

cover article

A new reformation of the public procurement system

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After the end of 2017 brought us a number of important changes in the field of public procurement, intended, according to the legislator's motivation, to perfect and streamline the public procurement system, and to reform the ex ante control function of the award of public procurement contracts/framework agreements, sectorial contracts/framework agreements and works concession and service concession contracts, in May 2018, the Romanian legislature amends and supplements the normative acts that have an impact on the public procurement system, starting from the same premise of perfecting and making it more flexible, with the aim of increasing the spending of the allocated funds, including European ones.

Thereby, the Romanian Government passed **Emergency Ordinance no. 45 of 24 May 2018 for amending and supplementing certain normative acts with impact on the public procurement system**, which was published in the Official Gazette of Romania, Part I, no. 459 of 4 June 2018, with effect from that date.

Amending the general value thresholds

Starting from the European Commission Communication no. 1219/2017 for transposing the provisions of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, repealing Directive 2004/18/EC, the new value thresholds in Art. 7 par. (1) of the Law no. 98/2016, the central element in the law for establishing the obligation to apply certain award procedures, but also the application of certain publication formalities and certain deadlines, is amended as follows:

- a) Lei (RON) 24,977,096, for public procurement contracts/framework agreements for works;
- b) Lei (RON) 648,288, for public procurement contracts/framework agreements for products and services;
- c) Lei (RON) 994,942, for public procurement contracts/framework agreements for products and services awarded by the county council, local council, the General Council of the City of Bucharest, and public institutions in their control;
- d) Lei (RON) 3,376,500, for public procurement contracts/framework agreements for services having as object social services and other specific services, provided in Annex no. 2 of Law no. 98/2016.

It can be observed in art. 7 par. (1) let. c) the mention of a specific threshold for public procurement contracts/framework agreements for products and services awarded by the county council, the local council, the General Council of the City of Bucharest, as well as the public institutions under their control.

Regarding **sectorial procurement**, the value thresholds from art. 12 Law 99/2016 shall provide:

- a) Lei (RON) 1,994,386, for sector contracts of products and services, and for solution contests;

- b) Lei (RON) 24,977,096, for sector contracts of works;
- c) Lei (RON) 4,502,000, for sector contracts of services having as object social services and other specific services, provided in Annex no. 2 of Law no. 98/2016.

In case of **works and services concessions**, the award procedures provided by Law 100/2016 apply to works and services concessions whose value, VAT excluded, is equal or greater than the threshold of Lei (RON) 24,977,096.

New value thresholds for direct purchases and simplified procedures

Both in the case of public procurement regulated by general Law no. 98/2016, as well as those regulated by Law no. 99/2016, contracting authorities will have the right to directly purchase (i) products or services if the estimated value of the acquisition, excluding VAT, is less than Lei (RON) 135,060, and (ii) works, if the estimated value of the purchase, excluding VAT, is less than Lei (RON) 450,200.

In the case of the simplified procedures, the maximum value thresholds were increased to Lei (RON) 360,160, in the case of the purchase of products or services, and Lei (RON) 4,502,000, in the case of the purchase of works.

Limiting the application of the lowest price criterion

The contracting authority may use the criterion of the lowest price only if it purchases products, services or works whose estimated contract value does not exceed the thresholds set out in art. 7 par. (1) of the Law no. 98/2016, and those stipulated in art. 12 paragraph (1) of the Law no. 99/2016, mentioned above.

Excluding economic operators with outstanding debts to the general consolidated budget

An economic operator shall not be excluded from the award procedure if the amount of outstanding taxes and contributions due to the general consolidated budget is less than Lei (RON) 10,000, as opposed to the old regulation which stipulated a maximum threshold of Lei (RON) 4,000.

Elimination of the obligation for contracting authorities to communicate partial results to bidders/applicants

EGO nr. 45/2018 completely repeals the provisions of art. 214 par. (2) of the Law no. 98/2016, according to which, during the evaluation process, the contracting authority had the obligation to send to the bidders/applicants partial results, related to each intermediate stage of the process, namely the result of the verification of the DUAE applications and the outcome of the evaluation of the bids.

Access of bidders to the information of the other bids submitted in the award procedure

The amendment brought by EGO no. 45/2018 emphasizes the obligation of the contracting authority to allow, upon request, within a time limit that may not exceed one working day from the date of receipt of the application, the

unrestricted access of any bidder/applicant to the report of the award procedure and the information in the qualification documents, as well as information on technical and/or financial proposals that have not been declared by the bidders as confidential, classified or protected by an intellectual property right.

Regarding the previous regulation, the legislator emphasizes the obligation of the contracting authority to make available to the other bidders/applicants, in addition to the report of the award procedure, the qualification documents, and we can interpret this as meaning that they can no longer be declared confidential by bidders/applicants. Only information in the technical and financial proposals can be declared confidential, classified or protected by an intellectual property right. This eliminates the abuse of certain bidders/applicants who declared their entire offer as confidential, including qualification documents, in order to restrict the access of other bidders/applicants to them.

Amending public procurement contracts / framework agreements

EGO no. 45/2018 modifies the conditions under which such an amendment would be permitted without the organization of a new award procedure, providing one such situation where additional works, services or products are required from the original contractor, up to a maximum of 50% from the value of the original contract, that became necessary and were not included in the initial procurement procedure and changing the contractor (i) is impossible for economic or technical reasons such as interchangeability or interoperability with existing equipment, services or installations purchased under the initial procedure; and (ii) would cause the contracting authority a significant increase in costs.

In addition, in another permitted situation where the contractor with whom the contracting authority originally concluded the public procurement contract is replaced by a new contractor, it is also permitted that the rights and obligations of the original contractor resulting from the public procurement contract are taken over in the context of a reorganization process, including acquisition or insolvency (the previously legislation mentioned only merger or spin-off), by another economic operator fulfilling the initial qualification and selection criteria, provided that this change does not imply other substantial changes to the public procurement contract and is not carried out in order to circumvent the application of the award procedures provided by this law.

Eliminating the prior notification procedure

Among the main changes we mention the fact that persons who consider themselves harmed by an act of the contracting authority, the latter being defined as any deed, any operation that produces or is likely to produce legal effects, failure to comply with a legal obligation, omission or refusal to issue an act or to perform a particular transaction in connection with or in the course of an award procedure, will be addressed directly to the National Council for Solving Complaints (CNSC) or the competent court, without having to go through the prior notification procedure.

However, in the administrative-judicial proceedings before the CNSC, after the receipt of the complaint, the contracting authority may take the remedial measures it deems necessary following the complaint, within three days after its receipt. The adopted measures will have to be communicated to the complainant, to the other economic operators involved in the award procedure and to the CNSC within one working day after their adoption.

Clearer provisions on the limits of availability between CNSC and the courts of law

In compliance with the principle of availability, CNSC or the court examines the lawfulness and merits of the contested act and can:

- a) issue a decision to repeal it in whole or in part;
- b) order the contracting authority to issue an act / to take the necessary measures to restore legality, with a clear and precise indication of the operations to be performed by the contracting authority; or
- c) cancel the award procedure, in case the remedy of the challenged act cannot be achieved.

Also, as a new provision, CNSC or the court can not decide to award the contract to a particular economic operator unless it has been designated by the contracting authority or its status as successful bidder results from the information contained in the solutioning file.

Introducing the obligation to deposit a bond upon lodging the complaint / court action. Elimination of stamp duty for court action and for complaint against CNSC decision.

One of the important changes already known among the specialists for some time is the obligation to deposit a **bond** in advance of the complaint / court action, determined as follows:

- a) **2% of the estimated contract value**, if it is lower than the thresholds stipulated in art. 7 par. (1) of the Law no. 98/2016, as amended and supplemented, art. 12 paragraph (1) of the Law no. 99/2016, as amended and supplemented, art. 11 par. (1) of the Law no. 100/2016, with the subsequent modifications and completions, **but not more than Lei (RON) 35,000;**
- b) **2% of the established contract value**, if it is lower than the thresholds stipulated in art. 7 par. (1) of the Law no. 98/2016, as amended and supplemented, art. 12 paragraph (1) of the Law no. 99/2016, as amended and supplemented, art. 11 par. (1) of the Law no. 100/2016, with the subsequent amendments and completions, **but not more than Lei (RON) 88,000;**
- c) **2% of the estimated contract value**, if it is equal to or higher than the thresholds stipulated in art. 7 par. (1) of the Law no. 98/2016, as amended and supplemented, art. 12 paragraph (1) of the Law no. 99/2016, as amended and supplemented, art. 11 par. (1) of the Law no. 100/2016, with the subsequent modifications and completions, **but not more than Lei (RON) 220,000;**
- d) **2% of the established contract value**, if it is equal to or higher than the thresholds stipulated in art. 7 par. (1) of the Law no. 98/2016, as amended and supplemented, art. 12 paragraph (1) of the Law no. 99/2016, as amended and supplemented, art. 11 par. (1) of the Law no. 100/2016, with the subsequent modifications and completions, **but not more than Lei (RON) 880,000.**

The bond shall be returned to the person who deposited it at their request, not earlier than 30 days from the date of the final judgment or, as the case may be, from the date of cessation of the effects of the suspension of the award procedure and / or the performance of the contract.

Instead, the stamp duty for court action (first court and appeal) and for the complaint against CNSC decision was eliminated, but also the bond which had to be deposited for the request to suspend the award procedure and / or the performance of the contract until the final settlement of the case.

Special time limits for exercising claims for damages and claims on the performance of public procurement contracts

GEO no. 45/2018 introduces special deadlines for such claims as follows: the time limit for bringing an action is 1 year from the birth of the right to compensation for damages caused in the award procedure, and 3 years from the birth of the right to claims on the performance, annulment, nullity, termination, or unilateral termination of contracts, if special laws do not provide for other general statute of limitation periods of the material right to claim in relation to the legal or contractual obligations infringed.

Regarding the stamp duty for their settlement, it will also be determined according to the estimated value of the public procurement contract, according to the following formula: a) up to and including Lei (RON) 100,000,000 - 2% of the estimated contract value; and b) over Lei (RON) 100,000,000 - 1% of the estimated contract value.

Transitory provisions

Award procedures in progress at the date of entry into force of EGO no. 45/2018 remain subject to the legislation in force on the date of their initiation. An ongoing award procedure means any procedure for which a contract notice or, as the case may be, a simplified participation notice has been submitted, until the date of entry into force of GEO no. 45/2018 (June 4, 2018).

Complaints, litigations and claims pending before CNSC or, as the case may be, the courts at the date of entry into force of EGO no. 45/2018 continue to be judged under the conditions and procedure provided by the law in force at the date of their commencement.