

public procurement - draft laws published in September 2017

Draft law for amending and supplementing the Law no. 98/2016 on public procurement and on completing the Law no. 99/2016 on sector acquisitions was registered with the Senate for debate under no. B401 on September 5, 2017.

The draft law aims to solve problems raised by public administration authorities. It is intended to define a threshold for direct purchases, given the countless unforeseen situations when setting up the annual procurement plan, such as relatively minor damage to installations, machinery, equipment, furniture, etc. where the purchase would eventually involve both repair services and products or materials, spare parts, etc. It is believed that during a calendar year many such situations may occur, each of them different; if for each case of repairing or exchanging small-value items there should be a public procurement of separate services and products, the local authorities would do nothing but carry out dozens of contracts in various phases of the procedure with the involvement of the whole apparatus of the local council.

It is also proposed to eliminate the lowest price criterion provided by Law 98/2016 as the current wording is ambiguous and the idea that public money is best used if goods and services are purchased at the lowest prices is no longer up to date. It is underlined that the experience of more than a decade of the implementation of Directive no. 18/2004 has shown over time that complex work, major investments, have in fact proved much more expensive by accepting the lowest price bids because it was not possible to take into account more important factors such as the quality of the works, their sustainability, impact on the environment or other aspects that raise the cost of realization, but ultimately citizens and society benefit exponentially more.

In addition, the draft envisages the repeal of the provisions on the mandatory use of electronic catalogs, this decision being for the time being under the exclusive competence of the contracting authorities, the legislator being the one who should regulate such an obligation.

Draft law amending and supplementing the Law no. 99/2016 on sector acquisitions was registered with the Senate for debate under no. B404 on September 5, 2017.

The draft is aimed at forbidding the awarding of sectoral agreements / framework agreements by means of the simplified procedure or own procedure, as well as the direct purchase of products or services from economic operators issuing bearer shares or other equity. Also, it is envisaged to prohibit the participation in the tenders of solutions organized by the contracting entities of the economic entities that issue bearer shares.

In support of the proposal, it is emphasized that the current form of the law does not contain any provision ensuring the transparency of sectoral acquisitions in terms of knowing the identity of the natural and/or legal persons owning the shares of the companies participating in the award procedures, which is why a number of companies with unknown shareholders have repeatedly won contracts with the state of hundreds of millions of euros, money that contracting authorities pay from public funds, without any possibility to find out who the real beneficiaries of these sums.

It is emphasized that another important element for the proper conduct of award procedures is avoidance of conflict of interest. However, in the case of bearer shares, it is not possible to certify the veracity of these statements of lack of conflict of interest due to the anonymity of the equity.

For this reason, it is proposed to forbid the access of bearer shares companies in the concession award procedure governed by Law 100/2016 so as to restrict access to public money for entities with secret shareholding.

The consequence of adopting this draft will be that, in order to meet the new eligibility conditions, the holders of the companies concerned will have to convert bearer shares into nominative shares, according to the provisions of Law no. 31/1990, thus revealing their identity.

Draft law amending and supplementing the Law no. 98/2016 on public procurement was registered with the Senate for debate under no. B405 on September 5, 2017.

The draft law seeks to ensure greater transparency, starting with the obligation imposed on contracting authorities to allow interested persons access to the information contained in the procurement file after the award procedure has been completed, in compliance with the legal provisions guaranteeing free access to public information. According to the law, public access to these documents can only be restricted when the information is confidential, classified or protected by an intellectual property right.

However, the current form of the law does not contain any provision to ensure the transparency of sectoral acquisitions in terms of knowing the identity of the natural and / or legal persons owning the shares of the companies participating in the award procedures. For this reason, it is proposed in the draft law to ban the access of bearer share companies to the award of public procurement contracts and / or framework agreements regulated by Law 98/2016 so as to restrict the access of public money to companies with secret shareholders. As a consequence of this amendment, holders of bearer shares will be required to convert them into nominative shares to meet the eligibility conditions.

Therefore, it is proposed to introduce the following provisions in Law no. 98/2016:

- Prohibition of simplified procedures for the award of public procurement contracts / framework agreements to economic operators issuing bearer shares, as well as the access of these operators to solution contests through a simplified procedure;
- Prohibition of the direct purchase of products or services from economic operators issuing bearer shares;
- Exclusion from the award procedures of economic operators issuing bearer shares;

Draft law amending and supplementing the Law no. 98/2016 on public procurement was registered with the Senate for debate under no. B429 on September 14, 2017.

The draft takes into account the fact that, despite the modernization of the Romanian public procurement legislation, a number of important issues continue to persist, one of them being the award of public procurement contracts under conditions of profound lack of transparency. Thus, since Companies Law 31/1990 still permits the organization of joint stock companies with the share capital represented by bearer shares, it is impossible to determine whether the

procedures for the bidding and awarding of public procurement contracts are carried out under conditions of economic efficiency and public transparency. Under these circumstances, the current legislative context does not allow conflict of interest to be determined when a contracting authority assigns a public procurement contract to a company whose shareholding can not be identified because the shares of that company are not nominative.

Thus, at art. 53 of Law 98/2016 it is proposed to introduce a new paragraph stipulating that, in order to comply with the principles of transparency and equal treatment, the contracting authority has the right to request and the operator has the obligation to present the holder / beneficiary of the bearer shares in the situation in which the form of organization of the bidder / candidate / third party supporter or subcontractor to the procedure is a joint stock company with share capital represented by bearer shares. It is also intended to introduce the provision that, in the absence of the holder of these actions, the contracting authority has the obligation to exclude the candidate / bidder from the procedure.