

**PUBLIC LAW**

Special public procurement measures

A. Introduction and sequence

The final vote on Draft Law 41/XIV was held on 16 October and the new law establishes special public procurement measures and amends both the Public Procurement Code and the Code of Procedure in Administrative Courts.

Given the number, relevance and depth of the amendments introduced by the approval of the draft law, we are now assessing the new special public procurement measures and the amendments to the codes mentioned above will be addressed later on.

Indeed, among the changes now introduced, there is a set of what are called special measures, the objective of which is to simplify and speed up public procurement procedures.

These special measures do not apply to the formation of any public contract. Their main focus is on contracts dealing with the implementation of projects financed or co-financed by European funds – projects whose implementation is often considered to be hampered for purely procedural reasons. However, the measures also cover other areas, that are deemed to be in a greater need of swifter governmental action.

The measures approved are various and asymmetric, but we can identify three main sets of them:

- Measures applicable to (1) projects financed or co-financed by European funds and which also apply to projects for (2) housing and decentralisation, (3) information and knowledge technologies, (3) health and social support, (4) implementation of the Economic and Social Stabilisation Programme and (5) implementation of the Recovery and Resilience Plan;

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- Measures applicable to fuel management arrangements in the context of the Integrated Rural Fire Management System (*Sistema de Gestão Integrada de Fogos Rurais* - “SGIFR”);
- Measures applicable to the acquisition of agri-food goods.

B. Special measures applicable to projects financed or co-financed by European funds that can be extended to other areas

Scope

The first set of measures identified is the one that applies to projects financed or co-financed by European funds for housing and decentralisation, information and knowledge technologies, health and social support, and implementation of the Economic and Social Stabilisation Programme and the Recovery and Resilience Plan.

Taking into account the areas covered and, where applicable, the types of eligible projects and/or contracts and other relevant characteristics, concerning the duration of the measures or the requirement for government intervention, the scope of these measures is as follows:

Implementation of projects financed or co-financed by European funds			
Housing and decentralisation	Promotion of public housing		
	Promotion of cost-controlled housing		
	Intervention in properties whose ownership and management has been transferred to the municipalities as part of the process of decentralisation of powers		
Information and knowledge technologies	Contracts associated with digital transformation processes	Purchase of computer equipment Purchase, renewal, extension or maintenance of software licenses or services Purchase of cloud computing or storage services Purchase of consultancy or advisory services Public works	
	Measures applicable until 31 December 2022		
	Health and social support	Equipment in the health sector	Leasing or acquisition of movable property
		Care units	Public works to construct, renovate or rehabilitate buildings in the health sector, continuous and integrated care units and social support for the elderly, the disabled, children and youth
Homes			
Day centres			
Economic and Social Stabilisation Plan	Contracts intended to promote interventions which are considered to fall within its scope, by order of the Member of the Government responsible for the sector to which the intervention in question relates.		
Recovery and Resilience Plan	The order is dispensed with in the case of implementation of projects financed or co-financed by European funds		

The special measures are, in summary, to provide for the power of contracting authorities to:

- **Reduce the period for submitting tenders and applications** in *open procedures* and *procedures restricted by prior qualification*, with exemption from the grounds required by the Public Procurement Code (which provides that such a reduction depends on a situation of urgency that is properly substantiated by the contracting authority).
- **Launch *simplified procedures to form public contracts*** (*simplified open procedure*, *simplified restricted procedure by means of prior qualification*, and *simplified prior consultation*) whose value is below the thresholds determining mandatory publication of a contract notice in the Official Journal of the European Union (the characteristics of these simplified procedures are set out below).

In the case of simplified prior consultation, the value of the contract to be concluded must also be below EUR 750,000.

The thresholds determining the mandatory publication of a contract notice in the Official Journal of the European Union are (according to the amendment to the Public Procurement Code now also approved) the following:

Public services concessions		EUR 5,350,000
Public works concessions		
Public works contracts		
Supply of goods	Contracts with the State	EUR 139,000
Provision of services		
Design tenders	Contracts with other contracting authorities	EUR 214,000
	Contracts with entities operating in the special sectors (water, energy, transport and postal services)	EUR 428,000
Public contracts for social services and other specific contracts listed in Annex IX to the Public Procurement Code		EUR 750,000
	Contracts with entities operating in the special sectors (water, energy, transport and postal services)	EUR 1,000,000

Simplified procedures

The simplified procedures are essentially the same as those regulated in the Public Procurement Code. However, they include the specialities indicated below and they are intended to clarify or speed up certain points in the procedure, or to reduce the level of requirements applicable to participants in the procedures with regard to social security contributions, taxation and financial robustness. Some of the measures apply to all simplified procedures now provided for. Others only apply to the *simplified prior consultation*.

MEASURES APPLICABLE TO ALL SIMPLIFIED PROCEDURES

(simplified open procedure, simplified restricted procedure by prior qualification, and simplified prior consultation)

Rationale	<p>The contracting authority is relieved of the obligation to state reasons:</p> <ul style="list-style-type: none"> ◦ For the option of not making awards by lots; and ◦ For fixing the base price.
Impediments	<p>Candidates or bidders will be deemed to have fulfilled their tax or social security obligations if:</p> <ul style="list-style-type: none"> ◦ They have debts for which payment in instalments has been authorised and for as long as the conditions of this authorisation are met (e.g., payment of the first instalment and provision of guarantees), even if the instalment payment has been authorised to a third party or a party liable on a subsidiary basis; or ◦ They have claimed, defended, objected to or disputed the debt in court, provided that proper security has been provided or has been waived as required by law; or ◦ They are authorised to pay the debt in instalments, provided a security is provided; or There is a pending litigation process appropriate to the decide on the legality or enforceability of the outstanding debt and the tax enforcement proceedings have a security in place; or ◦ The tax enforcement action has been suspended and a security has been put in place. <hr/> <p>Bidders that have not paid their tax or social security debts should still be admitted if:</p> <ul style="list-style-type: none"> ◦ The debts result from a temporary absence of liquidity (proven by a statutory auditor (ROC) or certified accountant); and ◦ Together, they do not exceed EUR 25,000. <hr/> <p>The award of the tender submitted by a bidder with unpaid tax or social security debts leads to:</p> <ul style="list-style-type: none"> ◦ Retention of the entire amount due; and ◦ Deposit in favour of the Social Security or Tax and Customs Authority <p>by the contracting authority in proportion to their credits, thus excluding the imposition of confirmation of the tax and social security situation in the context of payments by public bodies.</p>
Preliminary hearing	<p>The time limit for the preliminary hearing following the preliminary report is shortened:</p> <ul style="list-style-type: none"> ◦ In the <i>simplified open procedure</i> and in the <i>simplified restricted procedure by prior qualification</i>, to a maximum of five days (while in the procedures laid down in the Public Procurement Code, it must be at least five days); ◦ In the <i>simplified prior consultation</i>, to a maximum of three days (whereas in the Public Procurement Code procedures it must be at least three days). <hr/> <p>The preliminary hearing is followed by the drafting and communication of the final report to the body with power to decide to contract, without the need for a further preliminary hearing.</p>
Collateral	<p>No collateral may be required if the successful tenderer demonstrates:</p> <ul style="list-style-type: none"> ◦ A lack of liquidity, evidenced by a statement from a statutory auditor (ROC) or certified accountant; and ◦ That it is impossible to obtain security for the performance of the contract to be awarded or to declare the assumption of joint and several liability from at least two insurance or banking entities. <hr/> <p>If no collateral is required, the contracting authority may withhold up to 10% of the value of the payments to be made, if this option is provided for in the contract documents.</p>
Administrative disputes	<p>The time limits for the submission, hearing of counterparties and decision of non-judicial challenges to decisions taken within the contract awarding procedures are shortened to three days (instead of the five days laid down in the Public Procurement Code)</p>

MEASURES APPLICABLE TO THE SIMPLIFIED PRIOR CONSULTATION

Electronic processing *Simplified prior consultations* to enter into the contracts listed below must be carried out on an electronic platform:

- Public works contracts worth EUR 150,000 or more;
- Contracts for the leasing or purchase of movable property and the purchase of services with a value of EUR 75,000 or more;
- Public works concession contracts or public services contracts with a duration of less than one year and a value of EUR 75,000 or more;
- Other contracts with a value of EUR 100,000 or more.

The remaining *simplified prior consultations* do not necessarily have to be carried out on an electronic platform.

Choice of invited entities No invitation to tender may be issued to entities to which the contracting authority has already awarded contracts for the current financial year and the two previous financial years following a simplified prior consultation, for which the cumulative contract price is:

- EUR 750,000 or more (public works contracts, or public service and works concessions);
- EUR 139,000 or more (public supply contracts, public service contracts and public design contests awarded by the State);
- EUR 214,000 or more (public supply contracts for goods, services and design contests awarded by other entities);
- EUR 428,000 or more (public supply contracts for goods, contracts for services, and design tenders awarded by entities operating in the water, energy, transport and postal services sectors).

C. Measures applicable to fuel management within the framework of the SGIFR and to the acquisition of agri-food goods

In these areas, the following measures have been adopted:

SGIFR - Integrated Rural Fire Management System Admissibility of adopting direct award or prior consultation procedures under the Public Procurement Code to conclude contracts to lease or acquire movable property, acquire services or works necessary for fuel management under the SGIFR when the value of the contract is, simultaneously:

- Below the thresholds for mandatory publication of a contract notice in the Official Journal of the European Union; and
- Below EUR 750,000.

The prohibitions on the choice of entities to be invited to tender laid down in the Public Procurement Code based on the cumulative contract price of previous awards do not apply.

Direct awards and prior consultations leading to the conclusion of the following contracts must be carried out on an electronic platform:

- Works contracts worth more than EUR 150,000;
- Leasing or acquisition of movable property and acquisition of services of a value of more than EUR 75,000;
- Other contracts with a value of more than EUR 100,000;
- Public works or public services concessions of a value exceeding EUR 75,000 and with a duration of less than one year.

**Acquisition
of agri-food
goods**

The *simplified direct award* procedure provided for in the Public Procurement Code may be adopted when the value of the contract is EUR 10,000 or less, provided the goods to be acquired are:

- From organic production;
 - Supplied by holders of the Family Farmer Status;
 - Supplied by holders of the Young Rural Entrepreneur Status.
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D. Supervision

Given the sensitivity of the matter, it has also been determined that the special measures now approved are subject to specific set of monitoring provisions, which can be summarised as follows:

- Remittance to the Court of Auditors, within 30 days of their conclusion, of all contracts concluded under these special public procurement measures (except where the contracts are subject to prior review by the same Court);
- Creation of an independent monitoring and supervision committee with five members (four appointed by the Portuguese Parliament and one by the Government), which is responsible for drawing up half-yearly evaluation reports. The members of the committee will be subject to specific rules on incompatibilities and the performance of their duties will be regulated by decree-law. ■