

## **Extended Abstract**

### **Comparison of procurement models in Portuguese-speaking countries**

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#### **Introduction**

Public procurement plays an important role in economic development and is such an important area for the public and private sector, nationally and internationally, as it enables public administrations to purchase goods and services for their citizens and to provide opportunities for companies to promote private investment and contribute to the growth of employment and the economy.

As regards the importance of public procurement, according to the Portuguese Competition Authority, this represents around 30% of total public expenditure and 12% of gross domestic product (GDP) in member countries of the Organization for Economic Cooperation and Development (OECD), 17 % of EU GDP, 19.5% of total public expenditure and 10% of GDP in Portugal [1].

The purpose of this study is to compare the different models of public procurement in Portuguese-speaking countries, such as Portugal, Public Contracts Code (PCC), Brazil, Law no. 8666, Angola, Public Procurement Law (PPL) and Mozambique, Regulations for the Contracting of Public Works, Supply of Goods and Services to the State (RCS).

It is intended to focus on the important aspects of public procurement in these countries, which are, for example, adjudication, additional works, errors and omissions. In this way, it is intended to understand the mentioned regulations and to deepen the knowledge necessary for their analysis, through research and bibliographical study of general and theoretical concepts.

In the case studies, three contracts were chosen for adjudication analysis, also analyzing the additional contracts in relation to the initial contract for three different works, focusing on additional works, errors and omissions, is also carried out the analysis of legal conformity and discussions.

Finally, with the evaluation of the merit of the different contracting models and the researched studies, it is intended to draw conclusions and give the recommendations of good practices, thus constituting a basis to support for the use of the referred contractual models, in order to facilitate the perception of specificities in different countries.

#### **Laws and regulations**

##### PCC of Portugal

In Portugal, public procurement is planned and regulated in community and national legislation, namely in the Public Contracts Code (PCC), published in an annex to Decree-Law no. 18/2008 of 29 January. On 31 August 2017, Decree-Law no. 111-B / 2017 was published, which made

the ninth amendment to the PCC, with the introduction of the European directives, and enters into force on January 1, 2018.

This Decree-Law, according to the Portuguese government, aims to simplify, reduce bureaucracy and make public procurement procedures more flexible, increase the efficiency of public spending and facilitate access to public contracts.

The PCC establishes the rules for public works contracts, the leasing or acquisition of movable property, the acquisition of services, the concession of public works and the concession of public services and society.

This code provides for various types of contract procedures, including direct adjustment, prior consultation, public contest, competition limited by prior qualification, negotiation procedure, competitive dialogue and partnership for innovation.

#### Law no. 8666 of Brazil

This law establishes general rules on public tenders and administrative contracts related to works, services, including publicity, purchases, disposals and leases, within the scope of the Powers of the Union, States, Federal District and Municipalities in Brazil.

The bidding objectives in this country are to select the most advantageous proposal, comply with the constitutional principle of isonomy and promote the country's sustainable development.

There are five types of bidding in the Brazilian public sector, each of which follows a different process, such as competition, taking of price, invitation, contest and auction.

#### PPL of Angola

The current Angolan government procurement regime is governed by Law no. 9/16 of 16 June, in particular by the Public Procurement Law (PPL), which is significantly more detailed than its predecessor (Law no. 20/10), and its main objective is to fill gaps and simplify Angolan pre-contractual procedures.

This law establishes rules on the formation and execution of public works contracts, the leasing and acquisition of movable property and services, contracts which are implemented through public-private partnerships, some contracts in the sectors of defense, security and internal order, as well as other contracts not governed by special law.

As a general rule, PPL provides for four types of public procurement procedures, such as public contest, competition limited by prior qualification, invitation to tender restricted and simplified contracting.

#### RCS of Mozambique

The legal regime for Mozambican public procurement is regulated by Decree no. 5/2016, of 8 March, which approved the so-called "Regulations for the Contracting of Public Works,

Provision of Goods and Services to the State" (RCS).

This Regulation establishes the legal regime applicable to the contracting of works of public works, supply of goods and provision of services, including leasing, consulting and concessions.

The RCS includes 8 types of procedures for the formation of contracts by contracting entities, which are public contest, contest for previous qualification, restricted procedure, competition in two stages, bidding contest, small-scale competition, price quotations and direct adjustment.

## **Adjudication**

The adjudication "is the act by which the body competent for the decision to contract accepts the only tender submitted or chooses one of the tenders submitted."

It is intended to analyze the procurement regime in Portugal, Brazil, Angola and Mozambique, mainly in relation to the submission of tenders, award criteria, causes of exclusion of proposals, notification and causes of non-award.

### Portugal

In Portugal, the adjudication is made according to the criterion of the most economically advantageous tender for the contracting entity, according to article 74 of PCC, it is determined by one of the following modalities:

- a) Best relation of quality-price, in which the adjudication criterion is composed of a set of factors, and possible sub-factors, related to various aspects of the execution of the contract to be celebrated;
- b) Evaluation of the price or cost as the only aspect of the performance of the contract to be executed.

For the first modality, the contracting entity needs an evaluation model disclosed in the program of the procedure. This modality works with the factors and any subfactors that have their defined scores, the sum of the partial scores obtained in each factor or subfactor is the overall score, considering that winner is the one that obtains the highest overall score. This modality obliges competitors to consider all aspects required, especially factors that have large weights, it is intended to change the traditional thinking of worrying only with price.

Factors and possible sub-factors may, depending on the objectives and needs of the contracting authority, be the following:

- Quality;
- Organization, qualifications and experience of the personnel responsible for carrying out the contract;
- After-sales service and after-sales service;

- Environmental and social sustainability.

The second modality is only applicable when all other aspects of the execution of the contract to be celebrated are defined by the parts of the procedure, that is, who offers the lowest price that wins.

The tie-breaking criterion in the evaluation of proposals should be defined in the invitation or in the program of the procedure. The new PCC suggests a possible criterion, namely in descending order of relative weighting of factors and sub-factors, or the proposal that has been submitted by social enterprises or small and medium-sized enterprises, in ascending order of the category of companies.

### Brazil

There are 4 criteria of adjudication, namely the lowest price, the best technique, the technique and price and the highest bid or offer.

For the lowest price criterion, the classification is made in ascending order of the proposed prices. The winner is the one who presents the proposal according to the requirements of the invitation or invitation and has the lowest price.

The criterion of best technique and the criterion of technique and price are used exclusively for services of an intellectual nature, especially in the elaboration of projects, inspection and consultative services.

In the type of best technique, the evaluation and classification of technical proposals are carried out according to the criteria defined previously (for example the capacity and experience of the tenderer, the technical quality of the tender and the qualification of the technical teams to be mobilized for the execution). After the technical classification, the best ranked competitor is negotiated, based on the detailed budgets and having as reference the limit represented by the lowest price proposal, that is, it is tried to reduce the price of the best technically classified proposal for the lowest price possible. In the case of a deadlock in the negotiation with the first, the same procedure is adopted with the next competitor, in the order of classification.

The technical and price criteria work with the weighted average of the proposal, and the weights are pre-established in the instrument of call. This criterion seems fairer in relation to the criterion of better technique, especially for those who have more advanced technologies in the market.

The highest bid or offer is only applicable in cases of sale of assets or concession of real right of use.

### Angola

For proposals to be classified, the criteria shall be that of the most economically advantageous and the lowest price. For the first criterion, the factors and any subfactors must

be specified in the announcement and the contest program. The concern of the second criterion is the justification of the abnormally low price, if necessary, since the proposal whose price is not justified is rejected.

The decision of adjudication must be notified to the successful competitor, stating that, within a maximum period of six days, the winner lodges the final deposit, the value of which is expressly indicated in the notification.

Once the security deposit has been proved, the adjudication of the contract shall be notified to the other competitors.

### Mozambique

As regards the criteria for the evaluation of the proposal, there are the criterion of the lowest evaluated price and the criterion conjugated.

The first criterion is the one most used in Mozambique, whether in public works or in the supply of goods and services. The competitor offering the lowest price and guaranteeing the quality and qualification levels set out in the contest documents will be the winner.

The combined criterion is based on the combination of technical proposals, price and other factors, in accordance with the established weighting criteria. Other factors are, for example, condition of payment, deadline, warranty conditions, safety, environmental benefits, to be the holder of a valid certificate of the seal "Pride Mozambique. Made in Mozambique ". The proposal with the highest weighting will be the winner.

In the case of a tie of proposals, when the first criterion is adopted, the final must be determined by drawing lots in public session. This situation does not occur for the conjugated criterion, since the classification is attributed to the competitor that has the best technical classification, and the tie remains, the final one becomes by lot, also in public session.

## **Additional works, errors and omissions**

### Portugal

Additional works under the new PCC may result from two different circumstances, namely unforeseen circumstances and unforeseeable circumstances, or which could not have been foreseen by a diligent contracting authority.

When the complementary work is the result of the first unforeseen circumstances, the contracting authority shall order the contractor to execute the work as long as, cumulatively:

- Cannot be technically or economically separated from the subject-matter of the contract without serious inconvenience and entail a considerable increase in costs for the contractor;
- The price of such work, including that of previous additional work also resulting from unforeseen circumstances, does not exceed 10% of the contract price;

- Value does not exceed € 30.000,00, in case of adopting the direct adjustment procedure;
- Value does not exceed € 150.000,00, in case of adopting the prior consultation procedure;
- Value does not exceed € 5.225.000,00 if the public tender procedure is used or the competition is restricted by prior qualification without publication of the notice in the Official Journal of the European Union.

Where additional work is the result of unforeseeable circumstances, or a diligent contracting authority could not have foreseen, the contracting authority may order its execution provided that it cumulatively:

- Cannot be technically or economically separated from the subject-matter of the contract without serious inconvenience and entail a considerable increase in costs for the contractor;
- The price of such work, including that of previous additional work also resulting from unforeseeable circumstances, does not exceed 40% of the contract price.

Any additional work that exceeds the above limits must be awarded following a new procedure.

### Brazil

Law no. 8666 does not specify additions and deletions of works. Additions are understood as the sum of additional work, whether resulting from overwork or resulting from work to supply errors and omissions. The reasoning is the same for deletions.

In Brazil, once the contract has been signed, the provisions of the contract must be fulfilled. Under the same contractual conditions, the additions or deletions that occur in the works, services or purchases have a limit of 25%, compared to the initial value updated of the contract. In the particular case of building or equipment renovation, the ceiling is 50% for its additions, but for deletions the limit remains at 25%.

As for the percentage limits established, no increase could exceed such limits. For suppressions, as long as there is agreement between the parties, the law admits the extrapolation of its limit. It should be noted that the set of increases and the set of reductions should always be calculated on the initial value updated of the contract, applying to each of these sets, individually and without any kind of compensation between them.

In relation to the updated initial value of the contract, this generates, as a rule, discussion and doubts for its determination, since law no. 8666 does not clearly define how the reference value is calculated in the case of successive changes. In a simple interpretation of the legal provision, the updated value of the contract always corresponds to the value of the last contractual change, thus allowing that value to be changed forever. The problem is not evident for one or two simple changes, but rather for more complex situations, mainly in the context of administrative contracts for the provision of continuous service, which can be initially signed for a minimum period of 12 months, with possibilities of extensions, for equal periods, up to the

limit of 60 months [2].

### Angola

Additional works shall be ordered in writing by the developer and the supervisor shall provide the contractor with the elements necessary for its execution and for the performance of the measurements, such as drawings, profiles, plans, nature maps, volumes of jobs etc. With this, the contractor is obliged to carry out the additional works.

This obligation shall cease when:

- The contractor chooses to exercise the right of cancellation of the contract; or
- Within 10 days after reception of the order, the supervisor verifies that the contractor has neither the equipment nor the human resources necessary for its execution.

The PPL defines the limit of 20% for additional works, in relation to the value of the contracted works. If this value is exceeded, it is mandatory to negotiate between the parties with a view to concluding an agenda for the contract.

In the case of contracting by percentage, according to the PPL, that is to say, "the contract by which the contractor undertakes to perform the work at a price corresponding to its cost, plus a percentage intended to cover administration costs and normal remuneration of the undertaking", the contractor is not obliged to carry out all further work, subject only to 1/4 of the value of the contract work.

### Mozambique

As in other countries, in Mozambique, the contractor is also obliged to perform all the additional works, except when these works by type or by global price exceed 25% of the initial work of the contract or when the contractor proves that has no resources to carry out additional works, the type of which was not originally part of the contract.

For the contracting entity, it is required to provide the complete and detailed drawings and specifications necessary for its proper execution, as well as the respective quantities. When the work results from a change in the project, the contracting entity is also obliged to present the details of the project.

The contracting entity shall, in writing, instruct the contractor to carry out additional work with a clear indication of its type, whether it is new work or new quantities of existing work, as well as the applicable unit prices.

## **Case studies**

The case studies are divided into two parts. The first part includes 3 case studies, where the analysis of the adjudications of these concrete cases is carried out. The second part includes 3 other case studies, focusing on the additional work.

### 1<sup>st</sup> Case "Contract for the execution of road marking in various places of the Municipality of Cascais"

In this case, the criterion of adjudication was the lowest price and the competitors had 20 days to present the tenders. In Portugal, the 20 days established are legally admitted, but the criterion is economically more advantageous. In Brazil, there is the equivalent criterion of lowest price. But, the term of 20 days exceeded the limit established by Brazilian law, because it is 15 days. In Angola, the lowest price criterion is also allowed and the period established in the announcement is legally admitted in this country. In Mozambique, there is also the criterion of the lowest price. But, the deadline would have to increase one day if this contest took place in this country.

### 2<sup>nd</sup> Case "Construction of the Francisco Freitas Branco Primary and Secondary School in Porto Santo"

According to the notice, the tenderers have had 35 days from the date of dispatch of the invitation to contest, and their criterion of adjudication is also the lowest price.

As in the first case, was carried out legal conformities with the laws of Portugal, Brazil, Angola and Mozambique.

### 3<sup>rd</sup> Case "Contract of construction of a playground and geriatric in the Sports Complex of Vila Real Santo António"

This contract was entered into through the direct adjustment procedure, with a value of € 149.837,12.

As in the first case, was carried out legal conformities with the laws of Portugal, Brazil, Angola and Mozambique.

### 4<sup>th</sup> Case "Extension and Improvement of the Quinta da Bomba WWTP"

After consignment, 3 additional contracts were sent to the Court of Auditors.

The additional works of first additional contract result from the change in the layout and the diameter of the ducts. In the second additional contract, there are changes to the base project. In the 3<sup>rd</sup> additional contract, there are work to supply errors and omissions and additional works. The first type was due to the actual characteristics of the percolating beds that did not coincide with the design ones. The second type refers to the replacement of the arms of the distributors, for which, in design, only rehabilitation was envisaged.

For the analysis of legal conformity, in Portugal, complementary works of unforeseeable circumstances, the value attributed to these works, including previous work in the same circumstances, may not exceed 40% of the contract price for the international open tender procedure. In this case, the maximum percentage is 1.98%. For complementary works of unforeseen circumstances, the percentage limit is 10%, for the international public tender procedure. Thus, the value of 5.64% of this case is legally acceptable.

In Brazil, law no. 8666 defines the limit of 25% for additions or deletions, in relation to the updated initial value of the contract (the value of the last contractual amendment). Therefore, in this case, the percentage of cumulative accruals totaled 25.32%, which exceeds the allowed limit, that is, some of this work could not have occurred. As for the percentage of accumulated deletions, the value was 16.60% (less than 25%), so the works would be legally admissible, if this work were in Brazil.

It is recalled that, in Angola, the PPL defines the limit of 20% for excess works, in relation to the value of contracted works. Thus, if this work were located in Angola, the works in question would be legally admitted, as the value of 7.57% is lower than the limit of 20%.

In Mozambique, additional works by type or by global price cannot exceed 25% of the initial contract work. As 7.62% is less than 25%, it is also legally permissible in this country.

#### 5<sup>th</sup> Case "Surrounding street to the Carregado School Center"

On 20 January 2012 an additional contract of € 70.024,50 was sent to the Court of Auditors. The detailed identification of the object of the additional contract corresponds to the works of streets and support walls, transport to the dump, paving in the lane and parking.

The reason is, although the execution project was accompanied by a geological and geotechnical study. However, in the place where the deficient foundation conditions appeared, no boring occurred.

The consequence is the 19% increase in contractual value. As the percentage limit established for this circumstance in Portugal is 40%, that of Brazil is 25%, that of Angola is 20% and that of Mozambique is 25%, in this practical case, it would be legally admissible in all these countries.

#### 6<sup>th</sup> Case "Earthworks, infrastructures and paving of Pole 1 (Gonçalves) of the Logistics Platform of Leixões"

In this case, 9 additional contracts were submitted to the Court of Auditors.

In the first and second additional contracts, the work results from geological and geotechnical 'surprises'. The additional works of the third and fourth additional contracts correspond to quantities that exceed those foreseen in the project. In the 5th additional contract, the additional work corresponded to the resolution of an incompatibility found in the project between the limits of the implementation of Pole 1 and the respective expropriation.

In the 6th additional contract, they aimed at the application of new technical options different from the patented in the tender and were required by the INDAQUA concessionaire, in the execution phase of the work. Thus, the owner assumed the cost of these works.

The 7th additional contract concerned additional work on the connection of the waste water network from Pole 1 to the outside.

In the 8th additional contract, the telecommunication infrastructures specialty project was

updated to comply with the new legal framework.

In the 9th additional contract, the work resulted from changes decided on the works and accepted by APDL, S.A., because it was understood that the technical solutions initially envisaged were not adequate for the proper execution of the work.

In this case, it has carried out the same legal conformity verification. In Portugal, the calculation gave 11.99% for the complementary works of unforeseen circumstances, less than 40% allowed, 3.22% for the complementary works of unforeseen circumstances, less than 10% allowed. Therefore, both are legally admitted.

In Brazil, the percentage of cumulative increases, in relation to the present value of the contract, is 18.81% and that of suppressions is 7.37%, both less than 25% allowed. In this way, it is confirmed that the works mentioned are legally admissible, if the Brazilian law were applied to this work.

In Angola, the maximum percentage was 11.68%, as regards its admitted limit, this is 20% according to the PPL. Therefore, the result was far from this limit, that is, the works according to Angolan law, are also legally admissible.

This calculation in Mozambique is very similar to that of Angola, the maximum percentage is 13.03%, the regulation establishes the limit of 25% for this type of work. As the value of 13.03% is lower than the established limit, it is justified that these works would be legally admissible also in Mozambique.

## **Conclusions**

Through the study and comparison of contracting models in four countries (namely Portugal, Brazil, Angola and Mozambique), it was concluded that there are common points in the legislations analyzed, for example, in terms of pre-contractual procedures. This is also due to the fact that Portuguese-speaking countries influence each other. But there are differences, a result of the real situation of each country.

In the adjudication criterion, for example, in Portugal the most economically advantageous one is used, that is, quality and duration are important aspects in public procurement. There is awareness of the cost of life cycle, which is important in Europe, but not happen in developing countries. In these cases, they work more with the criterion of lowest price.

In the case of additional works, errors and omissions, they are normally indispensable parts for the completion of the work, all laws define the obligation to perform these works to the contractor. Regarding the price and term of these works, in any mentioned country, they are subject to the agreement between the parties, being considered the contractual price and the partial term of work plan. If there is no agreement, the matter is submitted to arbitration.

## References

[1] “Mais e Melhor por Menos: A Concorrência na Contratação Pública” ,Lisboa, 2016.

Available in:

[http://www.concorrencia.pt/vPT/Noticias\\_Eventos/Intervencoes\\_publicas/Documents/Interven%C3%A7%C3%A3o%20Presidente%20da%20AdC%20na%20sess%C3%A3o%20lan%C3%A7amento%20Campanha%20Combate%20ao%20Conluio.pdf](http://www.concorrencia.pt/vPT/Noticias_Eventos/Intervencoes_publicas/Documents/Interven%C3%A7%C3%A3o%20Presidente%20da%20AdC%20na%20sess%C3%A3o%20lan%C3%A7amento%20Campanha%20Combate%20ao%20Conluio.pdf)

[2] Carvalho, W.W. e Rigatto, S.H - Alterações em contratos administrativos: uma discussão da determinação do valor inicial do contrato, 2016.

Available in:

<https://revistajuridica.presidencia.gov.br/index.php/saj/article/viewFile/1395/1180>