

# Public Procurement

*Contributing editor*  
**Sally Roe**



2016

GETTING THE  
DEAL THROUGH

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# Public Procurement 2016

*Contributing editor*

**Sally Roe**

**Freshfields Bruckhaus Deringer LLP**

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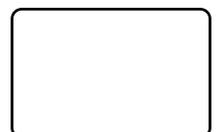


Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 3708 4199  
Fax: +44 20 7229 6910

© Law Business Research Ltd 2016  
No photocopying without a CLA licence.  
First published 2005  
Twelfth edition  
ISSN 1747-5910

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Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112



## CONTENTS

<b>Global overview</b>	<b>7</b>	<b>Ireland</b>	<b>99</b>
Marcel Kaufmann, Sally Roe, Sascha Arnold and Diana Harvey Freshfields Bruckhaus Deringer LLP		Patrick McGovern Arthur Cox	
<b>Austria</b>	<b>12</b>	<b>Italy</b>	<b>107</b>
Stephan Denk Freshfields Bruckhaus Deringer LLP		Filippo Satta and Anna Romano Studio Legale Satta Romano & Associati	
<b>Belgium</b>	<b>17</b>	<b>Japan</b>	<b>114</b>
Emmanuel van Nuffel and Kevin Munungu DaldeWolf		Nobuaki Mukai and Norito Ohori Momo-o Matsuo & Namba	
<b>Brazil</b>	<b>25</b>	<b>Kenya</b>	<b>119</b>
Claudia Elena Bonelli and Ana Cândida de Mello Carvalho TozziniFreire Advogados		Jairus Mohammed Nyaoga and Anthony Guto Mogere Mohammed Muigai Advocates	
<b>Bulgaria</b>	<b>31</b>	<b>Korea</b>	<b>125</b>
Boryana Boteva and Emilia Petkova Sabev & Partners Law Firm		Wonil Kim and Jin Kee Jung Yoon & Yang LLC	
<b>Canada</b>	<b>37</b>	<b>Macedonia</b>	<b>131</b>
Paul D Conlin, Ben Mills and Drew Tyler Conlin Bedard LLP		Jasmina Ilieva Jovanovikj and Dragan Dameski Debarliev, Dameski & Kelesoska Attorneys at Law	
<b>China</b>	<b>42</b>	<b>Mexico</b>	<b>137</b>
Christian Zeppezauer and Sherry Xu Freshfields Bruckhaus Deringer LLP		Roberto Hernández García and Adrián Roberto Villagómez Alemán COMAD SC	
<b>European Union</b>	<b>49</b>	<b>Netherlands</b>	<b>143</b>
Sally Roe and David Broomhall Freshfields Bruckhaus Deringer LLP		Winfred Knibbeler and Alvaro Pliego Selie Freshfields Bruckhaus Deringer LLP	
<b>Finland</b>	<b>58</b>	<b>Nigeria</b>	<b>149</b>
Tuija Kaijalainen and Kristiina Hirva DLA Piper		Chike Ekwueme Ekwueme, Ekwueme & Ekwueme	
<b>France</b>	<b>65</b>	<b>Norway</b>	<b>154</b>
Pascal Cuche and Juliette Deslandres Freshfields Bruckhaus Deringer LLP		Trygve Olavson Laake Difi - Agency for Public Management and eGovernment	
<b>Germany</b>	<b>74</b>	<b>Portugal</b>	<b>162</b>
Marcel Kaufmann and Sascha Arnold Freshfields Bruckhaus Deringer LLP		Duarte Abecasis and Lourenço Vilhena de Freitas Cuatrecasas, Gonçalves Pereira	
<b>Ghana</b>	<b>83</b>	<b>Romania</b>	<b>168</b>
David Ofosu-Dorte, Isabel Boaten and Ferdinand Adadzi AB & David Africa		Alexandru Ambrozie and Ramona Pentilescu Popovici Nițu Stoica & Asociații	
<b>Greece</b>	<b>88</b>	<b>South Africa</b>	<b>174</b>
Alexandros A Kortesis, Athanasios S Taliadouros and Vasiliki Karamani Potamitis Vekris		Michael Gwala and Andrew Molver Adams & Adams	
<b>India</b>	<b>95</b>	<b>Spain</b>	<b>181</b>
Sumeet Kachwaha Kachwaha & Partners		Ignacio Borrego and Ana Calvo Freshfields Bruckhaus Deringer LLP	

<b>Sweden</b>	<b>188</b>	<b>United Kingdom</b>	<b>206</b>
Fredrik Linder, Emma Berglund and Mikael Dubois Hamilton Advokatbyrå		Sally Roe and Diana Harvey Freshfields Bruckhaus Deringer LLP	
<b>Switzerland</b>	<b>194</b>	<b>United States</b>	<b>213</b>
Bernhard C Lauterburg and Philipp Zurkinden Prager Dreifuss Ltd		Alan WH Gourley Crowell & Moring LLP	
<b>Turkey</b>	<b>200</b>	<b>Venezuela</b>	<b>220</b>
Ziya Akinci Akinci Law Office		José Gregorio Torrealba R Hoet Peláez Castillo & Duque	

# Portugal

Duarte Abecasis and Lourenço Vilhena de Freitas

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## Legislative framework

### 1 What is the relevant legislation and who enforces it?

The key legislation in Portuguese jurisdiction is the Public Contracts Code (PCC), approved by Decree-Law 18/2008 of 29 January, as amended. There is a special regime for security and defence contracts established in Decree-Law 104/2011 of 6 October.

Also relevant is the regime of public-private partnerships approved by Decree-Law 111/2012 of 23 May.

Primarily in charge of government purchasing is the Central Purchasing Unit (Entity of Shared Services of the Public Administration, IP, ESPAP), and there is also a relevant central purchasing body in the health sector and other specific units in different ministerial departments. Apart from those bodies, tendering procedures depend upon the competent ministry's decision.

It is also relevant to mention the New Public Procedure Code (PPC) approved by Decree-Law 4/2015 of 7 January, and the revised Process Code in the Administrative Courts (PCAC) and the revised Administrative and Tax Courts Statute approved by Decree-Law 214-G/2015 of 2 October.

### 2 In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

EU directives apply to the Portuguese jurisdiction, as does the GPA. Nevertheless, the PCC develops and details the EU procurement directives, and also enlarges the regimes set forth in the above-mentioned directives, regimes that are therefore applicable to contracts that, owing to their nature and value, are not subject to those directives.

### 3 Are there proposals to change the legislation?

There are no current proposals to change the legislation. Nevertheless, with the entering into force of the new EU directives, it is quite likely that the PCC will be amended. However, it is relevant to outline a recent change to article 285 of the PCC, made by article 6 of Decree-Law 214-G/2015, where it is now stated that the judicial annulment of the contracts that have an object that could be subject to an administrative act, can only be claimed within six months, counted since the date of the contract signature, or, for third parties, counted since the acknowledgment of its clauses and that the judicial annulment of any type of contract that was caused by an absence of will or a defect of will, can always be claimed within six months of the date of the defect termination.

### 4 Is there any sector-specific procurement legislation supplementing the general regime?

As explained, there is a special regime for security and defence contracts established in Decree-Law 104/2011 of 6 October. The general rules of the PCC apply to the public passenger transport procurement and works or services concessions.

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## Applicability of procurement law

### 5 Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

The contracting authorities are in Portuguese administrative law the following: traditional administration, bodies ruled by public law, entities operating in special sector or utilities and, because of the PCC extension, some private entities that enter into public works agreements if they are financed

more than 50 per cent by contracting authorities. Some publicity rules apply to public works concessions in the above-mentioned situation.

Traditional administration entities are covered by government procurement rules. Those entities are the Portuguese state, the autonomous regions, the local entities, the public institutes, public foundations, public associations or associations of the previous entities.

The procurement rules also apply to bodies ruled by public law. According to Portuguese law, a body ruled by public law is: a legal public or private person, established for the specific purpose of meeting needs in the general interest, without an industrial or commercial character and mainly financed by a contracting authority, or subject to management supervision by a contracting authority or by an administrative, managerial or supervisory board whose members are mainly appointed by the contracting authority.

Pursuant to the CJEU decisions *Mannesmann* and *ARA v BFI*, and in order to assess what should be regarded as lack of industrial or commercial character, the PCC refers to situations in which the economic activity escapes from the competitive logic of the marketplace. In Portuguese case law, the CTT (then the Public Postal Company, now privatised) was considered not to have an industrial or commercial character.

According to this criterion, some public and mixed-capital controlled entities may be subject to public procurement rules.

Utilities are subjected to procurement rules if they are controlled by a public entity and operate in the water, energy, transportation and postal services, and regarding their contracts of public works (where the value thereof is higher than the directive threshold), public works concession, public services concession, lease or acquisition of movable assets (if their value is superior to the directive threshold), service acquisition (if their value is superior than the directive threshold). There are also several restrictions on the application of the procurement rules to the utilities that operate in these sectors.

### 6 For which, or what kinds of, entities is the status as a contracting authority in dispute?

The status as a contracting authority can be in dispute regarding the general criteria of bodies ruled by public law, since the above-mentioned criteria are vague. More recently, in recent state budget laws several public companies have been qualified as 'reclassified entities' (a category of entities foreseen in the National Institute for Statistics annual list and in the State Budget Framework Law for entities that under EU law would be in the public administration sector for Eurostat purposes). Those entities are, in principle, bodies ruled by public law, but more entities can qualify as such and are not listed in the budget, although some doubts may arise as to their status as a contracting authority.

Private entities that benefit from special rights that have not been granted in competitive terms are also subject to dispute as to the nature of contracting authorities.

### 7 Are there specific domestic rules relating to the calculation of the threshold value of contracts?

In the special sectors, and regarding utilities, only contracts with a value superior to the EU thresholds are subject to the procurement rules. Nevertheless, the general procurement principles will apply, as well as the European Commission interpretative guidelines.

For the other contracts in the classic sectors, there are thresholds below which the contracts can follow a direct agreement procedure (this

procedure is nevertheless regulated in the PCC). The value is determined as the maximum economic benefit arising from the contract. The direct agreement can only be chosen to enter into works contracts below €150,000, acquisition and lease of moveable assets contracts below €75,000 and any other contracts below €100,000 and the limited tendering with a previous qualification for contracts of any value.

Apart from the financial thresholds, there are also other exceptions that mean that a competitive procedure does not have to take place, both general and specific exceptions for certain types of contracts.

#### **8 Does the extension of an existing contract require a new procurement procedure?**

There are some time limits in the PCC for the extension of some types of contracts. Beyond those deadlines, the contract cannot be extended and a new procurement procedure is required. Some scholars maintain that the prorogation must always be done expressly. Also, some scholars maintain that the 'corrective prorogation', prorogation for the financial rebalance of the contract, for instance, is not subject to the above-mentioned deadlines.

In any case, that extension can require a new procurement procedure if the prorogation has a substantial effect on competition, according to the criteria established in the *Pressetext* case.

#### **9 Does the amendment of an existing contract require a new procurement procedure?**

The amendment of an existing contract can be done either unilaterally or through an agreement by both parties. In any case, the amendment should not affect competition. It is considered that the change affects competition, namely, if it would alter the order of the bids (except if the length of the contract or its nature justifies the alteration). To all these situations, the limits to the contract amendment established in the *Pressetext* case apply.

#### **10 May an existing contract be transferred to another supplier or provider without a new procurement procedure?**

The transfer to another supplier or provider is possible whether it is foreseen in the contract or not. This always requires the authorisation of the public entity, although that can have been previously granted in the contract. However, if the transfer entails a decrease in the expertise or performance ability, the transfer may require a new tender procedure according to the *Pressetext* case.

#### **11 In which circumstances do privatisations require a procurement procedure?**

Privatisations usually require a tender procedure, but that procedure is different from the ones set forth in the PCC. Depending on the nature of the privatisation, depending if it is a reprivatisation of a company nationalised prior to 1974, or a privatisation and, according to some doctrine, a reprivatisation of a company nationalised after 1974, the applicable laws differ.

For transactions concerning entities nationalised before 1974, Law 11/90 of 5 of April (amended by Law 102/2003 of 1 November and by Law 50/2011 of 13 September) applies.

For transactions concerning entities nationalised after 1974, Law 71/88 of 24 May, the Law on the selling of the state shares (and also Decree-Law No. 328/88 of 27 September and its successive amendments) apply.

Law 11/90 allows a direct sale in situations when it is recommended for the national public interest, the strategy for the economic sector of the company to be privatised or the economic and financial situation of the company.

Law 71/88 allows the sale of the company, apart from via public tender, on the stock exchange or through private negotiation. However, if the company is controlled by a public entity or if, because of privatisation that public entity (or a group of public entities) is to lose control of the company, then private negotiation does not apply, except regarding the stocks owned by specific companies mentioned in the same law (Parública, insurance companies, banks, investment companies, risk companies and funds).

#### **12 In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?**

Decree-Law 111/2012 establishes a new special regime for public-private partnerships, both for the structural and the contractual ones. The public partners are the Portuguese state, state entities, autonomous public funds, public companies and other entities controlled by the previous ones. This

regime is applicable even if the 'private partner' is a public company. The above-mentioned decree-law indicates the following contractual instruments: contract for the concession of public works, contract for the concession of public service, services contract, management contract and cooperation contract. Partnerships involving an expense of less than €10 million or an investment of less than €25 million are excluded from the application of the above-mentioned regime. Also excluded from the application of the public partnership regime are multi-municipal concessions of water and concessions awarded by the Portuguese state through decree-law.

Decree-Law No. 111/2012 establishes a risk-sharing requirement and lays down a procedure for awarding a partnership. The procedure follows the PCC, but there must be prior approval by the Minister of Finance and the minister responsible for the sector in question and the establishment of a project team. The jury is nominated by the said ministers and must include one or two members of the Technical Unit to monitor the partnerships. The decision is to be made by the Minister of Finance and by the Minister of the sector in question. The changing of a partnership is also subject to monitoring by a negotiation commission. The PCC has also established certain rules regarding PPP.

Contracts of structural partnerships can be subject to procurement rules if they can be qualified as bodies governed by public law or if they operate in the utilities sector. The choice of a private partner depends upon a procurement process other than by direct award, unless: a relevant public interest determines the direct award; and the private partner's contribution to the public partner's activity and to the public-private partnership project is not subjected to the competition.

Contracts between contracting authorities are only subject to procurement rules if the contract in question is a public works contract, a concession of public works, a concession of public services, a lease or acquisition of moveable assets or an acquisition of services.

A parent company can buy goods from a public-public joint venture company without a tender procedure if that company's activity is mostly pursued for the benefit of the parent company or companies.

#### **13 What are the rules and requirements for the award of works or services concessions?**

Awards of works and services concessions are also subject to the PCC. Therefore, the procedures established in the PCC apply. Nevertheless, the same PCC determines that for those kinds of contracts (and also for the contracts to do with the formation of a company) one can choose, regardless of the value, between public tender, limited tender owing to prior qualification and the negotiation procedure. However, when the public interest demands, services concessions and company contracts can be granted by a direct award.

#### **14 To which forms of cooperation between public bodies and undertakings does public procurement law not apply and what are the respective requirements?**

Part II of the PCC (procurement procedures) is not applicable to contracts entered into by contracting entities mentioned in article 2, No. 1, of the Code, namely, traditional administrative authorities (state, public institutes, regions and municipalities, public associations and associations of those entities), unless the contract is (or has a part that corresponds to) a public works contract, a works concession, a services concession, a rental and acquisition of a moveable assets contract or a services acquisition.

Part II of the PCC is also not applicable in the case of in-house relations that, following European Court of Justice jurisprudence, are defined as the relation between an entity and another entity over which it exercises the same level of control as it does over its own services and whose principal activities are carried out on its behalf.

#### **The procurement procedures**

#### **15 Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency, competition?**

The PCC states that the fundamental principles applicable to public tenders are those of principles of transparency, equal treatment and competition. The Constitution and the Public Procedure Code (PPC) also mention as material administrative principles (apart from other procedural principles), besides equal treatment, the following principles: public interest, protection of the rights of the individuals, impartiality, good faith, good administration and justice.

### 16 Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

The PPC determines that the impartiality principle apply to all administrative actions. This principle has two guarantees: an impediment to participating in the procedure and a request not to participate in the procedure (excuse or the suspicion) (see question 17).

### 17 How are conflicts of interest dealt with?

To deal with conflict of interests the PPC has set up two procedures: impediment and the excuse or the suspicion. In situations where there is some kind of relationship between the contracting authority and the bidders (family, personal friendship or enmity, personal or family interest in the deal, etc), the impediment regime applies and the contracting officer cannot interfere in the decision. In other situations where there is also a relationship between the contracting officer and the bidders (but a relationship different from those regarding the impediment), but which raises doubt as to the impartiality of the contracting officer, the contracting officer must start an excuse procedure; otherwise anybody can start a procedure of suspicion, and their superior officer or other members of the body can decide whether that situation is relevant and whether the officer can participate in the procedure.

### 18 How is the involvement of a bidder in the preparation of a tender procedure dealt with?

According to the PCC, anyone who has given direct or indirect assistance in drafting the tender rules cannot bid, if such assistance has given them a competitive advantage. Nevertheless, according to CJEU case law, in *Fabricom*, a bid cannot be rejected on the above-mentioned grounds prior to giving an opportunity to justify that the assistance given in drafting the tender rules did not grant them any advantage.

### 19 What is the prevailing type of procurement procedure used by contracting authorities?

It is the direct award.

### 20 Can related bidders submit separate bids in one procurement procedure? If yes, what requirements must be fulfilled?

According to the PCC, the members of a grouping bidder cannot enter into another grouping bidder. Moreover, the bids can be excluded if there are strong signs of agreements or acts of the bidders in order to violate the competition.

### 21 Are there special rules or requirements determining the conduct of a negotiated procedure?

According to the present PCC, the negotiation procedure can be adopted for public works contracts, rental agreements and contracts for the acquisition of moveable assets, where: all the proposals have been excluded and the technical specifications are not substantially altered according to that procedure; the nature of the contract or the conditions of its execution do not allow the prior fixing of a global price in the technical specifications, and regarding public works contracts when the contracts are signed for the purpose of investigation, experimentation, study or development; and, with regard to services contracts, where the contractual specifications cannot be carefully defined.

The negotiated procedure follows the procedure of the limited tender, with adaptations, and includes a phase for the presentation of the candidacy and qualification, presentation of the initial version of bids, bid negotiation and presentation of the final version of bids and adjudication. The electronic auction cannot be used in this procedure.

According to the new Directive 2014/24/EU (which regulates public procurement), it is stated that, in respect to the procurement documents, contracting authorities shall identify the subject matter of the procurement by providing a description of their needs and the characteristics required of the supplies, works or services to be procured and specify the contract award criteria. Only the economic operators invited by the contracting authority following its assessment of the information provided may submit an initial tender, which shall be the basis for the subsequent negotiations, and contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure.

The negotiated procedure can also be used without prior publication, provided that certain requirements are met, according to each type of contract:

- for public works contracts, public supply contracts and public service contracts, when no tenders or no suitable tenders or no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure; when the works, supplies or services can be supplied only by a particular economic operator; and, as a third possibility, so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with;
- for public supply contracts, when the products involved are manufactured purely for the purpose of research, experimentation, study or development; for additional deliveries by the original supplier; for supplies quoted and purchased on a commodity market; and for the purchase of supplies or services on particularly advantageous terms;
- for public service contracts, where the contract concerned follows a design contest organised in accordance with this Directive and is to be awarded, under the rules provided for in the design contest, to the winner or one of the winners of the design contest; and
- for new works or services consisting in the repetition of similar works or services entrusted to the economic operator to which the same contracting authorities awarded an original contract.

According to the new Directive 2014/25/EU (which regulates procurement by entities operating in the water, energy, transport and postal services sectors), it is stated that only the economic operators invited by the contracting entity following its assessment of the information provided may participate in the negotiations and contracting entities may limit the number of suitable candidates to be invited to participate in the procedure.

The negotiated procedure can also be used without prior publication, in the following situations:

- where no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted in response to a procedure with a prior call for competition;
- where a contract is purely for the purpose of research, experiment, study or development, and not for the purpose of securing a profit or of recovering research and development costs, and insofar as the award of such contract does not prejudice the competitive award of subsequent contracts;
- where the works, supplies or services can be supplied only by a particular economic operator;
- insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting entity, the time limits laid down for open procedures, restricted procedures and negotiated procedures with prior call for competition cannot be complied with;
- in the case of supply contracts for additional deliveries by the original supplier that are intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations, where a change of supplier would oblige the contracting entity to acquire supplies having different technical characteristics, resulting in incompatibility or disproportionate technical difficulties in operation and maintenance;
- for new works or services consisting in the repetition of similar works or services assigned to the contractor to which the same contracting entities awarded an earlier contract;
- for supplies quoted and purchased on a commodity market;
- for bargain purchases, where it is possible to procure supplies by taking advantage of a particularly advantageous opportunity available for a very short time at a price considerably lower than normal market prices;
- for purchases of supplies or services under particularly advantageous conditions; and
- where the service contract concerned follows a design contest organised in accordance with this Directive and is to be awarded, under the rules provided for in the design contest, to the winner or to one of the winners of that contest.

These Directives are not transposed yet. However, the Order No. 3,290/2016, of 3 of March created a commission to elaborate the revision of the PCC, which is composed of scholars and government members.

## 22 When and how may the competitive dialogue be used? Is it used in practice in your jurisdiction?

According to the present PCC, the competitive dialogue procedure can be adopted when the object of the contract is too complex, and therefore does not allow the choice for a public tender or a limited tender with previous qualification. A particularly complex solution can be taken into consideration where the contracting authorities are not objectively able to define the technical means to satisfy these needs or objectives, or are not objectively able to specify the legal or financial make-up of the project, or both, unless the contracting authority is responsible for such inability.

According to the new Directive 2014/24/EU (which regulates public procurement), it is stated that only the economic operators invited by the contracting authority following the assessment of the information provided may participate in the dialogue. Contracting authorities may also limit the number of suitable candidates to be invited to participate in the procedure. Contracting authorities shall set out their needs and requirements in the contract notice, and they shall define these needs and requirements in that notice or in a descriptive document, or both. At the same time and in the same documents, they shall also set out and define the chosen award criteria and set out an indicative time frame.

According to the new Directive 2014/25/EU (which regulates procurement by entities operating in the water, energy, transport and postal services sectors), it is stated that only the economic operators invited by the contracting entity following the assessment of the information provided may participate in the dialogue. Contracting entities may also limit the number of suitable candidates to be invited to participate in the procedure. Contracting entities shall set out and define their needs and requirements in the call for competition or in a descriptive document, or both. At the same time and in the same documents, they shall also set out and define the chosen award criteria and set out an indicative time frame.

These Directives are not transposed yet. However, the Order No. 3,290/2016, of 3 of March created a commission to elaborate the revision of the PCC, which is composed of scholars and government members.

## 23 What are the requirements for the conclusion of a framework agreement?

The administration can only conclude framework agreements with one contractor when all the aspects of the execution of the contracts to be concluded in the scope of said agreement are sufficiently specified. The co-contractor is obliged to enter into contracts under the conditions of the framework agreement when the contracting authority so requests, but the public administration is not bound by that obligation. The maximum deadline for these framework agreements cannot exceed four years, unless the nature of the contract or the conditions for its execution so require.

The PCC provides for the existence of central purchasing bodies that can be instituted by each contracting authority for one ministerial department or for several ministerial departments, such as the above-mentioned ESPAP. The establishment of contracts subject to the central purchasing bodies is subject to the PCC procurement rules and therefore these central purchasing units can also enter into framework agreements.

## 24 May a framework agreement with several suppliers be concluded? If yes, does the award of a contract under the framework agreement require an additional competitive procedure?

It is possible to enter into a framework agreement with several suppliers. In such situations, the award of the contract under the framework agreement requires a limited tender, by invitation, that sets out the main aspects of the procedure.

## 25 Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

In principle, a member of a bidding consortium cannot change during the procurement procedure, since the PCC determines that those members, and only they, must enter into the contract. Some may permit a change of bidding consortium owing to a merger or spin-off of a company member of the bidding consortium.

## 26 Are unduly burdensome or risky requirements in tender specifications prohibited?

There are no specific provisions in the PCC on this and the previous PPC is only concerned with preventing the public contracting entity entering into a contract that establishes proportional obligations for the contracting authorities. The new PPC does not, however, have any rule regarding this matter.

Nevertheless, the proportionality principle set forth in the PPC applies, and therefore, one cannot, in our view, establish excessively burdensome requirements for the bidders.

## 27 What are the legal limitations on the discretion of contracting authorities in assessing the qualifications of tenderers?

There are no special limits set forth in the PCC concerning the discretion of the contracting authorities in assessing the qualifications of the tenderers. In the contracts of public works, works and services concessions, renting and acquisition of moveable assets and services acquisition, the award factors cannot refer to the qualities of the bidders. Bidders' qualifications are usually analysed during the limited tender procedures, in the first phase of the procedure. There are two models for this qualification: a simple model where all the candidates that qualify and comply with some preset minimum standards continue to the second stage; and a complex model, where there is an evaluation and selection of the tenderers that can bid, based on criteria previously set (the subcriteria must also be set in advance). Please note that the tenderers can benefit from the expertise of the parent company and for most of the contracts from third parties if those parties commit themselves to performing the parts of the contract for which the expertise is required. The financial capacity can be proved by a bank declaration, or in case of a consortium if one of the members is a bank established in the European Union.

## 28 Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

The PCC has no specific rules for fostering participation of small and medium-sized enterprises in the procurement procedure. The tender documents may, however, try to foster that participation by establishing, for instance, prerequisites related to the social impact of the contract proposal, albeit within the limits set down in EU directives and EU case law.

The contracts can be divided into lots, but there are no rules limiting the number of lots that can be awarded to single bidders.

The new directives, however, state that contracting authorities may, even where tenders may be submitted for several or all lots, limit the number of lots that may be awarded to one tenderer, provided that the maximum number of lots per tenderer is stated in the contract notice or in the invitation to confirm interest. It is also stated that public procurement should be adapted to the needs of SMEs and contracting authorities should be encouraged to make use of the Code of Best Practices set out in the Commission Staff Working Document of 25 June 2008 entitled 'European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts', providing guidance on how they may apply the public procurement framework in a way that facilitates SME participation.

## 29 What are the requirements for the admissibility of alternative bids?

Alternative bids are allowed if the tender documents so allow.

## 30 Must a contracting authority take alternative bids into account?

The contracting authority must, if alternative bids are allowed, take those bids into account.

## 31 What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

The change of the tender specifications that are not subject to competition (according to the tender documents) leads to exclusion. The omission of some terms and conditions demanded by the tender documents may not lead to exclusion, but then the terms and conditions set forth in the tender documents apply.

### Update and trends

The relevant aspects to take into consideration are the entry into force of the revised PCAC and the intended changes in the PCC because of the new EU directives, that are not yet approved.

### 32 What are the award criteria provided for in the relevant legislation?

The tender can be decided upon the lowest price criterion (if the tender documents fulfil all the details of the contract, leaving only the price as a decisive aspect) or else according to the most favourable proposition from an economic standpoint. In this situation all the factors and subfactors that develop the adjudication criteria must be set in advance. In the contracts of public works, works and services concessions, lease and acquisition of movable assets and services acquisition, the award factors cannot refer to the qualities of the bidders.

The new Directives alter the award criteria in a way that member states may provide that contracting authorities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts. Only then can we assess where the new criteria will also be changed in the revised PCC.

### 33 What constitutes an 'abnormally low' bid?

An abnormally low bid happens when the proposed price is 40 per cent lower than the price established in the tender programme for public works contracts and 50 per cent lower in any other kind of contract.

### 34 What is the required process for dealing with abnormally low bids?

Prior to the exclusion of such bid, the contracting authority must ask the bidder for clarifications and in its analysis one can take into consideration, namely, the economy in the building processes or in the rendering of services, the exceptional favourable conditions for the service rendering or the technical solutions adopted, the originality of the works, the goods and the services rendered, the specific working conditions of the bidder, the fact that the bidder may benefit from legal state aid.

### 35 How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

Bidders convicted of professional misconduct, of a crime that affects their professional honour, or of crimes such as terrorism and money laundering can only bid after rehabilitation. There is no single rehabilitation procedure. The rehabilitation depends upon the judicial system and the professional orders. There is no self-cleaning, but in the PCC there are deadlines for some sanctions.

The new directives introduce the concept of self-cleaning, stating that any economic operator that is excluded for some specific grounds may provide evidence to the effect that measures it takes are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

### Review proceedings and judicial proceedings

### 36 Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

Administrative decisions relating to the procurement procedure and the tender documents can be challenged through an administrative review application. This review application shall be presented to the contracting authority and must be filed within five days of its publication or notification of the decision in question.

The complaint has no staying effect, but the qualification decision, the negotiation phase or the award decision are subject to a decision being taken thereon.

If the complaint is about the decision of qualification, the adjudication award or the rejection of the administrative complaint, the authority must notify the other tenderers for an administrative hearing. The complaint must be decided within five days, except if there is an

administrative hearing, in which case the five-day period runs from the end of the hearing.

The procurement decisions can be also challenged in court by means of an administrative lawsuit pursuant to the Remedies Directive regime.

The general limit for challenging acts of the contracting authorities is three months, although there is no established limitation period for acts that are null and void. There is also no limit for the tender documents. The limitation period for the annulment of the contract is six months, unless the contract has an object that could be subject to an administrative act, in which case the invalidity is argued according to the deadlines previewed for the administrative act with the same object and the same regulation of the specific situation. If the contract is a public works contract, a service contract or a contract for the acquisition or lease of movable assets or a concession contract of public works or services, then a specific means of judicial challenge is applicable. The limitation period for challenge is one month in all situations (including acts null and void) and six months for the annulment of contracts. According to the new version of the new PCAC, one can also request the condemnation of the administration to adopt the act it was legally bound to perform.

If there is a mediation and dispute resolution clause, a specific lawsuit regime will apply.

### 37 How long does an administrative review proceeding or judicial proceeding for review take?

The administrative review procedures are usually short. The PCC foresees a deadline of five days for the decision. The judicial proceedings differ if they are urgent or non-urgent. Urgent means such as interim measures and special pre-contractual acts annulment lawsuits (applicable to some kinds of contracts: public works, concessions, services acquisition) usually last from three months to one year. Judicial appeals usually also last from three months up to one year. Other lawsuits can last up to three years at the first instance court. Judicial appeals usually last one or two years.

### 38 What are the admissibility requirements?

Procurement procedural acts are justiciable and contracts are also justiciable. The requirements for admission, apart from the deadlines discussed below, are the court competence (the Supreme Administrative Court is competent in the first instance for the acts and contracts of the higher officers of the state (eg, President of the Republic, National Assembly, Council of Ministers, Prime Minister, etc); the local administrative courts are competent for the other acts and contracts), a direct and personal interest, an interest in acting (for instance, one cannot challenge a tender based on the illegality of the successful bid if one is classified in fifth place and does not challenge the other bids) and finally the justiciability of the act that must have external effects and cause damage to the applicant.

Procedural acts that are merely internal or that cannot cause damage to the applicant or the bidder cannot be challenged (for instance, a request to obtain proofs that was not directed at the applicant but was requested of a third party). Also, acts that merely confirm a previously notified and challenged act cannot be challenged if they have no new effects.

Regarding contracts, the other bidders can challenge them if they differ from the adjudication act.

### 39 What are the deadlines for a review application and an appeal?

The deadline to present an administrative review application is five working days after the notification. No administrative review is mandatory. The reviews must be decided in a five-day period.

The deadline to present a judicial appeal differs depending on the kind of lawsuit. For an administrative action lawsuit, it is three months (except if the act is null and void, when there is no deadline); for an urgent lawsuit against pre-contractual acts the deadline is one month (according to the jurisprudence this deadline is applicable even when the act is null and void); but if the request is to invalidate the contract, there is a six-month deadline. For a request of liability, if it is tort liability, there is a substantive three-year deadline, after which the right to claim damages is terminated.

The three-month deadline is suspended during the administrative review and during judicial vacations. The one-month deadline, being an urgent procedure, is only suspended in case of administrative review.

An administrative action lawsuit can be presented against pre-contractual acts of contract not included in the scope of the urgent lawsuit (or to demand the issuance of an act, the nullity of a regulation or the issuance of a regulation) and to assess the contract's validity and execution,

when a contract was entered into or performed, or even a mere contract performance without any prior administrative act.

The urgent lawsuit must be presented against pre-contractual acts of the contract included in its scope: public works, works and services concessions, lease and acquisition of moveable assets and services acquisitions (this lawsuit is also applicable to challenging tender regulations; scholars consider this lawsuit can also be presented to demand the issuance of an administrative act).

There is no deadline for the judicial decisions.

**40 Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?**

The administrative review application does not suspend the procedure, but bars the contracting entity from going on to the next procedural phase until a decision has been taken. In fact, the complaint has no staying effect, however, the qualification decision, the negotiation phase or the award decision are subject to a decision being taken thereon.

The judicial application for review has no automatic staying effect, but the urgent lawsuit against the award acts has an automatic staying effect upon those acts and the execution of the contract, given the case that it has already been concluded, which can be reverted by the court if that is requested by the interested parties, because of a public interest and harmful consequences balancing. For other pre-contractual acts, no automatic suspension is set forth. It is discussed whether other interim measures apply; scholars accept that possibility under the new PCAC, while others reject it.

If applicable, an interim measure of suspension of the effects of some pre-contractual act has an automatic staying effect, an effect that can nevertheless cease if the public entity invokes a public interest in continuing the tender procedure.

**41 Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?**

Unsuccessful bidders must be notified of the adjudication, but not of the contract. Nevertheless, adjustments to the contract made prior to the contract signing and after the adjudication must be conveyed to all bidders whose bid has not been excluded.

**42 Is access to the procurement file granted to an applicant?**

Access to the procurement file must be granted to the bidders and in some circumstances even to the non-bidders. The bidders have access via the electronic platform to most aspects of the procedure. In the previous hearing after the preliminary report all aspects of the procedure must be disclosed.

Also, according to PPC, all interested parties have a right to access the administrative files if they have a legitimate interest in accessing those files. To demonstrate a legitimate interest it is sufficient to wish to present a lawsuit for which access to the file is relevant. Apart from that, all terminated procedures are open to public access according to Law 67/2013 of 28 August. Nevertheless, state secrets, commercial secrets, professional

secrets and banking secrets, among others, can be protected. Also, EU documents can have restricted access depending on the subject matter.

**43 Is it customary for disadvantaged bidders to file review applications?**

It is customary for disadvantaged bidders to file review applications.

**44 May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?**

Contracts can be terminated following a judicial review application where it is concluded there was a violation of the procurement law. The administrative courts may, if requested, invalidate not only the adjudication act, but also the contract concluded afterwards. In some situations they can annul the contract directly or declare it null and void if the invalidity is based on direct legal violations by the contract's clauses – violations that stem from any procedural violation.

**45 Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?**

There is legal protection for interested parties against an award without any procurement procedure. It can be challenged not only by an administrative review application for the maximum responsibility of the public entity that made the award, but also in the administrative courts through the remedies established in the Process Code in the Administrative Courts, through an administrative lawsuit, or through an urgent lawsuit against pre-contractual acts.

The court of auditors must also control most of the contracts that incur expenditure by public bodies and even some public-owned companies.

In the new PCAC, a new claim is contemplated, regarding the adoption of temporary measures aimed to prevent the formation of a *fait accompli* situation or a situation in which at the final judicial decision, one cannot resume the procedure in order to determine which of the competitors is the successful tenderer.

**46 If a violation of procurement law is established in an administrative or judicial review proceeding, can disadvantaged bidders claim damages? If yes, please specify the requirements for such claims.**

Disadvantaged bidders can claim damages. The amount of the damages depends upon whether they can prove they had a right to the contract (if the illegality had not occurred), in which case they can ask for the value of all losses, including loss of profit, otherwise they can only ask for compensation for their expenses.

It is also important to highlight the possibility given to the court, under the new PCAC, of annulling a contract based on a violation of the procurement rules of its formation, and inviting both parties do come to a liability agreement, if a claim is sustained but cannot be fulfilled, because of an impossibility or exceptional damage to the public interest.

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## Getting the Deal Through

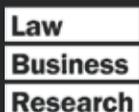
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Public Procurement  
ISSN 1747-5910



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