
Public procurement amendments

Decree-Law 78/2022 of November 7 amends several public procurement regimes, including the Public Procurement Code

Portugal - Legal update

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Key aspects

- Amends the direct award, negotiation and competitive dialogue procedure regimes
- Establishes a new basis for excluding bids
- Establishes new requirements for submitting bids: labor costs and employees allocated to concession contracts and acquisition of services agreements
- Amends the mechanism for rectifying irregularities of form
- Amends the supplementary work and warranty period regime
- Extends the scope of application of the design-build public works contract regime
- Clarifies the preferred model for contracting local economic operators, as well as environmental and sustainability factors
- Extends the time limit for special measures

Amendment of public procurement regimes

Introduction

[Decree-Law 78/2022 of November 7](#) (“**Decree-Law 78/2022**”) makes several amendments to the public procurement regimes and the administrative tenders required to carry out research and development (“**R&D**”) activities:

- a) Twelfth amendment to the [Public Procurement Code](#),¹ approved by Decree-Law 18/2008 of January 29 (“**PPC**”)
- b) First amendment to [Law 30/2021 of May 21](#) (“**Law 30/2021**”), which approves special public procurement measures for projects financed or cofinanced by different funds, including under the Recovery and Resilience Plan (“**RRP**”)
- c) First amendment to [Decree-Law 60/2018 of August 3](#) (“**Decree-Law 60/2018**”), which establishes the regime for the administrative tenders necessary to carry out R&D activities

Decree-Law 78/2022 arises from a backdrop of:

- the procedural acceleration and simplification that began in 2021 with the special measures established in Law 30/2021, which has now been clarified and developed;
- the need to modify the PPC to bring it in line with European public procurement directives (Directives 2014/23/EU, 2014/24/EU and 2014/25/EU of the European Parliament and of the Council of February 26, 2014 – the “**Directives**”); and
- the pursuit of the “Agenda for Decent Work and Valuing Young People in the Employment Market.”

Contracting authorities can now ask bidders in precontractual tenders for a document showing the necessary labor cost structure for performing the contract. Rules are also established for the employment contract regime applicable to employees allocated to certain concession contracts and acquisition of services agreements.

¹ Twelfth amendment to the PPC, approved by [Decree-Law 18/2008 of January 29](#).
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Entry into force: Decree-Law 78/2022 enters into force on December 2, 2022, and it applies to public procurement tenders that begin after this date. However, the supplementary work amendments made by Decree-Law 78/2022 already apply to contracts performed on December 2, 2022.

1. Amendments to PPC

1.1. Amendments relating to the possibility of adopting direct award and negotiation or competitive dialogue procedures

> New rules for use of direct awards

The PPC establishes the **possibility of making a direct award** in cases where, in an earlier public tender or restricted prequalification tender:

- > no applications or bids were submitted and the specifications and—where applicable—the minimum technical and financial capacity requirements are not substantially different from those of the earlier tender, which is a possibility that is maintained in Decree-Law 78/2022; and
- > all the submitted bids were excluded and the specifications are not substantially different from those of the earlier tender.

In this latter scenario, **these bids must now be “unsuitable” under the regime established in the Directives**. The preamble to Decree-Law 78/2022 itself emphasizes that the new wording of article 24 PPC refers to “*the set of provisions in the PPC that correspond to the European definition of ‘unsuitable proposals’ (bids)*.”

- > Also, the PPC now limits the possibility of using direct awards for contracts that have a lower value than the European thresholds based on the exclusion of all the bids or applications, except:
 - a) in cases where the bids are excluded due to blatant disregard for the subject matter of the contract (article 70-2.a)); or
 - b) in the case of applications, in the event of (i) an impediment (article 184.2.c)); (ii) applications based on false documentation or in which the applicants have knowingly made false statements (article 184.2.j)); or (iii) failure to meet the minimum requirements for technical and financial capacity (article 184.2.l)).

Decree-Law 78/2022 also provides that making a direct award in these cases is conditional on there being no substantial change in the specifications or in the invitation to tender and the specifications of the earlier tender. Also, the notion of substantial change is no longer restricted to a change in the minimum technical and financial capacity requirements, specifically by changing the basic parameters of the specifications, but now also refers to “*the modification of aspects of contractual performance.*” Therefore, determining how the courts will interpret this aspect in the future will be crucial.

➤ **Provision for the use of the negotiation or competitive dialogue procedure when the precontractual tender has ended without an award being made**

The amendments made to article 29 of the PPC mean that the contracting authority can now also use the negotiation or competitive dialogue procedure in cases where all the bids in an earlier public tender or restricted prequalification tender were excluded on any of the exclusion grounds established in articles 70 and 146. The only exception is in cases where the bids blatantly disregard the subject matter of the contract to be signed.

In this new case, the contracting authority need not publish the tender announcements if:

- it only invites all the bidders from the public tender or restricted prequalification tender; or
- the bids for the earlier public tender or restricted prequalification tender were only excluded on the grounds under article 70.2 mentioned above.

1.2. New basis for excluding bids

- Bids that blatantly disregard the subject matter of the contract to be signed must now be excluded (see the first part of the new wording of article 70.a) PPC).

1.3. New requirements for submitting bids: labor costs and employees allocated to the performance of concession contracts and acquisition of services agreements

- **Submission of document showing the labor cost structure**

Lawmakers added a new article to the PPC (article 57-A) under which the contracting authority can ask bidders for a document showing the necessary labor cost structure for

contractual performance, especially when this concerns sectors where the fixed cost of labor is a decisive factor in price formation.

This document must identify the costs resulting from services required by law or by collective labor instruments, stating (i) the fixed or average amounts, and (ii) the percentage of relative weight. However, the exact terms for preparing the document still need to be regulated in an ordinance.

The document will be automatically classified under article 66.1 PPC, and there is no need for the bidder to request this classification for the purpose of restricting third-party access to the document, as the contracting authority is prevented from directly or indirectly disclosing its contents.

Article 57-A PPC does not regulate the terms for preparing the document in question but refers to an ordinance; therefore, compliance with this obligation is contingent on the ordinance being published.

In practice, seeing how other bidders will be able to dispute whether the successful bidder fulfilled its legal obligations under this article will be interesting.

➤ **Employees allocated to the performance of concession contracts and acquisition of services agreements**

Public works concession contracts, public service concession agreements and acquisition of services agreements now require—under article 42 and the new article 419-A PPC—the inclusion of a clause in the specifications regarding the obligation to ensure that employees allocated to concessions with a duration period of more than one year have a permanent employment contract.

This obligation does not apply to employees:

- (i) allocated to concessions with a duration period of one year or less (in this case, they can work under a fixed-term or short-term employment contract, but only for a period that is not shorter than the concession term);
- (ii) with a fixed-term or short-term substitute contract; or
- (iii) who carry out occasional tasks or non-durable services.

Failure to comply with this new obligation constitutes a very serious regulatory offense that, for companies, is punishable with a fine of between €7,500 and €44,800 under the new subparagraph f) of article 456 PPC.

Under the PPC, committing any infringements punishable as regulatory offenses can lead to the offender being prohibited from participating in any public procurement tender for up to two years when this is justified by (i) the gravity of the offense, and (ii) the fault of the agent.

1.4. Amendment to the mechanism for remedying irregularities of form in submitted applications or bids

Under the new wording of article 72.2 PPC, the jury must ask applicants and bidders to correct irregularities of form in their applications or bids within five days (This period remains unchanged.) This must still be done in compliance with the principles of equal treatment and competition, but there is now an express requirement that the content of the applications or bids cannot change.

Lawmakers have included a list some of the specific examples of remediable irregularities of form:

- (i) Failure to submit—or the incorrect submission of—documents that prove facts or capacities that existed before the date the application or bid is submitted, including the declarations in schedules i and v PPC or the European Single Procurement Document (ESPD).
- (ii) Failure to provide a Portuguese translation of documents submitted in a foreign language.
- (iii) The absence or insufficiency of signatures—including digital signatures—on any documents included in the application or bid. The applicant or bidder can now remedy this by attaching a signed ratification declaration for the documents already submitted.

Failure to remedy these irregularities under the terms and for the purposes of article 72.3 PPC within the 5-day period will now constitute a regulatory offense, punishable with a fine of between €5,000 and €30,000 under the new subparagraph e) of article 457 PPC.

1.5. Amendments applicable to works contracts

> Amendment to supplementary work regime

One of the most impactful amendments to Decree-Law 78/2022 concerns the supplementary work regime. First, comparing the definition of additional work that has now been revised in accordance with the Directives is important:

Previous PPC version	New PPC version (introduced by Decree-Law 78/2022)
Work is considered supplementary when the type or quantity is not established in the contract.	Work is considered supplementary when: <ul style="list-style-type: none">• the type or quantity is not established in the contract; and• <u>it is necessary for performing the contract.</u>

Therefore, supplementary work that is not necessary for completing the works can only be done if the contracting authority wants it to be done. Also, the contracting authority can now order the co-contractor to carry out supplementary work for financial reasons, as well as for the current technical reasons.

The contracting authority can also demonstrate that the change of operator is highly inconvenient, as opposed to having to demonstrate a considerable rise in costs for the site owner. This undetermined concept may lead to the greater use of this figure.

We emphasize that the new amendments regarding supplementary work apply to contracts that are being performed on December 2, 2022, and not only to new contracts signed after that date.

> Amendment to the warranty period for correcting equipment defects

The warranty period for defects in equipment allocated to but separable from the works was changed from two to three years (see new wording of article 397.2.c)).

Consequently, article 295—on releasing the security deposit—was amended, but it still establishes a 30-day period for the public contracting party to fully release the security deposit for obligations with a warranty period of three years or less (instead of only two years).

A three-year period was already established for goods purchased by consumers, under Decree-Law 84/2021 of October 18, which regulates consumer rights in the purchase and sale of digital goods, content and services, and transposes Directives (EU) 2019/771 and (EU) 2019/770.

In short, the warranty periods established in the PPC for works contracts are fully in line with those in Decree-Law 84/2021 of October 18, as Decree-Law 84/2021 of October 18 already established a 3-year period for goods and a 10-year period for the structure of a building (and

this period was already stipulated in the PPC), while the 5-year building warranty period is maintained for any other irregularities.

1.6. Warranty period for acquisition of goods contracts

The PPC already established that the aspects of the sale of consumer goods and related warranties regarding the liability and obligations of the supplier and producer and consumer rights would apply, with the necessary changes, to acquisition of goods contracts (see article 444 PPC).

Therefore, the maximum warranty period was extended from two to three years for acquisition of goods contracts. However, the supplier can propose a longer period when it involves an aspect relating to performing the contract put out to tender, as already established in the previous version of the PPC.

1.7. Clarification of the preferred model for contracts with local economic operators and of the environmental and sustainability factors included in the award criterion and the tiebreaker criterion

To adapt the PPC to the Directives, the lawmakers clarified the following:

- (i) Use of reserved contracts: the possibility for contracting authorities to reserve for certain entities the formation of a set of current use contracts with a lower value than the threshold of the Directives is contingent on the contracts not involving a certain crossborder interest (see new wording of subparagraph c) of article 54-A.1 PPC).
- (ii) Environmental and sustainability conditions as aspects of contract performance and amplification of the award criterion: the list of factors and subfactors contained in article 72.2.d) no longer includes the example of “*products of local or regional origin*” or “*products from holder of Family Farming Status.*”

2. Amendments to the special public procurement measures for projects financed or cofinanced by various funds, including under the RRP (Law 30/2021)

2.1. Creation of a special regime for design-build works contracts

As explained, Law 30/2021, which approves special public procurement measures, not only created a special measures regime but also amended the PPC to speed up and simplify contract formation procedures.

One of the most impactful measures of Decree-Law 78/2022 is the creation of a new special regime² for design-build works contracts in precontractual tenders for projects financed or cofinanced by European funds, including those in the RRP. The objectives of this regime are to:

- eliminate the unnecessary waste of time and resources by the contracting authority when it considers that market players are better able to prepare a works execution plan; and
- streamline procedures.

As this is a special procedure, the following requirements apply:

- a. The contracting authority must provide a preliminary study with the specifications (not only the preliminary program required by the PPC) and the successful bidder must then draw up the execution plan.
- b. The contents of the items referred to in the previous subparagraph must comply with Ordinance 701-H/2008 of July 29 and must be included in the specifications.
- c. The base price established in the specifications must itemize the maximum amounts the contracting authority is willing to pay for (i) the design services, and (ii) the execution of the works.
- d. The award will be decided using the multifactor type.³ Article 2A.5 of Law 30/2021 establishes that the amplification factors and subfactors must (i) be strictly objective, (ii) ensure that bids can be adequately compared, and (iii) include at least the price for the design and the price for the execution of the works.

Finally, for the purpose of choosing the procedure, the contract to be signed will not be considered a mixed contract (see subparagraph 6 of the new article 2-A of Law 30/2021).

² As opposed to the PPC rule establishing access to the design-build type on an exceptional basis.

³ Under which the award criterion is amplified by a set of factors—and possibly subfactors—corresponding to various performance aspects of the contract to be signed (see reference from the new article 2-A.5 of Law 30/2021 to article 74.1.a) PPC).

2.2. Clarification of application to precontractual procedures for execution of the RRP

As the lawmakers expressly state in the preamble to Decree-Law 78/2022, article 2 of Law 30/2021 is amended to “clarify the applicable procedures in the case of precontractual tenders for the execution of the RRP,” thereby clarifying that this application is not contingent on any ordinances.

2.3. Extension of period for applying special measures

The application period for special procurement measures will be extended until December 31, 2026, in the following cases:

- Execution of contracts aimed at promoting public or controlled-cost housing or for intervening when the ownership and management of real estate has been transferred to the municipalities as part of the decentralization of powers process (see new wording of article 3 of Law 30/2021).
- Execution of contracts for the lease or acquisition of IT equipment, the purchase, renewal, extension or continuation of software licenses or services, the purchase of computing or cloud storage services, the acquisition of consulting or advisory services, and the execution of public works associated with digital transformation processes (see new wording of article 4 of Law 30/2021).
- Execution of contracts for the lease or purchase of goods and the acquisition of services or the performance of public works aimed at constructing, renovating or refurbishing real estate in the health sector, ongoing and integrated care units, and social support for the elderly, people with disabilities, children and young people (see new wording of article 5 of Law 30/2021).

2.4. Contract monitoring - Duty to send contracts electronically to the Institute of Public Markets, Real Estate and Construction (“IMPIC”)

- Law 30/2021 already established a series of obligations to send contracts to the Court of Auditors for inspection and created an independent commission to monitor and supervise the tenders and, in particular, to oversee compliance with transparency and impartiality requirements for special measures contracts.

- The new paragraph 7 in article 19 of Law 30/2021 requires the IMPIC to create a specific section on the public procurement website for special measures procedures and contracts. Contracts must now be sent electronically to the IMPIC for publication on the website; otherwise, they will not be effective.

3. Amendment to Decree-Law 60/2018

Lawmakers also made a minor amendment to article 3 of Decree-Law 60/2018—which simplifies the administrative procedures required to carry out R&D activities—to exclude the application of part II of the PPC to the formation of lease agreements or the acquisition of goods or services agreements in the context of carrying out R&D activities up to the threshold established in the Directives.

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