

cover article

Putting in practice the new public procurement legislation

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Amid the significant changes introduced in the 2016 legislation on public procurement, the cover story of this month addresses from a practical perspective a number of issues such as the effectiveness of the award criteria, the requirements for the quality of contract performance, the qualification and organization of staff involved in the evaluation of bids, also marking some changes considered to be problematic by our specialists.

The initiative of the European law maker for amending the award criteria by inserting more complex criteria, which take into consideration other aspects such as the lifetime use of equipment, the costs of this use, the quality of the product or service purchased, the environmental impact, transcribed as is in the national legislation governing public procurement is visionary, meant to give more value to such proceedings, focusing on quality, higher standards, and removing the dictatorship of the lowest price, which does not ensure fulfillment of these criteria and requirements of the contracting authorities.

Using public money efficiently does not necessarily mean awarding a public contract for the lowest price without taking into account other criteria, whose failure or incomplete fulfillment at the time may result in higher costs for the purchaser, than if it had opted for a more expensive service, work or product, but superior in terms of quality and future costs generated.

Although there are four (4) award criteria, still the most widely used is the lowest price. The contracting authorities are already used in a well defined common practice to having the evaluation of bids under this criterion. Using the lowest price is obviously much easier, the evaluation of bids is much harder to be challenged by bidders participating in the proceeding, the authorities considering that in this way they are more protected and more efficient. Although here it should be noted that, since there is no threshold below one would consider an unusually low price, it remains at the discretion of the contracting authority when and if to seek clarification from the bidder, which can cause the report of the proceedings to be challenged by the other bidders.

However, as we mentioned above, in the long term, the purchase, for example, of an inexpensive product that meets the minimum technical requirements, but which does not take into account the life span, the cost of post-warranty service, the consumption of electricity/fuel/other supplies, will inevitably lead to higher costs for the purchaser, leading to a higher total cost than if they had purchased a little more expensive product but of higher quality.

For example, when purchasing medical imaging equipment, which is quite complex in terms of the required technical specifications, we note the generalized tendency of hospitals to impose as award criteria the lowest price, although it would be extremely useful to insert a criterion for the award as the best value for the price and the best value for the cost. There can be many decisive evaluation factors, such as after-sales service, after-warranty service, technical support and the average time of getting it, the specialized personnel involved in the provision of related services or servicing during warranty and post-warranty. Finally, such equipment must be sustainable and effective in the long term, not cheap and from a lower class.

Another example are the works contracts that concern building roads that do not involve complex intellectual services and are not infrastructure projects for trans-European transport, these categories being exempted from the award criteria of the lowest price and the lower cost, where one must necessarily focus on the quality of the works, the process and completion time of the project, not only on the price / cost of the works.

There is also the tendency of contracting authorities to also use in complex tenders, of high value, the award criterion of best value for price, but the price remains a determining factor, with 90% of the general assessment.

Thus, even though in theory the award criteria of best value for price and best value for cost transpose the best the vision of the European law maker, sadly in Romania the contracting authorities are still reticent to implement these criteria with priority.

Obviously, the staff of the newly formed procurement departments in many contracting authorities is still in the transition period from the old to the new legislation, and there are few guidelines, norms or national case-law to help them apply complex award criteria with greater flexibility.

A praiseworthy initiative is that of the National Public Procurement Agency (NPPA) to organize regional meetings around the country, targeted to the personnel of the contracting authorities, undertaking to develop more support materials in the form of notices, guidelines or instructions to bring clarifications where there are problems in implementation of new legislation. NPPA launched on December 19, 2016 "Public Procurement Guidelines" available on the dedicated webpage www.achizitiipublice.gov.ro, an online application that provides access to updated information, according to the legislative changes occurred, for all those involved in public procurement in Romania, thus replacing the tertiary legislation over-regulation.

We consider that these guides and instructions must emphasize the details of the application procedures for the new award criteria, for encouraging the contracting authorities to apply them with confidence and professionalism.

Last but not least, the Romanian law maker recently adopted Government Decision no. 774/2016 amending and supplementing Government Decision 634/2015 on the organization and functioning of the NPPA, which expressly provides that NPPA's role will be to ensure operational support for contracting authorities, through the implementation of dedicated tools to disseminate, including by electronic means, best practices in performance of the public procurement process, and to develop standard documents, forms and templates framework, guidelines, manuals and other operational instruments to support the correct and uniform application of the legislation on public procurement and must ensure their dissemination. NPPA complied with at first by starting the previously mentioned online application.

Therefore, we should expect these measures to take actual form in public procurement procedures better adapted to the real long term needs of the contracting authorities.

But the new law also contains a few problematic provisions, out of which we mention, as an example, a series of issues encountered by our team in practice:

- absence of a threshold for determining the unusually low price, which can bring many practical problems for contracting authorities, who must judge by their own analysis such threshold and request explanations from bidders, and also for bidders, who will have to have prepared a serious and justified breakdown of the offered price, to be able to provide such pertinent explanations. Obviously, the analysis of market prices by contracting authorities to establish the level below which the price of the product / service / work purchased is considered unusually low is sometimes incomplete, without there being a written report in the public procurement file, which raises criticism and complaints from unsuccessful bidders with a higher price;
- The alternative competency for solutioning of complaints - bidder submitting the complaint to the CNSC gets to plead for its case before the competent court if in the procedure another bidder submits a complaint directly to the court. There are practical problems with regard to confidentiality rules strictly outlined and implemented by CNSC, but also on the judges' understanding of the technical terms and procedures, who are still in training on public procurement procedures compared those of the courts of appeal that have already formed a good practice. The solution here would be, on the very technical side, to obtain a specialist expertise, even as the opinion of specialists in the field; otherwise, it is very difficult for a stranger to the

area, whether it be a lawyer or an engineer / economist, such as we have in the CNSC panels, to rule on delicate technical issues impacting the project profoundly;

- the institution of the subcontractor of the subcontractor declared in the bid, also called a sub-subcontractor, even though it is regulated by Law 98/2016, is not very detailed, and the contracting authorities are hesitant in admitting participation to the tender of bidders as sub-subcontractors;
- even though the stage of prior notice before submitting a challenge in awarding procedures was introduced, in case of existence of an award report, the contracting authorities are extremely hesitant to adopt remedial measures, meaning to review the decision of the evaluation committee. Implicitly, they maintain the awarding decision and this leads to complaints requesting the annulment of the procedure report, partly or in whole. The prior notice produces effects if the award documentation is challenged, when many contracting authorities prefer to comply and adopt remedial measures for avoiding the suspension of the procedure and extending the awarding date of the contract. But, if the procedure is finalized by adopting a awarding decision, the prior notice only delays without immediate effect the conclusion of the public procurement contract.

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