



Public Procurement & Government Contracts 2021

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Portugal

Law and Practice

Trends and Developments

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Introduction

The year of 2020 was an abnormal year due to the Pandemic situation declared in March. The public investment came to a violent and abrupt slow down or even a complete stop and the government turned over to the implementation of emergency legislative measures to deal with the health crisis. Almost all the ongoing public procurement procedures came to a stop and saw the deadlines being extended. The main long-term government contracts in implementation were all negatively affected, and some were even suspended or had their terms extended.

COVID-19 and Its Impacts

In the first half of the year measures implemented by the government only considered the lockdown or the postponement of the investments but on the second half other type of measures began to be put in place, regarding ways to tackle with the necessary economic and social downfall and preparing for the post pandemic as the government had the notion that it needed to boost and accelerate the investment that was stopped.

It was terrible to see the huge investments announced in 2019 by the government to be implemented in 2020 instantly to come to a stop or a standby, like the new Lisbon Region second airport in Montijo, the urban road passenger transport concessions all around the country, the new port terminals in Sines (*Vasco da Gama*), in Lisbon (*Barreiro*) or in *Leixões*, the modernisation of the rail network, or the metro expansion in Lisbon and Oporto, among others that were envisaged, in a public/private investment estimate of almost EUR5 billion.

The only major exceptions to this general lock down were one or two tenders for urban road passenger transport concessions, being Lisbon the major one, a tender for the expansion of the Lisbon Metro (infrastructure and rolling stock worth of EUR115 million), new rolling stock for the Metro do Porto, worth of EUR50 million, and ten new electric ferries for Transtejo, the government owned ferry transport company in charge of the crossing of the river Tagus, worth of EUR50 million.

Emergency measures

As said, the first legislative emergency measures taken by the government, in March and April, aimed only:

- to freeze ongoing public investments;
- suspend pending deadlines; and
- to expedite procurement of medical supplies to deal with the pandemic.

Law No 1-A/2020, of 19 March 2020, suspended all court and administrative procedures, with some exceptions, namely urgent procedures. Therefore, since 9 March 2020 all proceedings were suspended including public procurement. This measure was considered disproportional and Law 4-A/2020, of 6 April 2020, lifted the suspension in what regarded public procurement procedures, so in fact they were only suspended from 9 March 9th to April 6th.

Decree-Law No 10-A/2020, of 13 March 2020, authorised an exceptional procurement regimen for the supply of medical products to fight the Pandemic. Direct simplified awards were authorised, and other simplified regimens were put in place to allow a speedier acquisition of medical products and workers considered legally justifiable by way of necessity and urgency. These exceptional rules override the normal regime of the Public Procurement Code.

Suspension of Public Contract Clauses and Legal Regime

More controversial and constitutionally dubious was the exceptional regimen introduced by Decree-Law No 19-A/2020, of 30 April 2020, which suspended all the public contract clauses and legal regime (Public Procurement Code) on economic and financial rebalance and on the right to be compensated due to lesser infrastructure utilisation, including related to PPP contracts. Obviously, the several Highway Shadow Toll Concession Contracts in place, based on vehicles utilisation payments, with the demand risk split between the government and the private operator, were the most affected by this measure.

By this exceptional rule, it was prohibited to ask for an economic and financial rebalance or a compensation for facts affecting the concession during the emergency period. It was also stipulated that economic and financial rebalance due to pandemic causes or compensation for lesser infrastructure utilisation due to facts occurred outside of that period, could only give rise to a mere extension of the term of the contract and no monetary compensation.

This exceptional rule was soon challenged by concessionaires and should see several arbitrations and judicial disputes emerging from this limitation if the government cannot agree in amicable terms to a reasonable and fair alternative means of compensation as this can be called as utterly violating consolidated legal and contractual rights of private counterparts and has to be seen as a

unilateral modification of contracts that has to give cause to a just compensation in order to maintain the existent economic and financial balance of the contract. By the Portuguese Constitution it is deemed that the government can promote public interest but within the respect of private rights.

The Portuguese Procurement Code establishes the right to economic and financial rebalance and the right to be compensated in case of unilateral modifications of a contract by the government, and this is a general principle of law, established since early days, even before the current Constitution of 1976, when the powers granted to government had fewer constitutional limitations than today. Therefore, this limitation on the rights of concessionaires is seen as a huge violation of constitutional fundamental rights and will necessarily be challenged if the government is to pursue in this sense.

It must be kept in mind that the lockdowns due to COVID 19 had a huge impact on road mobility and we have seen our highways almost empty in this period. A concessionaire that is paid for vehicle driving through the infrastructure had an abrupt down fall of its payments and has obviously the right to be duly compensated as it kept the obligation to continue with the maintenance of the road. It is something that we are going to see the consequences in the new future and litigation cannot to be put aside.

Accelerating the Economic Environment

In the second half of the year, seeing the terrible consequences on the economy, the government began trying to accelerate the economic environment by enacting legislation more favourable to investment. In terms of government contracts this was done by a legislative proposal to simplify the Public Procurement Code and the Administrative Courts Procedural Law (Law Proposal No 41/XIV/1.^a, of June 18th) and by allowing some government contracts to skip the necessary previous review by the Audit Court before being implemented.

Law No 27-A/2020, of 24 July, rose the limit for a contract to be submitted to the previous review of the Audit Court to EUR750,000 (and in cases of joint contracts, to EUR950,000). Therefore, these contracts could begin to be implemented immediately and would be only scrutinized by the Court afterwards, in subsequent audits. This law keeps being in force till today. The measure accelerated the implementation of small and medium government contracts.

Law Proposal No 41/XIV/1.^a was to be a major change in our Public Procurement Code, aiming to simplify procedures and specifically to accelerate procurement of contracts financed with European funds. Government wanted to allow contracts to be signed more quickly by cutting or speeding some procedures so as to execute the public investments in time, especially those that were to be financed by European funds. The government was thinking namely on ways to have immediate access to the coming Resilience and Recuperation European Financing that has a very short timeframe to be executed (four years).

Modifications to procurement procedural rules

At the same time, government proposed modifications in the procurement judicial procedural rules in order also to allow contracts to be implemented more quickly by restricting the automatic suspension of an adjudication (today someone that challenges an adjudication within a ten-day delay automatically stops the implementation of a contract and for the contract to resume its implementation the government has to ask the court to lift the suspension, which is not easy). Nevertheless, although Parliament approved the proposal (as Decree 95/XIV), the President of the Republic exercised its veto by alleging that it did not dealt sufficiently with the necessary Audit Court post-intervention (as its powers of pre-intervention were limited) and was not duly precise on the new parliament review that was included in order to control the contracts of government. Till now, Parliament did not made modifications or insisted on its approval, so it keeps pending and not yet in force.

Case Law

In terms of main new case law discussions, attention should be called to some important 2020 court decisions. Two main themes continue to be upfront on all discussions:

- the electronic signature of bid documents; and
- the qualification of bidders through subcontractors.

In a decision of 15 October, the Administrative South Central Court ruled that it was mandatory to electronically sign individually each document before uploading into the electronic platform, even if they are to be jointly inserted into one only PDF. The court said that this was the only way to secure its content and to be sure they were attributable to the bidder and unchanged. The discussion has been going on for some time and this decision is not going to put an end to it.

Immediately, it was violently 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 demand that each document inside a PDF should be equally and each also signed was unnecessary. Regarding this, to defend an exclusion of the bidder for not signing each document incorporated in a PDF was disproportional and should not be deemed.

Despite this reasoning, the current jurisprudence continues to demand the signature of each document even if they are inserted in one PDF, considering not enough to sign just the PDF, and sanctioning this omission with the exclusion of the bidder. The decision of 15 October is currently being reviewed by the Supreme Court and we have to wait and see what the final decision will be.

Ownership of Certificates of Public Works

Another important decision in a controversial matter that has been under discussing for some time was decision of 15 July from the Administrative North Central Court, regarding the necessity and the timeframe to prove the ownership of a certificate of public works in a mixed contract, that is to say a contract that includes in its object part of services and part of public works. The issue is controversial, as can be seen in this decision: the court of first instance decided in one way and was overruled by the North Central Court (and, in 2021, the Supreme Court turned again to the decision of the first instance), so we had three different decisions over the same case. What is in discussion is if the bidder in a mixed contract has to prove the ownership of a certificate of public works and if it has to be proved simultaneously with the upload of the bid or in a later stage only with the habilitation documents. Also in discussion was the possibility of a bidder to prove the said ownership via a subcontractor and, if so, when it has to say that it will use a subcontractor.

The courts admitted the general use of a subcontractor to fill in the bidder lack of a certificate but demanded that this must be done jointly with the bid and not afterwards. And the courts final decision was that the certificate has even to exist already at the time of the upload of the bid and not after, so that the Jury cannot override this by asking the bidder to complete the lacking information in a later stage. The North Central Court admitted against the first instance, that the Jury could ask for the lacking certificate, but the Supreme Court ruled against, considering to deliver a certificate only afterwards and one that was obtained also afterwards was deemed to be a violation of impartiality and equality. This matter continues not to be settled as we can see by all those contradictory opinions and we have to follow on this theme in the future.

Conclusion

The year of 2020 was, therefore, a mixed year, with restrained measures on investment on the first half and attempts to boost investment on the second half. Also, in terms of courts decisions we could see some important issues on debate but no final settlements yet on the horizon. Hope that 2021 can bring us the investments and the contracts Portugal so eagerly needs and are waiting for so long to be accomplished.

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