



12th amendment to the Public Procurement Code Law n.º 30/2021, of 21 May

Introduction

After a legislative process much scrutinized by the public opinion – and following the presidential veto of the first draft bill approved by the Assembly of the Republic in December – Law no. 30/2021 was published last May, 21.

This is a highly relevant diploma, as it introduces a wide range of revisions to the Public Procurement Code, approved in an annex to Decree-Law no. 18/2008, of 29 January and subsequently amended (hereinafter, the “CCP” according to the acronym in Portuguese), as well as the Code of Procedure in Administrative Courts, approved in annex to Law no. 15/2002, of February 22 and subsequently amended (hereinafter, the “CPTA” according to the acronym in Portuguese) and Decree-Law no. 200/2008, of 9 October, which approves the legal regime applicable to the constitution, organic structure and operation of purchasing centers.

In addition, Law no. 30/2021, of 21 May, approved special measures for public procurement with regard to:

- i. projects financed or co-financed by European funds;
- ii. contracts aimed at the promotion of public housing or at controlled costs or intervention in properties whose ownership and management has been transferred to the municipalities, within the scope of the process of decentralization of competences;
- iii. contracts whose object is the acquisition of computer equipment, the acquisition, renewal, extension or maintenance of software licenses or services, the acquisition of computing or cloud storage services, the

- acquisition of consulting or advisory services and the performance of public works associated with digital transformation processes;
- iv. contracts whose object is the lease or acquisition of movable property, as well as public works contracts intended for the construction, renovation or rehabilitation of real estate within the scope of the health sector, continuous and integrated care units, and social support in the field of elderly people, disability, childhood and youth;
 - v. contracts aimed at promoting interventions that are considered as part of the Economic and Social Stabilization Program or the Recovery and Resilience Plan (hereinafter, the “PRR” according to the acronym in Portuguese)¹ – which is more relevant as we know that reforms and investments under the PRR total €16,644 million, distributed by €13,944 million in grants and €2,700 million in loans;
 - vi. contracts whose object is the leasing or acquisition of goods, the acquisition of services or the carrying out of works necessary for the management of fuels within the scope of the SGIFR; and
 - vii. contracts whose object is the acquisition of agri-food goods.

In some cases (in the context of housing, information and knowledge technologies, health and social support), these special measures only apply until December 31, 2022.

Amendments to the CCP introduced by Law n.º 30/2021, of 21 May

With the declared objective of reducing bureaucracy and streamlining procedures for the formation of public contracts, Law no. 30/2021, of 21 May, amended 79 articles of the CCP, although, naturally, with varying levels of relevance. Below, we will mention some of the main changes.

The end of prior consultation preference over direct award

First, we highlight the revocation of article 27-A of the CCP, which established, since 2018², that whenever the recourse to more than one entity was possible, and provided that this was compatible with the grounds invoked for the adoption of the direct award procedure, the prior consultation procedure should be adopted (with invitation to at least 3 entities).

Taking into account the legislative evolution in this regard (take into account that, in the original formulation - of 2008 - of article 112, the direct award covered the procedure in which the contracting authority directly invited one or several entities of its choice), we believe that the revocation of article 27-A only eliminated the obligation, but not the possibility, for the contracting authority to invite several entities (and not just one) in cases of choice of the direct award procedure based on material criteria. In fact, this understanding is in accordance with the principles of Public Procurement of pursuit of the public interest, competition and non-discrimination.

Cost/benefit analysis on the basis of the decision to hire

Article 36 of the CCP provides that the decision to contract must be based on a cost/benefit analysis, in the case of contracts with a value exceeding €5 million or, in the case of partnership for innovation, €2.5 million. This obligation ceases to exist for contracts within the scope of the execution of projects financed or co-financed by European funds, in the promotion of public housing or controlled costs, in the conservation, maintenance and rehabilitation of real estate, infrastructure and equipment or in the acquisition of essential goods or services of current use.

¹ The PRR is a program with national application, with an execution period until 2026, which will implement a set of reforms and investments that aim to allow the country to resume sustained economic growth, reinforcing convergence objectives with Europe over the next decade.

² Wording introduced by Decree-Law no. 111-B/2017, of August 31, with entry into force on January 1, 2018.

We understand that the justifications for these exceptions will be diverse. With regard to contracts co-financed by European funds, for example, and taking into account the need to prepare cost/benefit analyzes in this context, we believe that the elimination of the duplication is justified.

Award of tenders with a contract price above the base price

Law no. 30/2021, of 21 May, added to article 70 of the CCP a new precept – the no. 6 – which allows the award of tenders above the base price, provided that the following assumptions are cumulatively verified:

- i. The pre-contractual procedure in question is a public tender or a restricted tender by prior qualification;
- ii. All bids have been excluded;
- iii. The program of the procedure expressly provides for this possibility;
- iv. The modality of the award criterion adopted has been the multifactor;
- v. The price of the tender to be awarded respects the limits of value up to which the type of procedure in question can be used and the maximum limits of authorization of expenditure of the competent body for the decision to contract, if applicable;
- vi. The decision to authorize the expense enables or is revised in order to enable the award for that amount.

Once these assumptions are fulfilled, the contracting authority may, exceptionally and for duly substantiated reasons of public interest, award the tender that, from among the tenders that have been excluded on the grounds that the base price has been exceeded (under the terms of subparagraph d) of paragraph 2 of article 70 of the CCP), has been ranked first in accordance with the award criterion, provided that it does not exceed the amount of the base price by more than 20%.

Reconfiguration of the abnormally low price regime

The abnormally low price regime has undergone significant amendments, to address questions that have long been raised in doctrine and jurisprudence.

Thus, the abnormally low price threshold can now be defined by reference to average prices obtained in a preliminary consultation to the market, thus disappearing the reference to the criterion of percentage deviation from the average of the prices of the tenders to be admitted.

Furthermore, the contracting authority is no longer required to state reasons for the need to set an abnormally low price.

Finally, it should also be noted that the contracting entities may now request clarifications on the price presented by competitors, even when they have not defined, a priori, in the procedure documents, the situations in which the price or cost of proposal is considered abnormally low, namely because it proves insufficient to fulfill legal obligations in environmental, social and labor matters or to cover the costs inherent to the execution of the contract.

Limit to the choice of invited entities (art. 113 and 114) - introduction of the concept of "specially related entities"

Taking into account the increased number of situations in which there is a choice of entities invited to submit a tender (prior consultation or direct award procedures), the legislator established new limitations to this choice, namely by emphasizing the concept of "specially related entities". Such relationship can be measured based on a set of evidences, including:

- i. Sharing, even if partial, of legal representatives or partners;
- ii. Existence of a simple participation, reciprocal participation, dominance or group relationship.

In other words, in addition to the entities referred to in paragraph 2 of article 113 of the CCP³, the entities specifically related to them can no longer be invited to submit a tender.

Limit to the choice of invited entities (art. 113) - Local/regional preferences in certain contracts

On the other hand, the limitation referred to in paragraph 2 of article 113 of the CCP described above⁴ is not applicable to direct award procedures for the formation of lease contracts or acquisition of movable property and the acquisition of services of current use promoted by local authorities whenever:

- i. the invited entity is a natural person or a micro, small or medium-sized company, duly certified under the terms of the law, with headquarters and effective activity in the territory of the municipality in which the contracting entity is located; and
- ii. the contracting authority has substantiated evidence that, in that territory, the invited entity is the only supplier of the type of goods or services to be leased or acquired.

Reserved Contracts

Article 54-A of the CCP already provided that a contracting entity could reserve the possibility of being a candidate or bidder to entities whose main object was the social and professional integration of disabled or disadvantaged people. Now, this article has been amended to provide for more positive discrimination factors. Thus, contracting authorities may reserve the possibility of being a candidate or bidder to:

- i. Entities whose main object is the social and professional integration of people with disabilities or disadvantaged;
- ii. Micro, small or medium-sized companies duly certified under the law, in certain pre-contractual procedures;
- iii. Entities with headquarters and effective activity in the territory of the intermunicipal entity in which the contracting authority is located, in procedures promoted by intermunicipal entities, associations of local authorities, local authorities or local companies for the formation of lease contracts or acquisition of movable property or acquisition services of current use with a value lower than the thresholds referred to in subparagraphs c) of paragraph 3 or b) of paragraph 4 of article 474 of the CCP, as the case may be.

Contract Manager

The first novelty is the fact that it is no longer mandatory to use the figure of the contract manager in contracts executed by simplified direct award. Article 128(3) of the CCP expressly provides that the simplified direct award procedure is exempt from any other formalities provided for in the Code, including those relating to the appointment of a contract manager. In our opinion, contracting authorities may still appoint a contract manager, even when the contract has been preceded by a pre-contractual simplified direct award procedure – they are just not obliged to do it.

Another novelty is the one resulting from the new wording of paragraphs 1 and 2 of article 290-A of the CCP, which provides for the possibility of the contracting entity to appoint more than one contract manager, with the function of permanently monitoring the execution of the contract, in which case it should clearly define the roles and responsibilities of each one.

Finally, another amendment that should be highlighted is the one resulting from the provisions of article 290-A, paragraph 7 of the CCP, which requires the contract manager to sign a declaration of non-existence of conflicts of interest, in the terms of the model provided for in Annex XIII to the Code.

³ That is, entities to which the contracting authority has already awarded, in the current economic year and in the two previous economic years, following a prior consultation procedure or direct award based on the value of the contract, tenders whose accumulated contractual price is equal to or higher to the following thresholds: (i) for works contracts: €30 thousand (direct award) and €150 thousand (prior consultation); (ii) for lease contracts, acquisition of movable property and provision of services: €20 thousand (direct agreement) and €75 thousand (prior consultation).

⁴ See previous footnote.

Corruption and related offenses prevention plan

It should also be noted that a paragraph 9 was added to article 81 of the CCP, which establishes that, in cases where the value of the contract to be signed determines its subjection to prior inspection by the Court of Auditors, the competent body to the decision to contract must request the contractor to submit, together with the other qualification documents, a plan to prevent corruption and related infringements, unless the contractor is a natural person or a micro, small or medium-sized company, duly certified under the law.

Exceptional public procurement regime

As already mentioned, Law no. 30/2021, of 21 May, approved exceptional public procurement measures, which derogate the contract formation rules of Part II of the CCP in certain situations, such as pre-contractual procedures related to execution of projects co-financed by European funds; pre-contractual procedures related to housing and decentralization; pre-contractual procedures in terms of information and knowledge technologies or pre-contractual procedures relating to the execution of the Economic and Social Stabilization Program and the PRR, among others. Let's have a look at some characteristics of this special regime.

Simplified pre-contractual procedures with higher contract values

For the execution of (a) contracts intended for the execution of projects financed or co-financed by European funds; (b) contracts included in the scope of the Economic and Social Stabilization Program or in the PRR; as well as (c) contracts in the fields of housing, information and knowledge technologies, health and social support (in these cases only until 31 December 2022), contracting authorities may:

- i. Initiate and process simplified public tender procedures or restricted tender procedures by prior qualification when the contract value is below the European thresholds (referred to in paragraphs 2, 3 or 4 of article 474 of the Public Procurement Code)⁵, as the case may be;
- ii. Initiate and process simplified prior consultation procedures, with invitation to at least five entities, when the contract value is simultaneously below the aforementioned European thresholds and below €750 thousand, in the case of works contracts (note that, under the terms provided for in the CCP, the "normal" thresholds for adopting a prior consultation procedure are €75 thousand for leasing or acquisition of movable property and acquisition of services; €150 thousand for public works contracts and €100 thousand for other contracts which do not configure concession or partnership contracts);
- iii. Initiate simplified direct award procedures pursuant to article 128 of the Public Procurement Code, when the value of the contract is equal to or less than €15 thousand (note that, under the terms of the CCP, the simplified direct award could only be adopted for the formation of contracts for the acquisition or leasing of movable property and for the acquisition of services with a value of less than €5 thousand and of public works contracts with a value of less than €10 thousand).

Reduction of the deadline for submission of tenders and applications

Another special public procurement measure approved by Law no. 30/2021, of 21 May, is the possibility for contracting entities to reduce the deadline for the submission of tenders and applications in public tenders and restricted tenders by prior qualification regarding the execution projects financed or co-financed by European funds, in accordance with the provisions of paragraph 3 of article 136, paragraph 2 of article 174 and paragraph 5 of article 191, all of the CCP, without the need for a statement of reasons provided for in these provisions. This possibility results from paragraph d) of article 2 of Law no. 30/2021, of 21 May.

5 Currently, the European thresholds are as follows: (i) €5 350 000, for public service and public works concession contracts and for public works contracts; (ii) €139,000 for public contracts for the supply of goods, services and design competitions, awarded by the State; (iii) €214 000 for the contracts referred to in (ii), if awarded by other contracting entities; and (iv) €428,000, for the contracts referred to in (ii), if awarded by entities operating in the water, energy, transport and postal services sectors.

Electronic processing

It is also worth noting another measure approved by this diploma, and which results from its article 10, which under the heading “Electronic procedure” determines that the procedures to which the special regime of public procurement apply must be processed through an electronic platform used by the contracting authority (without prejudice to the provisions of subparagraph g) of paragraph 1 of article 115 of the CCP in relation to prior consultations for the execution of contracts worth less than €75 thousand for the lease or acquisition of movable goods and purchase of services; €150,000 for public works contracts; €100 thousand for other contracts that do not constitute concession or partnership contracts or €75 thousand for concession contracts with a duration of less than 1 year).

Exemption from reasoning duties

The contracting authority is also exempt from the duty to justify the decision not to divide the contract into lots or to set the base price, pursuant to article 11 of Law no. 30/2021, of 21 May.

Choice of invited entities

Regarding the limits to the choice of invited entities, the law determines that entities to which the contracting authority has already awarded, in the current economic year and in the two previous economic years, following a simplified prior consultation adopted under this regime, tenders for the conclusion of contracts whose accumulated contractual price is:

- a) In the case of public works contracts or concessions for public services and public works, equal to or greater than €750 thousand;
- b) In the case of public contracts for the supply of goods, the provision of services and design competitions, equal to or greater than (i) €139 thousand, if awarded by the State; (ii) €214 thousand, if awarded by other contracting entities; or (iii) €428 thousand, if awarded by entities operating in the water, energy, transport and postal services sectors cannot be invited to submit tenders to these simplified procedures.

Reduction of deadlines for prior hearing

The deadlines for prior hearing on the preliminary report is reduced to three days in the simplified prior consultation and to five days in the simplified public tender and limited public tender by prior qualification.

Possibility of deposit waiver

The possibility of not requiring a deposit was introduced if the successful bidder demonstrates the impossibility of:

- a) Make a cash deposit due to lack of liquidity;
- b) Obtain an insurance for the execution of the contract to be entered into, or a declaration of assumption of joint liability from at least two insurance or banking entities.

In these cases, the contracting authority may, if deemed convenient, retain up to 10% of the payments to be made, as security.

Administrative challenges

The deadlines for submitting administrative challenges, for hearing of the interested parties and for making a decision are, in simplified procedures, reduced to three days.

Inspection

In response to criticism from various parties on the potential increase in corruption and “misappropriation of public funds” allegedly facilitated by the simplification of the public procurement regime - especially with the extension of the thresholds for applying less competitive procedures - which even resulted in a presidential veto to the first version of the diploma approved by the Assembly of the Republic, the final version of Law no.

30/2021, of 21 May establishes that all contracts entered into following simplified procedures are subject to scrutiny by the Court of Auditors: (i) prior inspection (“visa”), in the case of contracts with a value equal to or greater than €750 thousand; (ii) subsequent inspection, all others. In the latter case, the contracts must be sent to the court within 10 days of their execution, accompanied by the respective administrative process, as a condition of the contract's effectiveness (namely for the purposes of any payments to be made).

An independent commission was also created, composed of 3 members designated by the Assembly of the Republic (one of whom chairs), 1 member designated by the Council for the Prevention of Corruption and 1 member designated by IMPIC, I.P.

The commission's mission is to monitor and supervise the procedures and the execution of contracts within the aforementioned special public procurement measures, making generic or specific recommendations to the contracting authorities, as well as preparing evaluation reports on the progress of the procedures and execution and implementation of the respective contracts to be submitted to the Government, the Assembly of the Republic, the Court of Auditors and the Public Prosecutor's Office.

Finally, in the regime of administrative offenses within the scope of pre-contractual procedures covered by the special measures of public procurement, the amount of the fines is doubled.

Final considerations

Over the past few weeks, we have been presenting some of the main amendments to the CCP and the exceptional public procurement measures introduced by Law no. 30/2021, of 21 May.

The diploma entered into force on 20 June 2021, but the new rules only apply to procedures that start after that date, as well as to contracts that may result from said procedures⁶.

As mentioned, this review was aimed at reducing bureaucracy and streamlining the procedures for formation of public contracts. Nevertheless, the solutions found to respond to criticisms regarding the potential increase in corruption and squandering of public funds - which imply the subjection of all contracts entered into following simplified procedures to audit by the Court of Auditors (prior or subsequently), as well as to the scrutiny of the independent commission - do not grant reasons to be optimistic about this.

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⁶ It should be noted that the amendments to Part II of the CCP relating to the modification of contracts - not analyzed in this newsletter - apply both to contracts that result from pre-contractual procedures that begin after the date of entry into force of the diploma, as to those that are in execution on the date of its entry into force, provided that the basis for the change actually occurred after that date. On the other hand, the amendments to the CPTA approved by Law no. 30/2021, of May 21, only apply to pre-contractual litigation actions that begin after its date of entry into force.