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Public Procurement & Government Contracts 2022

Portugal: Trends & Developments

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Trends and Developments

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Introduction

The COVID-19 pandemic continued to have significant effects during 2021, especially in the first half of the year. In the second half of 2021, the number of procurements began to rise again, mainly due to special legislative measures adopted by the government but also to the approval of the European Recovery and Resilience Facility and the beginning of its implementation.

In the final part of the year, problems began to appear because of the exceptional and fast rise in construction costs, mainly relating to labour but also to steel, cement and other materials and equipment, derived from the shortage in the world market and bottlenecks in major ports and the transport chain, all due to COVID-19. This problem will have a significant impact on all public contracts, demanding a rebalance of economic conditions due to unexpected and abnormal changes in circumstances.

New Procurement Laws

Special procurement rules

In 2020, the government tried to approve special procurement rules to speed up procurement procedures. The law was stopped by the President of the Republic due to concerns regarding transparency and lack of control from the Court of Audits and from Parliament. In 2021, after some changes, the Parliament finally approved what is now Law No 30/2021, of 21 May.

Law No 30/2021 is an important change to the Portuguese Public Procurement Code, aiming to simplify procedures and specifically to accelerate the procurement of contracts financed

with European funds. The government wanted to enable contracts to be signed more quickly by cutting or speeding up some procedures so that public investments could be executed in time, especially those that were to be financed by European funds. The government was mainly thinking of ways to ensure immediate access to the coming European Recover and Resilience financing, which must be secured within a very short timeframe (four years, although there are talks at a European level on extending the deadlines due to the war in Ukraine and its consequences).

At the same time, the government also inserted some modifications into the procurement judicial procedural rules in order to allow contracts to be implemented more quickly by modifying the rules on the automatic suspension of an adjudication (today someone who challenges an adjudication within the ten-day delay automatically stops the implementation of a contract and the government has to ask the court to lift the suspension in order for the implementation of the contract to be resumed, which is not easy). With the modifications to Articles 102.º and 103.º-A of the Procedural Code of the Administrative Courts, a judge must pass a preliminary ruling to ascertain the minimum *fumus boni iuris* of a challenge. The new law also speeds up the procedure so that a ruling can be obtained more quickly.

In addition to several important modifications to the Procurement Code, Law No 30/2021 has included the following special procurement measures to simplify and accelerate the procurement of contracts financed with European funds:

- creating new simplified procedures below the European threshold;
- cutting the deadlines to present candidates and bids;
- skipping some mandatory motivation duties;
- imposing an electronic procedure;
- permitting bonds not to be demanded in some cases;
- allowing bids even with some legal impediments; and
- shortening some procedural deadlines.

As well as European funded contracts, the Law also provided for the following types of contracts to be subject to these measures, but only until the end of 2022:

- housing;
- IT, knowledge and digital transformation; and
- health and social care.

Finally, the same special measures can also be applied to the following contracts:

- social and economic stabilisation programmes;
- the management of rural fires; and
- bio agro-food acquisitions.

Law No 30/2021 includes some transparency measures regarding stronger supervision by the Audit Court and a special Parliamentary Committee. It also strengthened the sanctions for violations of the new measures.

Modifications to the Procurement Code

Law No 30/2021 introduced 79 modifications to the Procurement Code, with the most significant addressing the following:

- the introduction of anti-corruption, social and environmental principles;
- the definition of in-house relations;

- the possibility to adjudicate a bid 20% above the maximum price established;
- the definition of abnormal low price;
- adjudication criteria;
- habilitation documents;
- the invalidity of contracts;
- contract managers;
- the modification of contracts; and
- the implementation of public works contracts.

These modifications only entered into force for new procedures, with some exceptions.

Transmission of establishment through a procurement procedure

Law No 18/2021, of 8 April, approved a modification to the Labour Law Code, regarding the transfer of an establishment in the award of a new service contract in the security, food, cleaning or transport sectors.

Case Law

Some important 2021 court decisions are worth highlighting here. The main theme in discussion continues to be the electronic signature of bid documents.

In 2020, the Administrative South Central Court ruled that it was mandatory to electronically sign each document before uploading it onto the electronic platform individually, even if they are to be jointly inserted into one PDF. The court said that this was the only way to secure the content and to be sure the documents were attributable to the bidder and remained unchanged.

The decision was heavily criticised because it was argued that the electronic signature in a PDF was sufficient technically to secure the entire content of the file, including all the documents within. Therefore, to exclude a bidder for not signing each document incorporated in a PDF was disproportional and should not be allowed.

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The decision was reviewed by the Supreme Court, which confirmed the reasoning in a decision of 25 November 2021. Therefore, the current jurisprudence continues to demand a signature on each document even if they are inserted into one PDF, considering it insufficient to sign just the PDF, and sanctioning this omission with the exclusion of the bidder.

In a decision of 18 February 2021, the Supreme Court decided that any company that has been subject to contractual sanctions exceeding the maximum penalties (20% or 30% of the contractual value) and that has showed significant or persistent defaults in the implementation of a previous contract is deemed to be prohibited from bidding in a subsequent procedure.

Finally, in a ruling of 7 October 2021, the Supreme Court confirmed the jurisprudence that each one of the members of a bidding group needs to present all the habilitation documents rather than just some of them.

Conclusion

2021 was a mixed year, with restrained measures on investment in the first half and attempts to boost investment in the second half.

In terms of court decisions, some important issues came under debate, with the Supreme Court confirming previous jurisprudence.

Considering the crisis surrounding construction material costs in the final half of 2021, it is expected that 2022 will see significant demands for contract rebalance and compensation of costs. There is also likely to be uncertainty among bidders as they cannot anticipate prices for long-term contracts. This will possibly bring about a review of pricing for public authorities and even a need to cancel some ongoing tenders in order to rethink them and relaunch them with different conditions.

Many deadlines to present bids have already been postponed, and some tenders have been cancelled with no bidders.

Without having a sense of the possible evolution of prices in the global market, no bidder is ready to commit themselves to a fixed price through a long period of time; the legal and contractual formulas of price revision need to be changed.

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SRS Advogados is a full-service, multi-practice law firm that advises clients on all aspects of national and international law, with 32 partners and about 140 fee earners. Through the creation of SRS Global (Angola, Brazil, Macau, Malta, Mozambique, Portugal and Singapore) and a strong network of international relationships with third parties, the firm aims to extend its experience, expertise and services globally so it can respond efficiently to complex issues with global implications. The public procurement department at SRS Advogados comprises a

team of specialist lawyers that assist and advise throughout the life cycle of any given project, covering the setting up, financing, negotiation and implementation of projects. The team has extensive experience in the road, rail, port, health and energy sectors, assisting numerous Portuguese and international clients on a wide variety of projects, including public-private partnerships, and assisting both private partners and public contractors, as well as financing bodies.

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José Luís Moreira da Silva is the partner responsible for the public procurement department at SRS Advogados, and has advised on several complex projects for public and private

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