

cover article

A practical analysis of the latest amendments to public procurement legislation

by Raluca Mihai – Partner with Voicu & Filipescu

The end of 2017 brought us a number of important changes in the field of public procurement, following the legislator's motivation to refine and streamline the public procurement system, and to reform the ex-ante control function of the award of public procurement contracts / framework agreements, of sector contracts / framework agreements and works concession and service concession contracts.

Thus, the Government of Romania has adopted the **Emergency Ordinance no. 98/2017 on the ex-ante control function of award of public procurement contracts / framework agreements, of sector contracts / framework agreements and works concession and service concession contracts**, which was published in the Official Gazette of Romania, Part I, no. 1022 of 22 December 2017, slated to enter into force on March 15, 2018, as well as **Emergency Ordinance no. 107/2017 for the amendment and supplementation of some normative acts with impact in the field of public procurement**, which was published in the Official Gazette of Romania, Part I, no. 1022 of 22 December 2017, with effect from that date.

As regards GEO no. 107/2017, the amendments are largely aimed at correcting some legal inconsistencies with European directives, correcting some omissions / drafting errors, clarifying some important concepts / aspects of primary legislation.

Ex-ante control

GEO 98/2017 will repeal upon its entry into force, on March 15, 2018, GEO no. 30/2006, which regulates a much lighter form of ex-ante control of public procurement procedures, initially exercised through the UCVAP Observers of the Ministry of Finance.

Under GEO 98/2017, the National Agency for Public Procurement (NAPP) is the public institution responsible for fulfilling the ex-ante control function of the contract awarding process and amendments to such contracts. In fulfilling the ex-ante control function, NAPP will perform quality and compliance control throughout the entire public procurement award procedure starting with the publication of the awarding documentation in SEAP and until the communications on the outcome of the award procedure remains final, but also on the amendments to the contracts included in the verification as a result of the application of a selection methodology.

It is important to note that NAPP will also verify the contracting authority's proposals for answers to the clarification requests made by the economic operators, as well as the entire bid assessment process. NAPP will perform the quality and compliance control of the conclusions of the critical phases of this process as follows: a) the composition of the assessment commission and the conclusions of said commission regarding the fulfillment of the formal conditions related to the submission of the bids/ applicants and the qualification / selection criteria by the bidders / applicants; b) the conclusions of the assessment committee on the technical proposals and their compliance; c) conclusions of the assessment committee on the financial proposals and their compliance; and d) the conclusions of the assessment committee regarding the analysis of the supporting documents for the fulfillment of the qualification / selection criteria submitted by the applicants to be selected according to the rules stipulated in the award documentation in the procedures stipulating the pre-selection stage, namely by the bidder(s) who shall be declared to be the winner(s) following the application of the award criterion, as well as the conclusions included in the award procedure report.

The entire verification process appears to be designed to remove as much as possible the objections of economic operators against any irregularities and unlawful acts in public procurement procedures and to facilitate the fast award of contracts. In fact, the legislator also mentions in the preamble to GEO no. 98/2017 that the absorption of structural

funds amounting to approximately EUR 43 billion is a priority public interest given their importance in the overall national economy and the effects of the absorption of structural funds on the potential for the development of the national economy. However, all these measures can not be implemented quickly and efficiently unless the award procedures are carried out much faster and in compliance with the legislation in force, and the reform of the ex-ante control will certainly help to achieve this goal.

Subcontractors and third party supporters

In the previous version of Law no. 98/2016, in Section 8 on the European Procurement Document (DUAЕ), art. 193 par. 2, it was provided that if the economic operator demonstrates that the criteria relating to the economic and financial situation or to the technical and professional capacity have been met by invoking the support of a third party, the DUAЕ must also include the information referred to in Art. 193 al. (1) with respect to the supporting third party. However, it is not specified that the supporting third party should present a completed DUAЕ form, separate from the bidder.

Instead, in the official version of the DUAЕ form, Part C - Information on capabilities of other entities, in Part II - Information on the economic operator states that the bidder must provide a separate DUAЕ form containing the information required in Sections A and B of this Part and of Part III for each supporting third party, duly filled in and duly signed by that party. In practice, it is obvious that this DUAЕ form is separately requested and filled in and signed by the supporting third party in the award procedures, the requirements of the DUAЕ standard form being in practice supplementary to the law.

Therefore, GEO no. 98/2017, art. 193 par. 2 has been amended and supplemented with the express request that, for the supporting third party, the bidder should present, in addition to the supporting commitment, the separate DUAЕ form. Actually, the amendment of the legislator is intended to cover a legislative gap for a logical requirement already used in practice.

Another interesting change with regard to supporting third parties is the repeal of the provision that if the third party's support for non-transferable resources (e.g. similar experience) was used, the third party's commitment was to ensure before the contracting authority the fulfilment of the obligations assumed by it, should the contractor encounter difficulties during the course of the contract. The reason stems from the fact that the provision is not found in the text of the European Directive no. 2014/24 / EU and becomes unnecessary in the context of the amendment of Art. 182 par. 2, namely ensuring the faithful transposition of art. 63, paragraph (1) of the Directive, thus clarifying the concrete way in which the third party's support can be taken into account in relation to the requirement of experience. Thus, art. 182 al. 2 stipulates that, as far as the fulfillment of the criteria regarding the educational and professional qualifications stipulated in art. 179 lit. g) of Law no. 98/2016 or to the relevant professional experience, the economic operator may rely on the capacity of the supporting third party only when it actually carries out the works or services in relation to which those qualifications are required.

As far as subcontractors are concerned, Art. 193 al. 3 of the previous version of Law no. 98/2016 stated that if the economic operator intends to subcontract part(s) of the contract, the DUAЕ also includes the required information on subcontractors. As in the case of the supporting third party, it is also not specified here that a DUAЕ form should be filled-in separately.

On the other hand, the official version of the DUAЕ form in Part D - Information on subcontractors whose capacities the economic operator does not rely on Part II - Information on the economic operator requires the bidder to indicate certain information concerning the subcontractors if so requested by the contracting authority. These could only be indicated by filling in a separate DUAЕ form.

Art. 193 al. 3 as amended by Government Emergency Ordinance no. 107/2017 includes the obligation to prepare a separate DUAЕ, but also differentiates between subcontractors whose capacity the economic operator relies on and those on whose capacities it does not. Actually, the legislator regulates more clearly now the three categories of entities on which the bidder relies/ which will be used in the performance of the contract: the supporting third party, the

subcontractor whose capabilities the bidder relies on and the subcontractor whose capabilities it does not rely on, this categorization not being evident wither from the previous wording of the legislative texts or from the official version of the DUAE form, but in any case resulting from European legislation and the practice of public procurement in Romania.

In addition, as far as subcontractors are concerned, the idea is that only those who are known at the time of submitting the bid will be declared in it with identification data. From the current wording of the legal text, however, it would appear that somehow the parts intended to be subcontracted or the percentage of them should be declared, without necessarily indicating the subcontractors, on which they could decide later. It remains to be seen whether, in practice, contracting authorities will understand and apply the current legal provision.

Clear deadlines for answer to clarification requests

The exact establishment of the deadlines for requesting and responding to clarifications to the procurement documents was necessary because the previous provision caused uncertainties in practice and gave rise to abuse by the contracting authorities and also by the economic operators participating in an award procedure.

The new provisions amend the procedure whereby the contracting authority must respond to requests for clarification from economic operators regarding the award documentation as follows: the contracting authority must set a deadline (or two) for responding to the clarification requests in the contract/award/simplified notice (the old regulation provided a 3-day recommended term from the receipt of such a request until the contracting authority's answer), and the deadline for the contracting authority to respond to requests clarifications prior to the deadline for submitting bids is increased to 10 days from 6 days and 5 days from 4 days for emergency situations.

Inadequate bid – a new concept

EGO no. 107/2017 clarifies, in line with the European Directives, the notion of admissible, unacceptable and non-compliant bids and introduces the new notion of inadequate bid.

The bid is considered unacceptable if it does not meet the formal requirements for its preparation and presentation, has been submitted by a bidder who does not have the necessary qualifications or whose price exceeds the estimated value as established and documented prior to the initiation of the award procedure, and this value can not be supplemented; the bid is considered non-compliant if it does not meet the requirements of the procurement documents, has been submitted late, shows evidence of anti-competitive or corrupt practices or was considered by the contracting authority to be unusually low.

The new concept of inadequate bid is defined as being irrelevant to the subject matter of the contract and which obviously can not satisfy the needs and requirements of the contracting authority indicated in the award documents without substantial modifications. We shall have to see how this way of rejecting a bid as inadequate will be used and interpreted in practice, especially since it can overlap relatively easily with the notion of non-compliance.

All these clarifications and amendments were absolutely necessary from the perspective of the Romanian legislator, which adopted them in order to avoid the initiation of infringement procedures by the European Commission against Romania, but also to comply with the provisions of the Partnership concluded between the Government of Romania and the European Commission on 6 August 2014 regarding the development and implementation of the National Public Procurement Strategy, provided by GD no. 901/2015 which will lead to ensuring financing from structural funds for projects of public interest.