CTSU
Sociedade de Advogados
Member of Deloitte Legal network

Newsletter CTSU no. 2/2018
May 2018

New rules on public procurement have come into force on January 2018…

What changed for contracting authorities and economic players with the entry into force of the last review of the Portuguese Public Procurement Code ("PPC")?

I – General Scope

The Public Procurement Code ("**PPC**") approved by the Decree-Law no. 18/2008, of January 29th, has been subject to several amendments over the years.

The last review resulted from the obligation to transpose the following European directives on public procurement, which should have occurred until April 2016:

- Directive no. 2014/23/UE, on the award of concession contracts;
- Directive no. 2014/24/UE, on public procurement;
- Directive no. 2014/25/UE, on procurement by entities operating in the water, energy, transport and postal services sectors; and
- Directive no. 2014/55/UE, on electronic invoicing in public procurement.

The transposition of the referred directives occurred only last year with the publication of the Decree-Law no. 111-B/2017, of August 31st, that represents the ninth modification of the PPC ("**DL 111-B/2017**"). This legal statute has been subject to the Rectification Statements no. 46-A/2017 and 42/2017, of October 30th and November 30th, respectively.

The Portuguese legislator went beyond compliance with the obligation to transpose the European rules and added other amendments to the current legal regime, which result from the experience of several years and the work developed by the doctrine and jurisprudence.

The purposes of this last review of the PPC were mainly the simplification, and making the public procurement procedures more flexible in order to increase the efficiency of public expenditure and easier access to public contracts by the economic players. These targets are part of the Program XXI of the Constitutional Government and of the section on public procurement of the National Reform Program, to which the PPC also aims to comply.

The new rules of the PPC have entered into force on January 1st 2018. The same are applicable to the pre-contractual procedures started after the referred date and to contracts executed under those procedures.

The main changes with direct impact on the economic players and the contracting authorities are highlighted below.

II – Main changes affecting economic players and contracting authorities

1. Public procurement principles

The public procurement, in the preparation and execution phases of the contract, is subject to the main principles governing the activity of the Public Administration provided for in the Portuguese Constitution, European Directives and the Administrative Procedure Code.

With the revision of the PPC, the legislator added to the principles expressly provided for in the PPC – v.g., principles of transparency, equality and competition -, a reference to the principles of legality, pursuit of the public interest, impartiality, proportionality, good faith, trust, sustainability, liability, equal treatment and non-discrimination, applicable to public procurement.

Although the same do not represent an innovation compared with the previous scenario, the express reference to these principles confirms and clarifies their application to the public procurement area. The

relevance of the main principles is reflected in the increasing number of decisions of the administrative courts based on the same.

The contracting authorities must also ensure that the economic players comply with the applicable social, labour, environmental rules and gender equality standards in the preparation and execution of public contracts.

2. Preliminary market consultation

Before launching a procurement procedure, contracting authorities may use a preparatory instrument called **"preliminary market consultation"**.

This preliminary market consultation consists in seeking information and/or advice from independent experts or authorities or from economic players. The above referred information intends to assist contracting authorities in the preparation and implementation of the procurement procedures and in the assessment of market prices in relation to the supply of a particular product and/or service, as well as, confirming the (in)availability of such product and/or service in the market.

This consultation may be carried out prior to the choice of any pre-contractual procedure but does not bind the contacting authority to launch a public procurement procedure.

However, if the contracting authority decides to start a public procurement procedure, all relevant information exchanged in the course of a candidate's and/or a competitor's participation in a preliminary market consultation shall be communicated to the other candidates and/or competitors and included in the tender documents to avoid any distortion of competition.

On the other hand, it is important for economic players to correctly assess to the potential risks inherent to their participation in a preliminary market consultation.

The PPC expressly foresees that entities that have, directly or indirectly, advisory or technical support in the preparation and drafting of the tender documents cannot be candidates, competitors or comprise any groupings if such participation provides them any advantage, which distorts the normal conditions of competition.

The economic operators who intend to participate in the procurement procedures require to be careful whenever they participate in the referred preliminary market consultation.

3. The new figure of contract manager

A new figure called "**contract manager**" was introduced in the revision of the PPC.

The contract manager shall be appointed by the contracting authority to monitor the performance of the contract execution on its behalf on a permanent basis. This appointment shall take place prior to the execution of the contract and furthermore requires to be mentioned in the contract's clauses.

The contract manager shall identify deviations, defects or other irregularities in the execution of the public contract and shall immediately communicate the same to the contacting authority, proposing, in a reasoned report, appropriate corrective measures to remedy the situation.

The contracting authorities may delegate powers to the contract manager to adopt corrective and require measures, except for contractual modification and termination.

Therefore, the performance of the contract manager implies a higher level of liability of the contracting authority in relation to the contractor taking into consideration the monitoring duties of the contract manager and its obligation to inform in case he identifies any irregular situation.

In contracts with a longer duration, the contract manager may have the advantage to promote a closer linked interlocutor in the contractual relationship, optimizing the relationship with the contracting authority. However, there are some omissions in the way the contract manager has been regulated.

In particular, it is important to clarify some important issues, such as the meaning of the contract manager's performance in standard or short-term public contracts, the articulation with the monitoring authority, namely and in particular in public works contracts, and the eventual opposition of the private contractor to the appointment of a particular manager contract, *maxime* on grounds of impediment or suspicion.

4. New pre-contractual procedures

a. Innovation Partnership

It is utmost importance to exploit the potential of public procurement to achieve the objectives of the Europe 2020 strategy for smart, sustainable and inclusive growth. In this context, it should be recalled that public procurement is crucial to driving "**innovation**", which is of great importance for future growth in Europe.

Within this framework, a new pre-contractual procedure called **'partnership for innovation'** is established, through Directive no. 2014/24/UE, which reflects the intention to mobilize the public procurement instruments for the promotion of innovation in strategic areas.

The innovation partnership enables to gather in a single procedure, the investigation and development ("**I&D**") of a product, service or works, and their future acquisition by the contracting authorities.

The Portuguese legislator does not specify what "innovative products, services and works" mean and decide not to transpose the definition of "innovation" established in the Directive no. 2014/24/UE.

It is important to take into consideration that the contracting authorities can only use this procedure "(…) ***where a need for the development of an innovative product or service or innovative works and the subsequent purchase of the resulting supplies, services or works cannot be met by solutions already available on the market*** (…)"[1].

Therefore, it is recommended that contracting authorities confirm by means of a preliminary study and/or preliminary market consultation, that the need for the launch of this specific procedure is not met by the solutions already available on the market.

The estimated value of the supplies, services or works shall not be disproportionate in relation to the investment required for their development. Moreover, the minimum requirements and the award criteria shall not be subject to negotiation, including its factors and sub-factors.

[1] cfr. consideration no. 49 of Directive 2014/24/EU.

The contracting entity may decide **to set up the innovation partnership with one partner or with several partners conducting separate research and development activities.**

The partnership must be structured in successive phases following the sequence steps in the research and innovation process, which may include the manufacturing of products, the provision of services or the completion of the works. It shall also set intermediate targets to be attained by the partners and provide for payment of the remuneration in appropriate instalments.

Contracting authorities are free, at the end of each phase, to decide to terminate or reduce the number of partners, and may terminate the individual contracts without additional costs (in addition to the values already spent in the attempt to reach results) if such possibility is provided for in the procurement documents.

b. Direct award and prior consultation

As to the most restrictive procedures of competition, it should be noted that the PPC maintained the **direct award** (procedure subject to some changes) and created a new procedure named **prior consultation**.

The **direct award** is limited to the situations of a single economic player, which the contracting authority invites to submit a bid. As general rule, this procedure may be used for **public works contracts with a price value less than €30,000.00 and public supply and services contracts with a price value less than €20,000.00**.

It is also allowed - based on a simplified direct award procedure - **to enter into small public works contracts until €10,000.00 and supply and services contracts until €5,000.00**.

The validity period of public contracts entered into following a direct award may not exceed one year as from the decision date and may not be extended. The contractual price cannot be reviewed.

In the **prior consultation**, the contracting authority shall address an invitation to at least three economic players in order to submit a bid and may negotiate aspects related to the execution of the public contract if that possibility is expressly provided for in the invitation.

This procedure may be use, as general rule, **for public works contracts with a price value less than €150,000.00 and supply and services contracts with a price value less than €75,000.00**.

It should be taken into consideration that there are serious limitations in the selection of the entities invited when the contracting authorities decide to use the direct award and the prior consultation procedures.

The execution of public contracts using the direct award or prior consultation must be published in the portal for public contracts opportunities. This publication is a precondition for the validity of the public contract.

The non-compliance with the rules above mentioned implies an illegal award and public contract executed.

5. Proceedings rules

The deadlines for the submission of applications and bids by the candidates/bidders have been reduced.

While this change promotes faster completion of procurement procedures, it implies shorter deadlines for the preparation by economic players of their applications and/or bids, increasing the risks of raising potential mistakes.

Currently, the deadline for submitting the errors and omissions list is 1/3 of the deadline to submit the bid, being equal to the deadline for submitting requests for clarification on procurement documents.

The competent entity body for the contracting decision must comment on the errors and omissions identified by the interested economic players. The lack of response by the contracting authority means that the errors and omissions identified by the candidates and/or competitors have been rejected.

Another relevant innovation **is the possibility of correcting identified irregularities when submitting bids and applications.**

Competitors have a maximum period of **five days to remedy minor irregularities** in their bids if the same do not affect competition and equal treatment. The correction of such irregularities may correspond to the correction of material or calculation mistakes.

The legislator intended to **avoid disproportional and prejudicial exclusions to the public interest in order to encourage competition in pre-contractual procedures and to ensure the award to the best bid**.

However, this solution has been raising some concerns taking into consideration the discretion the same involves in the interpretation of "minor irregularities". It will be necessary to wait for the jurisprudence of the state and arbitral courts on this matter.

6. Issues related to the analysis of the bids

The contracting authorities must **define the base price in the procurement documents** – the base price is the maximum amount that the contracting authority will pay by the execution of all the instalments, which constitute the scope of the public contract.

The determination of the base price must be duly justified on objective criteria and comply with the limits values up to which a type of procurement procedure may be used, as well as the limits for the expenditure authorisation of the competent body. **The obligation to justify the base price is mostly important in public contracts with a price value higher than five millions euros.**

In addition, **the minimum threshold price is no longer linked to a percentage of the base price** but is fixed in the procurement documents. **This amendment implies an increased burden of the contracting authorities in the preparation of the procurement documents**.

Moreover, **the use of the moment of submission of the bids by competitors as a legal criterion of tiebreaker between bids is expressly forbidden in any circumstance**.

In addition, it is provided that **the list of impediments of criminal nature are applicable to legal persons and not only to the members of corporate bodies**.

On the other hand, the award is done according to the criteria of the most economically advantageous bid. The most economically advantageous bid corresponds, among all the bids submitted and not excluded, to the best bid for the contracting authority.

An additional change is the relevance of the "***bad past performance***", i.e., the previous unlawful behaviour of the competitors in public procurement.

The punishment of the bad past performance is a reaction of the legislator to the serious and persistent non-compliance of public contracts by the economic players. It means **that economic players who have failed to comply with a public contract for at least once in the last three years may be prevented from submitting a bid under a public procurement procedure.**

Specifically, contracting authorities may exclude the competitors' bids who have incurred in contractual breach leading to the termination of a public contract, to the payment of compensation or to the application of penalties that have reached the maximum amount provided for in the law.

The participation of tenderers and/or competitors in procurement procedures in the conditions described above implies the practice of a very serious offence, punishable with a fine, giving rise to the exclusion of the application and/or bid.

7. Other relevant amendments

Contracting authorities must provide the **procurement documents** in the public procurement electronic platform **free of charge** from the date on which the notice is published or the invitation is sent.

Additionally, contracting authorities are **encouraged to enhance competition and split public contracts in lots** in order to facilitate the participation of small and medium companies in public procurement proceedings.

The award by lots consists in a splitting technique of the scope of a contract (e.g., execution of a work, acquisition of goods or rendering of services) in several autonomous lots, allowing the award to several competitors and the entrance into force of contracts with each of them.

The contracting authorities shall duly justify the decision of not dividing contracts into lots when dealing with purchase contracts of goods and services with a price exceeding 135,000.00 euros and public work contracts with a price exceeding 500,000.00 euros. Therefore, **contracting authorities must consider the division of the public contracts in lots and provide an explanation for a possible non-division.**

On this respect, and in order to promote competition, the contracting authorities **may limit the number of lots to be award to an economic player**. For this purpose, the contracting authorities must establish clear and non-discriminatory criteria in the procurement documents.

If contracting authorities limit the number of lots to be award to an economic player, they may have to select proposals less advantageous for the public interest taking into consideration the restriction to award all lots to a single competitor who submits the best proposal to all lots.

Another amendment is that contracting authorities may reserve the right to participate in public procurement procedures to economic operators whose main activity is the social and professional integration of disable and disadvantaged persons if at least 30% of the employees of those economic operators are as disabled or disadvantaged workers recognised by law. These contracts are named "**reserved contracts**".

Also relevant to economic players, **the value of the security deposit shall be no more than 5% of the contractual price** and its value shall be fixed by the contracting authority in the procurement documents, depending on the complexity and financial expression of the contract.

A **new system of release of the security deposit is also defined for public contracts in which the obligation to correct defects is greater than two years, promoting the anticipation of the moment of release of the greater part of the security deposit**.

The PPC establishes a more favourable regime to the subcontractors since they **may directly claim payment to contracting authorities in case of late payments owed to them by the private contractor**.

In these situations, the public contractor must notify the private contractor to proceed with the payment or to present reason for non-payment. In the absence of opposition or timely payment by the private contractor, the public contractor makes payments directly to the subcontractors for the overdue amounts, after which the public contractor may exercise the right to compensation between the amounts paid to subcontractors and the amounts due to them co-contractor. This regime does not apply to contracts for the concession of public works or services, nor to contracts that constitute a public-private partnership.

On the other hand, the contracting authorities connected to **central purchasing bodies must demonstrate, by alternative means, that they can purchase goods and services in a most economical way than those established in framework agreements**, namely as to prices or contractual costs. This new reality allows, for example, that a contracting party connected to the health system, obliged by a framework agreement, may purchase a specific good at a lower price through another national or European central purchasing body.

Finally, the use of arbitration (or other alternative means) for the resolution of any disputes arising from procurement procedures or contract subject to the PPC is expressly recognised.

However, the advantages of the use of arbitration may be mitigated taking into consideration that the law provides an appeal to the administrative courts when **the dispute amount exceeds 500,000.00 euros**.

III – Final Comment

The aforementioned several amendments with a relevant impact on contracting authorities and economic players, do not seem to correspond to a stabilisation phase of the public procurement regime, since new changes have been already announced, notably, in arbitration and pre-contractual litigation, due to the imminent reform of the Portuguese administrative litigation legislation.

In any case, improvements already added in the public procurement regime resulting from the entry into force of the new rules of the PPC should be used efficiently by economic players with a view to strengthening their intervention in the public procurement sector, which has clear perspectives for growth.

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