

JUNE 28TH, 2022

EXCEPTIONAL PRICE REVISION REGIME **WITHIN THE SCOPE OF PUBLIC PROCUREMENT**

1. In the generalized context of rising prices of raw materials, materials and labour, essential to various sectors of economic activity, the Decree Law No. 36/2022, of May 20th, establishes an exceptional and temporary regime in the scope of price increases impacting on public contracts.

A. Scope of Application

2. The rules of DL 36/2022 apply to public contracts being executed or to be executed and to public contract formation procedures already started or to be started (cf. article 2, no. 1 of DL 36/2022).

Regarding to the type of contracts covered, these are public works contracts, although this exceptional regime is also applicable, with the necessary adaptations, to contracts for the acquisition of goods and services and to public contracts which, irrespective of the legal nature of the project owner, are subject to public procurement rules (cf. article 2, no. 2 and 3 of DL 36/2022).

In the case of service procurement contracts, the applicability of the rules in DL 36/2022 is dependent on an Ordinance (not yet published) of the Ministry of Finance and of the Ministry responsible for the sector of activity, in which the categories of contracts covered will be identified (cf. article 2, no. 2 of DL 36/2022).

Finally, the regime contained in DL 36/2022 is not applicable to sectors whose co-contractors have been covered by specific support measures, whenever the extraordinary price revision is intended to offset the effects of the increase in costs of the same raw materials, materials, labour and support equipment already supported by specific measures (cf. article 2, no. 4 of DL 36/2022).

B. Extraordinary Revision Procedure

3. Under the law, the contractor, or any of the other private contracting parties, may request an extraordinary price revision if a certain material, type of labour or support equipment (cf. article 3, no. 1 of DL 36/2022):

a) Represent, or will represent, during performance, at least 3% of the contract price and;

¹ Hereinafter, "DL 36/2022".

b) The year-on-year rate of change of the cost is 20% or less.

4. From a procedural point of view, the request for extraordinary revision is characterized by the following steps:

- a) The request for an extraordinary revision must be submitted to the construction owner prior to the provisional acceptance of the work, and must contain, in a duly justified manner, the form of extraordinary price revision from among the methods provided for in article 5² of Decree-Law no. 6/2004, of January 6th, in its current wording³, that best suits the contract in question (cf. article 3, no. 2 of DL 36/2022);
- b) The construction owner must, within 20 calendar days⁴ from receipt of the request and under penalty of tacit acceptance, decide on the form of the proposed extraordinary price revision and may, in the event of non-acceptance, adopt the following measures, in exclusive and alternative terms (cf. article 3, no. 3 of DL 36/2022):
 - i) Submit, in a duly reasoned manner, a counterproposal;
 - ii) Perform the price revision according to the contractually established form, whereby, for cases of revision by formula, the updating coefficients resulting from the respective calculations are multiplied by a compensation factor of 1.1 (cf. article 3, no. 3, paragraph b) of DL 36/2022);
 - iii) Include certain materials and labour with revision calculated by the cost guarantee method, applying to the rest the contract formula, without any increase (cf. article 3, no. 3, paragraph c), of DL 36/2022).
- c) If there is no agreement on the form of the extraordinary revision, prices are revised based on the developer's counterproposal or, if there is no counterproposal, in accordance with that which results from paragraphs b) and c) of no. 3 of article 3 (cf. article 3, no. 4 of DL 36/2022).

C. Material and temporal scope of the extraordinary revision

5. From the point of view of its material and temporal scope, the form of price revision applies to all materials, types of labour and support equipment existing for the work and to the entire period of execution of the contract (cf. article 3, no. 5 and 6, do DL 36/2022) it should also be noted that the

² Specifically, the methods are as follows: by formula, cost guarantee, formula and cost guarantee.

³ Hereinafter "DL 6/2004".

⁴ Cf. article 471 no. 1, paragraph b), of the CCP.

correction of price revisions already calculated according to the form of price revision established in the contract is made in the month following the determination of the form of price revision (cf. article 3, no. 7 of DL 36/2022).

6. The price revision made under the terms of the DL 36/2022 rules out the ordinary revision provided for in the specific clauses of the contract under DL 6/2004 (cf. article 3, no. 8 of DL 36/2022).

7. The regime provided for in DL 36/2022 will remain in force until December 31st, 2022 and is applicable to all requests for extraordinary revision made until that date (cf. article 8, no. 1 and 2 of DL 36/2022).

D. Other questions

8. In addition to the extraordinary revision, an extension of the performance period is permitted, without any penalty or additional payment to the contractor, in the event of a delay in complying with the work plan resulting from an impossibility of obtaining the materials necessary for the performance of the work, demonstrably not attributable to the contractor. This extension is requested by the contractor; the owner of the work has 20 calendar days to respond, under penalty of tacit acceptance (cf. article 4 no. 1 of DL 36/2022). In the above cases, the contractor must submit a new, readjusted payment plan for approval by the owner of the work, which serves as the basis for calculating the price revision of the work to be performed (cf. article 4 no. 2 of DL 36/2022).

9. Until December 31st, 2022, the contracting entities may apply the rule in article 70 no. 6 of the CCP⁵ regardless of express provision in the procedure program, without prejudice to the applicability of the other requirements (cf. article 5 of DL 36/2022).

⁵ In accordance with article 70, no. 6 of the CCP, in open and restricted bidding procedures by prior qualification, in which all bids have been excluded and for reason of justified public interest, the contracting entities may award, among the bids that have only been excluded on the basis of article 70, no 2 paragraph d) of the CCP and whose price does not exceed the base price by more than 20%, the bid that is ranked first according to the award criteria, provided that: a) this possibility is expressly foreseen in the program of the procedure b) the limits of article 47, no. 4 of the CCP are respected and c) the decision authorizing the expenditure already allows or it reviewed so as to allow the award at that price. With the DL 36/2022, the express provision in the procedure program is no longer necessary.

10. On the day of publication of DL 36/2022 - May 20th - IMPIC. I.P⁶ issued the *Recomendação de Boas Práticas 01/2022-CCP*⁷, in which it is recommended, among other measures, that the author of the execution project be asked about the most appropriate method of calculating price revision and the respective periodicity, so that it may be included in the specifications (cf. II, Item 3). Additionally, and in the context of price increases, IMPIC advises that the specifications should contain a clause allowing the advance payment of prices (cf. II, Item 4), subject to the limits of Article 292 no. 1 paragraph a) of the CCP (or the limits of paragraph 2, if the expense occurs in more than one economic year). In this case, a bond of equal value to the amount advanced must be provided, and the contractor, in its proposal, has the prerogative to request such advance payment.

A **PARES | Lawyers** is available to provide information on this and other topics in a more concrete and adequate manner to the reality of each client, and is able to assist its clients on any topic regarding consumer rights.

Ricardo Neves
rn@paresadvogados.com

This Newsletter is intended for clients and lawyers and does not constitute advertising. Its copy, distribution or any other form of reproduction is forbidden without the express authorisation of the authors. The information contained herein is of a general nature and does not dispense with the need to obtain legal advice before making any decision regarding the matter under discussion. For further information, please contact **Ricardo Neves** (rn@paresadvogados.com).

⁶ Hereinafter “IMPIC”.

⁷ Hereinafter “Recomendação de Boas Práticas”.