

Cover article: "Public Procurement – Towards a clearer regulation of the qualification and selection criteria"

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This month's cover article focuses on some recent amendments introduced in the public procurement legislation regarding the new rendition of the qualification and selection criteria set forth by the contracting authority. Order no. 509/14.09.2011 of the President of the National Authority for Regulating and Monitoring of Public Procurement is analyzed, which was enacted due to the practical necessity to standardize the documentation related to the public procurement procedures, basically by regulating certain legislative gaps, as well as the need of an unitary approach in the field.

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PUBLIC PROCUREMENT – TOWARDS A CLEARER REGULATION OF THE QUALIFICATION AND SELECTION CRITERIA

The new rendition of the qualification and selection criteria set forth by the contracting authority within the public procurement procedures was recently regulated by the Order of the President of the National Authority for Regulating and Monitoring of Public Procurement (N.A.R.M.P.P.) no. 509/14.09.2011 (published in the Official Gazette no. 687/28.09.2011), hereinafter called “the Order”.

The main reason for the emergence of a new legal regulation was the practical necessity to standardize the documentation related to the public procurement procedures, basically by regulating certain legislative gaps, as well as the need of an unitary approach in the field, by all participants to such procedures: contracting authorities, economic operators, authorities involved in the reviewing of the way in which the public procurement contracts are awarded and performed.

PRINCIPLES OF THE NEW RENDITION OF THE QUALIFICATION AND SELECTION CRITERIA

There are two principles which are the basis for the new rendition of the qualification and selection criteria by the contracting authority, set forth by the lawmaker at the beginning of the Order, namely:

- the material link between these criteria and the subject of the public procurement contract which is to be awarded;
- the limitation of the level of the minimum requirements requested by the contracting authority exclusively to those strictly needed for the proper performance of the contract, while taking into account the complexity, volume, duration, value and nature of the public procurement contract to be concluded.

Per a contrario, the terms and requirements requested by the contracting authority which fail to comply with such principles will be deemed, pursuant to the new regulation, irrelevant and disproportioned in relation to the object to be procured.

DEADLINES FOR SUBMITTING APPLICATIONS/OFFERS AND CASES IN WHICH THEY ARE REDUCED

The fundamental and general principle in the matter, which is expressly regulated by the Order, consists of the setting of such deadlines contemplating a sufficient timeframe for the drafting of the applications/offers.

As regards the cases in which the deadlines for the submission of applications/offers are reduced, the

lawmaker sets forth the general rule-condition according to which this is possible only if the qualification and selection criteria, as well as the awarding criterion, published in the contents of the prior information notice, are also included in the contract notice. We believe that it is a well-timed general rule-condition, which clarifies several uncertainties and discrepancies occurred in practice, in this field, until now.

On the same matter, other new legal provisions also set forth that:

- in the case of the awarding criterion “the most economically advantageous offer”, the contracting authority must also detail the evaluation factors in the prior information notice. The legal provision is completely justifiable, since in the case of this awarding criterion, the evaluation is a complex administrative stage in the procedure and concerns different aspects, both technical and financial elements of the offer subject to review.
- for the purposes of accelerating the restricted tender and negotiation procedures with the prior publication of a contract notice, the contracting authority has two cumulative obligations, expressly regulated by the lawmaker, namely:
 - an obligation consisting of a positive conduct, namely to upload in SEAP a justification designed to support the emergency situation which imposes the reduction of the said deadlines and
 - an obligation consisting of a negative conduct, according to which, the abovementioned emergency situation should not be generated by its act or failure to act.

THE AWARDING OF THE WINNING TENDERER(S) WITHIN THE AWARDING PROCEDURE

The order introduces an express and unitary regulation in the Romanian laws regarding the aspects which must be contemplated by the contracting authority when awarding a public procurement contract, namely:

- the qualification and selection criteria, which reveals the tenderer's ability to perform the future contract;
- the evaluation factors, in relation to which it is also expressly provided that, in the case of the awarding criterion “the most economically advantageous offer”, the evaluation factors must emphasize the advantages of each technical and financial proposal.

Although it was also contemplated in the past in different awarding documentations and frequently encountered in practice, the express regulation of such aspects is useful because, by means of the inserted text, a uniform legal ruling for a series of situations frequently encountered in practice, both in

the administrative stage, and, especially, in the stages reserved for objections from different participants in regard to deeds issued within public procurement procedures.

THE FORM IN WHICH THE DOCUMENTS MAY BE SUBMITTED BY THE APPLICANTS/TENDERERS

Also commencing from a situation which is in fact frequently encountered in practice, the concurrent submission of several offers by one tenderer within several public procurement procedures, the lawmaker has expressly regulated, also filling in this case a legislative void, the possibility of alternatively submitting the documents required by the contracting authority in one of the following forms: original, certified copy or legible copy with the mention "true copy".

However, the current lawmaker:

- retains the obligation of submitting, in original, all documents issued by the applicant/tenderer, including the firm undertaking of a third party; allows the contracting authority to request, in original, the documents issued by insurance companies, banking companies or other accredited financial institutions and which can only be issued and, implicitly, used for the purposes of demonstrating certain requirements related to the awarding procedure for which they were requested.

JOINT OFFER

Frequently encountered in practice, in case of certain complex public procurement procedures, having as subject several types of activities which cannot be conducted by a single tenderer (for example, in infrastructure projects), the joint offer establishment benefits in relation to the new regulation of two main rules, namely:

- the contracting authority must provide in the awarding documentation which of the qualification and selection criteria are to fulfilled by each of the associated tenderers;
- if, under the "ability to exercise professional activity" and "technical and/or professional capacity" criteria, certain permits are requested for the participants or for the contracted personnel, the requirement is deemed as being fulfilled if one of the associated participants (respectively the subcontractor, if applicable) holds the permit requested personally or the permit requested for employees and only provided that it fully performs that part of the contract for which the permit is required and the respective authorized human resources.

TAXES AND LEVIES

In this matter, the Order expressly regulates two practical situations encountered by participants in different public procurement procedures, which turned up to be more than once reasons for disqualification and which, until now, could not be unitarily settled. Thus:

- the requirements referring to the obligation to pay levies, taxes and social security contributions to the component budgets of the general consolidated budget are deemed as being fulfilled to the extent that the economic operators provide payment facilities, such as rescheduling or compensation, approved by the relevant bodies;
- the reporting will be performed when no liabilities are recorded to the general consolidated budget, on a date correlated with the legal due date and not on the validity date of the document on the date the offers are submitted or opened.

SUPPLEMENTATION OF THE SUBJECT OF THE PUBLIC PROCUREMENT CONTRACTS

According to the new regulation, in the future, in such cases, the contracting authorities will be compelled to set both the value of the tender guarantee, and the qualification and selection criteria in relation to the estimated value of the contract to be concluded and not in relation to the total estimated value, which takes into account potential supplementations. To this end, the contracting authorities will be under the obligation to mention both the total estimated value, and the initial value of the contract, when filling in the invitation/contract notice.

THE TERMS “COMPLETED SERVICES” AND “PERFORMED AND COMPLETED WORKS”, “COMPLETED WORKS CONTRACT” RESPECTIVELY

Finally, the lawmaker defined three notions with high prevalence in practice as regards the performance/duration/effects of the concluded public procurement contracts, as follows:

- “completed services” means both partially delivered services, and services delivered at completion;
- “performed and completed works” and “completed works contract” mean either partially delivered works which are accompanied by a partial completion certificate, or delivered works accompanied by a completion certificate, or delivered works accompanied by a take-over certificate.

employment - legislative retrospective

THE NEW REVISAL. PENALTIES OF UP TO EUR 2,000 FOR EMPLOYERS THAT FAIL TO COMPLY

The order no. 1918/2011 on the approval of the procedure and the documents to be submitted by employers with the Territorial Labor Inspectorate for obtaining a password, as well as the procedure regarding the submission of the general register of employees in electronic format, published in the Official Gazette of Romania, no. 587 as of August 19, 2011 ("the Order no. 1918") provides the procedure and the documents to be submitted by employers with the Territorial Labor Inspectorate for obtaining a password, as well as the procedure regarding the submission of the general register of employees in electronic format, but also the employers' obligation to establish and fill in the general register of employees.

Employers must enter the data of all employees in a new electronic register by the end of October, when the deadline set forth by the Government Decision no. 500/2011 regarding the general register of employees ("**the Decision no .500/2011**"), which entered into force at the beginning of August, expires.

Therefore, the employers still have approximately 3 weeks to go to the labor inspectorates to request an access password for the electronic system within which they will enter data related to the salaries, benefits and professional experience of all their employees.

The refusal to provide the labor inspectorate with the register in electronic format (and the employees' personal files), as well as the failure to submit the register within 90 days as of the entry into force of Decision no. 500/2011, is severally sanctioned: the penalties are between 5,000 and 8,000 Lei (1,200 – 1,900 Euro).

Following the modifications brought by the new Labor Code (entered into force in May), this is the second major change on the labor market. As of January 1st, all employers had to replace the traditional employment records with electronic databases to which employers have access based on a username and a password.

The employment records were replaced within a 2-stage process: the first stage consisted in the collection of the data within the employment records, and the second stage in the scanning of the employment records, so as they can be returned to the employers. All data concerning length of service, pension rights and employment history of each employee are also currently registered in electronic format with the county pension offices.

A major advantage of the electronic employee management register is the fact that an employee who wishes to change its job this year would no longer be required to collect its employment record from its former employer: all its data may be collected electronically by the new employer.

employment - legislative retrospective

Another upside of the new electronic register is the fact that it will allow for an actual statistics of the number of Romanian employees, since, until now, the Labor Inspectorate counted only employment agreements, and an employee may have one or more employment agreements. Amongst the elements which should also be included in the electronic register is the personal identification code (PIN) of employees, the type of employment agreements, as well as the employment and employment termination date. Therefore, the Labor Inspectorate will be able to quantify the real number of employees if it performs PIN sorting operation in the database.

NOVELTIES BROUGHT BY THE NOU REVISAL 5.0.6

By the end of October, the salary, benefits and their value is to be filled in for registered individual employment agreements as well.

Employers are required to provide the Territorial Labor Inspectorate with the necessary documents for obtaining a password. The employees' data which are to be included in the electronic register are: name, PIN, nationality and country of origin (UE, Non-EU, European Economic Area), date of employment, secondment duration and name of the employer for which the secondment is performed, position according to RCO (the Romanian Classification of Occupations), type of employment agreement, salary and benefits, employment termination date.

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