

Country Reports

Portugal

New Directives on Public Procurement

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On 28 March 2014, a new European legislative package related to public procurement was published. This new public procurement legislative package has the following allocation in three new directives (“Directives”):

- (i) Directive 2014/24/EU, regarding general public procurement, revoking the previous Directive 2004/18;
- (ii) Directive 2014/25/EU, on procurement by entities operating in water, energy, transport and postal service sectors, revoking the previous Directive 2004/17;
- (iii) Directive 2014/23/EU, on the award of concession contracts.¹

The Directives introduce several innovations and, essentially, implement some court decisions consolidated over the last few years. A good example of this is the revision and clarification of concepts such as ‘public procurement’ and ‘body governed by public law’. The main goal of the Directives is to change the procedures in order to make the process for the formation of public contracts more flexible without compromising their transparency, in compliance with European principles already established in this area, and following the modern-day developments.²

The last of the mentioned directives, Directive 2014/23/EU, establishes a whole new set of rules regarding concession contracts, defining a new unified

framework on the European Community applicable to works concessions and public services. Indeed, the lack of rules concerning these contracts at the European level was resulting in legal uncertainty and obstacles to provide and execute services agreements in full respect of the fundamental freedom of circulations, depriving companies (especially small and medium companies) of their rights and causing them less business opportunities. The new set of rules, in the words of the European legislator, “ensure the effective and non-discriminatory access to all economic operators of the Union to its market and legal certainty, promoting public investment in infrastructure and strategic services to the citizens.”

The Portuguese Public Procurement Code – which transposed Directives 2004/17 and 2004/18 – has been in force since 30 July 2008. It is fair to say that, at that time, it was very innovative compared to the respective directives it transposed, and, in many matters, it predicted some of the solutions that were adopted in the new Directives; for instance, the exclusion of the public procurement rules for contracts between contracting authorities and between them and the entities over which the contracting authorities exercise control similar to the control they exercise over their own services (*in-house procurement*).

Still, the Portuguese legislator will have to undertake a review of the Portuguese Public Procurement Code and of the corresponding legal apparatus in order to accommodate this new European set of rules. Among the changes recommended by the Directives, the Portuguese law will certainly consider including the following:

- (a) Reduction of the minimum time limits for the submission of tenders or applications;
- (b) The possibility of weighting as a factor in the award criterion of the most economically advantageous tender the organization, qualifications and experience of the resources required to per-

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1 For detailed information on the Directives, see the data sheets, in English, prepared by the services of European Commission, available at: http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/reform_proposals/index_en.htm.

2 See, for instance, the gradual establishment of the *e-procurement* that these Directives impose: the mandatory use of electronic means to promote access to documents of the procedure and even submission of tenders.

form the contract, whenever they may have a significant impact on the level of implementation of the contract;

- (c) Establishment of more cases of impairment, including the possibility of considering prevented a candidate or tenderer who has demonstrated negative or persistent deficiencies in the implementation of prior agreements, if such failure has led to the termination of the contract and to the condemnation for damages or other comparable sanctions.
- (d) Concerning Directive 2014/25/CE, which regards specifically the water, energy, transport and postal service special sectors: (i) the possibility of exclusion from the scope of the Directive contracts awarded by a contracting entity whose activity is directly exposed to non-limited access market competition;³ and (ii) the exclusion of contracts for oil and gas from its scope as it was felt that the sector is already subject to full competitive pressure (which does not justify the application of a more flexible system).

- (e) Finally, regarding the innovative Directive 2014/23/EU, the Portuguese Public Procurement Code already provides a set of specific rules concerning awards (at pre-contractual and contractual stage); Therefore, it is not expectable that the Portuguese Public Procurement Code will need to be much amended on this matter.

These Directives are already in force since 17 April 2014, and the Member States have until 18 April 2016 to transpose them into their national laws. Portugal is not yet within the legislative process to transpose the Directives and, thus, we must wait for the execution of such legal procedure to assess on the respective content and legal impact on the context of the Portuguese Public Procurement law and practises.

3 This possibility must be recognized by the European Commission, at the request of the contracting authority.