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PUBLIC LAW

Coronavirus: Consequences of the declaration of a state of alert on public procurement

On 12 March, the Portuguese Council of Ministers approved a set of extraordinary measures provided for in Decree-Law 10-A/2020 of 13 March. These measures were adopted in response to the current situation of the spread of the new COVID-19 virus in Portugal and to the virus being classified as a pandemic by the World Health Organization on 11 March.

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The state of alert was declared by the Minister of Internal Administration and the Minister of Health on 13 March. With this declaration and the set of measures adopted, we need to look at the possible impact of these circumstances on ongoing tender procedures and on the performance of existing public contracts.

1. Impact on procurement

The measures approved by Decree-Law 10-A/2020 of 13 March include the creation of exceptional rules on public procurement, the authorisation of expenditure, and administrative authorisations. These rules are intended to ensure the immediate availability of the goods and services needed to respond, as a matter of urgency, to the current state of alert.

2. Impact on the choice of procedure

Based on the extreme urgency arising from the state of alert and to the extent strictly necessary, all contracting authorities are authorised to use the direct award process, with no limit on value, to enter into contracts for public works, or contracts to lease or buy movable property, or to acquire services.

Besides being able to use the direct award as described above, contracting authorities may also use the simplified direct award. This is now allowed for contracts to buy or lease movable property, or to acquire services, provided that, in this case, the contract price does not exceed €20,000. Therefore, it is possible to use a simple procedure with no formalities and with an increase in the legally established contractual price from €5,000 to €20,000.

The legislation approved by the Government introduces another provision of great importance in the area of public purchasing. It provides an exemption from the limits set out in the Public Procurement Code for (i) the choice of entities invited to tender (see article 113) and (ii) the requirement to use the prior consultation procedure. This applies instead of a direct award with no limit on the value whenever recourse to more than one entity is possible and compatible with the ground invoked to adopt this procedure (see article 27-A).

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The Government has also decided that, regardless of whether or not they are in writing, the contracts concluded under the exceptional rules can take full effect once the award is made and before they are actually published. Some contracts concluded under the exceptional rules require the prior approval of the Court of Auditors. These cases are subject to the rules for contracts concluded following a direct award procedure for reasons of extreme urgency. The rules provide that the contract can take full effect before the approval or the declaration of conformity, in particular, with regard to the payments to be made under them.

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With further regard to the requirement for authorisations, the Government has decided that the exception for centralised procurement of goods or services covered by a framework agreement for entities in the National Public Procurement System is now exempt from the need for prior authorisation.

Finally, the new rules allow contracting authorities to make advances payments of the price without meeting the applicable legal requirements. This is possible whenever it might not be possible to guarantee the availability, on the part of the economic operator, of the goods and services contracted under the exceptional rules. In this case, the acts and contracts in question can take full effect immediately.

Under Decree-Law 10-A/2020, contracting authorities must communicate any awards made under the exceptional rules to the members of the Government responsible for finances and for the sector involved. The awards must also be published on the public procurement website to ensure the principles of publication and transparency of procurement are respected.

3. Impact on spending authorisations

When it comes to spending authorisations, the exceptional system created by the government is based on the following rules:

- a) Tacit approval of spending authorisations from financial authorities and the authorities for the sector, when required by law, if there is no response within 24 hours of the application being sent electronically to the public body with power to authorise them;
- b) Justification of acquisitions for the purposes of an application for authorisation under the exceptional rules established in Decree-Law 10-A/2020 of 13 March;
- c) Tacit approval of the multi-annual expenditure resulting from Decree-Law 10-A/2020, of 13 March if, after submission of the application for authorisation by means of a ministerial order of extension of charges to the member of the Government responsible for the area of finance, and no refusal is issued within three days;
- d) Authorisation by the member of the Government responsible for the sector in question, in the case of budgetary changes that involve increases in exchange for other items of actual expenditure;
- e) Tacit approval of applications for release of funds to meet the objectives established in Decree-Law no. 10-A/2020, of 13 March, in properly justified cases, if a decision is not issued within three days of the submission of the application.

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4. Impact on administrative authorisations

Decree-Law 10-A/2020 of 13 March sets out various provisions regarding legally established administrative authorisations. Among others, it provides that the decision to contract services is exempt from the administrative authorisations provided for in law if the object is: (i) to carry out studies, (ii) issue opinions, (iii) to create projects, (iv) to obtain consulting services, or (v) to carry out any specialised works. Instead, the member of the Government responsible for the sector in question has the power to issue the authorisation.

5. Impact on the submission of applications and tenders, and on the progress of the procedure

Besides the impacts described above, which have been expressly addressed in the new law, we anticipate that others could arise from the exceptional situation that currently exists. In fact, some contracting authorities may decide to extend the deadlines to submit applications or tenders. This would allow interested parties to prepare them in good time and with full knowledge of the current conditions. Contracting authorities may also extend the deadlines for filing the supporting documents and for awarding the contract. Contracting authorities can take these steps at their own initiative or at the request of any interested party, candidate or bidder. Any request must demonstrate the reasonable impediment to meeting the deadline.

There has now been a change in the circumstances in which candidates presented their bids and in the basis on which they prepared them. Therefore, based on the principle of good faith, a candidate could withdraw its bid on the grounds that the current situation makes it impossible or excessively onerous to comply with the conditions in the bid previously submitted to the contracting authority. This possibility should be assessed on a case-by-case basis. The choice to withdraw must be justified in accordance with the specific circumstances underlying the pre-contractual procedure and in the light of the legal requirements applicable to the change in circumstances.

6. Impact on the performance of administrative contracts

The current situation is also expected to have an impact on the performance of administrative contracts (or on contracts subject to the same rules as these contracts). Therefore, without prejudice to the rules that apply to each contract and to the necessary case-by-case analysis, we can anticipate certain scenarios.

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There may be a need to re-set the financial balance of the contract based on the change in circumstances. However, this can only happen if (i) the state of alert changes the assumptions on which the party determined the value of its obligations under the contract, and (ii) the public contracting authority is or should be aware of these assumptions. Depending on the precise circumstances of the case, this re-setting of the financial balance may operate by way of an extension of the deadline to perform obligations or of the end date of the contract, or of a revision of prices, among others.

In addition, it may be possible to ask for the performance of the contract to be fully or partially suspended on the basis of temporary impossibility of performance. In this case, the co-contractor must demonstrate that performance is impossible.

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Furthermore, we anticipate that it will be possible for contracts to be modified for public interest reasons or because of an abnormal and unforeseeable change in circumstances. In these cases, depending on the specific situation, it may be appropriate to re-set the financial balance. Alternatively, there may be a right to modify the contract or to receive financial compensation. The solution would be decided in accordance with equitable criteria.

Additionally, the current situation could be classified as a case of force majeure and this could justify a total or partial breach of the contract. This possibility depends on the existence and content of a force majeure clause in the contract and for it to happen, the party invoking force majeure also has to demonstrate (i) the effect of the situation of alert on the impossibility of performing the contract punctually and (ii) the impossibility of adopting alternative measures, or the inadequacy of any such measures.

The co-contractor may even ultimately terminate the contract based on an abnormal and unforeseeable change in circumstances. However, this can only happen if the termination does not involve serious harm to the public interest in the specific case. Even if it does involve serious harm, the contract may still be terminated if maintaining it clearly calls into question the economic and financial viability of co-contractor or is excessively burdensome for it.

Finally, the confirmation of the possible effects and consequences described above, and the possibility and suitability of the application of the mechanisms referred to, will always depend on a case-by-case analysis. This analysis must address both the procedure and the contract, and the extent to which the operator and the contract are affected by the state of alert. ■

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