

LEGAL ASPECTS REGARDING PUBLIC PROCUREMENT IN ROMANIA

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Abstract: For the holders of public property rights, but also for the holders of private property rights, the current way of procuring the material assets necessary for their operation and their existence is the purchase of goods in the civil circuit of the company. In the case of public authorities and institutions, the acquisition of goods in the civil circuit is generally carried out through public procurement. In the field of procurement, the award procedure is the basic part of the procurement process. In other words, it is the time when the contracting authority meets with the operator or economic operators to evaluate the offers and decide the package of products, services or works that is appropriate for the institution or public authority.

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Public procurement is the sum of all the processes of planning, prioritizing, organizing, advertising and procedures for purchases by organizations that are fully or partly funded by public (European, national or local) budgets.

The Romanian Public Procurement Framework Act¹ regulates the way public procurement is carried out, the procedures for the awarding of public procurement contracts and the organization of the contests, the specific instruments and techniques that can be used for the award of public procurement contracts, as well as certain specific issues related to the execution of public procurement contracts.

The normative act aims to provide the legal framework necessary to achieve the purchase of goods, services and works in conditions of economic and social efficiency. The principles underlying the awarding of public procurement contracts and the organization of solution contests are:

- a) non-discrimination;
- b) equal treatment;
- c) mutual recognition;
- d) transparency;
- e) proportionality;
- f) assuming responsibility.

This law² applies to the award of a works contract by a non-contracting legal entity if the following conditions are met cumulatively:

a) the contract is financed / subsidized directly by more than 50% of its value by a contracting authority;

b) the estimated value, exclusive of VAT, of the contract is equal to or higher than the threshold of 23,227,215 lei, for the public procurement contracts / framework agreements;

c) the contract includes one of the following activities:

- civilian genius works;

¹ Law no. 98 of May 19, 2016 on public procurement, published in the Official Gazette of Romania no. 390 of May 23, 2016.

² Article 6 of Law no. 98 of 19 May 2016 on public procurement.

- construction works for hospitals, facilities for sports, recreation and leisure activities, buildings of pre-university and university education institutions and administrative buildings.

Recently, in the Official Gazette no. 1022 of 22 December 2017 was published Government Emergency Ordinance no. 107/2017 for amending and completing some normative acts with a major impact on public procurement.

These amendments cover all primary legislation in the field of public and sectoral procurement as well as concessions, including Law no. 98/2016.

Thus, the changed aspects start from the definition of Contracting Authorities and come to contraventions and sanctions.

While, according to Law no. 98/2016, in order for a public body to be considered a contracting authority, it should have been set up to meet needs of general interest, without commercial or industrial purpose, Government Ordinance no. 107/2017 provides clarification in that it considers that needs in the public interest are of a commercial or industrial nature if the entity set up under the law by a contracting authority fulfills cumulatively the following conditions:

- a) operates under normal market conditions;
- b) seeks to obtain a profit;
- c) bear the losses resulting from the exercise of its activity.

Also, the old threshold of 648,288 lei, existing until 01.01.2018, for the framework contracts or agreements for products and services, for which there is the obligation to publish the notices of participation and / or award in the Official Journal of the European Union, according to the new legislative amendments no longer apply to the local contracting authorities and the subordinated authorities. The new normative act introduces for these authorities a new threshold, considerably higher, of 994,942 lei, which until 01.01.2018 was 929,089 lei.

Moreover, while the old regulation made the award of contracts on individual lots even if they fulfilled the conditions regarding the estimated value and the percentage of the cumulated value, in the current regulation the contracting authority has the right to apply the simplified procedure or, as the case may be, the acquisition direct, for assignment.

According to Article 7 of the Law no. 98/2016¹, the award procedures for which publication of a contract notice and / or award is mandatory in the Official Journal of the European Union applies to the award of public procurement contracts / framework agreements whose estimated value net of VAT is equal to or greater than the following thresholds:

- a) 23,227,215 lei, for the public procurement contracts / works framework agreements;
- b) 600,129 lei, for public procurement contracts / framework agreements for products and services; b ^ 1) 929.089 lei, for public contracts / framework agreements for products and services awarded by local contracting authorities, as defined in art. 23 of the Local Public Administration Law no. 215/2001, republished, with the subsequent amendments and completions, as well as those under their subordination;
- c) 3.334.050 lei, for public procurement contracts / framework agreements for services that are related to social services and other specific services².

The contracting authority shall award public procurement contracts / framework agreements and organize contests for public procurement solutions the estimated value of

¹ Article 4, paragraph (3) of the Law no. 98 of 19 May 2016 on public procurement.

² Article 6 of O.U.G. no. 107/2017 of 20 December 2017 for the modification and completion of some normative acts with impact in the field of public procurement, published in the Official Gazette no. 1022 of December 22, 2017.

which is less than the thresholds mentioned by a simplified procedure, in compliance with the principles laid down by law.

However, the law also introduced an exception; the contracting authority may apply the simplified procedure or the direct procurement, where appropriate, for the award of individual lots, where the following conditions are met cumulatively:

a) the estimated value, without VAT, of the respective lot is less than 355,632 lei, in the case of the purchase of goods or services, or less than 4,445,400 lei, in the case of the purchase of works;

b) the aggregate value of the lots for which the condition referred to above is and is or has been awarded does not exceed 20% of the total value of all the lots in which the work concerned was divided, the purchase of similar products or services view.

Therefore, under the circumstances, any economic operator has the right to participate in the award procedure as a tenderer or candidate either individually or jointly with other economic operators, including in the form of temporary association established for the purpose of participating in the award procedure, in conditions provided by law.

The award procedures governed by law applicable to the award of public procurement contracts or framework agreements or the organization of contests of an estimated value equal to or above the values prescribed by law are as follows:

a) open tender;

b) restricted bidding;

c) competitive negotiation;

d) competitive dialogue;

e) partnership for innovation;

f) negotiation without prior publication;

g) solution contest;

h) the award procedure applicable to social services and other specific services; i) simplified procedure¹.

According to Article 12 of O.U.G. no. 107/2017 if no tender / request to participate has been submitted in the context of an open tender procedure, a restricted procedure or a simplified procedure for the procurement of those products, services or works, or only inappropriate tenders / requests for participation have been submitted, provided not to substantially alter the initial conditions of the acquisition and, at the request of the European Commission, to report to it.

This procedure will also be applied as a strictly necessary measure when periods of open tender, restricted bidding, competitive negotiation or simplified procedure can not be met due to extreme urgency due to unforeseeable and unpredictable events under no circumstances whatsoever of an action or inaction of the contracting authority.

With regard to clarifications in the awarding documentation, any interested economic operator has the right to request clarification or additional information regarding the awarding documentation, in compliance with the deadline set by the contracting authority in the contract notice / simplified / contest. The contracting authority establishes one or two deadlines in the tender / simplified / contest notice in which it will respond in a clear and complete way to all requests for clarification of the additional information, according to the provisions of the methodological norms provided by the law².

To the extent that requests for clarification or additional information have been requested within the deadline set out in the contract notice / simplified / contest, the

¹ Article 11 of O.U.G. no. 107/2017 of 20 December 2017 for the modification and completion of some normative acts with impact in the field of public procurement, published in the Official Gazette no. 1022 of December 22, 2017.

² Article 160 of Law no. 98 of 19 May 2016 on public procurement.

response of the contracting authority to these requests must be submitted at least 10 days and 5 days respectively in the demonstrated emergency situations by the contracting authority, before the deadline set for the submission of tenders or requests to participate.

The 10-day and 5-day periods respectively replace the old 6-day and 4-day periods as set out in the old regulation. The contracting authority has the right to establish through the procurement documentation requirements on the economic and financial situation that are necessary and appropriate to ensure that economic operators have the economic and financial capacity to execute the public procurement / framework agreement and to be protected against a possible risk of proper contract failure.

The requirements for the economic and financial situation established by the contracting authority may concern elements such as:

a) a minimum level of annual turnover, including a certain minimum turnover in the field of public procurement / framework agreement;

b) the minimum annual turnover imposed on economic operators must not exceed twice the estimated value of the public procurement contract or, as the case may be, the expected maximum value of the subsequent contracts to be executed at the same time or, if that is not the case known at the estimated value of the largest subsequent contract¹.

The contracting authority has the right to establish through the procurement documents the technical and professional capacity requirements that are necessary and appropriate to ensure that the economic operators have the human and technical resources and experience required to execute the public procurement / of the appropriate quality.

The technical and professional capacity requirements established by the contracting authority may in particular address the existence of an appropriate level of experience, by reference to contracts executed in the past.

In the case of procedures for the award of public contracts / service or works framework agreements or public procurement contracts / framework agreements for products requiring work or location or installation operations, the professional capacity of economic operators to provide services or to execute the construction or installation operations can be evaluated according to their skills, competencies, efficiency, experience and potential.

The economic operator shall demonstrate compliance with the technical and professional capacity requirements by presenting, as appropriate, one or more of the following information and documents:

a) a list of the works carried out during a period covering no more than the last 5 years, accompanied by certificates of good execution for the most important works; where necessary to ensure an appropriate level of competition, the contracting authority may establish that relevant works completed more than 5 years ago are taken into account;

b) a list of the main deliveries of the goods or of the principal services supplied during a period not exceeding the last three years, indicating the values, dates and public or private beneficiaries; where necessary for the purpose of ensuring an appropriate level of competition, the contracting authority may determine that deliveries of relevant relevant products or services rendered more than 3 years before are taken into account;

c) indication of the technicians or technical bodies involved, whether or not they belong to the economic operator's organization, in particular those responsible for quality control and, in the case of public works contracts, those available to the contractor for the execution work;

d) a description of the technical facilities and measures used by the economic operator to ensure its quality and facilities for study and research;

¹ Article 175 paragraph (1) of Law no. 98 of 19 May 2016 on public procurement.

- e) specification of the management and traceability systems within the supply chain that the economic operator will be able to apply during the execution of the contract;
- f) where the products or services to be supplied are complex or, exceptionally, intended for a particular purpose, the results of a check carried out by the contracting authority or, on its behalf, by a competent official body in the country in which the economic operator shall be established, subject to the agreement of that body, relating to the production capacities of the economic operator supplying the products or the technical capacity of the economic operator providing the services and, if necessary, the study and research facilities available to him and the measures quality control that he / she is to apply;
- g) the educational and professional qualifications of the economic operator providing services or executing works or of the managerial staff of the economic operator, if these are not assessment factors;
- h) specification of the environmental management measures that the economic operator will be able to apply during the execution of the contract;
- i) a statement of the average annual number of personnel of the economic operator providing services or works and the number of senior management personnel over the past 3 years;
- j) a statement of machinery, plant and equipment at the disposal of the economic operator providing services or executing works for the execution of the contract;
- k) specification of the part / s of the contract that the economic operator intends to subcontract;
- l) samples, descriptions or photographs of the products to be delivered, the authenticity of which must be certified at the request of the contracting authority;
- m) certificates issued by official quality control institutes or recognized organizations attesting conformity of the products to be delivered, clearly identified by reference to technical specifications or standards¹.

When intending to award a public procurement / framework agreement on lots, the contracting authority shall apply the capacity requirements by reference to each lot. By way of exception, the contracting authority may set requirements for the annual minimum turnover level by reference to groups of lots where multiple lots may be awarded to the same tenderer and the contracts for them must be executed at the same time.

However, as a condition for the possibility of awarding contracts which are the subject of several lots to the same tenderer, the contracting authority may establish the technical and / or professional resources requirements by reference to groups of lots where the use of these resources in the framework of the contracts is carried out simultaneously or it is impossible to allocate the same resource for multiple contracts running at the same time.

The capacity criteria and the minimum requirements required to meet them, together with appropriate evidence, are set out in the contract notice².

Where more than one economic operator participates jointly in the award procedure, they may benefit from the support of a third party for fulfilling the criteria relating to the economic and financial situation and / or technical and professional capacity.

According to Article 187 of the Law, without prejudice to legal or administrative provisions on the price of certain products or the remuneration of certain services, the contracting authority shall award the public procurement / framework agreement to the

¹ Article 179 of Law no. 98 of 19 May 2016 on public procurement.

² Article 181 of Law no. 98 of 19 May 2016 on public procurement.

tenderer who has made the most economically advantageous tender. In determining the most economically advantageous tender, the contracting authority has the right to apply one of the following award criteria: a) the lowest price; b) the lowest cost; c) best value for money; d) the best quality-cost ratio.

The best value-for-money / quality-cost ratio is determined on the basis of assessment factors including qualitative, environmental and / or social aspects related to the subject matter of the public procurement / framework agreement.

However, the contracting authority will not use the lowest cost / lowest price as the award criterion for:

a) certain categories of public contracts / framework agreements for works or services which have as their object intellectual services and which involve activities of a high level of complexity;

b) public procurement / design and execution framework agreements or services relating to trans-European transport infrastructure projects as defined by law and county roads.

According to the Emergency Ordinance no. 107/2017, it is a contravention not to provide NAPA with the information regarding not only the awarding of public procurement contracts / framework agreements, but also their modification.

The new legal act also removes the exception to the application of sanctions on public procurement contracts financed by European funds and / or national public funds related to them. Thus, sanctions will also apply if the contravention found is a deviation, in accordance with the provisions of O.U.G. no. 66/2011.

References

1. Law no. 98 of 19 May 2016 on public procurement, published in the Official Gazette of Romania no. 390 of May 23, 2016;
2. O.U.G. no. 107/2017 of 20 December 2017 for the modification and completion of some normative acts with impact in the field of public procurement, published in the Official Gazette no. 1022 of December 22, 2017.