

BUDGET IMPLEMENTATION LAW EXCEPTIONAL LEGAL REGIME FOR THE USE OF DIRECT AWARD PROCEDURE IN 2011

PUBLIC LAW

Decree-Law no. 29-A/2011, of March 1, (DLBI 2011), which establishes the necessary provisions for the implementation of the State Budget for 2011, approved by Law no. 55-A/2010, of December 31 (SBL 2011), introduced in the legal system exceptional rules related to the purchase of the goods and services and to the contracting of public works, to be in effect during the fiscal year of 2011.

Direct award procedures up to the EU procurement thresholds

Article 35 of the aforementioned decree-law establishes this regime and determines that, in the said period, by using **negotiation** or **direct award procedures, with mandatory consultation of at least three entities¹ up to the EU procurement thresholds**, expenditures may be incurred with (i) the **purchase of goods and services**, including information technology, and with (ii) the **contracting of public works**, as long as such expenditures continue to execute or implement new budgetary consolidation measures that allow, in general terms, a revenue increase or a reduction of public expenditure.

It should be noted that this provision only applies to State “*integrated services and autonomous funds and services*” (since this provision forms part of chapter II of DLBI 2011, exclusive for integrated services and autonomous funds and services). Therefore, this provision can not be used by municipalities, autonomous regions, public companies or municipal companies. “*Integrated services*” should be understood as **integrated services in the Direct State Administration** (e.g., Ministries and General-Directorates) and State “*autonomous funds and services*” should be interpreted as State services with administrative and financial autonomy, without a corporate nature (e.g. Public Institutes).

The **EU thresholds** for the use of the direct award procedure are generally more generous than the national thresholds established in the Public Contracts Code (PCC). In fact, PCC results from the transposition of EU directives, but the national legislator has been, in some cases, stricter than the EC legislator, imposing lower thresholds for the use of the direct award procedure. With this new provision:

¹ The mandatory consultation of at least three entities may be waived in task agreements to gather statistical information to be entered into by the National Institute of Statistics, I. P., as long as EU thresholds are respected, without prejudice to paragraph 4 of article 35 of Law no. 12-A/2008, of February 27, as amended by Laws no. 64-A / 2008, of December 31, 3-B/2010, of April 24, 34/2010 of September 2 and 55-A/2010, of December 31.

*Prior authorization from the
Minister of Finance*

1. Concerning to **public works contracts**, pursuant to article. 35 of the above mentioned decree-law and if the other requirements of this provision are verified, the State and the Public Institutes can now use the direct award procedure up to **€4,845,000.00**, which is the current EU threshold (the national threshold for these entities and for this type of contracts is €150,000.00).
2. Regarding the **purchase of goods and services** agreements in 2011, and if the other requirements of article 35 are verified, the State may use the direct award procedure up to **€125,000.00** and Public Institutes may use the direct award procedure up to **€193,000.00**, which is the current EU threshold (the national threshold for these entities and for this type of contract is **€ 75,000.00**).

Paragraph 3 of article 35 of DLBI 2011 establishes that the use of the **procurement rules described above**, requires **prior authorization** from the member of Government responsible for finance (or from the member of Government responsible for social security, where a body that integrates the perimeter of budgetary consolidation of social security is involved). The same provision also grants powers to the Minister of Finance for the **recognition of other exceptional situations which may entitle the use of the referred procurement rules**. In fact, this expression is fairly wide and gives a margin of discretion on the type of cases subject to this regime.

Finally, paragraph 4 of article 35 of DLBI 2011 authorizes the use of **urgent public tender** for the conclusion of (i) public works contracts co-financed by EU funds, (ii) if the value of such urgent public tender is less than the amount provided in subparagraph b), of article 19 of the PCC [i.e. € 4,845,000.00] and (iii) when the award criterion is the lowest price².

² In this situation, paragraphs 5 and 6 of article 35 of DLBI of 2011 establish that articles 88 to 91 of the PCC are applicable to the urgent public tender procedure in what concerns the requirement of a bond, and that a minimum period of 15 days for submission of tenders should be considered.

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