

Public Procurement

Contributing editor
Totis Kotsonis



2018

GETTING THE
DEAL THROUGH

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Public Procurement 2018

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Totis Kotsonis
Eversheds Sutherland

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Preface

Public Procurement 2018

Fourteenth edition

Getting the Deal Through is delighted to publish the fourteenth edition of Public Procurement, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Angola, Cape Verde, Chile, Mozambique, Panama, São Tomé and Príncipe and Tanzania.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would like to thank the contributing editor, Totis Kotsonis of Eversheds Sutherland for his assistance with this volume.

GETTING THE 
DEAL THROUGH 

London
May 2018

Angola

Raul Mota Cerveira and Ana Marta Castro

Vieira de Almeida

Legislative framework

1 What is the relevant legislation regulating the award of public contracts?

The Public Contracts Law (PCL), approved by Law 9/16 of 16 June – which repealed earlier legislation, in particular Law 20/10 of 7 September – is considered to be the key legislation regulating the award of public contracts.

Also relevant is Presidential Decree 202/17 of 6 September 2017, which establishes the legal framework for the access and use of the National E-Procurement System.

Moreover, a reference must be made to the Public-Private Partnerships Law (approved by Law 2/11 of 14 January 2011), and to the implementing regulations associated with the PCL: Presidential Decree 199/16 of 23 September 2016, which approves the regulation on public procurement procedures and the execution of framework agreements and, in particular, Presidential Decree 201/16 of 27 September 2016, which approves the standard draft contracts for public works, public supply and public services.

Finally, reference must be made to Decree Law 16-A/95 of 15 December, as amended, which approved the Administrative Procedure and Administrative Activity Code. This Law was partially repealed by the PCL, but it is still relevant as it is applicable to the public procedures in a subsidiary role.

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

Owing to the strategic and operational role of petroleum activities in Angola, there is a special regime that regulates access to petroleum activities: the Petroleum Activities Law, approved by Law 10/04 of 12 November 2004.

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

Angola is not a European Union member, or a signatory to the World Trade Organization's (WTO) Agreement on Government Procurement (GPA), the fundamental aim of which is to mutually open government procurement markets between its parties.

Although Angola is not part of the GPA, the Portuguese legal framework is a major influence on the PCL, as well as on other relevant legislation regarding the award of public contracts, and for that reason the PCL closely follows a framework similar to the EU's procurement directives.

4 Are there proposals to change the legislation?

The PCL, approved by Law 9/16, of 16 June 2016, is a recent piece of legislation and, at this stage, no new proposals to change it are expected.

Applicability of procurement law

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

Under the PCL, 'contracting authorities' are traditional public sector entities (eg, central and local authorities). The entities considered to be in this group include:

- the President of the Republic;
- the central and local administrative bodies;
- the National Assembly;
- the courts;
- the Attorney General's Office;
- independent administrative authorities;
- Angola's representation offices abroad;
- embassies and missions abroad;
- municipalities;
- public institutes;
- public funds;
- public associations;
- public companies; and
- publicly held companies.

6 Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

All public contracts concluded with contracting authorities fall within the scope of the PCL. The type of procedure differs depending on the estimated value of the contract at stake. Nevertheless, the award of certain contracts may be exempted from complying with procurement law in some situations (eg, when imperative grounds of urgency so require) and contracts with a value less than the relevant threshold (equal or less than 5 million Angolan kwanzas) can be awarded through a direct award – a non-competitive procedure – although its terms are also regulated by the PCL.

7 Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

Amendments to concluded contracts are permitted without a new procurement procedure on public interest grounds, and if the conditions under which the parties entered into the previous agreement changed in an abnormal and unpredictable way leading to a serious increase in the risks assumed by the original contractor.

Amendments can be introduced by a unilateral decision of the contracting authority based on public interest grounds, by an agreement entered into between both parties, or by a judicial or arbitral decision.

The amendments introduced cannot alter the overall nature of the contract and cannot affect competition within the procurement procedure launched for the performance of said contract (ie, the changes to be introduced cannot alter the order of the bids previously evaluated).

8 Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

No, there has been no case law clarifying the application of the legislation in relation to amendments to concluded contracts.

9 In which circumstances do privatisations require a procurement procedure?

Under the Angolan legal framework, privatisation processes do not fall within the scope of the PCL and are regulated by specific legislation. (Law 10/94 of 31 August).

The Angolan Privatization Law applies to the disposal of shares held by public entities. Like the procurement procedure prescribed in the PCL, with a few specifically foreseen exceptions, the privatisation

process should be held via public tender. Exceptionally, a privatisation process may be held through a limited tender with specific pre-qualified bidders or via a direct negotiation.

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

In accordance with the Public-Private Partnerships Law, approved by Law 2/11 of 14 January 2011, the setting up of a PPP is regulated by the PCL subsidiarily.

Advertisement and selection

11 In which publications must regulated procurement contracts be advertised?

Regulated procurement contracts must be advertised in the National Gazette, the Public Procurement Portal and in an acknowledged professional journal.

12 Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

Apart from not accepting contracting entities that fall within any of the exclusion grounds foreseen in the PCL, contracting authorities may only assess whether private contracting entities are qualified to participate in a tender procedure if the authority launched a limited tender with prior qualification, a restricted procedure or a simplified procurement procedure.

In a public tender, it is not possible to evaluate bidders' technical and financial qualifications.

In accordance with the PCL, in a limited tender with prior qualification, evaluation of bidders' qualifications is made during the first phase of this procedure. The qualitative criteria set out by the contracting authority to evaluate bidders' capacities must refer to bidders' economic and financial standing and their technical and professional abilities. Those qualitative criteria must be related and proportionate to the subject matter of the contract.

In the other public procurement procedures referred above (ie, the restricted procedure and the simplified procurement procedure) there are no specific phases in which the qualification of bidders is formally evaluated, since the selection of the bidders invited to participate is discretionary and is made prior to the launch of the said procedure.

13 Is it possible to limit the number of bidders that can participate in a tender procedure?

Following the assessment of the bidders and their compliance with the qualitative selection criteria referred to in question 12, a limitation on the number of bidders may occur.

In accordance with the PCL, if bidders demonstrate they comply with all the minimum qualitative selection criteria established, they will be invited to the second stage of the tender in which they will be invited to submit a bid.

14 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?

The concept of 'self-cleaning' has not been formally established in the legal framework prescribed by the PCL. However, if the rehabilitation of a bidder has occurred, the bidder will not be excluded.

It is important to note that there is a list compiled and advertised in the Public Procurement Portal identifying economic operators deemed as having defaulted the breach of contractual obligations of previous contracts. They are kept on the list for at least three years.

The procurement procedures

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

Yes. PCL states that the fundamental principles for tender procedures include the principles of pursuit of public interest, justice, equal

treatment, competition, impartiality, transparency, probity, economy, efficiency, effectiveness and the principle of respect for public heritage.

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

Yes. PCL has a specific provision establishing the principles of independence and impartiality of contracting authorities (articles 3 and 8). The most recent prescribes an extensive set of rules applicable to public officials responsible for the public procurement procedures, and specifically stipulates that they shall act impartially, prevent conflict of interests situations, respect confidentiality rules and follow all rules and regulations regarding the conduct and the legal impediments of public officials.

Additionally, the PCL contains different mechanisms to ensure impartiality: situations under which members of contracting authorities are prohibited from interfering in the decisions taken in the public procurement procedure (eg, situations in which they have directly or indirectly a personal interest in the outcome of such procedure), and situations under which members of contracting authorities are able to ask, in specific situations, for non-intervention in a certain procedure, with the purpose of not raising any doubt about the impartiality of the decisions to be taken therein.

It is also important to notice that most public procurement procedures are accompanied by an Evaluation Committee that holds a wide range of powers to ensure compliance with all legal requirements throughout the procedure.

17 How are conflicts of interest dealt with?

See question 16.

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

The involvement of a bidder in the preparation of a tender procedure may be grounds for an exclusion decision. However, this exclusion only happens in situations when such intervention is considered to have conferred advantages to the bidder and prejudices competition.

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

The prevailing type of procurement procedure used is the public tender.

20 Can related bidders submit separate bids in one procurement procedure?

The PCL has a specific provision under which economic operators participating in a procurement procedure as a consortium are not entitled to participate in the same procedure solely or as members of other consortia. Violations of this rule leads to the exclusion of both bidders.

There is no specific provision for related bidders (eg, different companies within the same group) submitting separate bids in the same procedure. Nonetheless, in most cases this situation would probably lead to the exclusion of both bidders. In fact, if certain companies belong to the same economic group definition, it would be very hard for them to demonstrate that they are independent and that they are not distorting competition, which constitutes another ground for exclusion.

The situation of a single subcontractor participating as a subcontractor in more than one bid in the same tender may also lead to the exclusion of all bids in which said subcontractor has participated, since that would probably lead to the conclusion that competition has been distorted. Nevertheless, this situation entails less risk than the situation of related bidders submitting separate bids in the same procedure.

21 Is the use of procedures involving negotiations with bidders subject to any special conditions?

The inclusion of a negotiation phase is possible in all public procurement procedures outlined in the PCL, depending on the discretionary decision of the contracting authority at stake.

There are two main methodologies for selecting bidders in the negotiation phase. In the first one, all bidders that have previously submitted bids that do not have any grounds that would lead to their exclusion are invited to participate. In the second one, only bidders that have bids in first-rank positions are invited to participate.

The maximum number of bidders that may be invited to the negotiation phase has to be previously publicised in the tender documents.

22 If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

See question 21.

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

The PCL and Presidential Decree 199/16 of 23 September 2016 regulate the framework agreements in order to allow public contracting entities to set the terms and conditions applicable to contracts that will be entered into with one or more contractors or suppliers for a given period of time.

The PCL allows for two different types of framework agreement: with a single supplier or with several suppliers.

A framework agreement usually follows a public tender or a limited tender with prior qualification, since those procurement procedures do not have any thresholds. On the contrary, if a framework agreement is awarded through a direct award procedure, the global value of the contracts to be executed under such framework agreement cannot exceed the respective threshold.

24 May a framework agreement with several suppliers be concluded?

A framework agreement may be concluded with several suppliers. The awarding of contracts under such agreements is preceded by the previously awarded suppliers (the co-contractors of the framework agreement) being invited to bid to submit a proposal to the specific aspects of the contract that will be relevant for that specific contract and that will be evaluated.

On the contrary, if a framework agreement is concluded with a single supplier, contracts based on that framework agreement will be awarded within the limits of the terms laid down in the framework agreement. Those terms must have been sufficiently specified in the procurement procedure that preceded the award of the framework agreement.

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

The general rule is for changes in a consortium to not be allowed during a procurement procedure, since the PCL expressly stipulates that all the members of a consortium, and only those members, must carry out the contract. Nonetheless, it would be difficult not to accept a change in the members of a certain consortium in the case of a merger or spin-off of a member, as it would have to be accepted in the case of a sole bidder.

26 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 PCL has no specific rule or mechanism that would further the participation of small and medium-sized enterprises (SMEs) specifically. However, the PCL prescribes specific rules in order to preferentially assign contracts to national economic operators as well as to prioritise national production. It is important to stress that the PCL grants some advantages to national SMEs.

In terms of division of a contract into lots, there are specific provisions regarding the value of a contract's lots and the selection of a specific type of public procurement procedure, and its relation to the number of lots to be considered.

27 What are the requirements for the admissibility of variant bids?

Variant bids are only admitted when specific provisions in the public procurement procedure expressly authorise their submission.

28 Must a contracting authority take variant bids into account?

See question 27.

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

Any violation of the tender specifications that are not subject to competition and evaluation leads to the exclusion of the respective bid.

30 What are the award criteria provided for in the relevant legislation?

There are two award criteria provided in the PCL – the lowest price and the most economically advantageous tender – which must be disclosed in advance.

Regarding the latter, as far as there is a connection to the subject matter of the public contract in question, various factors can be taken into consideration, such as:

- quality;
- price;
- technical merits;
- aesthetic and functional characteristics;
- environmental characteristics;
- running costs;
- cost-effectiveness;
- after-sales service and technical assistance;
- delivery date; and
- delivery period or period of completion.

31 What constitutes an 'abnormally low' bid?

What specifically constitutes an 'abnormally low' bid is under the discretion of the Evaluation Committee, or other contracting authority. The Committee or authority can require a bidder to submit a justification for their low bid.

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

If contracting authorities have stipulated the estimated price for the contract in the tender specification and the bidder intends to submit an offer with a price that may be considered as 'abnormally low', the bidder must submit a declaration with the grounds for the submission of said price. Otherwise, the Evaluation Committee may ask the bidder for an explanation. Failing to satisfy the committee constitutes grounds for excluding the bid.

The explanations may refer to several factors, such as:

- the economics of the manufacturing process;
- the technical solutions chosen or any exceptionally favourable conditions available to the bidder;
- the originality of the works;
- supplies or services proposed by the bidder;
- the specific conditions of work that the bidder benefits from; and
- the possibility of the bidder obtaining state aid.

Review proceedings

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

The PCL repealed most of the regulation regarding the appeal against review decisions prescribed in the Administrative Procedure and Administrative Activity Code.

According to the PCL, it is possible to challenge all decisions issued in public procurement procedures through administrative review proceedings, which are regulated by the contracting authorities, or through judicial review proceedings under the jurisdiction of administrative courts.

Regarding these types of decisions, it is important to mention the establishment of the Cabinet of Public Procurement, which is charged with supporting the executive branch to define and implement policies, practices on public procurement, judging administrative proceedings during reviews of procurement decisions and controlling the legality of the such procedures.

Administrative review proceedings are mandatory.

34 If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

See question 33.

35 How long do administrative or judicial proceedings for the review of procurement decisions generally take?

The review proceeding for procurement decisions is characterised by a pressing urgency aimed at avoiding excessive delays in the procurement procedure, so the request should be brought within five business days following the decision that is being challenged. Furthermore, if the review concerns the award or qualification decision, the contracting authority must invite other bidders to submit their views and issue a final decision within five business days after the deadline established for the other bidders to submit their views.

Judicial reviews can be initiated before the contract is formally concluded and after its termination. Usually it takes no less than six months to obtain the first-instance decision.

Judicial proceedings regarding pre-contractual litigation must be filed within 60 days after the relevant decision has been issued and the bidder notified.

36 What are the admissibility requirements?

All procurement decisions, as well as the signed contract, are justiciable. Any unsuccessful bidder can submit an application for review of a decision or contract, provided the bidder demonstrates it has been directly affected by the infringement and that it will obtain an advantage with the review decision sought, based either on the legality of the decision or the merits of it.

37 What are the time limits in which applications for review of a procurement decision must be made?

See question 35.

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

According to the PCL, the administrative procedure for reviewing procurement decisions does not automatically suspend the continuation of the procurement. However, if there is no decision on the case and the time for such a decision has not yet expired, the contracting authorities cannot, depending on the stage of the procedure, qualify bidders, begin the negotiation phase, award the contract or sign the contract.

39 Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

See question 38.

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

All bidders are notified of the award decision. The successful bidder is notified first and, as soon as the successful bidder pays the bond, the other bidders are notified. In public procurement procedures in which no bond is due, all bidders are notified of the award decision at the same time.

41 Is access to the procurement file granted to an applicant?

Throughout the public procurement procedure, all bidders have access to the documents submitted by the parties, issued by the jury and by the contracting authority, except documents that bidders request to be classified.

42 Is it customary for disadvantaged bidders to file review applications?

Review applications are often filed, especially in the cases in which the value or the strategic relevance of the contract is high.

43 If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

Yes, disadvantaged bidders can claim for damages.

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?

A concluded contract may be cancelled or terminated following a review application of an unsuccessful bidder. Nonetheless, these situations are not very common.

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

Legal protection is still available in these situations.

46 What are the typical costs of making an application for the review of a procurement decision?

The typical costs of making an application for the review of a procurement decision rise to around 25 per cent of the value of the contract, but in the absence or impossibility of said determination, costs are established in accordance with the subsidiary rules stipulated in civil proceedings.



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