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LEGAL INSIGHTS

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PUBLIC LAW | CONSTRUCTION

Legislation and case law updates

1st Quarter

LEGISLATIVE NEWS

MAINTENANCE OF THE AVERAGE CONSTRUCTION COST

The average construction cost per square metre remains set at EUR 532 for 2025.

Legislative framework: Ministerial Order 19/2025/1 of 22 January

END OF FINANCIAL INCENTIVES FOR FOSSIL FUEL BOILERS

As of 1 January 2025, financial incentives for the installation of stand-alone fossil fuel boilers are no longer available, except for those selected for investment prior to 2025.

Legislative framework: Decree-Law 11/2025, introduced the second amendment to Decree-Law 101-D/2020 of 7 December, which partially transposed Directive 2024/1275 (EU)

WEIGHTED COST INDEX FOR Q4 2024

The weighted labour cost indices for the fourth quarter of 2024, as well as the indices for materials and support equipment for December 2024, have been set for the purpose of applying price revision formulas.

Legislative framework: Notice 4270/2025/2 of 13 February

On 20 February, Notice 4820/2025/2 republished the weighted labour cost indices for the fourth quarter of 2024, replacing those erroneously published in Notice 4270/2025/2.

INFRAESTRUTURAS DE PORTUGAL – PRIORITY ROAD PROJECTS

In line with the Concession Framework, the Council of Ministers has instructed Infraestruturas de Portugal, S.A. to carry out studies and/or implement a set of priority road infrastructure projects.

Legislative framework: Resolution of the Council of Ministers 69/2025 of 20 March

ESTABLISHMENT OF THE VOCATIONAL TRAINING CENTRE FOR THE CONSTRUCTION AND PUBLIC WORKS SECTOR

The Government has approved the protocol establishing the Vocational Training Centre for the Construction and Public Works Sector, signed between the Institute for Employment and Vocational Training (IEFP, I.P.) and the Association of Civil Construction and Public Works Industries (AICCOPN).

Legislative framework: Ministerial Order 108/2025/1 of 13 March

CHANGES TO SUBCONTRACTING RULES IN PUBLIC CONTRACTS

In compliance with EU requirements, the general rules on subcontracting in public contracts have been amended.

The new legislation amends Article 318(4) of the Public Contracts Code to expressly allow the contracting authority (in the case of a works contract, the project owner) to stipulate contractually that certain critical contractual obligations – considering the nature of the contract – must be performed directly by the contractor (in the case of a works contract, the builder). This eliminates the previous option of setting a subcontracting cap based on a percentage of the contract price.

In other words, the project owner may now restrict the performance of key activities that directly impact the success of a project or operation to the main contractor.

This legislative amendment follows Decree-Law 54/2023 of 14 July, which repealed paragraphs 2 and 3 of Article 383 of the Public Contracts Code, thereby removing the maximum percentage limits on subcontracting in works contracts. At the time, no changes were made to the general subcontracting framework, and Article 318(4) continued to allow contracts to prohibit the subcontracting of certain obligations or of obligations whose cumulative value exceeded a set percentage of the contract price.

Decree-Law 66/2025 now addresses this inconsistency, aligning domestic law with the position of the Court of Justice of the European Union, which has held that subcontracting limits cannot be set by imposing a maximum percentage of the contract price in the abstract.

Legislative framework: Decree-Law 66/2025 of 10 April

CASE LAW

ON UNJUST ENRICHMENT OF PUBLIC WORKS PROJECT OWNERS

Judgment of the Central Administrative Court – Northern Circuit, dated 6 December 2024 (Case no. 00249/14.9BEMDL)

In the context of a public works contract entered into between a parish council and the claimant construction company, the court was called upon to determine whether the municipality was a party to the said contract and, as such, bore any contractual obligations.

The court held that the municipality had not entered into any contract with the claimant, nor had it taken part in the formation of the will that could have given rise to the alleged contract (even though the contract in question was deemed void). As a result, the municipality cannot be required to return, under Article 289(1) of the Civil Code, what was received under the contract or, if restitution is impossible, the corresponding value — such an obligation applies only to parties to the contract.

However, the municipality did in fact benefit from the services provided (the works), while the claimant, in performing the invoiced work, suffered a loss — both in terms of the costs incurred and the notional price it would have charged for equivalent services. Accordingly, the municipality is required to return the amount received, based on a legal ground: unjust enrichment (Article 473 of the Civil Code). The general 20-year limitation period applies (Article 309 of the Civil Code), rather than the two-year period provided for in Article 317(b) of the Civil Code.

As the invoiced prices were not contested in terms of market value or compared to prices that might have resulted from a public procurement procedure, the measure of the municipality's enrichment corresponds to the amounts invoiced.

ON THE ANNULMENT OF THE TERMINATION OF A PUBLIC WORKS CONTRACT

Judgment of the Central Administrative Court – Northern Circuit, dated 6 December 2024 (Case no. 00272/15.6BEPRT)

Once it is established that the works began before the request for authorisation was submitted to the Authority for Working Conditions (ACT), it cannot be concluded that all work commenced only after such authorisation for the purposes of meeting the factual requirements for the termination of the public works contract by the project owner under Article 405(c) of the Public Contracts Code. Termination of the contract precludes discussion of obligations arising under the contract, allowing only claims for compensation for any loss caused to the other party by the unjustified termination, in addition to the restitution of anything provided that is capable of being returned. However, this reasoning does not apply to the annulment of the termination (of a public contract) as an administrative act. In the case of administrative acts, the general rule set out in Article 173(1) of the Code of Procedure in Administrative Courts (CPTA) applies — the legal situation must be restored to what it would have been had the annulled act not been performed. Where the termination of a public works contract is annulled by a court, the situation must be treated as though the termination never occurred. The contract remains in force and binding on both parties, in its entirety, and is subject to all its clauses and the applicable law — including provisions on amounts withheld as reinforcement of the performance bond. Accordingly, a request for reimbursement of those amounts on the sole ground of the annulment of the termination is without merit.

ON JOINT LIABILITY UNDER ARTICLE 551(4) OF THE LABOUR CODE

Constitutional Court Judgment no. 892/2024 of 11 December 2024

This judgment interprets Article 551(4) of the Labour Code, as amended by Law 28/2016 of 23 August, to mean that the contracting entity is jointly liable for compliance with legal provisions and for any breaches committed by the subcontractor operating on its premises, including liability for any applicable fines. However, the contracting entity may avoid liability by proving that it acted with due diligence.

ON THE EXPIRY OF THE SELLER/BUILDER'S WARRANTY

Guimarães Court of Appeal Judgment of 18 December 2024 (Case no. 5446/23.3T8BRG.G1)

Where the existence of defects is acknowledged, listed, and the seller and builder undertake to remedy them, with actual work carried out on the property, before the expiry of the limitation period, such actions prevent the warranty from expiring.

ON THE CONTRACTOR'S LIABILITY TOWARDS A THIRD-PARTY PURCHASER OF REAL ESTATE

Lisbon Court of Appeal Judgment of 23 January 2025 (Case no. 29040/23.0T8LSB-A.L1-6)

The contractor's liability towards a third-party purchaser of a property intended for long-term use (Article 1225(1) of the Civil Code) constitutes a transfer of rights arising from liability that would initially have been exercised by the original project owner and are now exercised by the third-party purchaser.

ON NON-PECUNIARY DAMAGE SUFFERED BY THE PROJECT OWNER

Porto Court of Appeal Judgment of 25 February 2025 (Case no.19793/21.5T8PRT.P1)

Non-pecuniary damage suffered by the project owner as a result of defective performance by the contractor - which prevented the normal enjoyment of the dwelling as would have been expected had the contract been properly performed - is protected under the law.

ON THE IMPOSITION OF CONTRACTUAL PENALTIES IN PUBLIC WORKS CONTRACTS

Supreme Administrative Court (STA) Judgment of 13 March 2025 (Case no. 0205/14.7BESNT)

This judgment addresses the imposition of contractual penalties in public works contracts, specifically when such penalties are applied after the provisional acceptance of the works.

Key points from the judgment include:

- The STA held that the project owner may impose contractual penalties throughout the term of the contract, including after the provisional acceptance of the works. The court found that the Public Contracts Code permits this, as it does not reproduce the provision from the former Legal Framework for Public Works Contracts that limited the imposition of penalties to the period prior to provisional acceptance.
- The court also ruled that the imposition of contractual penalties is a duty of the project owner and becomes mandatory in the event of delays attributable to the contractor.

It is anticipated that this decision may lead some project owners to begin imposing contractual penalties even after provisional acceptance, in cases involving delayed performance.

6% VAT RATE ON URBAN REHABILITATION WORKS CONTRACTS

Supreme Administrative Court (STA) uniformity of case law decision of 26 March 2025 (Case no. 012/24.9BALSB)

This decision clarifies the conditions for applying the reduced 6% VAT rate to transactions classified as "urban rehabilitation works contracts" (Item 2.23 of List I annexed to the VAT Code).

Aiming to harmonise divergent case law on the matter, the STA ruled that a works contract may only qualify as an "urban rehabilitation works contract" if:

- the contract must relate to works carried out within an Urban Rehabilitation Area (ARU); and
- an Urban Rehabilitation Operation (ORU) must have been previously approved for that ARU.

Although the decision does not have general binding effect, it is anticipated that the position adopted by the STA may be followed by Portuguese courts in pending and future disputes involving the Tax Authority.

UNDERSTANDING OF THE AUDIT COURT

ON THE QUALIFICATIONS OF CONTRACTING COMPANIES

Audit Court Judgment no. 49/2024 of 10 December 2024 (Case no. 580/2024)

From a combined reading of Articles 8 and 20 of Law no. 41/2015 of 3 June (Legal Framework for Construction Activity), the Court of Auditors concluded that:

- a construction company awarded a public works contract must hold a licence in the subcategory corresponding to the most significant type of works;
- this subcategory must be of a class that covers the overall contract value;
- the contractor must also hold the appropriate qualifications in other relevant classes and subcategories for the remaining works and services; and
- where the awarded contractor subcontracts part of the works, it benefits from the qualifications held by the subcontractors.

If the awarded contractor does not hold a qualification that includes the subcategory for the most significant type of works, in a class that covers the full value of the contract, it is irrelevant that the contractor and subcontractors together hold all the qualifications required for the specialised works according to their respective portions.

The submission of an insufficient qualification document is equivalent, for the purposes of Article 81(2) of the Public Contracts Code (CCP), to a failure to submit the required document, resulting in the lapse of the award decision.

Without a valid award decision, the contract lacks an essential element and is therefore null and void (see Article 284(2), first part, and Article 96(1)(b) of the CCP).

The nullity constitutes absolute grounds for refusal of the Audit Court's approval, pursuant to Article 44(3)(a) and (b), and Article 44(4) (the latter interpreted a contrario), of the Law on the Organisation and Procedure of the Audit Court (LOPTC). ■