

PORTUGAL

KEY FACTS AND FIGURES

Key Facts and Figures in Portugal						
Overview	Total procurement 17,290,000,000€		Procurement % GDP 10%		2013 GDP 169,394,900,000€	Contracting authorities 4,467
Procedures applied	Open 48%	Restricted 3%	Negotiated procedure with call 1% no call 0%		Competitive dialogue 0%	Direct award 5% Other 44%
Share of contract notices by buyer	National 7%		Regional/local 12%		Body governed by public law 68%	Other 13%
Contract type	Services 28%		Works 6%		Supplies 66%	Framework agreement 6%
Ex ante conditionality criteria as of 2014	EU rules Fully met		Transparency Fully met		Training Fully met	Admin. capacity Fully met
E-procurement adoption	E-notification Mandatory		E-access Mandatory		E-submission Mandatory	Uptake rate 41%
Perceived corruption	Corruption widespread in society			Corruption widespread in procurement		
	Businesses 90%		Individuals 90%		At national level 78%	At local/regional level 83%
TED indicators	Value of tenders 2,720,222,950€		Of total procurement 16%		# contract notices 1,599	# contract awards 2,026
Other indicators	Received single bid 15%		# days for decision 94.1		Price only criteria 56%	MEAT criteria 44%
	Won by foreign firms 1%		Related to EU funds 27%		Joint purchase 2%	Central purchasing Yes, eSPap

For more detailed descriptions and links to sources for the above data, please see Section 4 of the report

Summary of public procurement system

The Portuguese government is structured in a decentralised system with its central government, two autonomous regions of Azores and Madeira, and municipalities and parishes at the local level. Azores and Madeira have their own political statute and enjoy legislative autonomy in some government areas, including the ability to adapt the national legislation according to their own specificitiesⁱ. This enabled these two regions for example to raise the threshold level for direct awards and change the regime of guarantees that is requested by contractors.

Starting in 2007, Portugal began a substantial shift of the procurement system from one in which responsibilities were widely dispersed, to a centralised system under the coordination of the Institute of Public Markets, Real Estate and Construction (*InCI*) and the Entity of Shared Services of Public Administration (*eSPap*)ⁱⁱ. It modernised and professionalised procurement in Portugal leading to transparency best practices with substantial cost savings within public administration.

A key element of the reforms has been the embracing of e-procurement, implemented via private platforms. Portugal became an EU leader by making e-procurement mandatory in 2009, and today the e-procurement environment system is well-established, covers the entire procurement value chain, and is often cited as a source of best practices for other MS.

DESCRIPTION OF FEATURES

Legal features of public procurement system

The current Portuguese procurement system was largely shaped by the adoption of the Public Procurement Code (PPC) in 2008, which transposed EU Directives 2004/17/CE and 2004/18/CE, and initiated a significant overhaul of the previously legal system.

The PPC modernised, centralised and professionalised the system by creating a central procurement agency, the *InCI*, and a purchasing body, the predecessor to the *eSPap*, and mandating electronic procedures for the central administration. Local authorities retain autonomy for their own procurement, but do have the ability to purchase via *eSPap*'s several framework contracts.

The PPC has subsequently been amended several times, the most recent being via Decree-law 149/2012, which specifies the implementation of Portugal's commitments on public procurement with respect to the Economic Adjustment Programme for Portugal. The autonomous regions of Madeira and Azores have some freedom to adapt the PPC according to their particularities as autonomous regions. The EU Directives of 2014 have not yet been transposed into Portuguese law.

Institutional system

The main policy body in the Portuguese procurement system is the Ministry of the Economy, which is in charge of development and definition of procurement policy. In this, it is supported by the *InCI*. Together with the Ministry of Finance, another major actor in the procurement system, their responsibilities cover the communication of information to civil society regarding procurement and reporting to the EU the procurement statistics. Both Ministries are responsible for compliance with statistical reporting of the procurement system.

The central purchasing body is *eSPap*, which manages a number of large framework contracts through which central government agencies are required to purchase standardised items such as motor vehicles and paper goods. *eSPap* recently assumed the missions and duties of the previous National Agency of Public Procurement (NAPP), among others. The *eSPap* provides a number of shared services to different government bodies of which procurement is just one. Services are available to any public body that decides to join the National System of Public Procurement (NSPP), including regional and municipal contracting authorities.

The Portuguese Competition Authority (PCA) has the mission to ensure compliance with the competition rules in Portugal, and in particular, to supervise and ensure that the public procedures do not violate these rules. PCA is a partner institution of the European Network of Competition Regulators.

Another external oversight body is the Court of Auditorsⁱⁱⁱ, which is a fully independent judicial body that has jurisdiction over all Portuguese administration institutions and its territory, and can apply sanctions for breaches^{iv}. Internal controls are performed by the Inspectors Generals of the various Ministries.

The Agency for Development and Cohesion (AD&C), which operates under the Ministry for Regional Development, also provides a significant supportive function. The Agency coordinates the regional development policy and ensures, at the technical level, the general coordination of the ESI Funds for the 2014-2020 programming period.

Key issues that have a bearing on administrative capacity

Human Resources: In 2013, *eSPap* counted 315 employees, of which 35% are higher technicians, 28% information scientists, and 25% technical assistants. In 2013, nearly 65% of *eSPap* employees held an undergraduate degree, with another 5% holding a Master's degree. As of 2011, *InCI* employed 127 people, of which roughly half are high skill technical employees. *InCI* staff attended in total approximately 7,000 hours of training both provided internally and externally^v. In both agencies, procurement represents less than half of their responsibilities.

In general, improvements in administrative capacity are hindered by a five year government-wide hiring freeze, which prevents the recruitment of any new experts,

and forces HR efforts to focus on luring the best and brightest away from other agencies with non-monetary perks.

Structures: As the main institution responsible for the professional development of civil servants, the National Institute of Administration organises training sessions on public procurement. The AD&C, as supportive body for ESI Fund implementation, has a dedicated team for public procurement, which, among other things, provides dissemination and guidance on procurement.

Training: There are several training seminars and e-learning courses that are organised in order to develop capacity. The eSPap, organises regular trainings for its own staff, including 67 training events in 2013, of which 28 were external events, for a total of 7,726 hours^{vi}.

There are also several workshops, conferences, and trainings on public procurement-related matters offered by eSPap and advertised on the e-procurement portal¹, which promotes various informational events and awareness raising initiatives for the contracting authorities.

Moreover, there are organised trainings for staff working on the implementation of Structural and Cohesion Funds, including Coordinating, Managing, Audit and Certification Authorities. There are also networking and training sessions for the implementation of green public procurement regarding energy-related matters, organised for both procurers and public procurement training providers^{vii}.

Systems/Tools: The auditing authorities have specialised tools and instruments designed to support and analyse public tendering procedures^{viii}. Furthermore, the national authorities in charge of the ESF funds provide an audit tool on the dedicated ESF website. That website also contains a tool for self-assessments which can be used for trainings of public and private entities^{viii}.

In Madeira the MAs regularly publish technical guidelines on public procurement procedures^{ix}. These guidelines and information are made available on the websites of the national authorities in charge of the coordination of Structural Funds. For example, the website dedicated to the coordination of the ESF contains a FAQ's section specifically dedicated to public procurement related matters^{ix}.

Furthermore, the AD&C is currently developing its own risk assessment tool, whose function is to assemble and track errors and irregularities from the 2007-2013 and 2014-2020 programming periods, in order to identify red flags for *ex-ante* controls. The necessary data for this tool is collected from Managing Authorities, Administrative Authorities and administrative courts. The AD&C also developed a procurement manual for supplies and services.

E-procurement

E-procurement in Portugal is highly developed and boasts a high level of adoption due to a concerted effort since 2008 by procurement stakeholders to develop the e-procurement infrastructure. The 2008 reform law requires all procurement to be carried out using electronic means and in fact, the vast majority of contracts' pre-award cycle is carried out online.

E-procurement in Portugal diverges from EU peers in that the system rests exclusively on privately run platforms, which compete against each other to offer e-procurement services to contracting authorities. These private operators are authorised by the government and linked to the central BASE portal, which acts as single point of contact for economic operators.

¹ <http://www.base.gov.pt/>

The central BASE portal has the role of centralising and recording information about the procurement procedures carried out via different e-platforms and performance of contracts. This central portal allows economic operators can search tender notifications in one location, and be linked through to the individual platforms to access tender documents and submit a bid. The information that is collected and provided to candidates and bidders by BASE consists of the calls for tenders, application, receipt and evaluation of tenders, as well as performance of contracts. Documentation is published on the entire tendering procedure, which aims to make this information available to all interested parties.

There are seven private portals that are connected to the BASE platform. *Vortal* processed 28% of the electronic contracts in 2013, *Construlink* 27%, *Saphety Level-Trusted Services* 21%, *ANO Inforlatcs System & Services* 16%, *Acin icloud solutions* 6%), *Infosistema sistemas de informação* 1%, and *central E-informação e comércio Electronico S.A.* 1%^x.

Corruption

Despite substantial efforts to improve transparency and counter corruption, including the creation of an independent Council for Prevention of Corruption (CPC) in 2008, Portuguese authorities continue to struggle with successfully preventing and prosecuting corruption cases. For example, although conflict of interest has been an area of substantial concern, oversight bodies currently lack an automated system for checking the names of award committee members against potential bidders. The CPC called for a better disclosure system back in 2012, but so far this has not been implemented^{xi}.

Another issue in combatting conflict of interest is the so-called 'revolving door' of individuals moving back and forth between the public and private sectors, and in particular between contracting awarding entities in government and the firms that bid for those contracts. Currently, the Portuguese government does not track or monitor such movements, allowing the practice to continue unchecked^{xii}.

The Portuguese procurement system is characterised by a high degree of transparency, which can contribute effectively to reducing opportunities for corruption. Specifically, a number of high profile corruption cases have increased awareness among contracting authorities that their documentation is both available to the public and being monitored. The resulting self-policing has led to a decline in overall errors in tender documents.

However, although the information is quite comprehensive, due to a lack of interoperability, oversight bodies such as the PCA do not have direct access to the underlying data. As such, searches must be done on a case-by-case basis, preventing automated searches for red flag behaviour, such as multiple bids of the same price.

Portugal also makes high use of direct award, the thresholds for which are well above the EU average. Here as well, the Portuguese system relies on transparency to mitigate the risk of corruption. Direct award contracts are subject to the same advance notification and award publication requirements as regular tenders. Furthermore, following a direct award of up to EUR 75,000, a contracting authority cannot make another award to the same bidder during the following two calendar years.

Europe 2020 Agenda

As regards green public procurement, the Portuguese public authorities have gradually expanded the incorporation of environmental requirements into award criteria and technical specifications. These environmental aspects include, for example, energy efficiency and CO2 emissions levels, use of recycled content and reduced packaging,

as well as waste management and fuel consumption. If an offer fulfils more than the minimum requirements, then up to 25% of the total score can be awarded in extra points. The two institutions in charge of the GPP in Portugal are the Ministry of Environment and the *InCI*^{xiii}.

In addition to this, the GPP plan is being supported by the National Laboratory of Energy and Geology in the form of a partnership. Its role is to support the capacities and raise awareness among public procurers with regards to sustainable public procurement (SPP), with the specific objective of achieving low carbon procurement processes^{xiv}.

Irregularities and findings of national Audit Authorities

In order to ensure compliance with procurement rules and regulations, the PPC mandates regular controls by the Court of Auditors, whose reviews indicate a number of recurring irregularities in procurement. Those cited in the 2015 annual report include truncated notice periods, failure to clearly define award criteria or evaluation models in tender specifications, unjustified use of direct award procedures, contracting between municipalities and their local businesses without establishing market prices, and signing of back dated contracts.

The Portuguese municipalities in particular suffer from recurrent irregularities in procurement procedures. In 2012, EU audits identified serious issues in the system, resulting in payment suspensions^{xv}.

The Inspectorate General of Finance (IGF) acts as the Audit Authority for ERDF and ESF funds. Their audits highlight two issues of particular concern. The first is conflict of interest. Although they have assembled a database of publically available information on companies, board members, and major stock holders, it must be searched on a case-by-case basis to detect potential issues, while declarations of honour are not currently mandatory for ESI funded projects.

The second issue of concern is the non-application of procurement rules by some non-public entities. Non-profits and associations that receive more than 50% of their annual revenue from public sources, such as volunteer fire brigades and some charities, are subject to the same procurement rules as other contracting authorities. Many, however, are ignorant of this fact, particularly those whose revenue, and thus applicability of procurement law, fluctuates from year to year. Although these organisations represent a small share of total procurement by value, their absolute number is substantial, and failure to apply the correct procedures is an irregularity.

Outlook

Like many MS, Portugal will be using the transposition of the 2014 procurement Directives as an opportunity to enact a broader set of amendments to national procurement law. Perhaps the most ambitious element of the planned reforms is a second re-imagining of the e-procurement environment.

One element of the reform is the adoption of a so-called 'broker model'. Under the current rules, the contracting authority chooses the platform they want to host their tenders, and tenderers must comply, often forcing them to create accounts and profiles for several services to be able to compete for contracts. Under the new system, both contracting authorities and bidders will be able to submit their documentation to the platform of their choice with the BASE portal acting as a go-between, or broker, to connect them.

Also, the rules of the private platform system state that platforms must be free of charge for economic operators, deriving their income exclusively from contracting authorities. Despite the ban, platform operators have gradually introduced creative

new ways to extract income from tenders. Because the only criteria for operating a platform is the security certification, enforcement is difficult. As such, the new rules are expected to introduce new certification criteria that will allow procurement authorities to sanction platforms for such violations, including by decertifying them.

In addition, *eSPap* is planning a substantial increase in their central purchasing activities. On the one hand, they would like to expand their current set of framework contracts to include new products, such as power. On the other hand, they would like to do more business with regional and municipal contracting authorities, for whom purchasing through *eSPap* is voluntary.

ANALYSIS

Strengths

Portugal's embrace of e-procurement and the reforms that put it into place are the biggest asset to the national system. Since implementation in 2008, the new system has had a host of positive impacts, including: reduced administrative burden and processing times; fewer irregularities; improved data collection, thereby strengthening both oversight and data-driven policy making; increased transparency and civil society involvement; strengthened competition; and substantial budgetary savings to the public administration and to taxpayers.

The success of the reform derives from both the strong public support built via the deliberative and inclusive process used to create it, and to the willingness of policymakers to adapt and amend it to address its weaknesses and failures.

In terms of the related reforms, policymakers and economic operators are particularly proud of having restricted the need to submit habilitation documents to only the winner of a given tender, replacing it with a simple declaration of honour. This one change substantially reduced the cost of submitting a bid, with essentially no downside for the public administration.

Weaknesses

Despite their substantial progress in recent years, Portugal's procurement system continues to struggle with a number of implementation issues. First and foremost among these issues is unsatisfactory oversight and enforcement. Despite the enactment of new, stiffer penalties for anti-competitive or abusive practices as part of the 2008 reform, the use of such sanctions has been modest, and in some cases, they have never been applied at all.

In part, the lack of enforcement can be attributed to difficulties in monitoring processes. For example, despite the massive amounts of real-time, machine readable data being generated by the electronic procurement system, systematic monitoring is limited by a lack of technical interoperability and the presence of administrative barriers. This substantially limits the ability of oversight bodies like the IGF and PCA to identify behaviour red flags in data currently being collected.

As a result, abuses such as bid rigging and conflict of interest, and irregularities such as unjustified add works, are persistent problems.

Another weakness lies in the fact that the legal challenges create substantial delays in procedures, particularly on major projects. It is commonly believed that many of these challenges are filed as a means for economic operators to harm their competitors, but at substantial cost to the public administration and to taxpayers.

Finally, Portugal makes quite extensive use of direct award for public contracts based on their far above average threshold for such procedures. Although there are

meaningful transparency and anti-favouritism policies in place to reduce the threat of corruption, the practice deprives contracting authorities of the benefits of public market competition.

Recommendations

- **Improve interoperability:** Portugal's shift to an electronic procurement system has provided it with a wealth of data, but many official agencies (the AA IGF, Competition Authority, even MAs) do not have access to it.
 - Develop technical interoperability to allow different bodies direct access to notices, contracts, bids, and performance data.
 - Improve legal interoperability by working with the Commission on Access to Official Documents to facilitate authorization while respecting confidentiality.
- **eSPap:** High voluntary use of eSPap framework agreements by non-central administrations is a good indicator of value, but mandatory use among central government agencies blocks valuable cost saving opportunities, and reduces price pressures on bidders. Also, the massive scale of framework agreements restricts competition to larger bidders and may result in vendor lock.
 - Allow limited ability of central government contracting authorities to opt out of framework agreements with justification.
 - Shorter framework agreement terms will reduce vendor lock.
- **Training:** Overall training is good, but problems persist, particularly in vaguely drafted technical specifications and evaluation methods.
 - Targeted trainings on writing technical specifications.
- **Corruption:** Corruption is commonly perceived to be a problem by authorities and the general public, but the track record of enforcement and prosecutions appears insufficient.
 - Increase prosecutions of corruption-related offences linked with public procurement; this may require strengthening the capacities of the anti-corruption prosecution authorities to effectively pursue such cases.
 - Better implement the verification of declarations of absence of conflict and enforce dissuasive sanctions for breaches.
 - Connect the Competition Authority to BASE data on bids and contracts to allow for improved targeted searches of corruption red flags.
 - Increase incentives to report suspected corrupt practices by implementing mandatory reporting of corruption for public employees, possibly extending the reporting obligations to the private sector and ensure effective protection of whistle blowers.
 - Enhance and promote channels for whistleblowers to anonymously and confidentially report suspected corrupt practices.
- **Appeals:** The appeals process is slow, expensive, and often abused for anti-competitive reasons.
 - Digitise the appeals filing process.
 - Narrow conditions under which an appeal fully halts a procurement procedure.
 - Increase fees for filing appeals, potentially making them relative to value of contract.
 - Create penalties for misuse of appeals.
- **Direct award:** Portugal's threshold for direct awards are substantially higher than other MS, substantially limiting the share of public contracts subject to competition
 - Reduce the thresholds and otherwise restrict the use of direct award.

- **One stop shop:** Contracting authorities and economic operators currently navigate multiple sources for information, guidance materials and contract notices, including the BASE portal, eSPap, InCI's websites.
 - Use BASE/eSPap as one-stop shop for procurement information.
- **MEAT:** The PCC makes a priority of adopting MEAT criteria where applicable, but roughly 50% of contracts are still awarded based on lowest price only.
 - Increase use of MEAT criteria through improved guidance materials and awareness raising campaign.

ⁱ European Union Committee of the Regions – Division of Powers, available at:

<https://portal.cor.europa.eu/divisionpowers/countries/membersLP/Portugal/Pages/default.aspx>

ⁱⁱ OECD (2007), Central Public Procurement Structures and Capacity in Member States of the European Union, SIGMA Papers, No. 40, OECD Publishing.

ⁱⁱⁱ *Tribunal de Contas* (Court of Auditors), available at: <http://www.tcontas.pt/en/english.shtm>

^{iv} Public Procurement Network (2010), Authority for the Supervision of Public Contracts, The comparative survey on the national public procurement systems across the PPN.

^v INCI, Balanço Social (Social Report) (2011).

^{vi} ESPap (Shared Services in Public Administration) (2013), Annual Activity Report, available at:

<https://www.espap.pt/quemsomos/Paginas/instrumentosgestao.aspx>

^{vii} Green Public Procurement 2020 website, available at: <http://www.gpp2020.eu/about-gpp-2020/>

^{viii} Government of Portugal (2014), Portuguese Partnership Agreement 2014-2020, available at:

<http://www.portugal.gov.pt/media/1489775/20140730%20Acordo%20Parceria%20UE.pdf>

^{ix} Available at:

<http://www.idr.govmadeira.pt/portal/Conteudo.aspx?IDMenu=2&IDSubMenu=147&Path=147&jmenu=2>

^x Ministry of Economy (2013), Public Procurement Annual Report 2013, available at:

http://www.inci.pt/Portugues/inci/EstudosRelatoriosSectoriais/EstudosRelatorios%20Sectoriais/Rel_Anual_Contratos_Publicos_2013.pdf

^{xi} Council for Prevention of Corruption, available at:

http://www.cpc.tcontas.pt/documentos/cpc_presentation.pdf

^{xii} European Commission (2014), DG HOME, EU anti-corruption report, Annex Portugal.

^{xiii} Open House (2010), Best practice on green or sustainable PP and new guidelines, Seventh Framework

Programme, available at: http://www.openhouse-fp7.eu/assets/files/D1.4_Best_practice_on_green_or_sustainable_public_procurement_and_new_guidelines.pdf

^{xiv} Green Public Procurement 2020 website, available at: [http://www.gpp2020.eu/about-gpp-2020/national-support-actions/http://www.gpp2020.eu/about-gpp-2020/national-support-actions/](http://www.gpp2020.eu/about-gpp-2020/national-support-actions/http://www.gpp2020.eu/about-gpp-2020/national-support-actions/http://www.gpp2020.eu/about-gpp-2020/national-support-actions/)

^{xv} European Commission (2013), DG REGIO, Annual Activity Report, available at:

http://ec.europa.eu/atwork/synthesis/aar/doc/regio_aar_2013.pdf