

public procurement - legal changes published in December 2017

Government Emergency Ordinance no. 98/2017 on the ex-ante control function of the award procedure of contracts/ framework agreements, sectorial contracts / framework agreements and works concession and service concession contracts

was published in the Official Gazette of Romania, Part I, no. 1022 of December 22, 2017, to enter into force on March 15, 2018. On the same date, it will repeal Government Emergency Ordinance no. 30/2006 regarding the verification function of the procedural aspects related to the process of awarding the public procurement contracts, public works concession contracts and service concession contracts.

The Emergency Ordinance regulates how the ex-ante control of the procurement process for contracts / framework agreements, sectorial contracts / framework agreements and works concession contracts and services concession contracts respectively, and amendments thereof.

According to the Ordinance, the National Agency for Public Procurement (NAPP) is the public institution responsible for performing the ex-ante control function of the contract awarding process and the amendment of these contracts. In performing the ex-ante control function, NAPP performs the quality and conformity control over:

- (a) the process of awarding contracts, after posting the procedural documents in SEAP / sending the notice for the negotiating procedure without prior publication and until the communications on the outcome of the award procedure remain final; both the awarding documentation, together with the contracting strategy and other accompanying documents including the errata notice, as well as the contracting authority's response to the clarification requests made by the economic operators, will be verified; and
- (b) contract amendments included in the verification as a result of the application of a selection methodology.

Quality issues are understood to cover legal provisions in the area of procurement / concessions that are subject to extensive or restrictive interpretation in the specific context of an award procedure because they must be adapted to the particularities of the economic activity / sector encompassing the subject matter of the contract and/or the relevant practices of the market in which the potential economic operators / bidders are constantly operating, and, in terms of regularity, those issues which concern legal provisions in the field of procurement/ concessions for which a literal interpretation can be made or for which NAPP issues an official interpretation of the way of application in practice, including by orders or instructions of the President of NAPP and which, as a rule, apply as such, for all award procedures, irrespective of the economic sector of the scope of the contract and / or the relevant practices of the market in which the potential economic operators / bidders are constantly operating.

The selection methodology is based on the application of criteria relating to the contracting authority's history of performance in procurement and the aspects of the contracting strategy that accompany each award procedure, namely the value and complexity of a contractual change that is intended to be achieved.

The Emergency Ordinance also contains provisions on:

- creating and regulating a conciliation procedure between NAPP and contracting authorities, whether such contracting authority has objections on deviations from the quality aspects of the check lists identified by NAPP

as a result of the ex-ante control activity over the award process and / or the measures ordered by NAPP to remedy those deviations;

- the regulation of the conditional or unconditional approval issued by NAPP; the findings of the ex-ante control activity and the measures ordered by the NAPP are subject to a favorable approval, which may be: a) unconditional, where no deviations are found regarding the quality and / or compliance aspects included in the checklists; or (b) conditional, where deviations are made with regard to the quality and / or compliance aspects of the checklists;
- NAPP's obligation to request in court, within 3 months from the date of acknowledging the signing of the contract, the finding as null and void of the contracts concluded following an awarding procedure which was subject to ex-ante control and in which NAPP issued a conditional approval, and the contracting authority carried out and finalized the award procedure without remedying the irregularities found by NAPP;
- introducing a new ex-ante control over the bidding process; NAPP conducts the quality and compliance 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) the 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.

Government Emergency Ordinance no. 107/2017 for the amendment and supplementation of some acts with impact in the field of public procurement was published in the Official Gazette of Romania, Part I, no. 1022 of 22 December 2017, with effect from that date.

The act amends a considerable number of articles from Law no. 98/2016 on public procurement, Law no. 99/2016 on sectorial procurement, Law no. 100/2016 on concessions of works and concessions of services, as well as from Law no. 101/2016 on remedies in connection with the award of public procurement contracts, sectorial contracts and concession contracts for works and concessions of services, as well as for the organization and functioning of the National Council for Solving Complaints, as well as from Government Emergency Ordinance no. 13/2015 regarding the establishment, organization and functioning of the National Agency for Public Procurement, approved by Law no. 244/2015.

Of these changes, we mention the following:

(A) Regarding the Law no. 98/2016 on public procurement:

- it defines the concept of needs of general interest intended to be met by bodies governed by public law designated as contracting authorities within the meaning of the law;
- a threshold value of Lei 929.089 is introduced for public procurement contracts / framework agreements for products and services awarded by local contracting authorities as defined in art. 23 of the Local Public Administration Law no. 215/2001, as well as those under their control; contracts with an estimated value, exclusive of VAT, greater than or equal to this threshold shall be subject to the award procedures governed by Law no. 98/2016 and the publication of a contract notice in the Official Journal of the European Union;
- it is noted that the award procedures governed by Law 98/2016, for which publication of a contract notice and / or award is mandatory in the Official Journal of the European Union, apply in the case of the award of public procurement contracts / framework agreements estimated value, net of VAT, is equal to or higher than the thresholds referred to in art. 7 of Law 98/2016;
- it clarifies the exceptional situation of art. 19, according to which the contracting authority may apply the simplified procedure or, as the case may be, the direct purchase, for individual lots, when the legal conditions are met;
- it is established that Law 98/2016 does not apply to public procurement / framework agreements and solution contests which the contracting authority is obliged to award or organize in accordance with procurement procedures other than those provided for by law: (i) established by a legal instrument that creates international legal obligations, such as an international agreement concluded in accordance with the treaties between Romania and one or more third countries or subdivisions thereof, covering works, products or services for joint implementation or exploitation of a project by signatories or as a result of the application of a specific procedure under European law in the context of territorial cooperation programs and projects; (ii) established by an international organization.
- Article 53 establishes the right of the economic operator to participate in the award procedure as a bidder or applicant either individually or jointly with other economic operators, including in the form of temporary association established for the purpose of participating in the award procedure, under the conditions laid down by law, by deleting the reference to participation as a proposed subcontractor or a supporting third party;
- it substantiates the contracting authority's right to apply the negotiation procedure without the prior publication of a contract notice, and where during a simplified procedure for the purchase of products, services or works no bids or only inadequate bids have been submitted, provided that the initial conditions of the procurement are not substantially altered and, at the request of the European Commission, a report (for better correlation with the text of the European Directive) is submitted to it;

- indicating in the bid the proposed sub-contractors data only if they are known at that time; the indication of the parts of the contract that have been decided to be subcontracted remains mandatory;
- it is stipulated that in the case of the simplified procedure organized in one stage, the contracting authority has the right to decide on the organization of a final stage of the electronic tender, in which case it has the obligation to specify this decision in the simplified notice and in the award documentation; for the same type of simplified procedure, the regulation that allowed economic operators to invoke the support of a third party for a maximum of 50% of the requirement for similar experience is eliminated;
- the procedure for the contracting authority to respond to requests for clarification from economic operators regarding the award documentation is modified as follows: the contracting authority shall set a deadline (or two) for responding to the clarification requests in the contract notice / simplified procedure/ competition; the old regulation provided for 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;
- the provision that if third party support was to be used for non-transferable resources, the third party's commitment was to ensure to the contracting authority fulfilment of their obligations, if the contractor encounters difficulties during the course of the contract, is repealed;
- it is stipulated that if more than one economic operator participate jointly in the award procedure, the fulfillment of the technical and professional capacity criteria as well as the economic and financial situation (the latter absent in the previous regulation) is demonstrated by taking into account the resources of all the members of the group and the contracting authority requires them to jointly answer for the performance of the public procurement contract / framework agreement;
- it is expressly regulated that supporting third parties and subcontractors must fill in and submit a separate ESPD form in the award procedures, containing certain information;
- paragraphs 3, 4, 5, 51 and 6 of article 215 defining the admissible, unacceptable and non-compliant bids are modified. 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 belatedly submitted, shows evidence of anti-competitive or corrupt practices or was considered by the contracting authority to be unusually low;

- a new concept of inadequate bid is introduced, defined as being a bid 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.

(B) Regarding Law no. 99/2016 on sectorial procurement:

- a series of corrections of terms and errors are being implemented throughout the legislative text, most likely resulting from the translation of the European Directive;
- the notion of contracting entity as defined in art. 3 par. 1 let. e) is replaced by the notion of contracting authority;
- art. 67 paragraph (2) provides that the contracting entity is entitled to require joint economic operators participating in the award procedure, once they have been awarded the contract (in the earlier regulation it was mentioned once the bid has been designated the winner), to adopt or to establish a certain legal form, provided that this had been provided in the contract notice or the award documentation and in so far as such amendment is necessary for the proper performance of the sectorial procurement contract;
- indicating the proposed sub-contractor identification data in the bid will be made only if they are known at that time; the indication of the parts of the contract that have been decided to be subcontracted remains mandatory;
- it is stipulated that in the case of the simplified procedure organized in one stage, the contracting authority has the right to decide on the organization of a final stage of the electronic auction, in which case it has the obligation to specify this decision in the simplified notice and in the award documentation; for the same type of simplified procedure, the regulation that allows economic operators to invoke the support of a third party for a maximum of 50% of the requirement of similar experience is eliminated;
- the procedure and the deadlines for response to the clarifications made by the bidders, as in the case of Law no. 98/2016, is amended;
- it is expressly stated in art. 197 par. 2 of the Law that if the third party does not meet the relevant capacity criteria or falls within one of the grounds for exclusion provided in art. 177, 178 and 180 of the act, the contracting entity shall request only once that the economic operator replace the supporting third party, without prejudice to the principle of equal treatment set out in art. 2 par. (2) let. b);
- it is expressly regulated that supporting third parties and subcontractors must fill in and submit a separate ESPD form in the award procedures, containing certain information;

- the admissible, unacceptable and non-compliant bid definitions are modified, as in the case of Law no. 98/2016, and the concept of inadequate bid is introduced.
- (C) Within the scope of Law no. 100/2016 on concessions of works and the concessions of services, the letters d) - l) are added to par. (2) of art. 111, representing new cases of misdemeanors. Also, art. 112¹, according to which, by way of derogation from the provisions of art. 13 par. (1) of the Government Ordinance no. 2/2001 on the legal regime of misdemeanors, the application of the sanction by fine has a statute of limitations of 36 months from the date when the misdemeanor is committed.
- (D) Regarding the Law no. 101/2016 on remedies in respect of the award of public procurement contracts, sectorial contracts and concession contracts for works and concessions of services, as well as for the organization and functioning of the National Council for Solving Complaints:
- it is stipulated that a person has or had an interest in an award procedure, if they have not yet been definitively excluded from that procedure; an exclusion is final if it has been notified to the applicant / bidder concerned and either it has been considered legal by the Council / court or it can no longer be the subject of an appeal;
 - it is stipulated that if several complaints are filed in the same procedure both before the National Council for Solving Complaints (NCSC) and before the court, the court can decide the connection of the appeals under the conditions of art. 139 of the Code of Civil Procedure (in the previous regulation, the connection was mandatory);
 - the deadline for resolving the complaints by NCSC is regulated to 20 working days from the date of receipt of the public procurement file, with the previous regulation being 20 calendar days;
 - in the procedure for settling complaints against NCSC decisions, it is stipulated that the court may order, by default, the provision of any evidence necessary to settle the case;
 - in case of a judicial appeal, the time limit within which the defendant shall file a statement of defense is changed from 3 working days (as stipulated by the old regulation) to 5 working days after the complaint was communicated by the court;
 - the court's ruling in the case of disputes that have been solved by court can be attacked by second appeal within 10 days from the date of the communication, instead of 30 days, the deadline from the previous regulation.

As transitional provisions, GEO 107/2017 stipulates that: (i) the award procedures in progress at the date of its entry into force (22 December 2017) remain subject to the legislation in force at the time of their initiation; (ii) the complaints, trials and requests pending before the NCSC or, as the case may be, before the courts at the date of its entry into force continue to be judged under the conditions and procedures provided by the law in force on the date on which they started ; and (iii) adjusting / reviewing the price of public procurement contracts / sectorial contracts concluded before

VOICU FILIPESCU

Attorneys at Law

News in Laws – Legal Monthly Newsletter
January 2018

the entry into force of Law no. 98/2016 , respectively of Law no. 99/2016 shall be carried out in accordance with the legal provisions in force at the time of their implementation.