

Portugal

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1.Does your legal system provide specific procedures for the award of contracts for contracting authorities?

Yes, contracting authorities (not only public administration entities but also “bodies governed by public law”) must comply with the Public Contracts’ Code, approved by Decree-Law 18/2008 (29th January 2008). In spite of implementing EC Directives 2004/17 and 2004/18 (31st March 2004), this piece of legislation provides specific procedures for the award of contracts both above and below the European thresholds.

2.Do the procedures for the award of contracts depend on the kind of goods, services etc. which are to be procured?

The procedures for the award of contracts depend on the amount of money the contracting authorities are willing to pay for the procured goods, services or works – rather than on their specific type.

However, some procedures only consent the award of certain contracts: it depends on their subject matter. For instance, contracting authorities are not allowed to use an urgent open procedure nor a dynamic purchasing system to award public works contracts (only goods and services).

Furthermore, there is a special regime for the award of contracts covered by article 296.^o of the Treaty establishing the European Community (TEC) - i.e. contracts for the purchase of products which are intended for specific military purposes - laid down in the Decree-Law 33/99 (5th February 1999).

3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc. which are to be procured (thresholds) and if so, what are the thresholds?

In Portugal the choice of a certain public procurement procedure limits the contract's value - instead of the contract's estimated value limiting the choice of a public procurement procedure. Thus, the contract value is no estimated value but the maximum amount of money the contracting authority is allowed to pay for the contract regarding the chosen procedure.

When choosing the negotiated procedure without prior notice public administration entities are allowed to award contracts under 75.000 euros (goods and services) or 150.000 euros (public works), whereas "bodies governed by public law" are allowed to award contracts under the respective European threshold (goods and services) or 1.000.000 euros (public works).

Contracts awarded by utilities (operating in the water, energy, transport or postal service sector) are only subject to procurement rules when their value is above the respective European threshold.

The open and restricted procedures whose notice is published only in the national official journal (and not in the European official journal) allow all contracting authorities to celebrate contracts up to the respective European threshold.

4. In which way does the contracting authority have to inform the market about the intended procurement?

All public procurement procedures must be advertised in the national official journal (online), except for the negotiated procedure without prior notice. Whenever the contracting authorities are willing to pay an amount of money higher than the respective European threshold (which differs according to the subject matter of the contract: goods, services or works), then a notice must also be published in the European official journal.

The award of public contracts through negotiated procedures without prior notice must be reported by the contracting authorities to an online "supervision entity".

5. Does an undertaking which is interested in the contract need to have a specific legal form to submit a tender?

No, in order to submit a tender, an undertaking (or a consortium) is not required to assume a specific legal form. However, the undertaking (or consortium) selected may be required to do so when it has been awarded the contract.

6. Are undertakings allowed to submit joint offers, e.g. as general contractor and subcontractor or as bidding consortium?

Undertakings may submit individual offers or joint offers (as bidding consortium). However, they cannot submit individual and joint offers in the same procedure (both will be excluded). Regardless of their individual or jointly participation, undertakings may always play the

simultaneous role of subcontractors.

7. Do undertakings interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?

It is not legally binding for an undertaking to have a registered office or branch office in Portugal in order to submit a tender.

8. If in your country it is possible for foreign undertakings to submit a tender for a contract with a contracting authority directly from abroad, does the foreign undertaking have to consider certain additional aspects, such as having to provide certain supporting documents and have foreign and domestic undertakings equal rights in the procedures for the award of contracts?

There can be no discrimination between national undertakings and those established in other member states of the EU, as laid down in the TEU. The same rule applies to undertakings established in one of the contracting parties of the Agreement on the European Economic Area or of the World Trade Organization, as laid down in the respective treaties.

Therefore, foreign undertakings must produce the same documents as national ones.

9. Is a multinational bidding consortium allowed to submit a tender?

Yes: all members of a bidding consortium must be identified when submitting the tender and one of them has to be appointed as proxy representative.

10. In which language do the tenders have to/can be submitted and which form is required, written form, fax, e-mail or digital?

Tenders must be submitted in Portuguese. It is possible, though, to submit a tender in a foreign language as long as it is accompanied by certified translation. Sometimes contracting authorities allowed certain documents (usually related to technical features) to be submitted in a foreign language (previously announced).

As a rule, tenders must be uploaded on the online platform designated by the contracting authority. Exceptionally, contracting authorities may authorize the submission of tenders by email or fax (or post until the online platforms are not fully operational).

11. Are there any legal regulations within which term tenders have to/can be submitted to the contracting authority?

The Public Contracts' Code sets several minimum time limits within which tenders must be submitted. These limits differ according to:

- (i) the type of procedure,
- (ii) whether or not a prior notice was published in the European official journal,
- (iii) the subject matter of the contract, and (iv) whether the contracting authority belongs to the "classic" sector or the utilities one.

12. Can the tenderers claim their costs for preparing the tender? If so what are the conditions for and up to which amount a reimbursement can be claimed?

The tenderers may claim their costs for preparing the tender whenever it is not excluded (by formal or substantial reasons). There is no limit on the amount of the reimbursement. However, the tenderers must offer proof of the costs they wish to claim and be able to relate them to the preparation of their tender.

13. Are there any selection criteria set by law that tenderers have to satisfy in a procedure for the award of a contract and can the contracting authority establish its own additional selection criteria?

The Public Contracts' Code sets rules on personal situation of the tenderers and minimum suitability to pursue the professional activity. It is up to the contracting authorities to establish the further selection criteria (namely those related to economical and financial standing as well as technical and/or professional ability). In order to do so, contracting authorities must choose between the restricted procedure and the negotiated procedure with prior notice (or the competitive dialogue in case of complex contracts). Contracting authorities may not establish further selection criteria in open procedures.

14. Does your legal system provide legal protection against an alleged award of a contract favoring a competing tenderer even before the contract with the competitor is actually awarded (primary legal protection)? If so please roughly explain the proceedings. Is such a primary legal protection applicable for foreign tenderers without any restrictions?

The public procurement legal regime provides for a hearing of all tenderers prior to the awarding of the contract. This means the contracting authority must not notify them of the award decision draft, as well as the (eventual) tenders exclusion decision draft. The tenderers have no less than 5 working days to submit their comments on the decisions draft.

The contracting authority must not award the contract prior to the referred hearing, after which it is supposed to take in consideration the comments produced by the tenderers.

Having been notified of the definite award decision, the tenderers may challenge its legality and/or ask for its suspension. The contracting authority must wait no less than 10 working days between the notification of the award decision and the signing of the contract.

Any tenderer may file a petition for judicial review of the award decision (including the suspension of the procedure/contract) within a month after its notification.

15. If primary legal protection exists in your country, does depend on certain conditions, p.e. certain thresholds or the kind of goods, services etc. which are to be procured? If so, which are the conditions?

Contracting authorities must always conduct a hearing of all the tenderers prior to the awarding of a contract, irrespective of the thresholds or the kind of goods, services etc. The same can be said of the possibility of judicial review.

16. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g. through damage claims etc. (secondary legal protection)? If so, which are the principal conditions which have to be presented before a court to be able to be awarded the damages?

In addition to the primary legal protection stated in the answer to question (15), it is also possible to judicially ask for damages and lost profits on the grounds and to the extent that they were caused by an unlawful award of a contract.

The claim might be successful provided that there is evidence of a decision contrary to public procurement rules, which violates a provision set out to protect tenderers, and the tenderer (who is supposed to fall within the scope of the referred provision) proves to have been affected.

It usually turns out to be quite difficult to establish the causation

between the violation and the alleged damage.

17. Can your office

–give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc. and assist in the procurement procedure in your country?

–represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?

–Please name a contact person within your office for questions of public procurement law!

Our Office offers legal assistance in this field to public and private / national and foreign Clients during both the procurement procedures and throughout the lifetime of the contract itself (including the drafting of procedural documents, the drawing up of tenders, the negotiation of contracts, the eventual litigation, etc). Our Office also provides legal assistance to the process of the contract approval by the Court of Auditors and intervenes in dispute resolution in court, before any jurisdiction or in arbitration or other alternative forms of dispute resolution.

The contact person within our Office for questions of public procurement law is Dr. João Amaral e Almeida (Partner): jaa@servulo.com.