

Public Procurement in Romania: An Obstacle to Development?

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Abstract

Over the last few years, after the fall of the communist regime in Romania and especially after the integration of the Romanian state into the Euro-Atlantic structures, especially into the European Union, one of the key elements of this article, the desire for accelerated development has started to circulate in our country. Not infrequently, a worrying statement has been circulating in the public arena, which basically underlined the precarious state of affairs in Romania in the early 2000s: Romania is at least 30-40 years behind the countries of the West. Could this be so? Probably. I was not mature enough to understand the reality. However, it is hard not to notice that European funds are one of the best "gifts" our country has ever received. There is often news about completed projects, projects in progress or projects for which the tender is being prepared. I will emphasize the last part, the projects for which the tendering of contracts is being prepared, as I have not infrequently read articles and seen reports on this subject. In Romania, the awarding of contracts is a lengthy process and the question that arises is: is the public procurement procedure in our country the obstacle standing in the way of catching up with the West by 30-40 years? Is rigorousness to blame? Or bureaucracy? Or democracy? Or whose fault is it? We will uncover the answers to these questions by analyzing the public procurement procedure in Romania, a never-ending story, which is holding back large-scale projects, but above all the scarecrow of non-reimbursable external funds.

Keywords: *public procurement, Romania, external funds, procedure, European Union, projects, development*

Introduction

When it comes to public procurement legislation in Romania, we think of two components: national legislation and European legislation. Whether we are talking about a public institution or a commercial company that benefits from European funding, they are obliged to apply the legislation in force in the field of public procurement or other established rules concerning this procedure. It has to be said that this legislation is complex, has connections with various areas and is frequently amended. The legal basis is Law No. 98/2016 on public procurement, which strictly regulates the way in which the procedure in this field must be organized. More precisely, according to the text of the law, its subject matter is set out in Chapter I - General Provisions, Section 1, Article 1: "This law regulates the manner of carrying out public procurement, the procedures for awarding public procurement contracts and organizing competitions for solutions, the specific

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instruments and techniques that may be used for the award of public procurement contracts, as well as certain specific aspects related to the execution of public procurement contracts." But what do we mean by the term "public procurement"? But what do we mean by the term "public procurement"? Given the legislative framework in the field, according to the definitions set out in Section 2, Article 3 of the above-mentioned law, "procurement" or "public procurement" means "the acquisition of works, products or services by means of a public procurement contract by one or more contracting authorities from economic operators designated by them, regardless of whether the works, products or services are intended or not for the realization of a public interest."

Who are the contracting authorities?

For the purposes of Law No. 98/2016, Section 3, Article 4, Paragraph (1), the following are contracting authorities:

- a) the central or local public authorities and institutions, as well as the structures within them which have delegated the quality of authorizing officer and which have established powers in the field of public procurement;
- b) public law bodies;
- c) associations formed by one or more contracting authorities referred to in a) or b).

By bodies governed by public law we mean, according to the law, any entities which, regardless of their form of constitution or organization, cumulatively meet the following conditions:

- a) are established to meet needs in the general interest, without having a commercial or industrial character;
- b) have legal personality;
- c) are financed, for the most part, by the entities referred to in paragraph (1) a) or of another body governed by public law, or more than half of the members of the administrative board/management or supervisory body are appointed by an entity referred to in paragraph (1) a) or another body governed by public law.

Award procedures

Direct procurement

It should be noted that there are certain financial thresholds below which contracting authorities have the right to award procurement contracts directly, without having to initiate the public procurement procedure which we will discuss later in this article. In the case of direct procurement, it can only be carried out if the estimated value of the procurement, excluding VAT, is less than 270,120 lei, whether we are talking about goods or services. In the case of the

purchase of works, the award of the contract by direct procedure can be made only if the estimated value of this purchase, excluding VAT, is less than 900,400 lei.

Other contract award procedures covered by the legislation in force

In accordance with the legislation in force, the tender procedures applicable for the award of public procurement contracts/framework agreements or for the organization of design contests with an estimated value equal to or greater than those mentioned above, in the case of direct purchases, are the following: open tender, restricted tender, competitive negotiation, competitive dialogue, innovation partnership, negotiation without prior publication, design contest, tender procedure applicable to social services and other specific services and simplified procedure.² We will take a few of these forms in which procurement can be awarded and highlight the distinguishing features, based on the legislation in force.

Open tender

When it comes to open tendering, it should be borne in mind that this procedure allows any economic operator to submit a tender following the publication of a contract notice. This invitation to tender is initiated by the publication of this notice, by which the contracting authority requests economic operators to submit tenders. The tender procedure, according to the legislation, is conducted in a single mandatory phase, but the contracting authority is given the right to organize a final phase of electronic auctions, which must be specified in the contract notice and in the tender dossier, and tenders may be submitted within a minimum of 35 days from the date of dispatch of the contract notice in the Official Journal of the European Union³. Within this period, the tenderer may submit the tender drawn up in accordance with the information and requirements set out in the procurement documents, together with the documents or the single European purchasing document demonstrating that it meets all the qualification criteria set by the contracting authority.

Restricted tender

Unlike an open tender, in a restricted tender, any economic operator may submit a request to participate if such a notice is published, but only those candidates who meet the qualification and selection criteria set by the contracting authority will be entitled to submit a tender at the subsequent stage. This type of tender is launched in the same way as an open tender, but the procedure itself is

² These procedures are those contained in Law No. 98/2017 on Public Procurement, Chapter III, Section 1, Paragraph 1, Art. 68.

³ The Official Journal of the European Union (OJEU) is the official publication of the European Union in which all legislative acts and official notices, including those related to public procurement, are published.

different. While when it comes to the open procedure we are talking about one single mandatory stage, in the restricted procedure we have two such mandatory stages.

The first stage is the submission of requests to participate and the selection of candidates, which is carried out on the basis of the qualification and selection criteria established by the contracting authority. At this stage, the contracting authority has the right to limit the number of candidates meeting the qualification and selection criteria, provided that a certain minimum number of candidates is ensured. This minimum number of candidates must be specified when the notice is published and must be sufficient to ensure genuine competition. This number may not be less than 5.

The second stage consists of the submission of tenders by those candidates selected in the first stage and their evaluation, this time by applying the award criteria and evaluation factors⁴. The contracting authority may decide to hold a final phase of an electronic auction, which must be specified in the contract notice and in the award documents in accordance with the legal provisions.

While the open tender procedure provides for a minimum period of 35 days for the submission of tenders from the date of publication of the notice in the OJEU, the restricted tender procedure provides for a minimum period of 30 days for the submission of requests to participate, plus a period of at least 30 days for the completion of the second stage of the award procedure, which starts with the dispatch of the invitations to participate.

Competitive negotiation

In the case of competitive negotiation, any economic operator has the right to submit a request to participate following the publication of a contract notice, with the right to submit initial tenders in the subsequent stage being reserved to candidates meeting the qualification and selection criteria set by the contracting authority. On the basis of the initial tenders, unlike the two forms of tender discussed earlier, the contracting authority will conduct negotiations with a view to improving them. This procedure is initiated by sending out a contract notice, similar to the two above-mentioned procedures, for publication with a view to providing the information and documents for qualification and selection established. This procedure is usually carried out in two compulsory stages.

The first stage is the submission of requests to participate and the selection of candidates by applying the qualification and selection criteria. For this stage, similar to the restricted tender procedure, the contracting authority has the right to limit the number of candidates who will be invited to submit initial tenders, but a minimum of 3 candidates must be ensured for the procedure to be valid.⁵

⁴ According to Law No. 98/2016 on public procurement, Chapter III, Section 1, Paragraph 3, Art. 78.

⁵ According to Law No. 98/2016 on public procurement, Chapter III, Section 1, Paragraph 4, Art. 82.

The second stage consists of the submission of initial tenders by the candidates selected in the first stage and their evaluation to determine whether they meet the minimum criteria set by the contracting authority. Subsequently, in this phase, negotiations take place to find solutions to improve the initial tenders, followed by the re-submission of the final tenders and their evaluation, applying the award criteria and evaluation factors.

In the case of this procedure, the contracting authority must specify in the contract notice the objective and non-discriminatory criteria or rules which it intends to apply and other information concerning the number of candidates. It should also be said that, unlike the tender procedure, the authority may award the public procurement contract/framework agreement on the basis of the initial tenders, without negotiation, but only if it reserves this possibility in the published contract notice.

The minimum requirements set by the contracting authority, the award criterion and the evaluation factors may not be subject to negotiation. The authority must negotiate with tenderers all initial and all subsequent tenders submitted by them, except the final tenders, with the aim of improving them. During these negotiations, the contracting authority is obliged to ensure that the principle of equal treatment of all tenderers is observed, without providing information in a manner which discriminates against any one tenderer, thereby avoiding creating an advantage for one tenderer over the others.⁶ Negotiations may be conducted in successive rounds with the aim of reducing the number of negotiated tenders, if the Authority so decides. The reduction in the number of tenders may be effected in accordance with the provisions of art. 85, para. 9, solely on the basis of the evaluation factors set out in the contract notice or other procurement document. In this case, the authority must indicate the application of the option to conduct negotiations in successive stages in the contract notice.

Competitive dialogue

In this procedure, as in the others, any economic operator is entitled to submit a request to participate following publication of the contract notice. Only those candidates who meet the qualification and selection criteria will be entitled to participate in the dialog phase. Candidates still in the running for the public procurement contract at the end of the dialogue phase will be able to submit their final tenders, which will be examined on the basis of the evaluation and selection criteria established by the contracting authority. This procedure is initiated by sending for publication a notice of participation, whereby the authority asks economic operators to submit requests to participate in order to provide the information and documents for qualification and selection mentioned above, according to the text of the law. The procedure is carried out, unlike those mentioned earlier, in three stages.

⁶ According to Law No. 98/2016 on public procurement, Chapter III, Section 1, Paragraph 4, Art. 85.

The first stage is the submission of requests to participate and the selection of candidates by applying the qualification and selection criteria. At this stage, as in the competitive negotiation procedure, the contracting authority may limit the number of candidates invited to participate in the dialogue stage, provided that a minimum number of candidates ensuring genuine competition is chosen. This number may not be less than 3. This stage is followed by the second stage, which involves discussions with the selected candidates in order to identify solutions that meet all the requirements of the contracting authority and on the basis of which the final tenders will be submitted. The last stage is the submission of the final tenders by those candidates still in the running for the procurement contract. These tenders are evaluated by applying the award criteria and evaluation factors.⁷

The contracting authority is required to indicate in the contract notice the objective criteria or rules it intends to apply, without discrimination between tenderers, as well as the minimum or maximum number of candidates, if any. The dialogue phase is carried out with each selected candidate individually, the aim of which is, as mentioned above, to identify and define the optimal solutions to meet the Authority's needs, with the parties having the opportunity to discuss all aspects of the procurement. As in the case of competitive negotiations, the contracting authority must ensure that the principle of equal treatment is respected throughout the entire dialogue stage, without creating an advantage for one of the tenderers.⁸

Like the competitive negotiated procedure, the authority may conduct the dialogue in successive rounds in order to reduce the number of solutions to be discussed at this stage, provided that this option is specified in the contract notice. The reduction may be made only by applying the evaluation criteria laid down at the time of publication of the contract notice or descriptive document. The dialogue phase will continue until the contracting authority is able to identify the solutions best suited to its needs. Once the dialogue phase has been completed, the economic operators remaining in the competition for the public procurement contract will be able to submit final tenders on the basis of the solutions identified. At the final stage, the Authority reserves the right to request clarifications, specifications or other improvements to the final tenders. These may not lead to changes in the essential elements of the tender procedure, including the needs and requirements established by the contracting authority.

According to Article 93, para. (2), the contracting authority may require negotiations with the tenderer whose final tender has been designated as offering best value for money, with a view to confirming the financial commitments or other terms or conditions included in the tender, in order to determine the terms of the contract. There is also, within the meaning of the same Article, the possibility for the contracting authority to provide for bonuses or payments to the participants in the dialogue, under the conditions laid down in the procurement documents.

⁷ According to Law No. 98/2016 on public procurement, Chapter III, Section 1, Paragraph 5, Art. 88.

⁸ According to Law No. 98/2016 on public procurement, Chapter III, Section 1, Paragraph 5, Art. 91.

Innovation Partnership

Under this type of procedure, any economic operator may submit a request to participate following the publication of a contract notice, with those candidates meeting the established qualification and selection criteria submitting initial tenders at the subsequent stage, on the basis of which the contracting authority will conduct negotiations with a view to improving them. This procedure is initiated, like the others, by the dispatch for publication of a contract notice by which the contracting authority requests economic operators to submit requests to participate.

This Innovation Partnership is carried out in three stages

The first stage is the submission of requests to participate and the selection of candidates, applying the established qualification and selection criteria. Again, the contracting authority may limit the number of candidates who will be invited to submit initial bids, but this number may not be less than 3 candidates, in order to ensure genuine competition. In the second stage, the economic operators selected in the first stage will submit initial tenders, which will be evaluated in accordance with the requirements set by the contracting authority. The last stage is negotiations, the aim of which is to find solutions to improve the initial tenders with a view to submitting and evaluating the final tenders, according to the law in force.

This procedure is applied only when the Authority identifies a need for the further development and procurement of an innovative product, service or works, which cannot be satisfied by solutions available on the market at the time of starting the innovation partnership. The Authority shall be free to choose to implement this innovation partnership with one partner or with several partners carrying out separate research and development.⁹ The Innovation Partnership shall take place in successive phases. It shall follow the sequence of stages in the research and innovation process, which may include the manufacture of products, the provision of services or the completion of works, as referred to in Article 101. Intermediate milestones shall be set in this procedure, the resolution of which shall be the responsibility of the partners, as well as the payment of the price in appropriate installments. After each phase, the contracting authority may decide to terminate the innovation partnership or, in the case of an innovation partnership with several partners, to reduce the number of partners by terminating individual contracts. The condition for this to happen is that the authority has mentioned these possibilities in the award documentation. Where an innovation partnership is concluded with more than one partner, the Authority is under an obligation not to disclose to the other partners the proposed solutions or other confidential information communicated by a partner without the consent of that partner. Also, within this partnership, the Authority must take steps to ensure that the structure,

⁹ According to Law No. 98/2016 on public procurement, Chapter III, Section 1, Paragraph 6, Art. 98.

duration and value of the different phases reflect the degree of innovation of the proposed solution and the sequence of research and innovation activities necessary to be able to develop an innovative solution, unavailable on the market.

Simplified procedure

The simplified procedure may be applied under the conditions laid down in Article 7, para. (2), according to which "The contracting authority shall award public procurement contracts/framework agreements and organize design contests relating to public contracts with an estimated value below the corresponding thresholds provided for in paragraph (1) by applying a simplified procedure in compliance with the principles set out in art 2, paragraph

(2). "Therefore, in order for the simplified procedure to be initiated, the estimated value of the contracts must not exceed:

- a) 25.013.925 lei*), for public procurement contracts/works framework agreements;
- b) 649.895 lei*), for public procurement contracts/ framework agreements for products and services;
- c) 1.000.557 lei*), for public procurement contracts/framework agreements for products and services awarded by the county council, the local council, the General Council of Bucharest, as well as public institutions subordinated to them;
- d) 3.506.625 lei*), for public procurement contracts/framework service agreements for social services and other specific services, as set out in Annex no. 2.

The simplified procedure is launched by publishing the simplified contract notice in SEAP¹⁰, accompanied by the related tender documentation. The contracting authority is required to fix the period for the submission of tenders according to the complexity of the public procurement contract/framework agreement and the specific requirements, in order to allow economic operators adequate time to prepare their tenders and to prepare the qualification and selection documents, if requested.¹¹

In the case of this procedure, in contrast to the above-mentioned procedures, the authority may decide to organize the simplified procedure either in a single stage or in several stages involving both the selection of candidates and the negotiation and evaluation of tenders. In the latter case, this must be specified in the simplified contract notice. Furthermore, the minimum period between the date of dispatch of the invitation to tender and the date of submission of tenders must be

¹⁰ SEAP - Electronic Public Procurement System - is an electronic platform that ensures the transparency of the public procurement process and procedures. Through it, public authorities procure, by electronic means, goods and services necessary for the activity or works of the administrative unit concerned.

¹¹ According to Law No. 98/2016 on public procurement, Chapter III, Section 1, Paragraph 10, Art. 113

at least 10 days, except where the complexity of the products for which the public procurement procedure is initiated is low, in which case the minimum period shall be reduced to 6 days. Additional conditions and modalities for the application of the simplified procedure may be established by methodological norms for the application of Law No 98/2016.

Too rigorous?

On paper, it seems that these procedures through which public procurement can be made are not complicated. The steps appear to be simple and easy to follow, but the reality is that there is a big difference between theory and practice. Often, although all the necessary steps are followed in each of the procedures under consideration, even in simplified procedures, problems arise quickly. This is why many infrastructure and other projects go for long periods of time without awarded contracts. Problems arise when challenges enter into the equation or, in some cases, tenders are not submitted by the deadline foreseen in the tender notice published in the Electronic Public Procurement System. If we focus strictly on challenges, it is inevitable that the resolution of these will not take several months, if not more than a year. But it's not just about the complaint itself, it's about the whole process after the complaint is submitted and published in SEAP. Let's have a look at the current legislation in force concerning the settlement of appeals against the award of public procurement contracts.

According to Law No. 101/2016, Section 5, Article 24, para. (1), "The Council shall decide on the merits of the appeal within 20 days from the date of receipt, under the terms of Art. 18 para. (2) of the public procurement, sector procurement or concession file, or within 10 days in the event of an exception preventing the substantive examination of the challenge.". As specified in this article, the CNSC¹² is responsible for settling appeals. Also within this article, we find, in para. (2), that "In duly justified cases, the time limit for settling the challenge may be extended by 10 days, the extension being communicated to the contracting authority."

Although the National Appeals Council delivers its decision in a relatively short time, maximum 30 days, parties who consider themselves aggrieved by the decision may file a complaint with the competent court within 10 days of being notified of the decision and/or being informed of it. In practice, this is where the real challenge starts, as the time limit for dealing with complaints varies from case to case. In practice, this is the source of many of the delays that large-scale projects accumulate. Perhaps a solution should be found to streamline the process? Perhaps.

¹² CNSC - The National Appeals Settlement Council - is an independent body with administrative - jurisdictional activity, whose organization and functioning are regulated by Law no. 101/2016 on remedies and remedies in matters of award of public procurement contracts, sectoral contracts and works concession and service concession contracts, as well as for the organization and functioning of the National Appeals Settlement Council.

The point is that the way public procurement procedures are organized in Romania is quite rigorous, and when we are talking about projects financed by non-reimbursable external funds, and extremely well supervised. This does not mean that there is no possibility of losing funding due to the process delaying the achievement of the execution stage of the project itself. A very good case in point is the metro to be built in the city of Cluj-Napoca, where funding through the National Recovery and Resilience Plan¹³ (PNRR) risks being lost because the completion of the pre-execution stages has been delayed.

There are many such examples of projects which, unfortunately, have been sitting idle for long periods of time, with implementation starting very late. Not to mention cases where contracts are terminated, where the problems are even bigger and cause delays that can last for years.

But, of course, the Romanian legislation is not perfect, and the bureaucracy in our country is still part of a list of factors that make the plans for the accelerated development of the Romanian state start with the handbrake on. We hope that these impediments will no longer exist and public procurement legislation will be applied more effectively. I am convinced that over the years the implementation of large-scale projects has started to move faster, but what about those that have remained at the same stage for years? At the moment, I am sure we can dream of the day when they will be ready.

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¹³ PNRR - National Recovery and Resilience Plan - a country's plan for using funds from the European Union's Recovery and Resilience Facility (RRF), which was established to help member states recover from the economic and social impact of the COVID-19 pandemic.