



# The Legal 500 Country Comparative Guides

## Portugal: Public Procurement

### Contributing Firm



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- 1. Please summarise briefly any relationship between the public procurement / government contracting laws in your jurisdiction and those of any supra-national body (such as WTO GPA, EU, UNCITRAL)**

According to the Portuguese Constitution, European law and international conventions duly ratified or approved are applicable within the Portuguese legal system.

Others, such as UNCITRAL Model Law on Public Procurement, are *soft law* instruments.

- 2. What types of public procurement / government contracts are regulated in your jurisdiction and what procurement regimes apply to these types of procurements?**

In general, public procurement rules apply to contracts whenever the respective object is or may be subject to competition.

The following contracts are, *inter alia*, deemed as subject to competition: public works contracts, public works and services concessions, the lease or acquisition of movable assets, acquisition of services and company contracts.

The key code for public procurement is the Public Contracts Code (PCC), approved by Decree-Law no. 18/2008, of 29 January 2008, as amended, which has transposed Directives 2014/23/EU, 2014/24/EU and 2014/25/EU, all of the European Parliament and of the Council, dated 26 February 2014.

Specifically regarding the defence and security domain, we should highlight Decree-Law no. 104/2011, of 6 October 2011, which has transposed Directive 2009/81/EC, of the European Parliament and of the Council, dated 13 July 2009, which provides new rules for contracts between European Union countries and security and defence material suppliers.

In addition, please note that specific statutes enacted by the Autonomous Regions of Azores (Regional Legislative Decree no. 27/2015/A, of 29 December 2015) and Madeira (Regional Legislative Decree 34/2008/M, of 14 August 2008, as amended) are also relevant.

Besides the statutes that are specifically applicable to this sector, the Administrative Procedural Code, approved by Decree-law no. 4/2015, of 7 January 2015, shall also be taken into consideration, as well as the Procedural Code of the Administrative Courts, approved by Law no. 15/2002, of 22 February 2002, as amended.

**3. Are there specified financial thresholds at which public procurement regulation applies in your jurisdiction?**

In general, public procurement rules apply to the contracts referred to in the previous question irrespectively of their value.

In any event, please note that there are thresholds applicable to the type of public procedure that may be chosen for the award of different types of contract.

This being said, please note that in relation to procedures for public works and associated service contracts to be executed by entities directly financed for more than 50% of the contractual price by contracting authorities, as defined by PCC, public procurement rules shall only apply in case the value of the contracts is equal or higher than EUR 5,350,000.00 or than EUR 214,000,00 respectively.

Also, for contracting authorities in the water, energy and transport sector, public procurement rules shall, in principle, only apply to:

- Public works contracts: ≥ EUR 5,350,000.00.
- Lease or acquisition of movable assets, acquisition of services: ≥ EUR 428,000.00.
- Service contracts for social and other specific services: ≥ EUR 1,000,000.00.

Finally, on the defence and security domain, public procurement rules shall only apply to:

- Acquisition of goods or services: ≥ EUR 443,000.00.
- Public works contracts: ≥ EUR 5,548,000.00.

**4. Are procurement procedures below the value of the financial thresholds specified above subject to any regulation in your jurisdiction? If so, please summarise the position.**

Procurement procedures for contracts that are not subject to the public procurement rules shall comply with the general principles of the administrative activity and, *mutatis mutandis*, with the general principles of public procurement.

**5. For the procurement of complex contracts\*, how are contracts publicised? What publication or journal is used for these purposes?**

In tenders (meaning public tenders and tenders limited by previous qualification), which are the most relevant procurement procedures for complex contracts, a notice must always be published in the Portuguese Official Gazette and, if applicable, in the Official Journal of the European Union.

As to domestic public tenders the time limit to submit a bid shall not be shorter than 6 days, unless when referring to a public works contract where the time limit is of at least 14 days. This minimum time limit may in specific cases be reduced to 6 days.

As to domestic tenders limited by previous qualification, the minimum time limit to apply and to bid is also of 6 days, unless when referring to a public works contract where the time limit to bid is of at least 14 days. This minimum time limit may in specific cases also be reduced to 6 days.

As to international public tenders, such time limit shall not be shorter than 30 days. This time limit may in certain cases be reduced to 15 days. Same rule applies to applications on tenders limited by previous qualification, being the minimum time limit to bid 25 days. This minimum time limit may in specific cases be reduced to 10 days.

**6. For the procurement of complex contracts, where there is an initial selection stage before invitation to tender documents are issued, what are typical grounds for the selection of bidders?**

The most relevant procurement procedure where there is an initial stage before invitation is the tender limited by previous qualification.

There are two different qualification models in this type of procedure: the simple model and the complex model.

In the simple model all candidates meeting the minimum requirements for technical and financial capacity are deemed as qualified.

As to the selection system, it consists of the qualification carried out according to the criterion of the greatest technical and financial capacity.

The criterion used to qualify the greatest technical and financial capacity implies the use of an evaluation model to which the provisions of public tenders are applicable, *mutatis mutandis*.

Candidates meeting the minimum requirements for technical and financial capacity are ranked according to the qualification criteria referred to in the preceding number, and only those ranked in the places corresponding to the number set out in tender documents shall qualify, unless when candidates meeting those minimum requirements are less than five. In this case, all candidates meeting the minimum requirements for technical and financial capacity shall be deemed as qualified.

**7. Does your jurisdiction mandate that certain bidders are excluded from tendering procedures (e.g. those with convictions for bribery)? If so what are those grounds of mandatory exclusion?**

The PCC lists the situations in which entities are not allowed to participate in a procurement procedure.

In summary, this is the case of entities, or in certain cases of its managers, that:

- Are going through insolvency, liquidation, dissolution or cessation of activity.
- Have been convicted by a final and unappealable sentence for any crime that affecting professional honour.
- Have been subject to administrative sanctions for serious professional misconduct, if in the meantime their rehabilitation has not occurred.
- Do not have their situation regularized regarding social security contributions.
- Do not have their situation regularized regarding taxes.
- Have been subject to an accessory sanction prohibiting it from participating in public tenders provided for in special legislation.
- Have been, less than two years ago, the object of the application of administrative or judicial sanction for the use of their service of labour legally subject to the payment of taxes and social security contributions, not declared under the terms of the rules imposing such obligation.
- Have been convicted by a final and unappealable sentence for any of the following crimes, if in the meantime the respective rehabilitation has not occurred:
  - Participation in a criminal organization;
  - Corruption;
  - Fraud;
  - Money laundering or terrorist financing;
  - Terrorist offenses or offenses relating to a terrorist group;
  - Child labour and other forms of trafficking in human beings.
- Have provided advice or technical support in the preparation of the procedure, resulting in an advantage that distorts the normal conditions of competition;
- Have endeavoured to unduly influence the decision of the competent body, to obtain confidential information that may give it undue advantages in the procedure, or have provided erroneous information that could materially alter the exclusion, qualification or award decisions;
- Are covered by conflicts of interest that cannot be effectively corrected by measures less burdensome than exclusion;
- Have accused significant or persistent deficiencies in the performance of at least one previous public contract in the last three years.

**8. Please described a typical procurement procedure for a complex contract. Please summarise the rules that are applicable in such procedures.**

The main types of procedures applicable to complex contracts are public tenders and tenders limited by previous qualification.

Public tenders include the following stages:

- Publication of a notice
- Clarifications and errors and omissions
- Submission of bids
- Analysis and assessment of bids
- Preliminary report
- Prior hearing
- Final report
- Negotiation of bids (if applicable)
- Awarding decision
- Qualification documents, bond and others if applicable
- Contact execution

Public tenders for complex contracts may take approximately 3 to 6 months.

In turn, tenders limited by previous qualification include the following stages:

- Publication of a notice
- Clarifications and errors and omissions
- Submission of applications
- Analysis and assessment of applications
- Preliminary report
- Prior hearing
- Final report
- Qualification decision
- Invitation to bid
- Clarifications and errors and omissions
- Submission of bids
- Analysis and assessment of bids
- Preliminary report
- Prior hearing
- Final report
- Awarding decision
- Qualification documents, bond and others if applicable
- Contract execution

Tenders limited by previous qualification for complex contracts may take approximately 6 months or more.

**9. If different from the approach for a complex contract, please describe how a relatively low value contract would be procured?**

As to public tenders and tenders limited by previous qualification, please refer to the answer. The only difference is that such procedures will probably take less time to be finished as contracting authorities will set shorter time limits for the submission of applications and/or bids and will speed the analysis and assessment of applications and/or bids.

**10. What is seen as current best practice in terms of the processes to be adopted over and above ensuring compliance with the relevant regime, taking into account the nature of the procurement concerned?**

The PCC does not include any provision on this matter.

However, one may say that there is a concern related to anticompetitive practices in public procurement.

In this context, the Portuguese Competition Authority recommends some measures to be preferably adopted in order to fight against anticompetitive practices.

The purpose of such measures is to promote the participation of the greatest number of competitors, attracting both national and foreign investors, and consist, among others, in avoiding restrictive and unnecessary qualification requirements, such as quality certificates, and considering the award procedures for certain lots, with a view to avoid market-sharing schemes.

Still on this regard, the contracting authorities are also encouraged to design clear tender documents and to set awarding criteria that promote competition, meaning that criteria not related to price should be clearly and objectively specified and its importance duly weighted.

**11. Please explain any rules which are specifically applicable to the evaluation of bids.**

The evaluation of bids is made according to the criterion of the most economically advantageous tender for the contracting authority, determined by one of the following means:

- Best quality-price ratio, in which the award criterion consists of a set of factors, and possible sub-factors, related to different aspects of the performance of the contract to be executed; or
- Evaluation of the price or cost as the only aspect of the performance of the contract to be executed.

Factors and sub-factors must have a connection with its object for the contract to be concluded, covering all, and only, aspects that refer to the performance of the contract to be submitted to competition by the specifications.

Such factors and subfactors may include the following: quality, organization, qualifications and experience of the personnel and environmental sustainability of the performance of the contract.

Finally, please note that, in duly justified cases, the contracting authority may choose not to submit the price or cost to tender, in which case a fixed price or a maximum price must be established in the specifications.

**12. Please describe any rights that unsuccessful bidders have that enable them to receive the reasons for their score and (where applicable in your jurisdiction) the reasons for the score of the winning bidder.**

Following the analysis and assessment of bids, the jury is required to prepare a preliminary report containing the reasons giving grounds to each bidder's score and the proposal of awarding decision, which is notified to all bidders.

Bidders are allowed to provide comments to said preliminary report and only after analysing such comments the jury prepares a final report containing final decision proposal.

**13. What remedies are available to unsuccessful bidders in your jurisdiction?**

There are both administrative and judicial remedies.

Meaning that the unsuccessful bidder may challenge an unfavourable award before the contracting authority within 5 working days as of the notification of such decision.

Besides, tender documents and administrative acts may also be challenged before administrative courts. Regarding procedures on public works contracts, public works and services concessions, lease or acquisition of movable assets, acquisition of services and company contracts, the corresponding proceedings are of urgent nature.

Still regarding urgent proceedings, it is worth stressing that while tender documents may be challenged during the course of the public procurement procedure, administrative acts may only be challenged within 1 month and, if applicable, within 10 working days as of the notification of the awarding act to obtain the so-called automatic suspensive effect.

Finally, an awarded contract may be terminated by the court on the basis of the illegality of the preceding administrative acts (such as the awarding decision) of if it violates any mandatory provision or principle, in particular in cases where the contract amends essential aspects of the specifications or the selected bid or include modification provisions that violate the regime set out in the PCC.

**14. Are public procurement law challenges common in your jurisdiction?**

Public procurement law challenges are quite common in Portugal, having no negative consequences to bidders, such as reputational harm.

The applicable judicial fee is of 204,00 €, for each party, and the cost of legal fees depends on a number of factors, including the complexity of the case at hand and the chosen law firm.

**15. Typically, assuming a dispute concerns a complex contract, how long would it take for a procurement dispute to be resolved in your jurisdiction (assuming neither party is willing to settle its case).**

A dispute concerning a complex contract is not likely to be resolved in less than 6 months (excluding appeals).

The main stages of an urgent proceeding are the following:

- Claim: please refer to answer provided to question 10, above.
- Answer: time limit 20 days.
- Trial (if applicable): scheduled by the judge.
- Closing statements (if applicable): time limit 20 days.
- Final decision: 10 days but the judge usually takes more time to take this decision.

Finally, please note that in procedures where the standstill period is applicable and the claim is submitted within 10 working days as of the notification of the awarding act, the claimant also benefits from the automatic suspensive effect of the awarding act and of the contract if already executed. This being said, the defendant is then allowed to request the court to lift such effect, which results in an autonomous procedural issue that has also to be decided by the court.

**16. What rights/remedies are given to bidders that are based outside your jurisdiction?**

Foreign bidders are given the same rights and remedies granted to national bidders.

**17. Where an overseas-based bidder has a subsidiary in your territory, what are the applicable rules which determine whether a bid from that bidder would be given guaranteed access to bid for the contract?**

Overseas-based bidders with subsidiaries in Portugal are given the same rights and remedies as nationally owned companies.

This, notwithstanding the fact that further to the awarding decision, it may be required that the contractor sets up a company in Portugal.

For instance, as to public works or services concessions, the PCC sets forth that the concessionaire shall have its headquarters in Portugal, except when otherwise stated in the contract.

**18. In your jurisdiction is there a specialist court or tribunal with responsibility for dealing with public procurement issues?**

Decree-law no. 174/2019, of 13 December 2019 has recently created the first specialized competence courts for public procurement.

More in particular, such specialized courts will be included as part of the existing Administrative Courts of Lisbon and Porto, which will have extended jurisdiction over the areas that are under the jurisdiction of the neighbouring administrative and tax courts.

However, the installation and entry in to force of said specialized competence courts is still waiting for an ordinance of the member of the Government responsible for the area of justice to be issued.

**19. Are post-award contract amendments/variations to publically procured, regulation contracts subject to regulation in your jurisdiction?**

Yes.

In accordance with the PCC, the contract may be unilaterally changed by the contracting authority on the grounds of public interest.

Besides this, said code also establishes that the contract may be changed by mutual agreement or by a court decision on the grounds of an abnormal and unforeseeable change in circumstances or of public interest.

To note, however, that there are several limits to such amendments. These cannot lead to a substantial change of the subject matter of the contract, neither to a change in its economic balance in favour of the contractor or to an increase of 25% of the initial contractual price, if the contract is amended on the grounds of a change in circumstances, or of 10%, if the contract is amended on the grounds of public interest. Additionally, in principle, changes cannot be introduced in a way that affects competition.

Finally, in general, contracts may be assigned, as long as the respective future contractor proves to have the qualification and technical and financial capacity of the former contractor and provided that the contracting authority issues an authorization.

**20. How common are direct awards for complex contracts (contract awards without any prior publication or competition)?**

Direct awards for complex contracts are not completely unusual as this procedure may be adopted, not only according to specified financial thresholds, but also irrespectively of the contract value if certain material criteria are met.

Amongst others, such material criteria include the following:

- For any contract: the extreme urgency resulting from unforeseeable situations not attributable to the contracting authority.
- For public works: the performance of works under a framework agreement.
- For lease or acquisition of movable assets: in case of goods intended for partial replacement or for broadening awarded to the same contracting authority, provided that different goods would cause incompatibilities, or disproportionate technical difficulties of use or maintenance.
- For acquisition of services: in case of certain intellectual services.

This notwithstanding the fact that direct award may only be adopted if prior consultation (which is a procedure where the contracting authority invites at least three potential bidders) is not possible or compatible with the ground put forward to the choose of the procedure.

Decisions taken within a direct award and the corresponding tender documents may be challenged on the grounds of its illegality, violation of the applicable procurement rules or principles and also violation of other mandatory provisions.