

CONSTRUCTION LAW INTERNATIONAL

FROM THE IBA INTERNATIONAL CONSTRUCTION PROJECTS COMMITTEE

Vol 3 ISSUE 2

ISSN 1819-1371

June 2008



the global voice of
the legal profession

**The ICC Model
Turnkey
Contract for
major projects**

**Focus on
Public Sector
Contracting**

A conference presented by the IBA International Construction Projects Committee and supported by the IBA European Forum

3rd Biennial IBA Conference on Construction Projects from Conception to Completion

5-6 September 2008

Brussels, Belgium (Marriott Hotel)

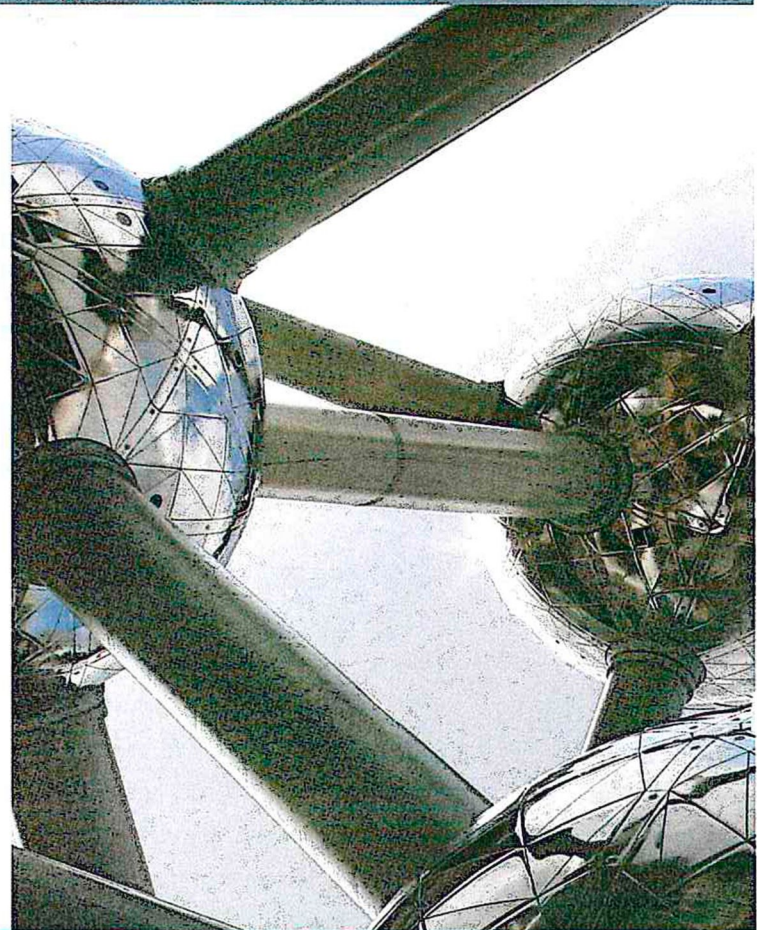
By attending this conference you will have the chance to receive up to nine CPD hours for your professional development.

Topics will include:

- Avoiding procurement pitfalls
- Structuring the project
- Alliancing, partnering and supply-chain management
- The project lawyer: the lawyer's role during the construction phase
- Recent developments in dispute resolution

Who should attend?

The conference will be of interest to lawyers (both in-house and outside counsel) and consultants involved in the effort to prevent, avoid and resolve disputes in the construction industry. It will cover topics of interest to lawyers engaged in the practice of construction law internationally and will be particularly relevant for young lawyers who can meet and exchange their respective experiences in a friendly context.



For further information, please contact:

International Bar Association

10th Floor, 1 Stephen Street

London W1F 1AT

United Kingdom

Tel: +44 (0)20 7691 6868 Fax: +44 (0)20 7691 6544

E-mail: confs@int-bar.org Website: www.ibanet.org



the global voice of
the legal profession

New rules for the adjudication of public contracts in Portugal

José Filipe Abecasis and Diogo Duarte de Campos

PLMJ Advogados, Lisbon

The Portuguese Government has recently published the Decree-Law 18/2008, dated 29 January 2008. It will come into force by 29 July 2008. This new law on public procurement procedures and performance of public contracts is named the Public Contracts Code (PCC). This article provides an overview of the PCC and then considers certain aspects which have attracted criticism on competition grounds.



Overview (José Filipe Abecasis)

One of the main features of the PCC is that, for the first time, rules applying to procurement and performance of the several types of public contracts (including public works, public works concessions, rendering of services and acquisition of goods) have been aggregated in one law with similar treatment.

The PCC promotes the implementation, in Portugal, of the more recent directives of the European Union on coordination of the procurement of public contracts (Directive 2004/17/CE of the European Parliament and of the Council and Directive 18/2004/CE of the European Parliament and of the Council). It also reflects a significant effort in the modernisation of both procurement procedures and structures of contract performance.

Regarding the implementation of EU directives, one of the major innovations of the PCC is the obligation for public bodies to publish, in the Official Gazette of the European Community (JOCE), the list and respective values of the contracts expected to be executed within the following year, even before the procurement procedure is initiated. This obligation is extended to the entities (even private ones, such as the concessionaires) acting in the sectors of utilities, such as water, energy, transport and postal services.

In terms of modernisation (although also benefiting from recent evolutions in EU directives), the PCC establishes several new types of procurement procedures such as the concurrence debate, the electronic auction, the general conditions agreement and others. One of the main themes of these new types of procedures is the strong use of

communication technologies, be it for access or registration of data or the communication between parties during the procedure.

In fact, the bureaucratic charges and heavy documentary requirements burdening bidders in a procurement procedure have been drastically relieved by way of a substitution of a sworn declaration as to the facts that are to be proven, combined with the bidder granting access to the relevant data basis for confirmation of that declaration when necessary. Therefore, certifications that there are no outstanding tax debts or social security contributions and a number of other requisites for the admission to tender are no longer required, reducing also the frequent consequences of non admission to tender due to a formal error in a document submitted or the lack of one of the documents.

Entities acting in public sector water distribution, energy, transport and postal services are required to create systems of pre-qualification of bidders, meaning that those participating in tenders are limited to those that were invited and qualified, for the adjudication of works contracts or for the acquisition of goods or services.

The announcement of launching of a pre-qualification system is to be published in the Portuguese Official Gazette as well as in the JOCE and, if the system is to last for more than three years, an annual announcement is to be republished in the same manner. Under these systems, a group of contractors will become pre-qualified for any tender launched by the adjudicating entity, provided that the rules set for the pre-qualification procedure are reasonable, objective, non-discriminatory and adequate for the object of contracts under consideration.

Finally, the PCC foresees the creation of the so-called acquisition pools (centrais de compras), to be further regulated under an autonomous law. These acquisition pools are to be electronic sites where public bodies and economic agents produce their respective demands and offers in order to achieve the adjudication of several types of contracts, including works contracts.

With so much that is new in terms of procedures and provisions, only the future will tell if the PCC will be able to achieve its goals of modernisation and simplification of public procurement procedures, while making the adjudicating criteria more transparent and technically rigorous. There are, however, many signs coming from the good use of electronic means for the adjudication of contracts in both public and private sectors and there is also a distinct trend for the simplification of procedures and mentalities

'One of the major innovations of the PCC is the obligation for public bodies to publish the list and respective values of the contracts expected to be executed within the following year, even before the procurement procedure is initiated.'

in the cultural environment. These signs and trends are encouraging as to the success of the PCC, even if some further steps will become necessary to complete this path.

Restrictions to competition (Diogo Duarte de Campos)

As noted above, the Portuguese legislature has taken the opportunity, via the PCC, to make a small revolution in Portuguese administrative law and, in particular, in public procurement. In fact, until this new Code, the Portuguese legislation concerning public expenditure and public contracts was completely dispersed and old fashioned, and therefore misleading and difficult to apply to more sophisticated transactions.

The PCC tries to organise such procedures better. Whilst it is still very early to make a complete assessment, however, it is already possible to uncover some of the challenges it embodies.

Notwithstanding the advantages of the new Code, some political choices have been criticised by the business community within the relevant sectors. Further, they may not be in line with the recent interpretative communication from the Commission on the Community Law applicable to contract awards not or not fully subject to the provisions of the public procurement directives (although this communication is under review by the Court of First Instance, Process T-285/06) and the most recent decisions from the European Court of Justice.

In fact, the Portuguese legislature has considered that it was fundamental to end the constant recourse to the more complex pre-contractual procedures (public tender and restricted public tender), as is expressly mentioned in the preamble to the PCC. Therefore, some problems may arise in contracts outside the scope of the public contracts directives, namely in public services concessions and contracts below the relevant thresholds, because the Portuguese legislature admits the use of private treaties in quite a broad way.

In fact, the PCC provides that concession contracts and partnership contracts may be

'The PCC provides that concession contracts and partnership contracts may be adjudicated by private treaty for relevant reasons of public interest.'

adjudicated by private treaty for relevant reasons of public interest. Nevertheless it should also be mentioned that if a contracting authority does not invoke a reason of public interest it must comply with one of the following pre-contractual procedures: (i) public tender; (ii) limited public tender; or (iii) procedure by negotiation. This means that, on the one hand, in normal cases, adjudication of this kind of contract will go beyond the compulsory rules of the public contracts directives but, on the other hand, if the contracting authority invokes a reason of public interest it may adjudicate the contract by private treaty.

The problem is that, while national legislatures may freely go beyond the constraining rules of the public contracts directives, in any case, they must always comply at least with the general principles of the Treaty. That does not seem to occur in this case. In fact, one may admit that a public tender might not be adequate for the adjudication of a concession or partnership contract, but the total eradication of competition (and transparency) may not be a proportional solution.

The Code also allows, on a much wider range than the old legislation, the adjudication of works, services and supply contracts by private arrangements. This decision has been the prime focus of criticism by the business community because it seems like a step back in transparency despite it having been the prime objective of the latest guidelines of the Commission. As a result of that political decision, in accordance with the PCC, contracting authorities may adjudicate public contracts of works by private treaty up to €150,000 (if the contracting authority is the Government) or up to €1 million (if the contracting authority is another body governed by public law).

As to what concerns services and supply contracts, the PCC also distinguishes between contracts promulgated by the Government or by a body governed by public law. In the first case, the Code allows for contracts celebrated by private treaty up to €75,000 and, in the second case, up to the relevant threshold (currently €206,000). This means that there is not, as is common, several degrees of pre-contractual procedures, applicable in accordance with the complexity or the value of the contract.

Therefore, all contracts above the thresholds must comply with the strict pre-contractual procedures established in the public contracts directives; below those, they can be adjudicated without any kind of advertisement. The lack of transparency is even more evident because the PCC, contrary to the old legislation, leaves to the discretion of the contracting authority the decision to ask more than one entity to apply for a proposal.

One other restriction to competition concerns in-house providing. Despite the fact that the public contracts directives do not have any particular clause regulating in-house contracts (contrary to what the Commission had suggested accepting the amendments of the European Parliament), the Portuguese legislature decided to specifically rule on this matter, in terms that are very close to those that have been admitted by the European Court of Justice. Therefore, in-house providing is not subject to the strict rules of public procurement applying to the contracts promulgated by a contracting authority if: (i) the authority (on its own or jointly with other contracting authorities) exercises over the other contractor a control similar to those exercised over its services; and (ii) the contractor's activity is substantially developed towards those that exercise a similar control over the contractor.

The main question concerning in-house providing is that the PCC, although clearly inspired by the *Teckal* case (Process C-94/99), also tries to incorporate the developments emerging from the *Asemfo* case (Process C-295/05), concerning joint control. Therefore, as mentioned, the concept of 'similar control' became wider than as previously defined. This innovation of the Portuguese legislature though inspired by case law, may give rise to some difficulties because quite recently the European Court of Justice (in Process C-220/06) seems to have returned to a strict concept of 'similar control', closing the door opened by the *Asemfo* case.

Nonetheless, it is still too early to make a full assessment of the new PCC, especially because it will all depend on how national courts will apply it. Furthermore, considering all the connections between the PCC and the public contracts directives, it will be critical to see how the European Court of Justice analyses the Code.

José Filipe Abecasis and Diogo Duarte de Campos are Partners of PLMJ Advogados in Lisbon, Portugal. The Editors thank ICP member José Miguel Júdice for arranging the provision of this article by his colleagues.