

THE EYES OF THE PORTUGUESE AUDIT COURT ON PPPS - ESQUÍVEL ADVOGADOS

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A number of recent decisions by the Portuguese Audit Court (Tribunal de Contas – TdC) have had a significant impact on concession holders’ and award bid winners’ ability to renegotiate or revisit the terms of the contracts entered into with the Portuguese State. The result is that new factors need to be considered by those bidding for Portuguese concession or public works projects.

In the last trimester of 2009 the Portuguese TdC analysed a number of public-private partnership

(PPP) agreements related to several subconcessions entered into by EP – Estradas de Portugal, SA (EP). These agreements set out the terms defining the awarded bids regarding the design, construction, widening (including increase in the number of lanes), financing, operation and maintenance of several stretches of road across different parts of Portugal. Such analysis occurred under the fiscalização prévia legal control mechanism assumed by the Portuguese TdC.

On these occasions, the TdC decided to refuse the validity of the agreements entered into by EP and subsequently its approval (designated as “visto”) of the schemes, based in three main policy and procedural arguments:

(i) The lack of a public comparative study (this study is required by paragraph c) of article 6 of Decree-Law 86/2003, of 26 April as amended, which approved the legal framework of Portuguese PPP legal framework);

Las últimas decisiones del Tribunal de Cuentas (TdC) portugués han tenido un gran impacto en la capacidad de las empresas concesionarias de negociar y revisar los términos de los contratos con el Estado. Esto significa que ahora el TdC se convierte en uno de los elementos de riesgo en las alianzas público-privadas (Publicprivate partnerships). Las ofertas y pujas para los proyectos se tendrán que analizar a la luz de las decisiones del TdC para evitar sorpresas, afirma José Luís Esquível, socio fundador de Esquível Advogados en Lisboa.

(ii) The lack of an environmental impact declaration (the Portuguese TdC considered that the decision to launch the tender procedure for the award of the sub-concessions without EP having previously obtained the necessary environmental impact declaration was also in clear breach of the aforesaid PPP regulation), and

(iii) A breach of the rules of the tender programme (the Portuguese TdC also considered that the decision to award the sub-concessions to the awarded bidders was taken in clear breach of the rules set forth in the tender programme regarding the negotiations phase which are binding on EP. Such breaches arise from the fact that the tender programme sets out that:

- a. the purpose of the negotiations phase between the award body and the bidders is intended to improve the proposals selected for this phase, and
- b. the outcome of such negotiations cannot result in less advantageous conditions being offered to EP in the final proposal (in these instances, the proposal submitted by the awarded bidder after the negotiation phase offered less advantageous conditions to EP).

This understanding of the Portuguese Auditor Court is in line with a certain vision of the roles and responsibilities of the institution that has emerged over the last four years, in that awarded private bidders may often take (or gain) more advantage from PPP schemes than the public partner (grantor). Through these decisions the Portuguese TdC has therefore now signalled that all players involved in PPP models (in particular the ones supported by project finance mechanisms) must pay attention to the role that, at the end of each tender process, the Court may have.

As a result, the sub-concession agreements that were the object of the refusal by the Portuguese TdC has inevitably meant that the relevant road construction and refurbishment projects have suffered delays in terms of their respective commencement and the revision of the final offers.

This has specifically affected the financing conditions and forced the banks and the bidders to find new solutions in order to readjust the agreements to the points underlined by the Portuguese TdC.

This means, at the end of the day, that the Portuguese TdC must now be considered a part of the initial risk matrix applicable to PPP structures. Project bids and tenders must be considered in light of the TdC's findings and the line of decisions issued on this matter need to be duly considered by bidders in order to avoid further (unwanted) surprises.

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