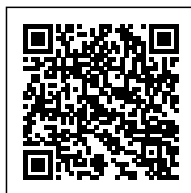


BUILDING ON PORTUGAL'S TWO DECADES' OF PROJECTS EXPERIENCE

Posted on 30/12/2009



Category: [Uncategorized](#)



The introduction of Portugal's Public Contracts Code has dramatically simplified the execution of projects and PPP agreements but difficult issues do still arise

A pesar de la cantidad de proyectos planeados en Portugal de infraestructura, ferrocarril, del volumen de carreteras y proyectos sanitarios que hay en marcha, no hay una forma de presentar propuestas, ni un proceso de concursos

claramente establecido,
comenta Pedro Melo de
PLMJ en Lisboa.

Despite the scale of the rail and airport infrastructure projects planned in Portugal and the continuing focus and volume of road and health projects underway, there is no common single preferred bid or tender process, says Pedro Melo, a public and administrative law partner at PLMJ in Lisbon.

"It is not exactly a question of 'preference' but instead a question of complying with the relevant public and utilities procurement law, alongside the EU regulations concerning the matter; having said that the usual procedure for awarding an administrative contract, for example, a concession contract, normally encompasses an international public tender with a negotiation phase at the end of the procedure for the two best bids."

Until the enactment of Portugal's Public Contracts Code in July 2008, such procedures would depend upon the creation of a specific statute setting out all the necessary legal provisions by which the award should be made, he says. The introduction of the new Code has however done away with this requirement as the possibility of an international public tender with a negotiation phase is already foreseen.

"Also and perhaps more importantly, the Code encompasses the typical issues that were necessary in the realm of public-private partnerships (PPPs) – for example, direct agreements are now expressly covered within the Code," he says.

"Simply put, from a legal point of view, Portugal now has the proper judicial environment to set up PPPs."

Such a belief is borne out by the figures, according to the 2009 PPP Annual Report issued by the

Portuguese General Directorate of Treasury, Portugal currently has 86 concession agreements underway: 57 in operation, 17 under construction and a further 12 currently out to tender.

Nonetheless controversies do still arise. Most recently, the Portuguese Audit Court rejected the user pricing mechanisms of several motorways launched by EP – Estradas de Portugal.

"These decisions were immediately challenged in the same Court, with the final decision expected in the very near future," says Melo.

And despite the similarity of the procurement processes utilised across rail, road and healthcare schemes, different projects do require different perspectives at least regarding the risk matrix involved, he says. In addition, on a contractual level different issues may also arise within different sectors, he notes.

The health sector particularly may prove more complex due to the models used in the so-called "first wave of hospitals" programme: "This model entails a management contract, a construction and maintenance contract, a clinical services contract and finally an utilisation contract – between the special purpose vehicle (SPV) responsible for the construction and maintenance and the SPV responsible for rendering the clinical services."

Consortia are inevitably also a feature of PPPs due to the varying demands of project scales, cost and know-how and inevitably issues can arise among "partners" during the bidding, construction or maintenance phases, he says.

"All projects are different but the major players now active or engaged in PPP projects in Portugal are usually acquainted with such contracts and so the level of experience with consortium

agreements is quite significant."

He stresses however that confidence – or the lack of it – between partners may often be the main "sticking point" when it comes to setting up a consortium agreement.

It is vital therefore that agreements between consortia members are in place before the major phases of a project are undertaken, but Melo emphasises that as a result of the tremendous experience of the Portuguese market fewer issues do now arise. With more than two decades of infrastructure developments in Portugal, investors, contractors and operators can benefit from the lessons that have already been learnt.

"Due to the remarkable experience of the Portuguese in the field of public procurement and PPPs, consortium contracts, like many other types of contracts, are nowadays relatively standardised. The result is that parties are often more aware of their roles and the relationship demands made upon partners across the cycle of a specific project, in both the pre- and post-bid phases."