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Contributed by Cuatrecasas ***Authors:*** Duarte Abecasis, Lourenço Vilhena de Freitas, João Sena, Leonor Catela

Law and Practice

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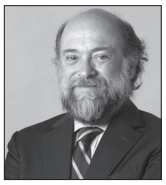
Cuatrecasas offers a local approach through wide coverage of the Iberian territory, advising on administrative law, constitutional law, public procurement, town planning and environment, regulated sectors, and tax law. The practice focuses on the legal and administrative handling of the relations between public, private and inter-administrative entities, advising both public and private entities. Cuatrecasas advises (central or local) public entities in relation to public service, to the organisation and functioning of public entities, in particular state-owned and municipal companies, to pre-contract procedures, drafting the corresponding tender documents, as well as during the pre-contract, awarding, contract performance stages and the launching and monitoring of public private partnerships. The firm also advises on the preparation of territory planning instruments. It advises Portuguese and Spanish private entities, either individuals or companies, in particular on drafting requests and applications before public entities of the central and local administration and assisting with the ensuing administrative procedures. Specifically on public procurement, the firm advises on awarding procedures leading to the conclusion of works and public works concession contracts, public service contracts and other public-private partnerships, concessions to exploit public domain, contracts for the supply of goods and the provision of services, contracts for the lease of real property or movable assets and other administrative

Authors



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1. General

1.1 Basic Statutes Governing Public Procurement

The key legislation in Portugal is the Public Contracts Code ("PCC"), approved by Decree-Law no. 18/2008 of January 29th, which was subject to a profound reform in 2017 through the approval of Decree-Law no. 111-B/2017 of August 31st. These core alterations were approved in order to ensure the Portuguese legal order's compliance with the standard put forth by the new EU Public Procurement Directives: 2014/23/EU, 2014/24/EU and 2014/25/EU. This comprehensive statute includes the solutions for all levels of public contracting, as well as for the European special sectors. All matters relating to pricing are generally defined in the PCC. According to Portuguese law, the awarding entities must define the conditions governing the contract in the tender documents, mainly in the terms of reference.

It is also relevant to mention Decree-Law 111/2012 of May 25th, which approved the general rules for the PPP, the revised Public Procedure Code ("PPC") approved by Decree-Law 4/2015 of January 7th, the Code of Procedure in the Administrative Courts and the revised Administrative and Tax Courts Statute approved by Decree-Law 214-G/2015 of October 2nd.

1.2 Regulations Governing Cost Reimbursement and Pricing Issues

The applicable legislation is the PCC, which has recently been subject to a profound reform, as it governs all matters relating to public procurement in Portugal. Decree-Law 111/2012 also has to be considered for PPPs.

1.3 Public Sector Procurement Procedures

The procedures by which to lawfully adjudicate a public contract are all contained in Article 16 of the PCC.

Following the structure of the PCC, the first procedure available is the direct award procedure ("ajuste directo"), which is by far the most flexible and least competitive procedure available to the contracting authorities. This procedure is based on price or on specific reasons stipulated in the PCC for each type of public contract. In light of the new legislation, only contracts pertaining to goods and services valued at up to EUR20,000 may be awarded by direct award; similarly, adjudicating a contract through a direct award procedure in public works contracts is limited to contracts valued up to EUR30,000.

The second type of procurement procedure listed in the PCC is the prior consultation procedure ("consulta prévia"), which is also price-based. The main difference between the two is that the contracting authority is able to lawfully select one proposal within the direct award without being obliged to regard any others, while the prior consultation procedure demands that at least three different entities are selected, thus slightly broadening the scope of agents competing for the award.

Nevertheless, price thresholds remain a key criterion, so the PCC further restricts the contracting authority's ability to negotiate price in each individual contractual type. Only contracts pertaining to goods and services valued at up to EUR75,000 may be awarded by a prior consultation procedure; similarly, adjudicating a contract through a direct award procedure in public works contracts is limited to contracts valued up to EUR150,000. With regard to any other type of contract, except for public works concessions or public services concessions, the value may add up to EUR100,000.

The third procurement procedure is the public tender procedure ("concurso público"), which is not limited by a price threshold, meaning that, in essence, the contracting authority may resort to it regardless of the value of the contract under analysis. This is due to the competitive nature of this procedure, which is regulated in a very detailed way in the PCC through the scrutinised stipulation of each pre-contractual phase and the powers of the contracting authority during the procedure – which are significantly limited in comparison with any of the abovementioned procurement procedures. If the value of the contract reaches the European threshold, publication in the Official Journal of the European Union becomes mandatory.

The fourth procurement procedure is the limited tender with prior qualification ("concurso limitado por prévia qualificação"), which does not vary much from the proceeding and requirements of the public tender, although it does include a previous system of qualification and selection of tenders according to the technical and financial capacity of the offerors. Only qualified offerors are invited to present an offer. As is the case with the public tendering procedure, the contracting authority may adopt the limited tender with prior qualification procedure regardless of the value of the contract. If the value of the contract reaches the European threshold, publication in the Official Journal of the European Union becomes mandatory.

The fifth procurement procedure is the negotiation procedure ("procedimento de negociação"), which, according to the PCC, can be adopted in the following circumstances:

- for public concession contracts;
- for companies' incorporation agreements;
- when the needs of the public authorities cannot be satisfied by the solutions offered in the market;
- when it is not possible to conclude a contract without previous negotiations, due to the complexity of the goods or services involved; and

- when 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 sixth procurement procedure is the competitive dialogue procedure ("diálogo concorrencial"). In accordance with the PCC, the competitive dialogue procedure can be adopted in the following circumstances:

- when the needs of the public authorities cannot be satisfied by the solutions offered in the market;
- when it is not possible to conclude a contract without previous negotiations, due to the complexity of the goods or services involved; and
- when the contractual specifications cannot be carefully defined.

Pursuant to Directive 2014/24/EU, 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 shall define these needs and requirements in that notice or in a descriptive document, or both.

The last procurement procedure set forth by the PCC is the innovation partnership ("parceria para a inovação"), which may be adopted whenever a contracting authority is interested in the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works, provided that they correspond to the performance levels and maximum costs agreed between the contracting authorities and the participants. The innovation partnership shall be structured in successive phases following the sequence of steps in the research and innovation process, which may include the manufacturing of the products, the provision of the services or the completion of the works. The innovation partnership shall set intermediate targets to be attained by the partners and provide for payment of the remuneration in appropriate instalments.

It is important to highlight that, in accordance with the PCC, the only procurement procedures available for the award of public works and public services concession agreements, as well as for the award of articles of association, are the public tender procedure, the limited tender with prior qualification procedure, the negotiation procedure and the competitive dialogue procedure. However, the prior consultation procedure and the direct award procedure can be utilised if the value of the public works and public services concession agreements is less than EUR75,000 and the duration is less than one year.

Regarding the so-called "special sectors", if the agreement to be awarded relates to an activity in the water, energy, transportation or postal services sectors and is performed by the contracting authorities operating in those areas, the latter shall adopt, in alternative, the public tender procedure, the limited tender with prior qualification procedure, the negotiation procedure, the competitive dialogue procedure or, if the requirements are met, the innovation partnership procedure.

Hence, one can clearly conclude that the negotiation ability of contracting authorities is relatively limited in general, and extremely limited when it comes to the element of price, due to the imposition of a competitive, equality-oriented and transparent view of public procurement in light of the supremacy and influence of European Union Law.

1.4 Common Types of Procurement Procedures

According to the data made available on the BASE webpage (which is run by the Construction and Real Estate Institute and comprises all official data available on Portuguese public procurement), the direct award is the most common procurement mechanism. In 2017, the number of contracts awarded by direct award represented 81.2% of all public procurement procedures.

However, one of the amendments brought forth by the revised Public Contracts Code is the decrease of limits up to which a contracting authority may choose to adjudicate a contract through to a direct award procedure. As mentioned above, only contracts pertaining to goods and services valued at up to EUR20,000 may be awarded by direct award; similarly, a contracting authority may choose to adjudicate a contract through a direct award procedure in public works contracts however limited to contracts valued up to EUR30,000.

The aforementioned amendment aims to reduce the contracting authorities' temptation to resort to direct awarding procedures and increase the number of contracts being awarded by any of the other procurement procedures, which are more competitive.

These measures aim to increase transparency and equality within tendering procedures.

1.5 Eligibility to Bid for Public Sector Opportunities

The PCC sets forth a number of eligibility criteria for potential bidders. First and foremost, bidders who have been

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 they have been deemed rehabilitated. However, there is no single rehabilitation procedure – it depends upon the judicial system and the professional orders.

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

Furthermore, according to the PCC, anyone who directly or indirectly assisted in drafting the tender rules cannot bid, if such assistance has given them a competitive advantage. Nevertheless, according to case law of the Court of Justice in the European Union, in *Fabricom*, a bid cannot be rejected on these grounds without there being a prior opportunity to justify that the assistance given in drafting the tender rules did not grant any advantage.

Finally, some technical prerequisites may be in order. For example, in the case of public works contracts, and as per Article 81 of the PCC, contractors must hold the appropriate construction title to be eligible.

1.6 Compliance and Ethics Rules

Under the PCC, no particular compliance and ethics rules are incumbent upon public sector contractors.

1.7 Disappointed Bidders

Article 100 of the Code of Procedure in Administrative Courts provides the legal framework for pre-contractual litigation – the adequate means of challenging an award granted by a contracting authority at the end of a tendering procedure. This judicial procedure covers cases related to the formation of public works agreements, public works concessions, public services concessions, the acquisition and leasing of movable assets, and services procurement.

Pre-contractual litigation may be initiated by any legitimate party to the proceedings, under the general regime set forth in the Code of Procedure in Administrative Courts, within one month of the award decision being made public by the contracting authority. The presentation of the claim suspends the public procurement procedures, or the execution of the public contract if it has already been signed.

It is worth noting that, following the 2015 revision of the Code of Procedure in Administrative Courts through the approval of Decree-Law no. 214-G/2015, of August 19th, pre-contractual litigation has been broadened to encompass litigation pertaining to the pre-contractual phases of all types of contracts foreseen in the EU Directives on Public Procurement.

A claim under pre-contractual litigation may aim to annul the award of the contract or any of the tender documents, or to force the contracting authority to award the contract to another interested party, or both.

Disadvantaged bidders may also resort to petitioning the implementation of interim measures, in order to seize the production of effects in the post-awarding phase of the contract.

Disadvantaged bidders may also claim damages, the amount of which 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.

Outside the scope of Article 100 of the Code of Procedure in Administrative Courts, said diploma also encompasses other judicial procedures related to contractual litigation, such as filing a claim regarding an issue of interpretation, validity or execution of a public contract in the competent administrative courts, as per Article 37, subparagraph l) of the Code of Procedure in Administrative Courts.

Finally, disadvantaged bidders may also resort to petitioning the implementation of interim measures, in order to force the assessment of the legality of the formation of the contract if it proved disadvantageous to the petitioner in the post-awarding phase of the contract.

1.8 Handling Disputes

There are some specific cases in which a particular legal framework is applicable. Should a dispute arise from the performance of a public service concession between a consumer and a public concessionaire, such as the supply of electricity, then Consumer Conflicts Arbitration is the appropriate legal resort. This task is often undertaken by the regulatory entities of each particular sector – in the electricity supply example, the competent authority would be the ERSE.

2. Contract Award Process

2.1 Tender Procedures for Soliciting Offers

According to the PCC and the European Directives on Public Procurement, unsolicited proposals are not allowed. Therefore, there must be a previous administrative approach from the contracting authority in order for a proposal to be submitted by a potential contractor.

The PCC sets forth two different procurement procedures for soliciting proposals from potential government contractors: the direct award and the prior consultation procedures. Both these proceedings may only be adopted if the value of the contracts at stake reaches a certain threshold (for further developments, please refer to **1.3 Public Sector Procurement Procedures**).

In the direct award procedure, the contracting authority can directly solicit a proposal from a potential government contractor of its choice. In the prior consultation procedure, the contracting authority can directly solicit a proposal from at least three potential government contractors of its choice, and may then negotiate the aspects of the execution of the contract in question with them.

Also, and according to the new innovation partnership procedure, in cases where a public need for certain goods or services is identified and is not available in the market, the contracting authority can solicit proposals from the admitted bidders, for research and development projects to meet the needs and requirements identified in the parts of the procedure.

Similarly, in the competitive dialogue procedure, where there are certain needs and requirements to be fulfilled by way of a future agreement, the contracting authority may invite the qualified candidates whose solutions have been accepted to submit a proposal.

As it pertains to the formal requirements for the solicitation of bids, it is worth noting that, according to Article 34 of the PCC, in procedures where the value of the contract equals or exceeds the so-called "European thresholds" set out in article 474 of the PCC, the relevant contracting authority must publish a prior information notice in the Official Journal of the European Union, as per the mandate of Article 48 (1) of Directive 2014/24/EU.

If the value of the contract falls short of the abovementioned thresholds, then the contracting authority is merely obliged to publish a notice in the Official Gazette (*Diário da República*).

In procurement procedures that are subject to publication in the Official Journal of the European Union, the parameters of what data must be included in the prior information notice may vary slightly, depending on the type of contract.

In the case of a rental contract or a contract for the acquisition of moveable assets, the notice must include the estimated contractual price; as for public works or concession contracts, reference must be made to the essential characteristics of the contractual object.

The period covered by the prior information notice must not exceed 12 months from the date of publication, except in the particular case of social services contracts.

With regard to procurement procedures that are not subject to publication in the Official Journal of the European Union, publication of the mandatory notice in the Official Gazette must be performed within 24 hours of the issuance of the order by the contracting authority.

2.2 Negotiating Tenders

There are no legal grounds for price negotiation, either prior or parallel to the due process of law. Furthermore, the price is always limited by the value set by the contracting authority in the tender documents – the so-called basic price ("preço base"), which refers to the maximum amount the contracting authority is permitted to pay for the contractual performance.

However, according to the present PCC, the contracting authority must employ one of the procurement procedures provided for in the PCC in the pre-contractual stage.

The procurement procedures contemplated in the PCC include a negotiation stage; in this regard, the competitive dialogue procedure and the negotiated procedure are structured to contemplate such a phase.

The prior consultation procedure can also include a negotiation phase when the invitation to submit proposals indicates that said proposals may be subject to negotiation. The same regime is foreseen for the public tender procedure, for some type of agreements.

The general principles that guide Portuguese public procurement (as well as European public procurement) mandate that any negotiations have to be conducted in respect of fair competition and within the limits of the "preço base", with transparency, non-discrimination and equal treatment. Furthermore, Article 74 demands that the key aspect in selecting a proposal is the application of the most economically advantageous tender, which the contracting authority may abide by through the resort to either price or cost effectiveness.

Nevertheless, the available methods that may be employed by the contracting authority in order to lawfully adjudicate a public contract are all displayed in Article 16 of the PCC (for further developments, please see **1.3 Public Sector Procurement Procedures**).

Thereby, it can clearly be concluded that the negotiation ability of contracting authorities is relatively limited in general, and extremely limited when it comes to the element of price, due to the imposition of a competitive, equality-oriented and

transparent view of public procurement in light of the supremacy and influence of European Union Law.

2.3 Accounting Standards

Offerors only have to comply with the conditions of the contractual competition procedure, according to what is referred to in the terms of reference for the awarding of an individual contract.

2.4 Verification of Tenders

Generally speaking, offerors are not required to provide certifications in support of the prices offered, unless it is specifically provided for in the tender documents.

However, pursuant to Article 71 of the PCC, in the tender documents the contracting authorities may set forth a threshold value for the price of a proposal to be considered abnormally low, considering, for example, a certain percentage deviation of said price in relation to the average price of the proposals under submission – among other adequate criteria within the purview of the individual contracting authority.

In such a case, the contracting authority is obliged to seek clarifications from the offeror as to the value presented, which the latter must submit **in writing**, thus providing due justification for the price offered.

This solution was adopted in the 2017 reform, in keeping with the jurisprudence of the European Court of Justice (namely, the *Slovensko* ruling, C-588/10, 29/03/2012). The goal behind its incorporation into the Portuguese legal system was to prevent contracting authorities from unduly and excessively resorting to this criterion as grounds for exclusion of a given bid.

Otherwise, documents containing price justifications are not one of the documents expressly foreseen in Article 57 of the PCC, which must be mandatorily submitted in the bid proposal, under penalty of its exclusion.

However, it is common practice for the tender documents to include a reference to the necessity to obtain a commitment statement from a third party relating to the terms and conditions and the attributes of the proposal, in cases where said third party is performing a certain contractual obligation rather than the government contractor (for example, pertaining to the certification of a certain good that makes up the contractual object). Such a requirement is also provided for in Article 168(4) of the PCC.

2.5 Accounting and/or Estimating Systems Subject to Audit or Inspection Requirements

Offerors' accounting or estimating systems may be subject to audit or inspection requirements whenever the contractual object requires a certain certification, which must be obtained as a prerequisite of eligibility. In such a case, one must pay regard to the provision of Article 57 (3) and Article 58 (3) of the PCC, which, when read together, allow for certain documents to be included in a foreign language if the offeror deems them to be indispensable for the proposal attributes.

In any other case, the applicable legislation does not prescribe the need for the offerors to present a certification of any sort regarding language requirements. However, as a general rule, the documents that make up the bid proposal shall be submitted in Portuguese, as expressly stated in Article 58 of the PCC, although there are exceptions to this rule, such as mentioned above.

3. Post-Award

3.1 General Process and Terms and Conditions for Payment to the Contractor

The general rule stems from Article 299 of the PCC, which states that the obligation is due, without need of further notice, within 30 days of the contracting authority receiving the invoice if the contract does not specify a date or deadline for payment.

Advanced payments are possible but are subject to a strict discipline, and a bank guarantee is required in order for them to be implemented, as per Article 293 of the PCC. The payment is made against the presentation of an invoice, and the certification that the good was delivered, the service was provided, or the work was executed.

Indeed, as it stems from Article 292 of the PCC, whenever the conclusion of public contracts imposes the payment of a price by the contracting authority, the latter may only proceed to an advanced payment when, for instance, the amount of the advance does not exceed 30% of the contractual price.

In exceptional cases, advances may be provided regardless of the requirements set forth in Article 292 of the PCC by way of a detailed and reasoned decision by the administrative entity that is competent to authorise the correspondent public expenditure.

3.2 Government Pay Relative to Actual Costs

According to Article 300 of the PCC, the contract may allow for and provide the terms for a price revision mechanism, without prejudice to the applicability of the financial recovery regime – thus allowing for the government to pay based on actual costs.

According to Article 300 of the PCC, the contract must provide for a calculation method, establishing how to apply it,

and establishing the frequency with which the revision of prices must occur.

The abovementioned legal rules are especially applicable to public works contracts, in accordance with Article 382 of the PCC.

3.3 Purchasing Goods or Services from a Foreign Contractor

The requirements governing a foreign contractor's accounting and pricing depend on whether the contractor operates within or outside the European Economic Area. If the subcontractor operates within the European Economic Area, the equivalence clause will be applicable, and the same regime set forth in the PCC shall be mandatorily applied.

In fact, such an understanding was stressed by the European Court of Justice in the Case C-458/08, Commission v Portugal: *"[…] by requiring providers of building services established in another Member State to satisfy all the requirements imposed by the national scheme at issue, and in particular by Decree-Law No 12/2004, in order to obtain authorisation to exercise, in Portugal, an activity in the construction sector, thereby precluding the possibility of account being duly taken of equivalent obligations to which such providers are subject in the Member State in which they are established, or of the verifications already carried out in that regard by the authorities of that Member State, the Portuguese Republic has failed to fulfil its obligations under Article 49 EC."* These obligations require not only the elimination of all discrimination based on nationality against providers of services who are established in other Member States, but also the abolition of any restriction that is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where it lawfully provides similar services, even if it applies without distinction to national providers of services and to those of other Member States.

If the contractor operates outside the European Economic Area, the applicable legal framework is set forth in the revised Agreement on Government Procurement ("GPA"), in force as of April 6th 2014, which is a multilateral agreement within the framework of the WTO. At present, the GPA comprises 19 parties (it should be noted that one of these parties is the EU, which means that all 28 Member States are party to the GPA). Another 31 WTO members participate in the GPA Committee as observers. Ten of these members are currently in the process of acceding to the GPA. All WTO members are eligible to accede.

The fundamental goal pursued by the GPA is to mutually open government procurement markets among its Parties; thus, the text of the Agreement establishes rules requiring open, fair and transparent conditions of competition in government procurement.

The PCC expressly refers to the GPA in certain dispositions. For instance, Article 6-B sets forth that agents from GPA signatory states are entitled to be subject to the same conditions as agents operating within the European Economic Area, namely with respect to the assessment of an agent's qualification documents.

Pertaining to the works contract regime set forth in the PCC, Article 383 expressly states that national entities of GPA signatory states must present a declaration issued by the Public Markets, Real Estate and Construction Institute(*Instituto dos Mercados Públicos, do Imobiliário e da Construção – I.P.*) ascertaining that they are authorised to execute the provisions set out in the contract to be concluded, in order to be qualified under the law as successful tenderers.

3.4 Rules That Apply to a Foreign Subcontractor's Accounting and Pricing

The contractor continues to be the sole responsible entity before the contracting authority, so there are no special rules that apply to foreign subcontractors.

3.5 Access to a Contractor's Records

Generally, the government does not have a general right to access a contractor's records. However, depending on the nature of the contract and on the terms set therein, certain access may be negotiated and granted. This is usually the case with PPPs.

3.6 Audit Rights

The government's audit rights may depend upon the nature of the contract. For example, audit rights may be recognised if the contract sets forth a regime under which the contracting authority is due to sustain some of the costs of the endeavour, or pay a certain sum to the contractor. However, these terms must be laid out explicitly in the contract.

The government may perform an audit during the execution of the contract. During that time, the contracting authority may exercise its audit rights subject to the principle of proportionality, with minimal disruption to the execution of the parties' obligations under the contract.

Under Article 2(2), subparagraph k) of Decree-Law no. 96/2012, of April 23rd, the Inspectorate-General of Finance is competent to evaluate and control the quality of services rendered by concessionaires.

Furthermore, reference must be made to sectorial regulators. Independent public entities monitor the activities of the operators in the telecommunications, energy, water distribution and waste-water treatment sectors,, and may thus be entitled to periodically access some relevant financial information. For example, in the energy sector, the Electricity Services Regulatory Entity (ERSE) is in charge of exercising

sectorial regulation and may be granted access to the aforementioned data.

3.7 Recovering Costs

If, under the terms of the contract, the contracting authority is obliged to make a payment to a third party in substitution of the contractor, then the contracting authority may make use of its recourse mechanism with a view to recovering these costs.

The contracting authority may recover these costs either under the terms set forth in the contract, or under the right of recourse as per the general regime of the Portuguese Civil Code, approved by Decree-Law no. 47344/66, of November 25th. That situation does not, therefore, depend on any precise public procurement-specific rules.

The penalties shall only be applicable if they are prescribed in the terms of reference and in the contract. Otherwise, the contracting authority may only be able to recover interest values on the amounts at stake.

The statute of limitations applicable to the enforcement of contractual liability provided for in the Civil Code, approved by Decree-Law no. 47344/66, of November 25th, may be applicable. If it is a contractual responsibility, the government has 20 years to claim; if it is not, the government has only three years.

4. Review Procedures

4.1 Resolving Disagreements Between the Government and a Contractor

Article 476 of the PCC explicitly sets forth the conditions under which the parties may resort to alternative dispute resolution mechanisms such as arbitration.

The abovementioned disposition states that the resort to arbitration or other methods of alternative dispute resolution is at the disposal of the parties, under Portuguese law, in order to settle a dispute arising either during the pre-contractual stage or during the execution stage of contracts to which the PCC applies.

The legislator expressed a clear preference for institutionalised arbitration as opposed to *ad hoc* arbitration. However, the Parties are allowed to resort to *ad hoc* arbitration in particularly complex disputes, regardless of whether they stem from legal or technical issues, as per article 476 of the PCC.

In disputes valued at more than EUR500,000, there is a guaranteed possibility of appeal to the competent administrative court, under the conditions set forth in the abovementioned disposition.

Still within the scope of alternative dispute resolution methods, the parties may resort to procedures such as mediation and conciliation, and determination by an expert or a panel of experts to settle a particular and concrete legal or technical issue that may arise.

Nevertheless, it is always within the parties' purview to file a claim regarding an issue of interpretation, validity or execution of a public contract in the competent administrative courts, as per Article 37, subparagraph l) of the Code of Procedure in Administrative Courts.

4.2 Agencies, Courts and/or Organisations Permitted to Resolve Disputes

As mentioned above, institutionalised arbitration is preferred over *ad hoc* arbitration, under the PCC. The Centre for Administrative Arbitration (*Centro de Arbitragem Administrativa - CAAD*) is one of the possible institutions within the parties' purview.

Sectorial regulators may also be competent to act in dispute resolution scenarios. For example, the Energy Services Regulatory Entity ("ERSE") is competent to settle disputes pertaining to consumer litigation.

5. Miscellaneous

5.1 Other Unique Aspects

The use of cost-based pricing in private and public contracts depends strongly on the professional skills of the personnel involved. The writing of adequate terms of reference is the first obstacle to overrule. If that is not obtained, serious disputes will certainly arise. Later, monitoring the execution of a contract is likely to be more demanding than a simple price-invoice type.

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