



public procurement - legal changes published in January 2022

The National Agency for Public Procurement ("NAPP") published on January 25, 2022, within the Guides and useful documents section of its website, the **Guidance on the "third-party upholder" institution**, as regulated in article 182 of Law no. 98/2016 on public procurement and article 196 of Law no. 99/2016 on sectoral procurement - [Indrumare-tert-sustinator-25.01.2022.pdf \(gov.ro\)](#).

The third-party upholder is defined by Law no. 98/2016 on public procurement and Law no. 99/2016 on sectoral procurement, as the third party with the assistance of which the economic operator manages to fulfil the criteria relating to the economic and financial standing and/or the criteria relating to technical and professional capacity, regardless of the nature of the legal relationship existing between the economic operator and the third party concerned, when a public/sectoral procurement contract is intended to be concluded.

The Guide recommends contracting authorities/entities to consider the following aspects:

- The third-party upholder is neither a bidder, nor a subcontractor, but the contracting authority/entity shall be able to effectively benefit from its support to ensure that the public/sectoral procurement contract is successfully completed.
- The rights of the contracting authority/entity in relation with the third-party upholder shall be clearly and explicitly stated and reflected in the legal relation between the third-party upholder and the economic operator it upholds.
- Drafting a contract in which to expressly stipulate the obligations of the third-party towards the economic operator, the rights of the latter and the fact that the third party takes responsibility in relation with the contracting authority/entity (depending on the type of support granted). This legal act shall also be submitted to the contracting authority/entity. It is recommended to use the contractual clauses in Annex 2 of the Guidelines.

In relation with the qualification criteria that can be fulfilled with the assistance of the third party, support for third parties can be relied upon for the fulfilment of the criteria relating to:

- A.** The economic and financial situation, for the fulfilment of criteria relating to a certain level of turnover or a certain level of other relevant economic and financial indicators, such as annual liquidity level, overall solvency, capital solvency, profitability, **except** for the criteria concerning the professional risk insurance for the economic operator, as concerns the specific characteristics of the economic operator for which the insurance is issued.

The third-party upholder is **jointly and severally liable** with the economic operator for the performance of the public/sector procurement contract. In so far as there are several third-party upholders, each of them may be jointly and severally liable for the entire outstanding obligation.

- B.** Technical and professional capacity, for the fulfilment of all the criteria provided in article 179 of Law no. 98/2016 and article 192 of Law no. 99/2016, **except for:**
- a.** Cases where the subject-matter of the contract is the supply of complex or exceptional products or services intended for a particular purpose, in which case the production or technical capacity must be fulfilled in the person of the economic operator.
 - b.** Criteria on "the indication of the environmental management measures that the economic operator will be able to apply during the performance of the contract", as the criteria concern procedures for the identification, planning, implementation, verification and continuous improvement of the environmental measures specified on the organized sites, implemented at economic operator's level.



- c. Criteria relating to authorizations/certificates, as the authorization/certificate may be used in its own name, **except** in cases where:
- i. the public/sector procurement contract covers several activities, and the authorization/certificate is required only for the performance of one or more secondary activities of the contract;
 - ii. the contracting authority/entity has not required, through the award documentation, that certain essential tasks to be performed directly by the bidder.

In relation with the cumulation rule between the bidder and the third-party upholder for the fulfilment of the qualification/selection criteria, the conditions shall be met in any of the following ways: (i) cumulation between the candidate/bidder and a third-party upholder; (ii) cumulation between the candidate/ bidder and several third-party upholders; (iii) cumulation between the members of the association and a third-party upholder; (iv) cumulation between the members of the association and several third-party upholders; or (v) fully by third party upholder/(s).

Exceptions to the cumulation rule are:

- Cases where the contracting authority/entity imposes qualification criteria on the economic operator/consortium of economic operators which must be proved in their own person, when certain essential tasks shall be performed directly by them.
- The formulation of the criteria relating to the number of contracts by which the level applied for/quantity applied for can be reached by the wording "*at the level of one contract*", as provided for in Article 6 para. (1), points a) and d) of ANAP Instruction no. 2/2017 - the criteria shall either be fully demonstrated by the bidder/candidate or fully demonstrated by the third-party upholder.
- Cases in which a given capacity shall be fully met by an economic operator due to the subject- matter of the contract which presents certain particularities.

The **exception** to the possibility of fulfilling a qualification/selection criterion entirely through the third party/third-party upholders is the case of indivisible contracts, since they must be performed by a single operator. Where the contracting authority/entity considers that a specific contract is indivisible, it shall specify in the procurement documents that, for the fulfilment of the purpose of that contract, the cumulation of the capacities (knowledge and/or experience) of two entities which, taken separately, do not have the capacities required for the performance of the contract, is not allowed.

An economic operator may cumulate the following qualities at the same time:

- (1) Bidder/candidate in an award procedure and third-party upholder in another bid/candidature or
- (2) Third-party upholder for one or more candidates/bidders in the same award procedure.

The contracting authority/entity is also responsible for verifying if the third-party upholder fulfils the relevant capacity criteria and does not fall within the grounds for exclusion provided for by law. If the third party does not fulfill these conditions, the contracting authority/entity shall request the economic operator, **only once**, to replace it. **Failure to reply shall be considered equivalent to an unacceptable bid and the contracting authority/entity shall no longer be entitled to request the replacement of the third-party upholder.**

Annex 1 to the Guidelines provides models of a Firm Commitment to uphold the bidder in fulfilling the criteria relating to economic and financial standing or technical and professional capacity. The Guide also contains tables detailing how the third-party upholder/(s) fulfil the above criteria. We also recall that the recommended contractual clauses are contained in Annex 2 to the Guidelines.