

New regulations in public procurement law

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Beside the regulations coming into effect in the context of the Covid-19 pandemic, further legal acts regulating the award of public contracts have been enacted this year.

For instance, after the Emergency Government Ordinance no. 23 dated 04.02.2020 has been declared unconstitutional due to lack of certain opinions on the part of authorities, the Government Emergency Ordinance No. 114 dated 09.07.2020 (hereinafter referred to as the “GEO”) entered into effect, restating some provisions of the unconstitutional ordinance with partial amendments.

We shall briefly describe below some changes of substantive law regulated in the GEO.

Confidentiality

Within public procurement procedures, contracting authorities are prohibited from disclosing information from the technical offer, elements of the financial offer and/or justification of the prices/costs, to the extent the tenderers/economic operators designate them as confidential and provide evidence for such confidentiality. The reason for confidentiality can consist exclusively in such information containing personal data or technical or commercial secrets or being protected by intellectual property rights. The evidence concerning the confidentiality of the information must be attached to the offer by the tenderer relying on such.

Motivation of the grounds for exclusion

The contracting authorities evaluate the measures taken and proved by the economic operators regarding their reliability in spite of a relevant exclusion ground (except for the obligation to pay taxes, duties and contributions to the state budget), taking into consideration the gravity and particular circumstances of the criminal offence or misconduct. In case the measures are considered to be insufficient, the economic operator will receive the exclusion decision of the contracting authority including the reasons for such exclusion.

Thus, the contracting authorities must motivate their exclusion decision in the abovementioned scenario.

New deadlines in public procurement procedures

The contracting authorities must report on the award procedures within the following time frames:

- within 60 working days from the day on which the (first) offers/ projects are submitted in case of open procedures, restricted procedures, innovation partnerships and contests;
- within 20 working days from the day on which the offers are submitted in case of simplified procedures and negotiated procedures without prior publication; and

- within 100 working days from the day on which the offers are submitted in case of competitive dialogues and negotiation procedures.

As an exception, the abovementioned time frames can be extended once by maximum 80 working days in justified cases, with the consent of the head of the contracting authority, whereas the extension must be communicated to the relevant economic operators within maximum 2 working days following the expiration of the initial evaluation period.

Moreover, in cases of restricted procedures, negotiation procedures, competitive dialogues and innovation partnerships, the contracting authorities must produce an interim report within 20 working days as of the day of submission of the requests to participate.

Decisions of the National Council on the Settlement of Claims (ro: CNSC) or of the law courts regarding the cancellation of an act, the adoption of an act or measures for restoring legality must be implemented by the contracting authorities within 20 working days following the communication of the decisions.

Conclusion

In our opinion, the limitation of the confidentiality obligation of the contracting authorities is reasonable considering the abusive practice of some economic operators according to which all submitted documents were declared confidential. However, the new regulation seems extreme, more so, as under certain conditions it can become very difficult to procure and provide evidence for the confidentiality of trade secrets. Particularly difficult will be the situation of the relevant copyrights, which, according to the Romanian law require, in principle, no registration. Practice will show whether contracting authorities and economic operators will implement the abovementioned limitation of the confidentiality obligation in a reasonable manner; the breach of competition regulations must be avoided.

Additionally, we welcome the new introduction of maximum time frames in public procurement procedures. However, one should not forget that such time frames had already been regulated in the legislation before, however they were changed or even abolished.

On a final note we would like to highlight that some changes of the GEO aim at bringing the Romanian legislation in line with the European directives.

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