

CONSTRUCTION AND PPP/PFI: MARKET "CONTRA LEGEM"

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Long-term concessions provide governments keen to deliver quality infrastructures with both public control and the private management of operations. The concession contract critically therefore defines the commercial and operational parameters of the project and regulates the parties rights and obligations.

Paulo Nogueira da Rocha y Ricardo Ramos de Campos, socios del bufete luso Barrocas Sarmiento Neves, hacen hincapié en la necesidad de entender los factores de riesgo que existen entre las administraciones pi**o**licas que autorizan los contratos de infraestructuras y los concesionarios. Los autores utilizan como ejemplo los malos entendimientos que surgieron a raíz de la construcción de una autopista portuguesa por el concesionario BRISAL. Los autores opinan que las autoridades deberían respetar los derechos legítimos de los concesionarios que operan en el sector pi**o**blico. A main feature is to strike a balance in risk allocation between the concessor and the concessionaire in all major project areas. However, conditions can sometimes change fundamentally and unexpectedly over the duration of a contract which make it difficult to preserve this balance.

The principle of "efficient financial equilibrium" is the concessionaire's remuneration basis, effectively allowing it to earn a fair rate of return for its investments. In late 2004 the Portuguese Government ('Concessor') concluded a concession contract with BRISAL – Auto-Estradas do Litoral, S.A. ('the Concessionaire'), for the conception, financing, project implementation and maintenance of large sections of motorway and associated services along the central coastal region of Portugal.

The Concessionaire also concluded a contract for the actual construction of the relevant sections of motorway with public works contractors ('the Contractors'). During the course of these works certain exceptional events occurred that significantly delayed construction and causing unforeseen costs, notably arising from the environmental impact evaluation undertaken.

The Ministry for Environment issued an unfavourable Environment Impact Declaration (EID) concluding that the environmental viability of the construction areas did not guarantee that the execution of the project would comply with applicable legal limits on noise emissions.

The Concessionaire challenged this decision arguing that, within the environmental impact evaluation procedures, if certain legal formalities had been followed, which were disregarded, then it is likely that the EID would have been granted.

The challenge was successful and the Secretary of State for Environment ordered the unfavourable EID to be set aside and subsequently issued a favourable one. However these steps ultimately resulted in a four-month delay in the commencement of the construction works.

The liability of the Concessor for this delay was recognised by the Secretary of State for Environment, but it refused to acknowledge liability for the circumstances or their consequences on the contract, namely in relation to the construction completion time limits.

This is a recurring problem in concession contracts. An 'Owner of the Works' may refuse to acknowledge any circumstances claimed against it which might result in an extension to the time limits and an increase in the respective associated costs. This may have very serious negative consequences on the financial equilibrium of the contracts and on construction companies, which are forced to take on additional, unforeseen, and potentially irrecoverable costs.

In addition, a refusal to extend the contractual completion time limits may force contractors to accelerate their work, in an attempt to comply with previously established deadlines and avoid the application of significant contractual penalties.

There continues therefore to be a trend within Central Government of not recognising problems when they arise, and which are in no way the fault of the contractors, but which force them to increase their efforts to meet contractual commitments without due compensation.

The result of this is that most companies involved in the construction of public infrastructures, particularly in the area of motorways, complete these works by running up enormous losses which, in the great majority of cases, cannot be attributable to them and result from difficulties and delays outside of their control.

This situation is often however not helped by contractors who, eager to win work, have a tendency to sign up to ill-considered and disadvantageous agreements. The subsequent pressure to quickly get financing and agreements in place can often result, in practice, in companies relinquishing legitimate claims and the enforcement of their rights under contractually established dispute resolution mechanisms, leading to obvious, avoidable and consequent losses.

Whilst it is undeniable that there is a public interest in ensuring that fundamental motorway infrastructures are concluded quickly, this should not be done by rejecting the legitimate interests and rights of companies operating in that sector, and which also play important roles in the economy. Certainly this is the intention behind the applicable legislation and the contracts which are

executed but not the practice of the Portuguese State.

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