

## Country Reports

### Portugal

#### *Recent Amendments to the Portuguese Public Procurement Code – the Troika’s Visible Hand*

##### I. Introduction

In this report, we intend to describe the necessary amendments that were implemented by the Portuguese Government as a result of Portugal’s international obligations assumed through the 2011 Memorandum of Understanding with the Troika.

##### II. Report

The Memorandum of Understanding signed on 17 May 2011 between, on the one hand, the Portuguese Government and, on the other hand, the European Union, the European Central Bank and the International Monetary Fund (“Troika’s Memorandum of Understanding”) provided, as a condition for having financial assistance, for the implementation of changes on several Public Contracts-related aspects and, most importantly, changes to the Portuguese Public Procurement Code itself.

For instance, concerning Public Private Partnerships (PPPs), the Memorandum required that the Portuguese Government put in place a new legal and institutional framework with a view to reinforce the prior assessment of the risks when tendering PPPs, concessions and other public investments.

In order to meet the requirement set out in the Troika’s Memorandum, the Portuguese Government amended the Law governing Public Private Partnerships and created a Technical Unit responsible for the preparation, development, implementation and monitoring of PPPs.

Specific changes to the Portuguese Public Procurement Code were laid down with a view to improve public procurement practices, creating a more transparent, competitive and increasingly more efficient legal framework. In order to comply

with the aforementioned objectives, the Portuguese Government had to adapt the PPC using the following measures:

- to end the exception provided for in Article 2(2) of the PPC which exempted public foundations related to Universities from public procurement rules up until the relevant thresholds;
- to end all special procedures (permanent or temporary) enabling the direct award of public contracts below the EU thresholds;
- to review the public procurement framework concerning errors, omissions and additional works in accordance with the Public Contracts Directives;
- to implement the appropriate measures concerning the possibility to award additional works without competition;
- to adopt the necessary measures in order to make managers of the contracting authorities financially responsible in the event of non-compliance with public procurement rules;
- to ensure the prior supervision of public contracts by the competent national bodies;
- to modernize the Public Procurement Portal (BASE) according to the recommendations set out in Parliament Resolution No. 17/2010; and
- to amend Article 42 of the PPC, which provides that the tender specifications for contracts with a value equal to or higher than €25 million must include the obligation for the contractor to implement one or several research and development (R&D) projects directly related to the benefits derived from the subject-matter of the contract within Portugal.

Some of the above-mentioned measures were implemented by the Government by way of non-legislative intervention (for example, the modernization of the Public Procurement Portal (BASE) in order to increase the transparency of pre-contractual public procedures or the prior inspection of public contracts).<sup>1</sup>

However, some of the measures imposed by the Troika demanded an effective change of the PPC, which came to succeed with the Decree-Law 149/2012 of 12 July. Indeed, through the referred Decree-Law, several changes were made in the PPC

<sup>1</sup> Pedro Melo, Diogo Duarte de Campos, and Carla Machado, *Public Procurement in Portugal: The State of the Art and the Way Forward*, in EPPPL 4, 2011.

in order to comply with the measures under the Memorandum of Understanding signed with the Troika.<sup>2</sup>

In fact, the Portuguese Government eliminated (all) the exceptions to the full implementation of the PPC, namely those that benefited public foundations, hospitals and associations linked to Universities (namely State laboratories). Under this amendment, all these entities began to be fully subject to the legal regime and no longer only when buying above the relevant thresholds.

Additionally, the Portuguese Government changed the regime for the direct award of public contracts, eliminating the possibility of adoption of this type of procedure for the acquisition of computer software development services and equipment maintenance.

Still in compliance with the measures contained in the Troika's Memorandum, the Portuguese Government also changed the legal regime envisaged for errors and omissions, clarifying, in particular, the universe of errors and omissions.

The legal regime of additional works and services was also reviewed. Therefore, the Portuguese Government established that additional works and services were only admitted if below of 40% of the contractual price and errors and omissions if below 5% of the contractual price (or 10% in special conditions).

Finally, the Portuguese Government eliminated the additional requirement for research and development projects (R&D) in contracts with a value equal to or higher than € 25 million.

### III. Conclusions

On May 2012, the Portuguese Government signed a Memorandum of Understanding with Troika which predicted some changes to the public procurement rules.

The necessary amendments to the PPC are the result of the generic commitment assumed by the Portuguese Government with the Troika as a condition for financial assistance implementation.

In order to meet the requirements stated in Troika's Memorandum, the Portuguese Government approved the Decree-Law No. 149/2012 of 12 July through which were introduced the necessary amendments to the PPC.

The necessary amendments are related to the elimination of the exceptions to the full implemen-

tation of the PPC, the regime concerning the direct award of public contracts, errors and omissions and additional works and services and the elimination of the additional requirement for research and development projects (R&D) in contract with a value higher than € 24 Million.

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<sup>2</sup> See Gonçalves, Pedro, *Alterações ao Código dos Contratos Públicos na sequência do "Memorando de Entendimento com a Troika"*, in *Revista de Contratos Públicos* n.º 5, CEDIPRE.