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Qualitative selection and exclusion of economic operators in Portugal

Pedro Telles¹

Abstract

This chapter provides an overview of the qualification, selection, and exclusion of economic operators rules under Portuguese public procurement law (approved by Decree-Law no 18/2008, hereinafter “Public Contracts Code 2008”).² As Directive 2014/24/EU is yet to be transposed into national law, the chapter will focus on the law which transposed Directive 2004/18/EC. This chapter shows that the Portuguese law departs significantly from the EU template on rules regarding qualification, selection and exclusion of economic operators in public procurement. The Public Contracts Code is at times more similar to the new Directive 2014/24/EU than the Directive 2004/18/EC it transposed.

1. Introduction

The Public Contracts Code 2008 establishes a set of rules applicable to all public procurement in Portugal. Its scope includes contracts covered by Directive 2004/18/EC, Directive 2004/17/EC, contracts with a value below the thresholds,³ concessions, and public-private partnerships. This is a monolithic law that in addition to covering public procurement in the more traditional sense (pre-award), also includes extensive substantive rules on contract performance (post-award).⁴ It does not, however, deal in detail with how contracting authorities take their decisions⁵ or with remedies.⁶

¹ The author is grateful for comments received from colleagues at the European Procurement Law Group meetings in Munich (2014) and Birmingham (2015), and particularly to Dr. Albert Sanchez-Graells and Pedro Cerqueira Gomes.

² As amended by Law no 59/2008, Decree-Law no 223/2009, Decree-Law no 278/2009, Law no 3/2010, Decree-Law no 131/2010, Law no 64-B/2011 and Decree-Law no 149/2012.

³ Regulation 1336/2013/EU.

⁴ Contained in Articles 278 to 454 Public Contracts Code 2008.

⁵ Those are regulated by the Administrative Procedure Code (Decree-Law no 4/2015) instead.

⁶ Regulated by the Administrative Court Procedural Code (Law no 15/2002, as amended by Law no 4-A/2003) and the Administrative & Tax Jurisdiction Statute (Law no 13/2002, as amended by Law no 4-A/2003 and Law 20/2012).

The Portuguese legislator adopted a very detailed and prescriptive approach towards the transposition of Directive 2004/18/EC into national law.⁷ It had no issues in departing from the blueprint or model set by the Directive where it felt convenient or appropriate. The underlying theme of the changes introduced is one of simplification and transaction cost reduction. For example, electronic procurement has been mandatory in the country since 2009.

The conscious simplification policy influence can clearly be seen in the exclusion and selection rules that are discussed here. In this area the Public Contracts Code 2008 is very different from Directive 2004/18/EC. For example, in Portugal open procedures are single stage procedures whereby both selection/qualification information and the actual tender are submitted at the same time. Under Directive 2004/18/EC, the open procedure was conceived as a two stage procedure where selection/qualification information would be analysed separately and before tenders are submitted. In a sense, by not having a separate selection stage for the open procedure, the Public Contracts Code 2008 anticipated changes introduced only in Directive 2014/24/EU, as under this Directive it is now possible to run single stage open procedures.⁸ Another example of the similarity of the Public Contracts Code 2008 with Directive 2014/24/EU, only successful economic operators have to provide documentary evidence of compliance with grounds for exclusion or selection criteria when the contract is being awarded, not before and not all bidders.⁹ This simplifying effect is prevalent as well in the format in which economic operators are to provide the necessary information for qualitative selection and exclusion: all can be done online, preferentially with copies of documents and not necessarily with originals.

The Public Contracts Code 2008 rules on procedures are structured in a very peculiar way. Perhaps the best analogy is that the rules for procedures look like a set of lego bricks. There are general rules applicable to all procedures, such as the rules on exclusion of candidates. From this base set of “legal bricks,” each procedure, and its specific procedural

⁷ Regarding transposition details, please see Telles, Competitive Dialogue in Portugal, Public Procurement Law Review, 2010, 1 p. 2-3.

⁸ Directive 2014/24/EU, Article 27(1) and 56(2).

⁹ Furthermore, if the grounds of exclusion (Article 55) are found, the jury of the procedure shall exclude the tender (Article 146(2)(c)). Although it should be said that the average duration of an open procedure in Portugal is still one of the longest in Europe, according to TED data collated by SpendNetworks, available at: <http://tt.spendnetwork.com/>

rules, is then bolted on in sequence. There is no repetition of provisions but as no procedure chapter contains all the rules relevant to that procedure, practitioners are forced to cross-refer constantly to other areas of the code to discover the full scope of the legal rules applicable to a procedure.

The most complete set of procedural rules is to be found in the open procedure chapter.¹⁰ These rules are applicable to the open procedure directly and to all other procedures in a subsidiary way, that is if there are no specific rules in each of the other procedures chapters.¹¹ But not all procedural rules are to be found in the open procedure. A good example of this is the rules on the selection stage. As the open procedure does not have a traditional selection stage prior to the tender stage, the rules on selection are found in Chapter III (restricted procedure) instead.¹² For the remaining procedures (competitive dialogue and the negotiated procedure with prior publication of a notice) the restricted procedure rules function as subsidiary rules well, unless specific rules are present on the respective chapters.¹³ Another way to describe this structure is that the section applicable to each procedure contains only the rules that are specific for that procedure. This structure avoids duplication of provisions but at the cost of forcing anyone applying the Public Contracts Code 2008 to jump through multiple sections to have access to all procedural rules relevant for the procedure they want to use.

In the following sections we will explore in further detail the changes mentioned above, starting with qualitative selection and procedure, before analysing the grounds and procedure for exclusion. Finally, we will address some specific issues related to performance bonds, reliance on third party capacity, and temporary consortia.

2. Criteria for qualitative selection

2.1 Grounds for exclusion

¹⁰ Articles 130 to 164 Public Contracts Code 2008.

¹¹ Article 162 of the Public Contracts Code 2008.

¹² Articles 162 to 192 of the Public Contracts Code 2008.

¹³ Articles 193 (negotiated procedure with prior notice) and 204 (competitive dialogue) of the Public Contracts Code 2008.

As mentioned in the introduction, the grounds for exclusion are general rules and common to all procedures in Portugal. The Public Contracts Code 2008 regulates grounds for exclusion of economic operators in Article 55, transposing Article 45 of Directive 2004/18/EC. Most of the content included in Article 55 Public Contracts Code 2008 closely follows the text of Article 45 Directive 2004/18/EC, but the Portuguese law introduces some novelties.¹⁴

Article 55 Public Contracts Code 2008 states that an economic operator falling foul of any of its rules cannot take part in a public procurement procedure either on its own or as part of a consortium. No margin of discretion is given to contracting authorities as they are forced to exclude any relevant economic operators. This constitutes a deviation from Directive 2004/18/EC as only the grounds listed in Article 45(1) lead to a mandatory exclusion, whereas Article 55 Public Contracts Code 2008 also includes the causes contained in Article 45(2) of the Directive. Furthermore, there are no specific provisions in the Portuguese law allowing for self-cleaning¹⁵ other than the passage of time.

i) Grounds for exclusion transposing Article 45 (1)(2) Directive 2004/18/EC

The first five paragraphs of Article 55 Public Contracts Code 2008 effectively transpose Article 45(2)(a) to (f) using a “copy paste” approach that does not warrant comments other than the lack the aforementioned automatic exclusion. The same can be said of Article 55 paragraph (i), which transposes Article 45(1) on criminal organisations, corruption, fraud and money laundering. Article 55(i) allows for the rehabilitation of affected economic operators without providing any clues on how this is supposed to operate, which may lead to the conclusion that the Directive has been wrongly transposed in this regard and that Portugal needs to provide clear means for self-cleaning or rehabilitation of economic operators.¹⁶ Having said that, Article

¹⁴ On this topic, Mario Esteves de Oliveira and Rodrigo Esteves de Oliveira, *Concursos e outros procedimentos de contratacao publica*, Almedina, 2011, p. 820-830.

¹⁵ On the concept of self-cleaning in general see, Arrowsmith, Priess and Friton, (2009) “Self-cleaning – An emerging concept in EC public procurement law”, in Herman Punder, Hans-Joachim Priess and Sue Arrowsmith (eds), *Self-cleaning in public procurement law*, p. 1-32.

¹⁶ Cerqueira Gomes, *The Portuguese debarment system of those convicted of corruption*, *Revista de Contratos Publics* (2013) 7, p. 111-126. The author further argues that Article 30 of the Portuguese Constitution imposes a time limit on criminal sanctions and as such, at least the debarment due to criminal convictions will need to be

55 (b) and (c) Public Contracts Code 2008, transposing Article 45 (2)(c) and (d), do include a limitation on the extension of the grounds for exclusion. These are valid only while the individual has not been rehabilitated yet or, if a legal person, while the administrators convicted of the crime¹⁷ or the professional misconduct¹⁸ remain in post. In consequence, as far as economic operators who are legal persons go, it would appear that self-cleaning may occur by simply changing the administration, at least for the grounds of Article 55(b) and 55(c) Public Contracts Code 2008.

ii) National grounds for exclusion

The Public Contracts Code 2008 departs significantly from Directive 2004/18/EC in the remaining paragraphs of its Article 55 by adding national grounds for exclusions in paragraphs f), g), h) and j). Whereas the first three provide for exclusions based on debarment orders and similar administrative sanctions, paragraph j) excludes suppliers involved in drafting technical specifications or tender documents.

Paragraph f) debars from public procurement any supplier subject to debarment orders under Article 460 Public Contracts Code or other similar administrative sanctions found in Article 21(1)(e) of Decree-Law 433/82 and Article 45(1)(b) of Law 18/2003. Paragraph g) establishes a similar exclusion for suppliers found guilty of serious wrongdoing in labour law matters under Portuguese law.¹⁹

For the debarment sanction under Articles 55(i) and Article 460 Public Contracts Code 2008 to be imposed, the economic operator must be found guilty of infringement as set out in Articles 455 to 459 Public Contracts Code 2008. For example, falling under any of the reasons for exclusion of Article 55 when submitting a tender, request for participation, accepting a contract award or signing the contract is deemed to constitute a gross misconduct punishable with a fine between €2,000 and €44,800²⁰ in addition to the potential debarment under Article

time limited. The argument then becomes if that is the case for the more serious offences (the criminal offences), then for the lesser ones the principle of proportionality would require at least a similar treatment.

¹⁷ Public Contracts Code 2008 Article 55(b).

¹⁸ Public Contracts Code 2008 Article 55(c).

¹⁹ The procedure applicable will be discussed in the following section.

²⁰ Public Contracts Code 2008 Article 456(a).

460 which amounts to an administrative sanction. Both the fine and the debarment are decided not in a court of law but via an administrative procedure, led and decided by a public body which varies depending on the object of the contract.²¹ The maximum debarment period under Article 460 Public Contracts Code 2008 is two years. Although an appeal to the Courts is possible, there are no provisions for self-cleaning which may reduce the duration of the debarment. It is interesting that the provisions of Article 55 paragraph f) do not refer to any equivalent measures applied to economic operators for violation of laws from other Member States, leaving the question if debarments in other Member States have a similar effect in Portugal unanswered.

Paragraph g) states that any economic operator falling in the situation set forth in Article 562(2)(b) of the Labour Code²² may be debarred from participating in subsequent public procurement procedures. The Article from the Labour Code allows the ancillary sanction of debarment from public procurement procedures²³ to be imposed only in situations where the economic operator is relapsing in labour law infringements and dependant on the impact the wrongdoing had on the employee or the economic benefit obtained with the action. If declared, the debarment may last up to two years. As in the situation described in the previous paragraph, the infringement procedure is administrative in nature, led and decided by an administrative body as defined by Law 107/2009.²⁴ However, appeals to the Courts are once more permissible and as with paragraph f) it would appear that only infringements in Portugal would trigger the debarment.

Under paragraph h), economic operators subject to either a judicial decision or

²¹ Public Contracts Code 2008 Article 461(1). For public works and public works concessions contracts, the process is led by the *Instituto da Construcao e do Imobiliario, I.P.*, whereas the *Autoridade de Seguranca Alimentar e Economica* is responsible for processes arising from any other contracts.

²² Approved by Law no 07/2009 and amended by Law no 53/2011, Law no 3/2012, Law no 23/2012, Law no 48-A/2014, Law no 47/2012, Law no 69/2013, Law no 76/2013, Law no 27/2014, Law no 55/2014, Law no 28/2015 and Decree-Law no 59/2015.

²³ Technically, the Article mentions only the participation on “open procedures”, although this should be read as applying to any public procurement procedure for two reasons: i) first, “open procedure” is commonly used in the country as shorthand for “public procurement” and this is probably what the Labour Code lawmaker meant. Second, Article 55 applies to all procedures, so any debarment applies across the board for public procurement, irrespective of the actual procedure adopted by the contracting authority.

²⁴ For social security related matters, the competent body is the Instituto da Seguranca Social IP, and for all other matters the *Autoridade para as Conducoes do Trabalho*, Article 2 Law no 107/2009, as amended by Law no 63/2013.

administrative sanction for the non-payment of taxes and social security contributions related to their workforce²⁵ are also barred for two years from taking part in public procurement procedures. Contrary to paragraphs f) and g), however, paragraph h) extends the debarment to infringements in other countries, even if these are not EU Member States.

Finally paragraph j) excludes economic operators from a public procurement procedure if they were involved in its preparation, such as drafting technical specifications or the tender documents.²⁶ Until 2012, the original draft of this paragraph imposed an automatic exclusion for any sort of involvement with the procedure, and the Administrative Supreme Court saw no issue with it,²⁷ ignoring the *Fabricom*²⁸ ruling. The provision was revised in 2012²⁹ in accordance with *Fabricom* and now the exclusion is no longer automatic. As such, economic operators are only excluded now if the involvement provides them with an advantage which affects competition. The current wording is more in line with Directive 2014/24/EU Article 57(i).

In addition to the exclusion grounds provided in Article 55, the Public Contracts Code 2008 also includes some additional grounds for automatic exclusion in other areas of the law. These are related to formal requirements³⁰ during the selection stage that, if unobserved by the economic operator, lead to an automatic exclusion by the contracting authority. For example, if the application to participate or tender is submitted after the deadline,³¹ without containing the required documents³² or in a foreign language³³ without a legalised translation into Portuguese,³⁴ the contracting authority has to exclude the application for participation or

²⁵ This paragraph is slightly different from Article 45(2)(e) and (f) of Directive 2004/18/EC as it refers to obligations arising from workforce commitments only. Those two paragraphs are transposed instead in the Public Contracts Code Article 55(e) instead.

²⁶ On this topic, see Olazabal Cabral, "O artigo 55 al. j) do CCP: mais vale ser que parecer", *Revista dos Contratos Públicos*, no 1, 2011, p. 128.

²⁷ Case 01469/14, available at:

<http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/e8899bdf908942d580257e0c004e4912?OpenDocument&ExpandSection=1>.

²⁸ Case C-21/03 *Fabricom SA v Belgian State*, ECLI:EU:C:2005:127

²⁹ Decree-Law no 149/2012.

³⁰ Public Contracts Code Article 184(2).

³¹ Public Contracts Code Article 184(2)(a).

³² Public Contracts Code Articles 86 and 184(2)(e)

³³ Public Contracts Code Article 184(2)(g).

³⁴ Public Contracts Code, Article 82(2).

the bid.³⁵

2.2 Selection criteria

As a consequence of the structure adopted by the Public Contracts Code 2008 mentioned in the introduction, the specific rules on selection criteria are contained in its Article 165, within the restricted procedure Chapter. Article 165 establishes minimum technical³⁶ and financial³⁷ capacity requirements contracting authorities may adopt. As for the technical requirements the Portuguese law states that they need to be *adequate*,³⁸ taking into consideration the context of the contract to be performed.

Article 165(1) Public Contracts Code 2008 includes a list of examples that can be taken into account by contracting authorities as long as they are adequate: experience, CV or organisational models/organograms are all included, for instance. This list is not exhaustive and contracting authorities are free to set different requirements as long as they comply with the adequacy test and are not discriminatory. This was not entirely needed as for contracts above EU thresholds, the general EU principle of non-discrimination would apply in any event and for all contracts below-thresholds similar guarantees exist in Portuguese law as well.³⁹

The Public Contracts Code 2008 departs significantly from Directive 2004/18/EC financial criteria rules by imposing the use of a specific mathematical formula to calculate financial ratios.⁴⁰ The actual formula is not contained in Article 165(2) but in Annex IV to the Public Contracts Code 2008 instead. It may be argued that mandating the use of a specific mathematical formula for selection⁴¹ improves procurement decision-making by replacing

³⁵ For additional exclusion grounds due to conflicts of interest such as public managers (“gestor publico”) see, Costa Goncalves, *Direito dos Contratos Públicos*, 2015 Almedina, p. 243.

³⁶ Article 165(1) of the Public Contracts Code 2008.

³⁷ Article 165(2) of the Public Contracts Code 2008.

³⁸ Under Portuguese law, the administration is subject to the principle of proportionality and adequacy is one of its three components. The other two are strict proportionality and necessity.

³⁹ Namely, in Article 6 of the Administrative Procedure Code.

⁴⁰ Article 165(2) of the Public Contracts Code 2008.

⁴¹ And also for tender analysis, as the formula is identical, Public Contracts Code 2008 Article 132. On the mathematical formula selected by the Portuguese law maker for tender evaluation, Ricardo Mateus, J.A. Ferreira & Joao Carreira, Full disclosure of tender evaluation models: Background, and application in Portuguese public procurement, *Journal of Purchasing & Supply Management* (2010) 16 p.206-215.

cognitive heuristics with more precise decision mechanisms.⁴²

To compute the financial score for each economic operator, the Annex IV formula takes into account the following elements: i) expected contract value; ii) 6 month *Euribor* rates; iii) three year EBITDA⁴³ provided by the economic operator; iv) and a multiplying factor defined by the contracting authority. The output of the formula will be then be checked against the minimum financial requirement set by the contracting authority. If the complex selection process is being used, then the formula output will be compared against the results from the other economic operators.⁴⁴

The expected contract value and multiplying factor of the formula have to be disclosed by the contracting authority at the start of the procedure.⁴⁵ Providing this information up front allows economic operators to compute the formula themselves and make an informed decision whether to take part in the procedure based on their prospective chances of making it to the award stage. In consequence, in Portugal there is a small reduction in the discretion of contracting authorities on selection, which may also be explained with a desire to reduce litigation at this stage, as in Portugal judicial review is very accessible.⁴⁶

The Public Contracts Code 2008 still grants contracting authorities the possibility of establishing further financial requirements in addition to the baseline achieved by the mathematical formula,⁴⁷ but with the restriction that said additional minimum requirements need to be connected with the economic operators' ability to fulfil the contract. These

⁴² Mark Crowder (2015) Public procurement: the role of cognitive heuristics, *Public Money & Management*, 35:2, 127-134, DOI: 10.1080/09540962.2015.1007707 , Snijders, C., Tazelaar, F. and Batenburg, R. S. (2003), Electronic decision support for procurement management. *Journal of Purchasing and Supply Management*, 9, pp. 191–198 and Tversky, A. and Kahneman, D. (1982), Judgement under uncertainty. D. Kahneman, D. et al. (Eds), *Judgement under Uncertainty* (Cambridge University Press), pp. 3–22.

⁴³ Earnings Before Interest, Taxes, Deductions and Amortizations.

⁴⁴ For a detailed discussion of the simple and complex selection processes, please see section 3.

⁴⁵ Public Contracts Code 2008 Article 164 1(i).

⁴⁶ And with a short limitation of statute, any excluded economic operator has to apply for judicial review fairly quickly, well before the award decision has been taken. On the public procurement judicial review system in Portugal see, OECD (2007), "Public Procurement Review and Remedies Systems in the European Union", SIGMA Papers, No. 41, OECD Publishing. <http://dx.doi.org/10.1787/5kml60q9vkl-t-en>, p.94 – 96. Furthermore, the cost to file a judicial review process is quite low in Portugal, at around €200 at the time of writing (2015), Court Fees Regulations, approved by Decree Law 34/2008, and amended by Law 43/2008, Decree Law 181/2008, Law 64-A/2008, Law 38/2010, Decree Law 52/2011, Law 7/2012, Law 66-b/2012, Decree-Law 126/2013 and Law 72/2014, Article 7 and Table II.

⁴⁷ Public Contracts Code 2008 Article 165(3).

additional requirements need to be disclosed in the procurement documents at the start of the procedure, similar to the components of the mathematical formula⁴⁸ and have to comply with the principle of proportionality.⁴⁹

The Public Contracts Code 2008 contains some specific rules regarding consortia participation in public procurement procedures. In accordance with Article 54(2), consortia members are barred from participate in another tender within the same procedure.⁵⁰ This limitation applies from the moment the consortia member becomes a candidate⁵¹ or a tenderer.⁵² As tenderers are bound by their tenders for at least 66 days,⁵³ once they have been submitted the consortium is stable and no changes to its composition may occur, in line with the flexibility provided to Member States in *Makedoniko Metro*⁵⁴ to introduce further exclusion grounds. There are no explicit references in the Portuguese law however to the possibility of changes to a consortium between the selection and tender stage, but this author would probably consider that contracting authorities would take a conservative approach to such requirement as a means to reduce the likelihood of challenges during the procedure. The situation involving sub-contractors is slightly more complex. There is one explicit provision about sub-contracting in a restricted procedure, competitive dialogue and negotiated procedure with prior notice.⁵⁵ If the sub-contractor capacity is being used for the purposes of achieving technical capacity requirements by the main economic operator(s), then a statement from the sub-contractor assuming its obligations if successful needs to be included when submitting the request to participate in the procedure. In this scenario, the sub-contractor is technically a “candidate” for the purposes of Article 54 and cannot be included in another request to participate. In the open procedure the technical capacity is only checked at the end

⁴⁸ Public Contracts Code 2008 Article 164(3).

⁴⁹ This view was upheld by the Administrative Appeal Court in Case 01257/09.7BEPRT from 2010, where a turnover requirement of €15 million was considered disproportionate in a contract valued at only €131,000. However, judicial decisions do not generate precedent or case law in Portugal, so other courts may dissent in the future.

⁵⁰ With the same view, Esteves de Oliveira, Rodrigo. “Empresas em relacao de grupo e contratacao publica”, *Revista de Contratos Publicos* 2011 (2), p. 91.

⁵¹ Public Contracts Code 2008 Article 52.

⁵² Public Contracts Code 2008 Article 53.

⁵³ Public Contracts Code Article 65.

⁵⁴ Case C-57/01 *Makedoniko Metro v Elliniko Dimosio*, ECLI:EU:C:2003:47.

⁵⁵ Article 168(3) of the Public Contracts Code 2008.

of the procedure, after the contract has been awarded but before its conclusion. As such, if a main contractor or grouping wishes to rely on the technical capacity of a sub-contractor, as the information is only provided after the award,⁵⁶ technically there is nothing preventing a participant in another bid from becoming a sub-contractor at this stage. As for the actual delivery of the contract, the use of sub-contractors not disclosed in the tender is not explicitly forbidden.

On a vaguely related note, the issue of related undertakings as discussed in the *Assitur*⁵⁷ and *Michaniki*⁵⁸ cases, it has been argued in Portugal that it is possible for Member States to create their own exclusions as long as they are proportionate and comply with the requirements set by equal treatment and non-discrimination and competition principles. In consequence, related undertakings are to be excluded only when their participation will actually contradict one of these principles.⁵⁹

3. Procedures for evaluation and means of proof

There are in Portugal specific procedures for both exclusion and selection. As mentioned in the introduction above, the grounds for exclusion apply to all procedures and as such the process of exclusion is identical for all the procedures contained in the Public Contracts Code 2008. As candidates can only be selected in the restricted procedure, competitive dialogue, and negotiated procedure with prior notice, the procedural rules for candidate selection are only applicable to these procedures.

3.1 Procedure for exclusion

The exclusion process under the Public Contracts Code 2008 is set out in Articles 81 to 93 and

⁵⁶ Article 81(3) and (5) of the Public Contracts Code 2008.

⁵⁷ Case C-538/07 *Assitur Srl v Camera di Commercio, Industria, Artigianato e Agricoltura di Milano*, ECLI:EU:C:2009:317.

⁵⁸ Case C-213/07 *Michaniki AE v Ethniko Simvoulío Radiotileorasis Ipourgós Epikratias Elliniki Technodomiki (TEVAE)*, ECLI:EU:C:2008:731

⁵⁹ Esteves de Oliveira, Rodrigo. "Empresas em relação de grupo e contratação pública", *Revista de Contratos Públicos* 2011 (2), p. 103-109.

its rules are applicable to all public procurement procedures.⁶⁰ The rules contained in these articles constitute yet another major departure from Directive 2004/18/EC, as instead of all participants providing evidence at the start of the procedure, only those actually awarded the contract need to do so at the end. The approach taken by the Portuguese legislator is akin to the new “simplified style” open procedure contained in Article 56(2) Directive 2014/24/EU, whereby contracting authorities are allowed to check only the documentation of the successful bidder rather than that of all participants. The logic of the system adopted in Portugal is to reduce the transaction and opportunity costs of procurement, which is laudable and should be taken into account more often by law makers in other jurisdictions.⁶¹

i) Process

In every public procurement procedure, the successful tenderer has to provide a statement⁶² and documentary evidence guaranteeing its compliance with some of the requirements of Article 55,⁶³ namely not being convicted of a crime offending professional honour,⁶⁴ having fulfilled with all social security⁶⁵ and tax obligations,⁶⁶ and not taking part in a criminal organisation.⁶⁷

The actual documents the economic operator needs to provide depend on the type of contract. For public works contracts, economic operators will need to provide a certificate (“*alvara*”) from a Portuguese public body (INCI - Instituto da Construcção e do Imobiliário), which vouches for their ability to undertake public works.⁶⁸ The purpose of this approach is to reduce the workload for contracting authorities by effectively outsourcing the certification

⁶⁰ On this topic, Mario Esteves de Oliveira and Rodrigo Esteves de Oliveira, *Concursos e outros procedimentos de contratação pública*, Almedina, 2011, p. 834-843.

⁶¹ On this topic of transaction and opportunity costs, Telles, *The good, the bad and the ugly*, *Public Contracts Law Journal* (2013) 43 1, p. 3-27.

⁶² Public Contracts Code 2008 Article 81(1)(a). The form under which the statement needs to be presented is included as Annex II to the Code. If the same information were to be presented under a different format, it would constitute a non-compliance by the economic operator.

⁶³ Public Contracts Code 2008, Article 81(1)(b) and 83-A.

⁶⁴ Public Contracts Code 2008 Article 55(b).

⁶⁵ Public Contracts Code 2008 Article 55(d).

⁶⁶ Public Contracts Code 2008 Article 55(e).

⁶⁷ Public Contracts Code 2008 Article 55(i).

⁶⁸ Public Contracts Code 2008 Article 81(2).

work to a specialised public body. Foreign economic operators are also bound by a similar requirement: they are to present a declaration or statement from the same Portuguese public authority but not a “alvara” certificate. In any case, economic operators will always have to go obtain prior “authorisation” from that public authority after being awarded the contract and before concluding it.⁶⁹ The obvious question arising from this approach is the impact on foreign economic operators and the fact that this is effectively a non-tariff trade barrier which may be incompatible with TFEU principles by not offering economic operators an alternative, such as an equivalent certificate from the national register of the Member State where they are based.⁷⁰

The situation is different for supply and service contracts. For such contracts there is no Portuguese central entity or registry where a certificate or declaration has to be obtained. However, Portuguese law requires all economic suppliers to provide evidence of registration in official supplier lists that can provide contracting authorities with a similar degree of confidence that the economic operator meets the necessary experience or expertise requirements.⁷¹ The law makes reference to Annex IX B and C of Directive 2004/18/EC as potential sources of said certificates in other Member States.⁷² But entities such as the Companies Registrar in the UK or the *Registro Mercantil* in Spain do not necessarily contain that information. In fact, in England and Wales, companies incorporated under the current Companies Act 2006 are under no obligation of even having an object, so it is unlikely a certificate of incorporation would provide the information being requested by the Public Contracts Code 2008. Article 81(5)(b) Public Contracts Code 2008 provides a solution to the quandary: in case no such official document can be produced in another Member State, economic operators can simply provide an “honour statement”, self-declaring that they have the necessary capacity to fulfil the contract. As this provision is only applicable to goods and services contracts, one has to wonder why a similar solution was not provided for works contracts.

⁶⁹ Public Contracts Code 2008 Article 81(5). Part of the process can be done online, but the form needs to be printed and sent by email which seems odd in a country which moved the entirety of procurement online. The actual webpage is: <http://www.inci.pt/Portugues/EngVrs/Paginas/English.aspx>

⁷⁰ As per Annex IX A of Directive 2004/18/EC.

⁷¹ Public Contracts Code 2008, Article 81(4).

⁷² Public Contracts Code 2008, Article 81(5). The extent of this provision covers economic operators based in any Member State, EEA states or signatories to the World Trade Organisation’s Government Procurement Agreement (GPA). As for the latter category, the provision is only applicable in situations of reciprocity, ie, if the other signatory would provide access to EU economic operators on an identical contract opportunity.

Contracting authorities may set additional requirements for economic operators, such as legal requirements/certificates imposed by the underlying service or supply contract.⁷³ However, these do not constitute discretionary levels of capacity but more of a pass/fail assessment of compliance with said legal requirements. As with Article 81(5)(b), the Public Contracts Code 2008 provides an escape valve for foreign economic operators whose country may not have similar certification bodies or legal requirements.⁷⁴

If the successful bidder is a grouping of economic operators, for example a consortium, all tenderers in that bid need to provide the statement and documentary evidence required by Article 81(1) Public Contracts Code 2008.⁷⁵ The Code provides some flexibility in what concerns other documentary requirements, namely the certificates required by Article 81(2) in the case of public works or public works contracts or the requirements set forth in paragraphs (4), (6), (7) and (8) of that Article. For the latter, only the consortia members responsible for delivering the appropriate parts of the contract are subject to the obligation of providing required documentary evidence.

ii) Means of proof

Concerning the means of proof, Portuguese law is once more designed to make life easy for economic operators. As such, only the successful bidder will have to provide documentary evidence and even then only on very simple and straightforward terms.

After the award and before the contract is concluded, the successful bidder is to provide the necessary documents proving its compliance with the exclusion criteria set on Article 55 Public Contracts Code. The general rule, according to Article 83(1)(2), is that copies or reproductions of the documents can either be submitted to the electronic platform where the procedure took place, or the economic operator can point the contracting authority to where those can be found “on the Internet.”⁷⁶ As with qualitative selection for the restricted procedure, the same caveats apply here: what is meant by “on the Internet” is not clear. It is

⁷³ Public Contracts Code 2008 Article 81(6) and (8).

⁷⁴ Public Contracts Code 2008 Article 81(7). In terms of country and economic operator coverage, this provision is identical to Article 81(5).

⁷⁵ Public Contracts Code 2008 Article 84(1).

⁷⁶ Public Contracts Code, Article 83(3).

possible for economic operators to give authorisation to the contracting authority to directly check its situation online . For example, the supplier may allow the contracting authority to have access to its tax or social security records.⁷⁷ In that case, no documents need to be provided. There were recently reports in the national press of high ranking social security civil servants being arrested on corruption charges for allegedly manipulating data in the Social Security databases, so that any reports would wrongly output a certificate of compliance. At the time of writing a final judicial decision is yet to be reached, but this indicates an unintended consequence arising from the fact that the exclusion grounds are now checked at the end of the procedure and only for the successful tenderer. It gives the latter a very strong incentive to manipulate its records (in the alleged case, via corruption) as it has already been awarded the contract and these certificates are the only obstacle standing between them and the conclusion of the contract.

Although the rule is for the successful tenderer to provide copies of the relevant documents, an exception is in place for contracting authorities to request the originals in case of reasonable doubt about the authenticity of the copies provided. This is not automatic, however, as the contracting authority will need to justify the reasons for requiring the originals.⁷⁸

The definition of what constitutes “documentary evidence” depends on the requirement it refers to. For example, regarding bankruptcy, conviction of serious misconduct or corruption as requested in Article 55(a)(b)(i) Public Contracts Code 2008, a simple certificate from the criminal registry is required.⁷⁹ A similar requirement for a certificate from a public body applies for showing compliance with tax and social security contributions requested by Article 55(d)(e).⁸⁰ Once more the Portuguese law offers economic operators a solution in case they cannot source the needed certificate. Both can be replaced with a “honour statement” signed by the economic operator, a solution which may be of particular benefit for economic

⁷⁷ Public Contracts Code, Article 83(4). For social security, this authorisation is done via the “Portal da Empresa” (Companies Portal) here: <http://www.portaldaempresa.pt/CVE/services/balcaodoempreendedor/Licenca.aspx?CodLicenca=1730&Parametro=estabelecimento+-+mera+comunicaçã+prévia>

⁷⁸ Public Contracts Code, Article 83(5).

⁷⁹ Public Contracts Code Article 83-A(1).

⁸⁰ Public Contracts Code, Article 83-A(2).

operators based in other Member States. For the remaining requirements set forth by Article 55,⁸¹ the general means of proof rules mentioned above apply.

If an economic operator does not provide the requested documentary evidence, the contracting authority is under the obligation of annulling the contract award (after providing an additional deadline for compliance). The contract is then to be awarded to the next best tender,⁸² which will be subject to the same documentary evidence requirements as the first. The solution of going immediately to the next best tender without an explicit possibility of aborting the procedure⁸³ is debatable. Doing so fosters non-compliance with the obligation of maintaining tenders for 66 working days⁸⁴ in the case of collusion as it provides economic operators with a way to get out of a contract without immediate consequences.⁸⁵ It can be counter-argued however that the Portuguese law includes some serious consequences for economic operators that can affect their ability to take part in future public procurement procedures. The price to be paid by the economic operator for not providing the required information, or not backing up the self-declaration with documentary evidence which confirms it, is the debarment under Article 460 Public Contracts Code 2008. Additionally, for public works and public works concession contracts these facts are to be reported to the certifying body mentioned above. This constitutes an additional layer of protection for the system as it increases the likelihood of non compliant economic operators being debarred from future public procurement procedures as they will not be able to secure the required certificate.⁸⁶

In the case of fake documents or false statements, the contracting authority will inform the Public Prosecutors Office of the fact. False statements constitute a criminal offence in Portugal and carry a jail sentence of up to one year.⁸⁷

⁸¹ Please see previous section for detailed discussion.

⁸² Public Contracts Code Article 86(1)-(4).

⁸³ Article 76(1) of the Public Contracts Code 2008 establishes a duty to award for the contracting authority which can only be set aside only under the specific circumstances contained in Article 79(1). In consequence, a provision in the tender documentation that the contracting authority could abort the procedure at any time would be illegal and could give rise to damages under pre-contractual liability rules.

⁸⁴ Public Contracts Code, Article 65.

⁸⁵ The exception being in the case of public works or public works concessions, as this will be reported to the certifying public body mentioned above in section 3.1 and has an impact on the ability of said economic operator being able to obtain a certificate in the future, Public Contracts Code, Article 86(5).

⁸⁶ Public Contracts Code 2008, Article 86(5).

⁸⁷ Portuguese Penal Code, Article 348-A. This offense was introduced in 2013 by means of Law no 60/2013, as

3.2 Qualitative selection procedure(s)

The Portuguese Public Contracts Code offers contracting authorities two different ways to undertake the qualitative selection of economic operators in public procurement procedures: a complex system and simple one.⁸⁸ In the earlier case, a detailed analysis of each economic operator is undertaken, allowing for their ranking from best to worst, whereas in the second only a pass/fail analysis is carried out. In consequence, it is only possible to limit the number of participants in a procedure when using the earlier system. As mentioned in the introduction, it is only possible to undertake qualitative selection via a selection stage in the restricted procedure, competitive dialogue,⁸⁹ or negotiated procedure with prior notice. It is entirely possible in Portugal to run any of these procedures without any limitation on numbers of candidates, in case the simple selection system is used. A restricted procedure with a simple selection stage (where candidate numbers cannot be restricted) is not functionally different to a traditional two-stage open procedure in other Member States.⁹⁰

The contracting authority can choose freely between the complex and simple systems of qualitative selection. The choice between the one or the other is dictated by the objective the contracting authority wants to achieve. If it wants to rank the economic operator from best to worst, then it needs to use the complex system. If it only wants to assess economic operators on a pass/fail basis, then the simple model is the appropriate one. It can be said the complex model constitutes what one would expect a selection stage to be, particularly for procedures where the number of candidates making it to the next stage can be limited. The simple system with its pass/fail analysis is more of a qualification stage instead and in fact, the Portuguese law only considers the complex selection as a true selection.⁹¹

previously only false statements before the court would constitute a crime.

⁸⁸ With a detailed analysis, Mario Esteves de Oliveira and Rodrigo Esteves de Oliveira, *Concursos e outros procedimentos de contratacao publica*, Almedina, 2011, p. 830-833 and 846-851.

⁸⁹ On selection in the competitive dialogue procedure, Pedro Telles, *Competitive Dialogue in Portugal*, *Public Procurement Law Review*, (2010) 1 p.18-22.

⁹⁰ Although there are no numbers disclosing what selection system is being used under the restricted procedure, this procedure is less commonly used in Portugal than the open procedure (3830 vs 4749 procedures in 2013) and involving much smaller values (€269 million vs €1.568 billion in 2013), INCI, (2015) "Contratacao Publica em Portugal 2013", p.28.

⁹¹ Public Contracts Code 2008, Article 179(1).

The rules for both selection systems can be found between Articles 167 and 188 Public Contracts Code 2008. In addition to these articles, some others are relevant elsewhere in the law. The selection stage is expected to last a maximum of 44 days⁹² upon receipt of applications by economic operators, but there is no immediate consequence for the contracting authority if the deadline is not met.

Both models share a number of rules and steps to be undertaken and diverge mostly in the objectives of the selection stage as mentioned above. They also diverge in the detail of analysis the submissions are subjected to.

3.2.1 Common elements to both selection systems

The selection stage for either qualitative selection system starts with the remittal of the documentation by the economic operator in accordance with Article 168 Public Contracts Code 2008.⁹³ This submission is to be made in Portuguese,⁹⁴ unless the contracting authority allowed submissions of specific documents in a foreign language.⁹⁵ It shall include the documents required for the selection as well as the statement for the purposes of exclusion, in the format requested by Annex V to the Public Contracts Code 2008.

The default rule for submitting selection documents is that these are to be uploaded by the economic operator to the online platform adopted by the contracting authority. As a concession to the need for flexibility, if the document to be submitted is available “on the Internet,”⁹⁶ the economic operator may point the contracting authority towards that site instead. It is unclear what “on the Internet” means as, for example, most if not all of Portuguese public services are online and well integrated with one another but certificates are still subject to a fee. Does this count as being “on the Internet” as there is no cost-related qualifier on the original provision? Furthermore, what if the required document is on a private database available online, again subject to a fee? Even if the answer is affirmative, the fact is

⁹² Public Contracts Code 2008 Article 187 (1).

⁹³ Public Contracts Code 2008 Article 168 (1).

⁹⁴ Public Contracts Code 2008 Article 169 (1), although according to paragraph three, in specific circumstances related with complexity the contracting authority may authorise the submission of documents drafted in foreign language.

⁹⁵ Public Contracts Code 2008 Article 169(3) and 164 (1)(j)

⁹⁶ Public Contracts Code Article 170(4).

that this option pushes the transaction cost of finding this information to the contracting authority. It would have been preferable to include some sort of qualifier in this provision, such as “free and unrestricted access on the Internet”.

Upon expiration of the deadline for economic operators to submit their request for participation, the jury⁹⁷ publishes a list of participants on the electronic platform used.⁹⁸ It is questionable if this solution is the most adequate as it facilitates collusion between economic operators or the enforcement of existing cartel agreements.⁹⁹ The names of participating economic operators are not disclosed to the general public, or any other entity not taking part in the procedure¹⁰⁰ as the information will be made available on a password protected website.

The actual selection process is done by the jury via the application of the selection criteria that were adopted, once the requests for participation are in. After undertaking the selection, the jury issues a preliminary report with its proposed selection decision.¹⁰¹ In this report the jury also analyses the grounds for exclusion analysed in section 2.1 above. Participating economic operators are then given a minimum of 5 days to either accept the decision or contest it before the jury. It is important to note that economic operators can oppose at this moment a selection decision pertaining to another candidate. In case the proposed decision is changed a new preliminary report is issued, together with a new deadline for economic operators to express their views.¹⁰² Only after all comments have been dealt with is the final report issued by the jury. The final selection decision is undertaken by the contracting authority¹⁰³ which is free to accept or refuse the suggestions of the jury. Participating economic operators are notified of the final decision¹⁰⁴ and invited to participate

⁹⁷ Under Portuguese law the jury is the body composed by at least three members and tasked with *running* public procurement procedures, Public Contracts Code Articles 177(1) and 67. This body runs the procedure on behalf of the contracting authority.

⁹⁸ Public Contracts Code Article 177(1).

⁹⁹ It may even foster tacit collusion, for example. On this topic, Carmen Estevan de Quesada, "Competition and transparency in public procurement markets" P.P.L.R. 2014, 5, 229-244.

¹⁰⁰ Public Contracts Code Article 177(2).

¹⁰¹ Public Contracts Code Article 184(1).

¹⁰² Public Contracts Article 186(2).

¹⁰³ Public Contracts Code 2008, Article 186(4), although, they may be the same people but in different roles, Public Contracts Code Article 67(2).

¹⁰⁴ Public Contracts Code 2008, Article 188.

in the next stage of the procedure.

3.2.2 Complex system The complex selection method discussed above aims to evaluate in detail the technical and financial capacity of economic operators.¹⁰⁵ The evaluation should be done with recourse to an evaluation model similar to the one that needs to be adopted for the tendering stage¹⁰⁶ and the financial components of which were described above on section 2.1. The contracting authority has to disclose the evaluation model at the start of the procedure, including criteria and sub criteria additional to the mathematical formula. If it wishes to classify economic operators in accordance with different levels, information about these classifications needs to be disclosed as well, allowing economic operators to get an idea of their likely final score.¹⁰⁷

The adoption of this complex system allows contracting authorities to limit the number of participants in the award stage and ranking them from best to worst. Under this system, the contracting authority establishes the minimum set of requirements economic operators need to comply with and the number of candidates it will take forward in the procedure. In the case of a restricted procedure, the minimum number is five¹⁰⁸ and for the competitive dialogue it would be three.¹⁰⁹ The contracting authority is bound to select the economic operators best ranked up to (at least) the minimum number it set forth at the beginning of the procedure. In a scenario of a restricted procedure where the contracting authority declared that it would restrict the tendering stage to five candidates and whereby 20 candidates are good enough to qualify (ie, their technical and financial capacity meets the minimum requirements), then the best five of the 20 will have to be taken forward.¹¹⁰ There is no discretion whatsoever for the contracting authority to choose from the pool of qualified candidates which is not to be treated as a shortlist. In consequence it is possible to conclude that shortlisting in Portugal is restricted

¹⁰⁵ Public Contracts Code 2008, Article 181(1).

¹⁰⁶ Public Contracts Code 2008, Articles 181(1)(2) and 139.

¹⁰⁷ Public Contracts Code 2008, Article 165(1)(m)(i).

¹⁰⁸ Public Contracts Code 2008, Article 164(1)(m)(ii).

¹⁰⁹ Public Contracts Code 2008, Article 206(2). On the peculiarities of selecting competitive dialogue candidates in Portugal, Telles, (2012), Competitive dialogue in Portugal, in Arrowsmith and Treumer (eds), Competitive Dialogue in EU Procurement, p. 384-386.

¹¹⁰ Public Contracts Code 2008, Article 181(3).

to the best X candidates which have met the minimum requirements.

Once submissions are analysed via the application of the mathematical formula and further criteria, the contracting authority will proceed to notify each economic operator of the decision on the preliminary report described in section 3.2.1.

Although the complex selection model implies a ranking of economic operators, Portuguese law demands equal treatment for all economic operators during the award stage. It is unclear however, if a stacked ranking will not generate a bias in favour of the “best” economic operator during the award stage, or at least lead to cognitive heuristics issues.¹¹¹

3.2.3 Simple system The simple selection method is the second method contracting authorities can use in Portugal. Whereas the complex model allows the contracting authority to rank candidates, the simple model operates on a pass/no-pass binary approach.¹¹² Either economic operators meet the minimum technical and financial capacity requirements or they do not. The first proceed to the award stage, whereas the second do not. In the example of the restricted procedure with 20 qualified economic operators described in section 3.2.2 above, if the simple selection system had been adopted instead then all 20 would proceed to the tendering stage.

Due to its binary nature, the simple selection model is to be used in situations in which the contracting authority for whatever reason does not wish to select a finite number of economic operators. In a country like Portugal, where access to judicial review of procurement decisions is easy and relatively cheap, there is a built in incentive for the contracting authority to avoid discretionary selection decisions that would trigger a (lengthy) judicial review.¹¹³ This was observed by the author when researching the use of competitive dialogue in Portugal, which, albeit limited, indicated a clear preference for the simple selection system precisely to

¹¹¹ On this topic of heuristics in public procurement, Mark Crowder (2015) Public procurement: the role of cognitive heuristics, *Public Money & Management*, 35:2, 127-134, DOI: 10.1080/09540962.2015.1007707, particularly past behaviour heuristic ¹¹¹Batenburg, R. S., Raub, W. and Snijders, C. (2003), Contacts and contracts: dyadic embeddedness and the contractual behavior of firms. *Research in the Sociology of Organizations*, 20, pp. 135–188 and Garb, H. N. (1996), The representativeness and past- behavior heuristics in clinical judgment. *Professional Psychology: Research and Practice*, 27, 3, pp. 272–277.

¹¹² Public Contracts Code, Article 179.

¹¹³ Something similar was observed with the competitive dialogue in Spain, Telles, (2012) Competitive Dialogue in Spain, in Arrowsmith and Treumer (eds), *Competitive Dialogue in EU Procurement*, p.410.

reduce the prospects of litigation during the earlier part of the procedure.¹¹⁴

4. Reliance on third party capacity

The Public Contracts Code 2008 allows economic operators to rely on the capacity of third parties without prescribing detailed requirements. As such, in accordance with Article 168 and Article 81(3), if an economic operator wishes to rely on the capacity of a third party, all it needs to provide is an “honour statement” from the third party with a clear indication that they will undertake the tasks allocated to them as part of the contract, particularly in the case of sub-contractors. What is not clear is what should happen in case the third party will not be involved in the contract directly and is offering its capacity only as a means for the economic operator to be able to comply with the requirements. The textbook example here would be a group relationship where the subsidiary relies on the parent company’s finances to comply with the financial requirements. Under Portuguese law this does not appear to be possible since the Public Contracts Code 2008 does not foresee the possibility of economic operators to use the financial capacity of third parties.¹¹⁵

5. Performance bonds

Performance bonds are a traditional feature in Portuguese public procurement and they are included in the Public Contracts Code as well in Articles 88 to 91. They represent the perennial fear that economic operators are not to be trusted or that any contract carries risks for the contracting authority. It is debatable that this measure can stand a proportionality test in low risk contracts and it clearly disadvantages smaller suppliers by complicating their cash-flow. In addition, all costs incurred are to be borne by the economic operator,¹¹⁶ effectively meaning that they will have to pass the cost either to contracting authorities or other clients they may have.

¹¹⁴ Telles, (2012) Competitive Dialogue in Portugal, in Arrowsmith and Treumer (eds), Competitive Dialogue in EU Procurement, p. 384-386.

¹¹⁵ Melo Fernandes, O aproveitamento da capacidade financeira de terceiros para efeitos de participacao num concurso, Revista de Contratos Publicos 7, 2013, p. 102.

¹¹⁶ Public Contracts Code 2008, Article 88 and 90(9).

To partake in any public procurement procedure for a contract valued at €200,000 or more,¹¹⁷ economic operators need to pay a performance bond of up to 5% of the contract value as a guarantee of contract performance.¹¹⁸ For smaller value contracts the contracting authority can instead withhold 10% of all payments during contract performance, something that again disadvantages smaller suppliers by creating cash-flow issues, particularly in a country where the public sector is known for taking too long to pay.

This performance bond is to be paid by the successful tenderer, within 10 days of being notified of the contract award and before the contract is signed.¹¹⁹ If the economic operator does not pay the bond, the contract award will be declared null and void, with the contracting authority under the obligation of awarding it to the next best tender.¹²⁰ The same collusion caveats and remarks made in section 6 above about qualification information are valid here as well.

The bond can be paid in different ways such as a cash deposit,¹²¹ Portuguese State bonds, bank guarantee or insurance.¹²² Irrespective of the form it takes, the bond usually means effectively setting aside the required funds, as banks and insurance companies will not provide their securities without collateral, usually cash.

Conclusion

In this chapter the author have explored in detail how Portugal transposed Directives 2004/18/EC and 2004/17/EC in relation to qualitative selection and exclusion of economic operators. It was explained how policy decisions taken by the Portuguese lawmaker have made the national law very different from both Directives in what relates to qualitative selection and exclusion of economic operators.

One of the most interesting findings of this chapter is the understanding that the

¹¹⁷ Public Contracts Code 2008, Article 88.

¹¹⁸ Public Contracts Code 2008, Article 89(1). The value rises to 10% in case of an abnormally low price offer.

¹¹⁹ Public Contracts Code 2008, Article 90(1).

¹²⁰ Public Contracts Code 2008, Article 91(1).

¹²¹ Public Contracts Code 2008, Article 90(2)(3), the deposit needs to be made on a Portuguese bank account held in Portugal on the behalf of the contracting authority.

¹²² Public Contracts Code 2008, Article 90(2).

Portuguese legislator anticipated some of the changes that were subsequently introduced by Directive 2014/24/EU. These include changes such as dropping the traditional selection stage from the open procedure or trying to reduce the transaction and opportunity costs economic operators face when taking part in public procurement.

As for the transposition of Directive 2014/24/EU into Portugal, there is no information at the time of writing (January 2016) if the deadline transposition of April 2016 will be complied with or not. General elections were held in October 2015 and the new Government from the former opposition party only took office in December.