expressly stated in the contract. However, there is an exception when there is a universal or partial transfer of the contractor's contractual position following a corporate restructuring, to an assignee that meets the minimum requirements of a qualification and technical, economic and financial capacity required from the contractor, or when the contracting authority assumes the obligations of the contractor in relation to subcontractors. Furthermore, the assignment of the contractor's contractual position requires the authorisation of the contracting authority, which is also dependent on the prior presentation of the

qualification documents concerning the potential assignee that were required of the assignor at the award procedure stage.

The assignment of the contractor's contractual position may also occur owing to the contractor's breach of contract. The contract may provide that, in the event of a breach of contract by the contractor that meets the requirements for the termination of the contract, the contractor assigns its contractual position to the economic operator indicated by the contracting authority, following the sequential order of bidders of the award procedure after which the contract being performed was concluded.

Subcontracting also requires the authorisation of the contracting authority when it occurs during the contract performance phase. The authorisation is dependent on the prior presentation of the qualification documents concerning the potential subcontractor that were required of the contractor at the award procedure stage, as well as:

- the fulfilment, by the potential subcontractor, of the minimum requirements of technical or financial capacity, when the contract expressly makes the authorisation subject to the assessment of these capacities or of one of them; or
- the fulfilment, by the potential subcontractor, of the minimum technical capacity requirements concerning the services to be subcontracted, whenever the contractor resorts to the capacity of potential subcontractors for qualification purposes at the award procedure stage.

The intervention in the contract by the funding entities to ensure the continuity of the contracted services is also allowed if there is a contractual stipulation to this effect with the authorisation of the contracting authority. This intervention is allowed in the case of a serious breach by the contractor of its contractual obligations towards the contracting authority or third parties with whom the contractor has entered into subcontracts essential to the pursuit of the object of the contract, provided the breach is imminent or the requirements for termination of the contract by the contracting authority or subcontracts by third parties are fulfilled. This intervention may operate by transfer of corporate control of the contractor or by assignment of the contractor's contractual position to the funding entities or to the entity indicated by them.

Law stated - 05 June 2023

Has case law clarified the extent to which it is permissible to amend a concluded contract without a new contract award procedure?

The legal framework for the objective modification of contracts was subject to significant changes in the PCC revision of 2021 and, to the best of our knowledge and considering the published decisions, has yet to be the object of any judicial decision.

Regarding subjective modification, case law has applied the legislation and has most frequently addressed the assignment of the contractual position and subcontracting.

Law stated - 05 June 2023

Privatisation

In what circumstances do privatisations require the carrying out of a contract award procedure? (For example, if a public entity or activity is transferred to the private sector, is a contract award procedure required?)

Although the public procurement rules in the PCC encompass the incorporation of companies between public entities and private operators, Law No. 11/90 of 5 April (the Framework Law), establishes specific rules that have been chosen by the government as the standard rules to be applied in most privatisation processes.

According to the Framework Law, privatisations may be carried out alternatively or cumulatively through the sale of the shares representing the share capital and the increase of the share capital.

As a rule, and preferably, privatisation procedures are carried out through public tenders or a public offer. However, a call for tender open to specially qualified candidates regarding an indivisible lot of shares or the alienation of capital or subscription of shares representing its increase through direct sale (without tender) may be implemented when the national interest or the strategy defined for the sector so requires, or when the economic and financial situation of the company so recommends.

In most recent privatisation processes, the government has chosen to phase in the sale of shares or capital increases and combine different procedures for this purpose. In this regard, a combination of direct sales by private negotiation and public offers has been more frequent.

Law stated - 05 June 2023

Public-private partnership

In which circumstances does the setting up of a public-private partnership (PPP) require the carrying out of a contract award procedure?

The legal instruments that form the regulatory basis for public-private partnerships (PPPs) are typically public works and public services concessions and management contracts. The procedure leading to the decision to contract through PPPs is regulated by law (Decree-Law No. 111/2012 of 23 May 2012), and this entails an assessment of value for money of this form with other contracting alternatives available. However, PPP projects are implemented through agreements whose formation is regulated under the PCC, and they require a pre-contractual procedure in the same circumstances as other public contracts. In other words, as long as the circumstances set out in the PCC allow it, PPPs may be awarded through open procedures, restricted procedures and competitive procedures with negotiation.

Typically involving large-scale projects, with significant volumes of investment and allocation of financial and operational risks to the private party, PPP contracts are unlikely to be directly awarded through restricted or closed procedures. In most recent experiences, PPP contracts have been awarded through competitive procedures, with and without a negotiation phase.

Law stated - 05 June 2023

ADVERTISEMENT AND SELECTION

Publications

In which publications are calls for the expression of interest in regulated contract awards advertised?

New public procurement procedures subject to a public procedure should always be announced in the Portuguese official journal (Diário da República), and those involving higher values should also be announced in the Official Journal of the European Union .

Publication of the tender notice in the Official Journal of the European Union is mandatory for contracts above European thresholds.

Procedures that are not required to be published in the Official Journal of the European Union must be published in the Portuguese official journal.

Law stated - 05 June 2023

Participation criteria

Are there any limits on the ability of contracting authorities to determine the basis on which to assess whether an interested party is qualified to participate in a contract award procedure?

Several limits on the setting of the minimum technical and financial capacity requirements that candidates must meet in a restricted award procedure have been established.

The minimum requirements of technical capacity must be appropriate to the nature of the services that are the object of the contract to be executed, and they must describe situations, qualities, characteristics or other elements of fact.

The minimum requirements of financial capacity may not exceed double the value of the contract, except in duly justified cases. They must also refer to the candidates' estimated ability to mobilise the financial means foreseeably necessary for the complete fulfilment of the obligations resulting from the contract to be executed.

In the case of public works contracts or concessions, if the minimum requirements of technical and financial capacity required in the tender programme are based on factual elements already taken into account to grant the licence or registration certificate containing the appropriate and necessary qualifications to perform the work to be performed, these requirements must be more demanding than those legally provided for the concession of the licence or registration certificate.

Law stated - 05 June 2023

Is it possible to limit the number of bidders that can participate in a contract award procedure? (If so, on what basis, and what is the minimum number of bidders that must be invited to participate?)

As to procedures where no call for competition is applicable, the number of bidders that can participate can either be limited to one or to at least three.

In the case of open procedures restricted by prior qualification, the limitation of participation is indirectly imposed by the contracting authorities through the determination of minimum technical or financial capacity requirements that interested economic operators must meet (this rule is also applicable to competitive dialogues and innovation partnerships). Additionally, the contracting authority may also limit the number of candidates that may submit a tender. The number of these candidates cannot be lower than five, unless the number of candidates complying with the procedure requirements is lower than that.

Law stated - 05 June 2023

Regaining status following exclusion

How can a bidder that could be excluded from a contract award procedure because of past irregularities (eg, criminal convictions or other grave misconduct affecting suitability and reliability) regain the status of a suitable and reliable bidder? (Is the concept of 'self-cleaning' recognised as a means of re-establishing suitability and reliability? Which specific measures would have to be taken to do so?)

An economic operator subject to a participation prohibition because of past irregularities may still participate in contract award procedures by demonstrating that it has taken self-cleaning measures. The discretionary power to allow such an economic operator to participate in a specific contract award procedure rests with each contracting authority in each proceeding.

The Public Contracts Code (PCC) provides for the following examples of self-cleaning measures: demonstration of having compensated or taken measures to compensate any losses caused, full clarification of the facts and circumstances through active collaboration with the competent authorities and adoption of technical, organisational and personnel measures to avoid further irregularities.

Law stated - 05 June 2023

THE PROCUREMENT PROCEDURES

Fundamental principles

Does the relevant legislation require compliance with certain fundamental principles when designing and carrying out a contract award procedure? (For example, equal treatment, transparency and non-discrimination)?

The Public Contracts Code (PCC) requires compliance with the general principles enshrined in the Portuguese Constitution, the European Union treaties and the Code of Administrative Procedure, both during the contract award procedure and during the performance of the contract. Notably, compliance with the principles of legality, pursuit of public interest, impartiality, proportionality, good faith, trustworthiness, competition, publicity and transparency, equal treatment and non-discrimination are required.

Law stated - 05 June 2023

Independence and impartiality

Does the relevant legislation or case law require that a contracting authority is independent and impartial?

The obligation of contracting authorities to be independent and impartial results not only from the PCC, but also from the Constitution of the Portuguese Republic and the Code of Administrative Procedure.

Law stated - 05 June 2023

Conflicts of interest

Does the legislation address expressly the issue of conflicts of interest? (A conflict of interest can arise in relation to anyone taking decisions for and on behalf of a contracting authority in the preparation, or in the conduct, of a tender procedure, as a result of personal relationships or commercial interests, for example. Briefly discuss specific legislation dealing with such conflicts, or relevant case law.)

A conflict of interest is considered to be any situation in which a manager or employee of a contracting authority or of a service provider acting on behalf of the contracting authority, who is involved in the preparation and conduct of the public procurement procedure or may influence the outcome of that procedure, has, directly or indirectly, a financial, economic or other personal interest that is likely to compromise their impartiality and independence in the context of

that procedure. Such conflicts are expressly addressed in the PCC, which states that contracting authorities must adopt appropriate measures to prevent, identify and effectively resolve conflicts of interest arising in the course of public procurement procedures, so as to avoid any distortion of competition and ensure equal treatment of economic operators. Additionally, the PCC requires that members of the jury and all other parties involved in the proposal evaluation process sign a declaration of non-existence of conflicts of interest before taking up their functions.

Furthermore, in general, the Code of Administrative Procedure already provides for cases of impediment, excuse or suspicion in cases of conflicts of interest between members of administrative bodies and their agents.

On the competitor's side, the existence of a conflict of interest that is not effectively corrected by other measures less burdensome than exclusion may result in the impediment of the competitor to participate in the procedure or afterwards in the exclusion of its bid.

Law stated - 05 June 2023

Bidder involvement in preparation

Are there any restrictions on the ability of a bidder to be involved in the preparation of a contract award procedure? (If, for example, a potential bidder is involved in the drafting of tender documents or discussing possible specifications, is the bidder's participation in the bid prohibited? If so, is the prohibition absolute or qualified?)

The PCC determines the potential impediment to an economic operator when it has, in any capacity, provided, directly or indirectly, technical advice or support in the preparation and drafting of the procedure documents, as long as such previous collaboration with the contracting authority grants the economic operator a real advantage in relation to other competitors that distorts normal competition.

Therefore, only in the light of the specific circumstances of a case is it possible to assess whether competition has been distorted, and a judgment to this effect cannot be based on a mere presumption arising from that collaboration.

Law stated - 05 June 2023

Procedure

Which procurement procedure is primarily used for the award of regulated contracts?

According to the Annual Report on Public Procurement issued by IMPIC (the public authority in charge of public contracts), in 2020, 156,703 procedures were registered on the BASE portal, amounting to €18 million, excluding simplified direct adjustments and excluded contracts. The most frequent type of procedure used was the direct award, representing 50.7 per cent of the total number of procedures, followed by prior consultation (23.6 per cent) with, however, a very small contractual weight (20.9 per cent and 10.3 per cent, respectively).

Law stated - 05 June 2023

Separate bids in one procedure

Can related bidders submit separate bids in the same procurement procedure? (If yes, what requirements must be fulfilled?)

With the exception of the prior consultation procedure, there is no express prohibition of the submission of separate bids by related economic operators in the same procurement procedure. However, case law has ruled that the

submission of separate bids by related economic operators requires a case-by-case analysis by the contracting authority of whether there is strong evidence of acts, agreements, practices or information likely to distort competition rules.

Law stated - 05 June 2023

Negotiations with bidders

Is the use of procedures involving negotiations with bidders (eg, the competitive dialogue or the competitive procedure with negotiation) subject to any special conditions? (If so, what are these conditions?)

Procedures involving negotiations with bidders are subject to the conditions stated by the PCC; namely, the contracting authority may adopt the negotiation procedure or the competitive dialogue when:

- their needs cannot be met without adapting readily available solutions;
- the goods or services include the design of innovative solutions;
- it is not objectively possible to award the contract without prior negotiations owing to specific circumstances related to its nature, complexity, legal and financial arrangement or owing to the risks associated with it; or
- it is not objectively possible to precisely define the technical specifications by reference to a standard, European technical approval, common technical specifications or technical reference.

Additionally, the partnership procedure for innovation also provides for a time for negotiation with competitors for all the proposals submitted (the initial and subsequent ones, with the exception of the final one). However, the minimum requirements and award criteria, including their factors and sub-factors, cannot be negotiated.

Law stated - 05 June 2023

If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

The PCC establishes procedures that may or may not have a negotiation phase with bidders, such as the public tender and prior consultation, and these are the procedures where negotiation is most used because they are the pre-contractual procedures that are widely used in general and are simpler to process when compared with the competitive dialogue or the competitive procedure with negotiation.

Law stated - 05 June 2023

Framework agreements

What are the requirements for the conclusion of a framework agreement? (A framework agreement is an overarching agreement with suppliers that sets out the terms under which certain purchases (call-offs/sub-orders) can be made throughout the term of the agreement. Your answer should explain the contractual force and form of the framework agreements (or your country's equivalent).)

Under the PCC, contracting authorities may conclude framework agreements with one or more economic operators

only if they specify sufficiently all aspects of the performance of the contracts to be awarded under them; or with several entities only if they do not cover all or do not sufficiently specify all aspects of the performance of the contracts to be awarded under them.

In any case, framework agreements may not be adopted in any abusive manner or in such a way as to obstruct, restrict or distort competition.

Furthermore, framework agreements may follow any of the procurement procedures established in the PCC (direct award, prior consultation, public tender or others), depending on the expected contract price.

Law stated - 05 June 2023

Is it possible to conclude a framework agreement with several suppliers? (If yes, does the award of a contract under the framework agreement require an additional competitive procedure?)

Under the PCC, contracting authorities may conclude a framework agreement with several entities, regardless of whether the aspects of the performance of the contracts to be awarded under them are sufficiently detailed.

If the aspects of the performance of the contracts to be concluded following the call-offs are sufficiently specified, the contracting authority must adopt a direct award. Otherwise, the contracting authority will have to begin a prior consultation procedure, which will lead to a competition between the selected suppliers under the framework agreement.

Law stated - 05 June 2023

Changing members of a bidding consortium

Is it possible to change the members of a bidding consortium during the course of a contract award procedure? (If so, explain whether this is subject to any conditions.)

There is no express prohibition of the change of members in a bidding consortium during a contract award procedure, although this possibility is discussed among scholars. However, the PCC determines that all members of the bidding consortium, and only they, must enter into a consortium before the execution of the contract.

Law stated - 05 June 2023

Participation of small and medium-sized enterprises

Are there specific rules which seek to encourage the participation of small and medium-sized enterprises in contract award procedures? (For example, does the law allow or require the division of contracts into lots or limiting the number of lots a single bidder can be awarded?)

Several rules aimed at encouraging the participation of small and medium-sized economic operators in contract award procedures are enshrined. These include the division of contracts into lots, the establishment of the maximum number of lots that can be awarded to the same tenderer and the reserve of contracts.

Any contract may be divided into lots. However, the non-division into lots of public contracts for the purchase or lease of goods or purchase of services exceeding €135,000 and of public works contracts exceeding €500,000 requires that the contracting authority (except those from the special sectors) justify its decision.

Moreover, the contracting authority may limit the maximum number of lots that can be awarded to each bidder. This limit must be established in the tender programme, as must the criteria (which must be objective and non-

discriminatory) on which the choice of lots to be awarded is based in cases where the application of the award criteria results in the award to the same bidder of a number of lots exceeding the established limit.

Furthermore, the possibility of the contracting authority reserving participation in the contract award procedure to duly certified micro, small or medium-sized economic operators is also established. However, this possibility is restricted to contracts for the lease or purchase of movables or the acquisition of services below European thresholds and for public works contracts or public service and public works concessions with a value below €500,000.

Law stated - 05 June 2023

Variant tenders

What are the requirements for the admissibility of variant tenders? (A variant tender is a tender which offers to meet the contracting authority's needs on the basis of a solution which is different to the one which the contracting authority has specified, subject to that variant meeting certain minimum requirements). Are bidders free to decide whether to submit a variant tender or is the subject to the contracting authority expressly permitting this in the tender documentation?

Competitors can only submit a variant tender when the programme of the procedure expressly allows it. In this case, the bidders are obliged to submit a base bid, and the exclusion of this bid necessarily implies the exclusion of variant bids submitted by the same bidder.

Law stated - 05 June 2023

Is a contracting authority obliged to consider any variant tenders that might have been submitted?

The contracting authority only has to consider variant proposals when it expressly admits it in the terms of the procedure programme.

Additionally, the PCC states the possibility for the contracting authority to limit the maximum number of accepted variant proposals.

Law stated - 05 June 2023

Tender specifications

What are the consequences if a tender does not comply with the tender specifications?

According to the PCC, the consequence of the submission of a bid that does not comply with the tender specifications is its exclusion from the procedure.

Law stated - 05 June 2023

Award criteria

Does the relevant legislation specify the criteria that must be used for the evaluation of submitted tenders? (What are the legal limits for a contracting authority when determining the award criteria?)

The award is made according to the criterion of the economically most advantageous tender, determined in one of two ways: multifactor or single-factor (namely price). The criteria to evaluate submitted tenders are not specified, but there are legal limits on the determination of these criteria (they must not refer directly or indirectly to situations, qualities, characteristics or other factual elements regarding the economic operators).

Law stated - 05 June 2023

Abnormally low tenders

Does the relevant legislation specify what constitutes an 'abnormally low' tender?

The PCC does not specify a legal concept of what an abnormally low tender is or is not. Rather, it defers that matter to the contracting authority and exemplifies what an abnormally low tender may be:

- If the contracting authority chooses to define what an abnormally low tender is on an ex ante basis, it should also provide the applicable criteria, notably by taking into account average prices and preliminary market consultations.
- If a definition is not provided on an ex ante basis, the contracting authority may deem a tender as abnormally low after it is submitted, notably because it is insufficient to comply with legal obligations in environmental, social and labour matters, or to cover the costs inherent to the performance of the contract.

Law stated - 05 June 2023

Does the relevant legislation specify how to deal with abnormally low tenders?

The PCC provides contracting authorities with different possibilities for dealing with abnormally low prices.

If, in the invitation or in the procedure programme, contracting authorities define the situations in which the price or cost of a tender is considered abnormally low, they must indicate the criteria that governed this definition.

On the other hand, in the absence of a definition in the invitation or in the programme of the procedure, contracting authorities may consider a price or cost of a bid to be abnormally low, by duly justified decision, notably because it is insufficient to comply with legal obligations in environmental, social and labour matters, or to cover the costs inherent to the performance of the contract.

In any of the above cases, the contracting authority must first ask the competitor in question to provide an explanation, in writing and within an adequate period of time, concerning the relevant components of its bid.

The PCC provides a non-exhaustive list of possible explanations that the competitor may present before the contracting authority regarding its price composition. If the contracting authority is not satisfied with the explanations, it must exclude such a bid.

Law stated - 05 June 2023

REVIEW PROCEEDINGS

Competent review bodies

Which bodies are competent to review alleged breaches of procurement legislation? Is it possible to appeal against a review body's decisions?

The bodies competent to review alleged breaches of procurement legislation are:

- within the contracting authority or entity, the body allegedly breaching the procurement legislation itself or a body with hierarchical power over the latter;
- administrative courts, which are full courts of law; and
- arbitral tribunals as to decisions taken during procurement procedures, provided that the legal requirements to set up arbitration proceedings are met.

It is possible to appeal against review body decisions. This includes decisions taken by administrative courts, which may be appealed to higher administrative courts, including the Supreme Administrative Court and, in certain circumstances, decisions taken by arbitral tribunals.

Law stated - 05 June 2023

Do the powers of competent review bodies to grant a remedy for a breach of procurement legislation differ?

Yes, they do. Administrative bodies' powers typically include setting aside decisions breaching public procurement regulations, replacing the decision with a lawful one and resuming the public procurement procedure.

Interested parties may also seek remedies from the contracting authorities regarding breaches of the law by the procedure-specific regulation or specifications. Typically, economic operators also raise issues of law when requesting clarifications of the procedure documentation or informing the contracting authority of errors or omissions in the procedure documentation. The possibility of interested parties both requesting clarifications and pointing out errors or omissions in a given time frame before the submission of candidacies or bids is provided by public procurement law.

Administrative courts may set aside any decisions, regulations and specifications that breach public procurement regulations. Depending on the particulars of the case, administrative courts may also order the contracting authority to take the lawful decision and to enter into a contract with the challenging economic operator. Where discretionary power of administrative authorities is involved or the court is not able to determine the actual features of a decision by a contracting authority, administrative courts should clarify the parameters that bind the contracting authority when making a new decision.

Law stated - 05 June 2023

Time frame and admissibility requirements

How long do administrative or judicial review procedures generally take?

There is no publicly available official data on the actual duration of administrative review procedures. In any case, it is the clear intention of the law to speed up administrative review procedures, establishing very tight time bars (only days) to react.

As to judicial review procedures, the most recent publicly available information is that those taking place in administrative courts of first instance and ending in 2022 took, on average, six months.

Law stated - 05 June 2023

What are the admissibility requirements for an application to review a contracting authority decision? (What are the conditions for an application for review to be accepted? Briefly discuss issues of standing, and any substantive issues as to what is justiciable, etc.)

As to review by contracting authorities, there is no specific provision under public procurement law as to which parties may seek administrative review of a contracting authority decision. Furthermore, the extent to which requirements under general administrative law would apply is yet to be clarified. Typically, it is accepted that economic operators that have submitted a candidacy in a restricted procedure or a bid would have standing.

Regarding timing, the following applies to reviews by contracting authorities:

- The law provides that requests for the review of decisions taken during the procurement procedure must be submitted to the competent body within five business days of their notification. If the review procedures concern the issue of non-inclusion on the lists of economic operators that have submitted a candidacy in a restricted procedure or a bid, the applicable time limit is three business days.
- If the decision under review is that of qualification in restricted procedures or the contract award decision, the review body must ask other interested parties for comments within two days.
- Comments by those parties must be submitted within five business days.
- The review decision must be taken within five business days. If the review decision is not taken within those five days, the law presumes that the request for review was rejected.

As to review by administrative courts:

- Those parties alleging that they hold a direct stake in the outcome of the dispute resolution have standing. This typically includes economic operators taking part in the procurement procedure and that argue that their candidacy in restricted procedures should have been selected or that the contract should have been awarded to them. It may also include economic operators with an interest in taking part in the procurement procedure.
- Relief being sought should consist of the legality of decisions taken during the procurement procedure or of the procedure documentation. It may also include requests for the setting aside of contracts and for contracts to be awarded to, or entered into, with the claimant.
- Claims concerning administrative decisions must be submitted within one month of their notification.
- Claims concerning procedure documentation may be submitted throughout the duration of the procurement procedure.
- Under the general terms of law, regulations encompassing more than one procurement procedure may also be challenged.

Law stated - 05 June 2023

What are the time limits within which applications for the review of contracting authority decisions must be made?

In the case of administrative review procedures, the application must be submitted within five days of notification of the decision.

In the case of a judicial review procedure, the action must be brought within one month of notification of the decision. To benefit from the automatic suspensive effect of the decision (and of any contract that may be concluded), the action must be brought within 10 business days of notification of the decision.

Law stated - 05 June 2023

Suspensive effect

Does an application for the review of a contracting authority decision have an automatic suspensive effect on the contract award procedure? (If so, is it possible for the contracting party to seek an order for the lifting of an automatic suspension, and on what basis will the review authority decide whether to lift it?)

Yes, it is possible for the review of a contracting authority decision to have an automatic suspensive effect on the contract award decision, provided that:

- the decision under review is the contract award decision;
- the contract is to be set out in writing;
- a contract notice for the relevant procedure was published in the Official Journal of the European Union;
- the review is sought before an administrative court (some institutionalised arbitration regulations expressly provide for this automatic suspensive effect); and
- the request for review is submitted within 10 business days of the notification of the contract award decision.

Indeed, throughout the duration of the dispute resolution proceedings, the contracting authority (and other interested parties – typically, the awardee) may seek an order to lift the automatic suspension. All relevant interests should be balanced, and the automatic suspension should be lifted if it is concluded that not doing so would be seriously contrary to the public interest or would entail negative consequences for other involved interests that would be clearly disproportionate.

Law stated - 05 June 2023

Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

There is no official data available on this matter. From our experience, less than 50 per cent are successful.

Law stated - 05 June 2023

Notification of unsuccessful bidders

Is the contracting authority required to notify unsuccessful bidders of its intention to conclude the contract with the successful bidder and, if so, when does that obligation arise?

Pursuant to the Public Contracts Code, unless there is a duly justified reason, the award decision must be adopted and simultaneously notified to all competitors and to the successful bidder before the deadline for the obligation to maintain bids.

Law stated - 05 June 2023

Access to procurement file

Is it possible for an applicant seeking the review of a contracting authority's decision to have access to that authority's procurement file?

Under Law No. 96/2015 of 17 August, in each procurement procedure, it is mandatory to make available to all registered interested parties and participants in the procedure all acts, decisions and procedure documents. These must be made available on the electronic platform adopted by the contracting authority, and they must be freely accessible. However, there is an exception for any documents that have been classified at the request of the competitors.

Furthermore, in the judicial procedure to review the awarding decision, the contracting authorities are obliged to present, together with their defence, or within the respective deadline, the administrative file that contains all the information on the procurement procedure, including internal information of the contracting authority not disclosed on the electronic platform.

Law stated - 05 June 2023

Challenges to contracting authority decisions

How customary is it for contracting authority decisions to be challenged? (What is the approximate number of review applications dealt with by the relevant administrative or judicial authority in a typical year?)

Although there is no official data regarding only pre-contractual litigation, according to the information made available by the Directorate-General of Justice Policy, the number of cases initiated at the administrative courts of first instance in the past five years was as follows: 340 in 2017; 349 in 2018; 381 in 2019; 650 in 2020; 539 in 2021; and 373 in 2022.

Law stated - 05 June 2023

Violations of procurement law

If a violation of procurement law is established in review proceedings, can this lead to the award of damages? (If yes, please specify the requirements for such awards.)

If the administrative court (or the contracting authority, in the case of an administrative review procedure) decides that the award decision is illegal, that decision will be considered invalid. If the contract has not yet been fully executed, the contracting authority most probably will issue a new award decision or repeat the procurement procedure to correct the illegal award decision.

There may be cases where it is no longer possible to select the most economically advantageous bid because the contract has already been executed. If so, the possibility to award damages for positive contractual interest (economic advantage that would be obtained with the execution of the contract) or damages for negative contractual interest (damage that the affected party would not have suffered if it had not been for the expectation of the contract) is discussed.

It is not unanimous, but the most recent case law points to the award of damages for positive contractual interest if, in view of the specific circumstances at issue, it can be concluded that the affected competitor would be the successful bidder.

Law stated - 05 June 2023

Is it possible for a concluded contract to be set aside following successful review proceedings? (If so, in what circumstances is this possible and how usual is the grant of this remedy?)

It is possible for a contract to be set aside following the setting aside of the procedural acts on which it was based. This depends on the verification of the contract's causes of invalidity, which arise from a procedural irregularity, as well as the requirements of the urgent administrative action.

If the nullity of the procedural act on which the execution of the contract was based is judicially declared or may still be declared, the contract will be null and void.

If the procedural acts on which the execution of the contract was based have been annulled or are annulable, the contract will be annulable if it is proven that the procedural irregularity is an adequate and sufficient cause for the annulment of the contract, by implying a subjective amendment to the contract or an amendment to its essential content. However, this annulment effect may be waived by a judicial or arbitral decision when, considering the public and private interests at stake and the gravity of the breach giving rise to the procedural irregularity at stake, the annulment of the contract proves to be disproportionate or contrary to good faith.

The declaration of nullity or the annulment of the contract may be requested in the same action challenging the invalid procedural act. Alternatively, once the invalid act has been declared null and void or annulled, the economic operator can ask the court to declare the nullity or to annul the contract in an action to enforce the prior judicial declaration of nullity or annulment of the procedural acts, or by bringing an action to challenge the contract.

No publicly available data on this matter has been identified.

Law stated - 05 June 2023

Legal protection

Is legal protection afforded to parties interested in a contract which might have been awarded (unlawfully) without an advertised contract award procedure (so-called illegal direct award or de facto award)?

Interested parties are recognised as having legal standing to challenge a contract that has been executed following a direct award that did not comply with the criteria for choosing that procedure.

Law stated - 05 June 2023

Typical costs

What are the typical costs involved in making an application for the review of a contracting authority decision? (To the extent that it is possible to estimate the costs typically involved in litigation proceedings, please also provide that information.)

The typical costs involved in submitting a request for a review of a contracting authority's decision depend, on the one hand, on whether only administrative review or jurisdictional review is involved, and, on the other hand, on the complexity of the process.

In general terms, and without prejudice of the costs regarding lawyers' fees, according to the Administrative Procedure Code, the administrative review tends to be free, and the presentation in court of a request for jurisdictional review entails the payment of a fee, which is currently €204. As to appeals, court costs depend on the value of the case. Costs

are borne by the losing parties.

Law stated - 05 June 2023

UPDATE AND TRENDS

Emerging trends

Are there any emerging trends or hot topics in public procurement regulation in your country? In particular, has the scope of applicability of public procurement law been broadened into areas not covered before (eg, sale of land) or, on the contrary, been restricted?

The scope of applicability of public procurement law has remained stable.

Regarding emerging trends or hot topics, we highlight the matters of objective modification of the contract and price revision, as well as the modification of the tender after its submission but before the execution of the contract, bearing in mind the rise in prices and the difficulties in obtaining materials.

The special public procurement measures concerning the execution of contracts intended to implement projects financed or co-financed by European funds have also been the subject of debate.

Moreover, the issue of negative past performance and its enshrinement in the Portuguese legal framework has also prompted debate.

Finally, the implementation of the concept of specially related companies for the purposes of calculating the limits on the choice of economic operators invited to bid in restricted or direct award procedures has also raised many questions.

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Law stated - 05 June 2023

Jurisdictions

	Bulgaria	Sabev & Partners
	Denmark	Bird & Bird LLP
	Ecuador	Dentons Paz Horowitz
	European Union	Pinsent Masons
	Faroe Islands	Bird & Bird LLP
	Germany	BLOMSTEIN
	Ghana	AB & David Law Affiliates
	Greenland	Bird & Bird LLP
	Israel	S Horowitz & Co
	Italy	Satta Romano & Associati Studio Legale
	Norway	Advokatfirmaet Thommessen AS
	Panama	Patton Moreno & Asvat
	Portugal	PLMJ
	Singapore	CMS Holborn Asia
	Sweden	Schjødt
	Switzerland	BianchiSchwald LLC
	United Kingdom	Pinsent Masons