

PUBLIC PROCUREMENT IN THE FIELDS OF DEFENSE AND SECURITY

PUBLIC LAW

On October 6th, Decree-Law no. 104/2011¹ was published, establishing the **legal regime for public procurement on the fields of defense and security**. This Decree-Law implements Directive no. 2009/81/EC, of the European Parliament and of the Council, of 13 July². The new legal regime comes **into force on the 1st January 2012 and is applicable to the procedures of formation of contracts started after such date**. Its purpose is to adapt the public procurement regime to the specificity of the fields of defense and security.

This diploma does not break with the system that resulted from the previous regime established on Decree-Law no. 33/99, of 5 February. In essence, it regulates those procedures more intensely and foresees new situations.

This Decree-Law is applicable to the formation of contracts entered into by entities considered as “contracting entities” under the terms of the Public Procurement Code (PPC), which perform their tasks in defense and security fields and that have as their **object**:

- a) The supply of military equipment³, including any parts, components and/or connecting elements of the same;
- b) The supply of sensitive equipment, including any parts, components and/or connecting elements of the same;
- c) Public works, supplies and services directly related with the military equipment referred to in paragraphs a) and b) regarding one or all the elements of its life-cycle;
- d) Public works, supplies and services for specific military purposes, or for sensitive public works and services.

¹ This Decree-Law revokes Decree-Law no. 33/99, of 5 February, which established the legal regime for purchases in the field of defense, covered by article 223, paragraph 1, subparagraph b) of the Treaty of Rome (contracts related to weapons, ammunition and other war material).

² Directive no. 2009/81/EC, of the European Parliament and of the Council of 13th July, on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defense and security, which amends Directives 2004/17/EC and 2004/18/EC, both of the European Parliament and of the Council of 31 March.

³ For the purposes of this decree-law, military equipment includes, *inter alia*, the types of products provided in the list of weapons, ammunition and war material, approved by the Council Decision no. 255/58, of 15th April, interpreted according to the development of the technology, to the procurement policies and to the military requirements, based on the Common Military List of the European Union.

This diploma defines its scope according to the value of the contracts

Regarding the **value of the contracts**, this Decree-Law is applicable to the contracts whose estimated value is equal or more than *(i)* € 387.000,00 for supply and services contracts and *(ii)* € 4.845.000,00 for public works contracts (see paragraph a) of article 8 of Directive no. 2009/81/EC, of the European Parliament and of the Council, of 13 July).⁴ As so, below these thresholds, it is not mandatory to comply with this legal regime.

However, the contracts provided on article 5 of this Decree-Law are **excluded** from this legal regime, namely, *(i)* those involving the application of confidentiality rules, *(ii)* contracts with military purposes entered into by the Government and the government of another Member State and *(iii)* compliance with procedural rules and specific proceedings established in an international agreement. Hence, also in these situations, this legal regime is not applicable.

As so, when this Decree-Law is applicable, the contracting entities shall adopt, specifically⁵, under the terms of articles 14 and 15 of Decree-Law no. 104/2011, one of the following procedures in order to choose the awarded bidder:

- i)* a **negotiated procedure, with or without publication of the tender notice**, which follows a special procedure set out in Chapter III of this Decree-Law;
- ii)* a **competitive dialogue procedure**, which follows the procedure established in the PPC, except as provided in article 44 of this Decree-Law; or
- iii)* a **limited tender with prior qualification**, which follows the procedure established in the PPC, being this Decree-Law applicable in what concerns the powers of the jury, the minimum time limit and the period of validity of the bids (see article 44 of Decree-Law no. 104/2011).

To select the procedure, the general rule is to adopt the **negotiated procedure with publication of the tender notice** or the **limited tender with prior qualification**.

⁴ Decree-Law no. 33/99, of 5 February, which was previously applicable, did not define its scope according to the value of the contracts.

⁵ In this respect, Decree-Law no. 33/99, of 5 February, did not limited the procedures for the formation of contracts, generally referring to the decree-law concerning to the legal regime of public expenditure and purchase of goods and services (revoked by PPC, which then became the applicable regime) or to the tender with selection of proposals for negotiation, which was widely regulated in said decree-law. However, this decree-law required the adoption of direct award in certain situations (see footnote no. 6).

Special relevance is given to confidentiality obligations during the formation and execution of the contracts

The contracting entities may adopt simpler procedures such as the **negotiated procedure without publication of the tender notice** or the **competitive dialogue procedure** only in duly justified cases. In this context, article 16 of Decree-Law no. 104/2011 foresees the possibility to adopt a **negotiated procedure without publication of tender notice** in several circumstances. As so, this simpler procedure may be adopted, for instance, in urgent situations or for compelling reasons arising out from events unforeseeable by the contracting authority⁶. Moreover, articles 17, 18, 19 and 20 contemplate the adoption of this procedure in certain areas, namely, research and development, supply, works and complementary or repeated services and shipping or air transportation, respectively, which the contracting authority shall duly justify (see art. 21 of Decree-Law no 104/2011).

Concerning the process of the proceedings, some aspects of the **negotiated procedure with publication of tender notice** should be stressed. In one hand, a minimum time limit of 40 days for the submission of the applications is established, counted after the publication in the Official Journal of the European Union or after the date of dispatch of the invitations, which may be reduced in some cases, namely when electronic means have been used. On the other hand, a period of 90 days for the maintenance of the bids is laid out.

The law also allows the adoption of secondary policy concerns in public procurement, such as quality management and environmental management, in accordance with articles 33 et seq. of this Decree-Law, establishing the so-called “rules of qualitative selection”.

This Decree-Law also regulates **framework agreements**, providing a maximum term of seven years, although admitting that there may be some exceptions, which must be justified (articles 45 and 46)

⁶ Similarly, Decree-Law no. 33/99, of 5 February, required the adoption of the direct award for (i) contracts considered as secret, (ii) or whose execution was followed by special security measures, (iii) or when the protection of essential interests of the Portuguese State demanded it, (iv) or in situations of serious international tension.

*The offsets legal regime
is revoked*

It should also be noted that this Decree-Law provides a chapter concerning the safeguard of classified material, establishing confidentiality obligations during the formation and execution of the contract⁷.

Finally, it should also be referred that on the 6th of October Decree-Law no. 105/2011 was also published, which puts an end to the offsets legal regime, revoking Decree-Law no. 154/2006, of 7 August. The Decree-Law establishes a transitional regime applicable to the offset agreements already entered into or in execution.

⁷ Decree-Law no. 33/99, of 5 February, only provided on article 29 general confidentiality obligations. In turn, Decree-Law no. 104/2011 gives special relevance to this subject.

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