

Extract from : CHAPTER 12: PUBLIC PROCUREMENT

12.1. Introduction

The award of supply, service or public works contracts by State, regional or local authorities, or by entities governed by public law, must comply with national, European Union and international (specially World Trade Organisation) regulations. These are instrumental in ensuring transparency in award procedures, as well as equitable competitive conditions for potential bidders and good use of public funds.

The purpose of this chapter is to provide a brief overview of public procurement regulations applying in Portugal.

12.2. European Union Legal Framework

As public procurement represents more than 16% of the EU gross domestic product, opening public procurement to competition is a key European Union policy tool for implementing the single market, thus stimulating Europe-wide competition and obtaining an effective allocation of public monies as well as improving quality standards and cost effectiveness.

The coordination of procedures for the award of public works contracts, public supply contracts and public service contracts as well as procurement procedures of operating in the water, energy, transport and postal services sector were subject to further regulation at European level and two new Directives were passed in this regard as follows:

- Directive 2004/17/EC of the European Parliament and of the Council of 31st March 2004;
- Directive 2004/18/EC of the European Parliament and of the Council of 31st of March 2004.

These Directives took effect on their publication in The Official Journal (OJ) on the 30th April 2004 and shall be implemented in the Member States within 21 months.

The purpose for further regulating these matters is modernisation and simplification of the previous directives. As soon as they are implemented by the Member States, the public procurement market will be regulated by (only) two Directives: one

consolidated for supply, services and works within national, regional and local activities and the other for the same activities within the utilities sector (water, gas, electricity, transportation and postal services).

This new framework incorporates the following amendments:

- (i) Combination and consolidation of the three procedures for all three areas;
- (ii) Adjustment of the Directives to existing practices in the Member States and judgments made by the European Court of Justice;
- (iii) Allow the use of electronic communication and new electronic purchase technology and more flexible procedures;
- (iv) Rules aimed at fighting money laundering, fraud and corruption.

These Directives bring new procedures and techniques applicable to the public procurement as follows:

- (a) A competitive dialogue, which permits the negotiation of the project and contract conditions and possible technical solutions between competitors, in order to achieve a final tender document with high level technical/economic/legal solutions. In very complex projects, where the contracting authorities are not able to define alone all the characteristics of the project they wish to contract, such procedure becomes essential to promote the success of the project;
- (b) Framework agreements - a general agreement between contracting authorities and one or more suppliers, outlining the terms governing contracts to be awarded during a given period;
- (c) Central purchase units - these may conduct public procurement on behalf of other contracting authorities or public bodies;
- (d) New electronic purchasing systems - the Directives introduce the use of electronic purchasing systems to handle procurements by awarding authorities;
- (e) Reduced deadlines for bids - the use of electronic means allows shorter deadlines;
- (f) Publication of contracts - framework agreements must be published in the OJ within 48 days after award, at the least. When electronic means are used, contracts must be published either after 48 days or grouped and published quarterly 48 days after the end of the quarter.

New requirements have been included, such as the inclusion of environmental requirements (to products, services or works), performance and functional descriptions (in stead of technical specifications), social clauses such as alleviation of unemployment or the training of unemployed or disabled people.

Furthermore, new general provisions spanning from the CPV (Common Procurement Vocabulary) to the specification of award criteria, the national certification of enterprises and the information about special national conditions, have also been enshrined in the amended legal framework.

Finally, the contract threshold values above which the Directives are applicable, suffered minor adjustments, following the guidelines in such respect included in the WTO's Government Procurement Agreement.

These new Directives will replace the complex and fragmented legal framework, which is still applicable currently and until the end of the transposition process. In Portugal this process has already started (namely with Decree-Law 1/2005 of 4th January) but is not complete; thus the legislation still has a division by sectors arising from the previous European legal framework.

The main EU (ancient but still applicable) rules on public procurement are:

- Council Directive 93/38/EEC of 14th June 1993, coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Council Directive 98/4/EEC of 16th February 1998 and by Commission Directive 2001/78/EC of 13th September 2001 (the “utilities” directive);
- Council Directives 92/50/EEC, 93/36/EEC and 93/37/EEC, relating to the coordination of procedures for the award of, respectively, contracts for public services, public supplies and public works contracts, as amended by Council and European Parliament Directive 97/52/EC of 13th October 1997 and by Commission Directive 2001/78/EC of 13th September 2001 (the “Services”, “Supplies” and “Works” directives);
- Commission Recommendation 96/527/EC of 30th July 1996, on the use of the Common Procurement Vocabulary (CPV) for describing the subject matter of public contracts;

- Council Directives 89/665/EEC of 21st December 1989 and 92/13/EEC of 25th February 1992, on the coordination of the laws, regulations and administrative provisions relating to the application of, respectively, review procedures to the award of public supply and public works contracts and of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (also known as the “remedies directives”).

The 1997/98 amendments to the abovementioned directives incorporate the resolutions contained in the Government Procurement Agreement (GPA), from the WTO, concluded during the Uruguay Round multilateral negotiations by the Council on behalf of the Community (Decision 94/800/EEC of 22nd December 1994), effective as of the 1st of January 1996.

The GPA creates rights for suppliers, contractors and service providers of third countries, which have signed the agreement: Canada, South Korea, USA, Israel, Japan, Liechtenstein, Norway, Singapore, Switzerland and Hong Kong.

12.3. Portuguese Legal Framework

12.3.1. Public Procurement in the Water, Energy, Transport and Telecommunications Sectors

Decree-Law 223/2001, as amended by Decree-Laws 245/2003, 234/2004 and 43/2005, applies to public contracts awarded by State, regional or local authorities as well as to public companies where state authorities are majority shareholders or which hold public concessions, whose value (without VAT) is equal to, or over the following thresholds:

- (i) Contracts awarded within the telecommunications sector:
 - Public works contracts: € 5,000,000;
 - Supply or service contracts: € 600,000.
- (ii) Contracts awarded within the water, electricity and urban transport (including railways) sectors:
 - Public works contracts: 5,000,000 Special Drawing Rights (SDE)/ € 7,100,000;

- Supply or service contracts within the CCP nomenclature (except research and development and telecommunications services): 400,000 SDE / € 568,000.
 - Other supply or service contracts: € 400,000.
- (iii) Contracts awarded within the natural gas, oil, coal, and railway sectors:
- Public works contracts: € 5,000,000;
 - Supply or service contracts: € 400,000.

Upon awarding public contracts whose value is below these thresholds, contracting authorities can choose between applying Decree-Law 223/2001 of 9th August, or Decree-Laws 197/99 of 8th June, and 59/99 of 2nd March, all amended by Decree-Law 245/2003 of 7th October, and Decree-Law 43/2005 of 22nd February, relating, respectively, to award procedures for public services/supplies contracts and to public works contracts.

12.3.1.1. Contract Award Procedures

According to Decree-Law 223/2001, the award of public contracts must be preceded by one of the following procedures:

- Open procedures, whereby all interested entities may submit tenders;
- Restricted procedures, whereby only those entities invited by the contracting authorities may submit tenders;
- Negotiated procedures, whereby contracting authorities consult entities of their choice and negotiate the terms of contract with one or more of them.

In restricted or negotiated procedures, contracting authorities can select tenders through a pre-qualification system.

Contracting authorities must make known their intention to award a public contract through a public announcement.

12.3.2. Public Procurement in Other Sectors

The “Supplies” and “Services” Directives were first implemented by Decree-Law 55/95 of 29th March, later revoked by Decree-Law 197/99 of 8th June, as amended.

12.3.2.1. Public Service Contracts and Supplies Contracts

12.3.2.1.1. Scope of Decree-Law 197/99 of 8th June

The said Decree-Law, amended by Decree-Laws 245/2003, 1/2005 and 43/2005, does not contain a definition for “Public Service Contract” or for “Public Supplies Contract”. The former broadly means a contract for pecuniary interest concluded between a service provider and a contracting authority, while the latter is a contract for pecuniary interest concluded between a supplier and a contracting authority involving the purchase, lease, rental or hire purchase of products, with or without an option to buy them and the delivery of which may also include sitting and installation operations.

Decree-Law 197/99 applies to contracts awarded by the State, or regional or local authorities as well as legal entities established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and financed, for the most part, by the State, regional or local authorities, or subject to management supervision by such authorities, or having a managing or supervisory board, more than half of whose members are appointed by the same authorities.

Decree-Law 197/99 does not apply to public concession services, i.e., contracts whereby the State transfers the execution of a public service to an entity of its choice, for pecuniary interest and for the right to manage the said service, awarded to private entities.