The Government Procurement Review

Third Edition

Editors
Jonathan Davey and Amy Gatenby

Law Business Research

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Jonathan Davey and Amy Gatenby

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EDITORS' PREFACE

We are delighted to introduce this, the third edition of *The Government Procurement Review*. It brings even wider geographic coverage than the second edition, now covering six continents and 27 national chapters (including the EU chapter).

The political and economic significance of government procurement is plain. Government contracts are of considerable value and importance, often accounting for 10 to 20 per cent of GDP in any given state. Government spending is often high-profile and has the capacity to shape the future lives of local residents.

Even as the economic climate improves, it is perhaps no surprise that, with austerity the watchword throughout the developed economies, governments seek to demonstrate more effective, better-value purchasing; nor that many suppliers view government contracts as a much-needed revenue stream offering relative certainty that they will be paid. A concern to simplify procurement procedures and increase opportunities for small and medium-sized enterprises is also prevalent, particularly in the EU.

The World Trade Organization's revised Agreement on Government Procurement (GPA) now covers the 28 EU Member States, Armenia, Canada, Hong Kong (China), Iceland, Israel, Japan, Korea, Liechtenstein, the Netherlands with respect to Aruba, Norway, Singapore, Switzerland, Chinese Taipei and the United States. Montenegro and New Zealand were invited to accede to the GPA on 29 October 2014. Eight other states have started the process of acceding (Albania, China, Georgia, Jordan, the Kyrgyz Republic, Moldova, Oman and Ukraine).

In last year's preface, we mentioned potential new, protectionist clouds on the procurement horizon with the European Parliament having approved measures that would prevent firms from bidding for larger public contracts unless their home country allows reciprocal access to EU firms. While the European Parliament viewed these measures as encouraging third countries to reciprocate in opening markets, some (including the International Chamber of Commerce) feared it would have the opposite effect, provoking trade wars. It seems, for the moment at least, that these proposals are not proceeding, which in the authors' view is to be welcomed.

Regardless of these possible difficulties, we expect that the principles of transparency, value for money and objectivity enshrined in the UNCITRAL Model Law on Public Procurement and in the national legislation of many states will continue gradually to have a positive effect.

The biggest single development internationally in the period since the second edition is undoubtedly the adoption of new EU directives and progress towards the required national implementation, Member State by Member State. The New Directives cover, respectively, mainstream public sector and utilities procurement (replacing the 2004 directives) and concessions, an area previously only partly covered by the EU regime. The new directives have been described as effecting evolution rather than revolution, but cynics, pointing to the lengthening of the directives and the addition of new procedures, query whether the originally stated aims of simplification and 'flexibilisation' (a word that could only have been invented in Brussels!) have really been achieved.

At the time of writing, only the United Kingdom has implemented the mainstream directive, with the deadline for transposition being 18 April 2016.

Incidentally, when reading chapters regarding European Union Member States, it is worth remembering that the underlying rules are set in the directives at EU level. Readers may find it helpful to refer to both the European Union chapter and the relevant national chapter, to gain a fuller understanding of the relevant issues. As far as possible, the authors have sought to avoid duplication between the EU chapter and national chapters.

Some national authors have reported significant increases in challenges to contract award decisions, and this is certainly the experience in the United Kingdom. While it is clear that there are considerable variations between jurisdictions in the willingness or ability of suppliers to challenge, it seems to us that the increased risk of challenge can help hold awarding authorities to account and is likely to encourage greater compliance with national procurement rules. It may be that, in jurisdictions where bringing procurement challenges is either difficult or expensive, further measures are needed to amplify this effect.

Finally, we wish to take this opportunity to acknowledge the tremendous efforts of the many contributors to this third edition as well as the tireless work of the publishers in ensuring that a quality product is brought to your bookshelves in a timely fashion. We hope you will agree that it is even better than previous editions, and we trust you will find it to be a valued resource.

Jonathan Davey and Amy Gatenby
Addleshaw Goddard LLP
London
May 2015

Chapter 18

ROMANIA

Oana Gavrilă and Mariana Sturza[1]

I INTRODUCTION

Public procurement contracts are essentially regulated by Government Emergency Ordinance No. 34/2006 on the award of public procurement contracts, public works concession contracts and service concession contracts (GEO No. 34/2006). Specific sector regulation and clarifications of GEO No. 34/2006 can be found in the secondary legislation, consisting of government decisions and National Authority for the Regulation and Monitoring of Public Procurement (ANRMAP) orders. GEO No. 34/2006 transposes EC directives on public procurement[2] and creates the legal framework to secure compliance with the principles of contract awarding in public procurement: non-discrimination, equal treatment, mutual recognition, transparency, proportionality, optimum use of funds and undertaking of liability.

1 Oana Gavrilă is a managing associate and Mariana Sturza is a senior associate at Ţuca Zbârcea & Asociaţii.

2 Directive No. 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts; Directive No. 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, except for Article 41(3), Article 49(3) to (5) and Article 53, which are transposed by government decision; Directive No. 1989/665/EEC on the coordination of laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts; and Directive No. 1992/13/EEC on the coordination of laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, except for Articles 9 to 11, which are transposed by government decision.

II YEAR IN REVIEW

The domestic legislative framework was amended and supplemented in relation to the reviewing procedures. More specifically, the concept of a 'good conduct guarantee' was introduced, which is a guarantee in the form of a deposit amounting to 1 per cent of the estimated value of the public procurement contract (however, not more than €100,000), to be submitted by economic operators who are filing complaints within public procurement procedures. Such a deposit would be retained in full by the contracting authority in the event that the complaint filed by the economic operator is rejected or solved by a decision that is unfavourable for the economic operator that submitted the complaint.

The measure is aimed at reducing the number of complaints submitted in public procurement procedures, which is rather high compared with the number of complaints registered in other Member States.

Nevertheless, the measure was strongly challenged by economic operators, who claimed that such a measure is abusive and restricts the constitutional right to petition. The Constitutional Court was notified in this respect. The decision issued by the Constitutional Court upheld the unconstitutionality of the legal provision regulating the right of the contracting authority to retain the good conduct guarantee.

The problems with this good conduct guarantee were not entirely solved by the decision of the Constitutional Court, since only the right of the contracting authority to retain the guarantee was upheld as unconstitutional, but the obligation to submit the guarantee was not. Consequently, economic operators are still obliged to submit the good conduct guarantee, but the contracting authorities are no longer entitled to retain it.

III SCOPE OF PROCUREMENT REGULATION

To secure adherence to the principles underlying the awarding of public procurement contracts, a set of specific contract awarding rules and procedures has been devised. The scope of these rules and procedures is defined by reference to the entities that are obliged to apply them, and to the type of contracts entered into by them and the undertakings concerned.

i Regulated authorities

The contracting authorities in charge of the enforcement of GEO No. 34/2006 are the central, regional and local state authorities and the authorities controlled by them, joint ventures between such entities, suppliers of public utilities (i.e., water, energy, transport and postal services – separately regulated) and any legal subject that is active in one or more utility supply branches under a special or exclusive right granted by a competent authority.

ii Regulated contracts

Public procurement contracts may include works contracts, supply contracts or service contracts. The defence sector has special procurement regulations. A few particular rules

are provided in GEO No. 34/2006 for services of general interest (water, energy, transport, postal services). Generally, separate regulation is for reasons of national security.

Although, as a rule, the above-mentioned contracting authorities procure the products, services and works only through a competitive procedure, direct procurement of no more than €30,000 for services and supply contracts and €100,000 for works contracts is allowed. GEO No. 34/2006 expressly stipulates a few other contracts that fall outside its scope for criteria other than value.[3]

Once the contract is awarded through one of the competitive procedures regulated by GEO No. 34/2006, the question of amending the ongoing contract and the conditions under which such an amendment is allowed without triggering a new awarding procedure may also be raised. There is a very thin line between the legal amending of such contracts and the obligation to organise a new award procedure. In this respect, EC directives on public procurement and domestic laws do not contain any express provisions on cases when the amendment of a public procurement contract is, in fact, a new contract, which should be awarded under a public competitive procedure.

In practice, it follows that the amendments create a new contract, and a new contract awarding procedure must be organised in the following cases:

a the amendment marks a substantial departure from the initial contract and proves that the parties intend to renegotiate the essential terms of the contract (the said amendment changes the economic balance of the contract in favour of the contractor);

b the amendment would have also allowed the participation of other tenderers or the selection of another tender in the already organised procedure; or

c the amendment considerably extends the scope of the contract, including services that were not covered by the initial contract.

On the other hand, contracting authorities are expressly allowed to increase the price of a works or services contract by up to 20 per cent of the initial value by organising a simple negotiation procedure without the prior publication of a tender notice, when

3 The following are excluded from the scope of GEO No. 34/2006:

a A service contract on the purchase or lease of immoveable assets; the purchase, development or production of programmes for broadcasting purposes; the provision of arbitration and conciliation services; the provision of financial services in relation to the issuance, purchase, sale or transfer of securities or other financial instruments; employment; and the provision of research-development services fully paid for by the contracting authority.

b A contract awarded further to an international agreement entered into, in accordance with the provisions of the Treaty, with one or several non-Member States and referring to the supply of products or performance of works for the implementation or operation of a project jointly with the signatory states, if the respective agreement provides for a specific procedure for the awarding of such a contract; or the application of a procedure that is specific for international entities and institutions or is provided by EC laws. However, the European Commission must be notified of such contracts via ANRMAP.

certain conditions provided under the GEO No. 34/2006 are met. Such a procedure is completed by the execution of an addendum to the initial contract. The price may thereby be increased in the event that, due to unforeseeable circumstances, the procurement of supplementary or additional works or services becomes necessary for the fulfilment of the contract and if the following conditions are met:

a the contract is awarded to the initial contractor;

b the additional works or services are related to the initial contract or are necessary for the fulfilment thereof; and

c the maximum aggregate value of additional works or services does not exceed 20 per cent.

Subcontractors may be replaced after execution of the contract (in fact, this is a frequent practice), if the contracting authority agrees and if the initial technical and financial tenders are not varied.

To conclude, the public procurement contract can be amended without the organisation of a new procedure for competitive awarding only if the amendment is insignificant. However, such a decision must be thoroughly reviewed in advance from the perspective of domestic and European laws on public procurement, to reach a balance between the need to efficiently continue with the execution of the contract and the obligation to ensure free competition and equal treatment for all current and potential successful tenderers.

IV SPECIAL CONTRACTUAL FORMS

The procedures to be followed for the awarding of public procurement contracts differ by reference to value thresholds, the scope and particularities of the contract and the special conditions to be met by the undertaking that will be awarded the contract.

The special methods for the awarding of public procurement contracts are applicable when a framework agreement is executed, when the authority obtains, on its behalf, products or services meant for another contracting authority, and when the dynamic purchasing system or the electronic auction is applied.

i Framework agreements and central purchasing

A framework agreement is a written arrangement between one or several contracting authorities and one or several undertakings, establishing the essential elements and conditions to govern public procurement contracts that will be awarded in a given period, in particular the contract price and, as the case may be, the quantities. As a rule, the framework agreement is concluded further to an open or restricted tender.[4] The maximum term of a framework agreement is four years.[5] At least three undertakings

4 However, as an exception, another awarding procedure could also be held.

5 In exceptional cases, for reasons related to the nature and specifics of the contracts to be concluded, a longer term may apply.

must execute the framework agreement, when the latter is concluded with more than one undertaking.

To avoid the abusive or inappropriate use of framework agreements by the contracting authority, the latter must observe the following rules:

a not to award subsequent contracts on other performances than those provided in the framework agreement or subsequent contracts of a different type or nature;

b not to award subsequent contracts for and on behalf of another contracting authority that is not a party to the respective framework agreement, unless this other contracting authority is a central purchasing body; the latter (whose activity must be approved in advance by government decision) may acquire on its behalf products or services for another contracting authority;

c to provide for minimum qualifying conditions referring at most to the estimated value of the largest subsequent contract that is expected to be awarded during the term of the framework agreement;

d the documentation for the awarding of a framework agreement must contain specific information (e.g., the option to award subsequent contracts with or without resuming the contest, the award criteria and evaluation factors to be applied in awarding subsequent contracts, estimated minimum and maximum quantities that could be requested throughout the term of the framework agreement and under one subsequent contract); and

e if the framework agreement is entered into with several undertakings and the subsequent contracts are to be awarded by resuming the contest, the contracting authority, whenever it decides to obtain the products, services or works under such an agreement, must concurrently send to all the signatory undertakings an invitation to re-tender. In the re-tendering process, undertakings are only entitled to improve the elements or conditions for which the contest was resumed.

Besides the framework agreement, GEO No. 34/2006 regulates two other special award methods: the dynamic purchasing system and the electronic auction.

The dynamic purchasing system is a fully electronic time-limited process, open, throughout its entire term, to any undertaking that meets the qualification and selection criteria and has submitted a non-binding tender in accordance with the tender book requirements. The contracting authority is obliged to comply with open tender rules at all stages of the dynamic purchasing system. It is entitled to use a dynamic purchasing system only for the purchase of consumable goods with features generally available on the market that meet its needs.

The contracting authority must allow any undertaking concerned to submit a non-binding tender. After the receipt of this tender, the contracting authority is obliged to verify whether the tenderer meets the qualification criteria and whether its technical proposal complies with the tender book requirements. The tenderer is entitled to improve its non-binding tender at any time, provided that the technical proposal still complies with the tender book requirements.

Electronic auction may be used in the following cases: as the final stage of an open tender, restricted tender, negotiation with prior publication of a tender notice or a call for tender, and only if the technical specifications were accurately defined in the tender books; in resuming the contest among undertakings that signed a framework agreement;

and when submitting binding tenders for the awarding of a public procurement contract under a dynamic purchasing system. Intellectual services and works contracts cannot be awarded by electronic auction.

Under such a procedure, it is mandatory to indicate the elements of the tender for which it will be resumed and the possible value caps up to which the respective elements may be improved. At each round of the electronic auction, the contracting authority must immediately inform all tenderers of at least the minimum data that they need to determine their rank at any time.

ii Joint ventures

Public-public partnership, defined by domestic law as of December 2011, means the common development of a project by two or more domestic or international public entities. Domestic laws do not provide any detailed regulations on how public-public partnerships operate, but limit themselves to stipulating that public procurement rules apply in this case.

Public-private partnerships are regulated separately under Law No. 178/2010. The Parliament of Romania has recently passed a new Public-Private Partnership Bill, which would bring significant clarifications, changes and improvements to the existing framework and which is currently under a reassessment procedure. The bill is expected to enter into force this year.

Essentially, public-private partnerships can be implemented by various types of contracts under which the obligations of the public partner are transferred to the private investor. Upon completion of the contract, the public asset is transferred, free of charge, to the public partner, in good condition and free of any lien or liability.

The stages preceding the execution of such a contract are project initiation by publishing a notice, preliminary analysis and selection, negotiation and execution of the contract. Special law provides for detailed rules on the establishment of a special purpose vehicle (SPV) in which the public partner and the private investor will have stakes, with the private partner contributing in kind to the SPV's share capital.

V THE BIDDING PROCESS

i Notice

To ensure the necessary transparency in the awarding of public procurement contracts, mandatory rules had to be established for the publication of the notice of intention, tender notice, invitation to tender and award notice. The electronic system of public procurement, which is used for the development of contract awarding procedures by electronic means, as well as for the registration of certain types of procedures, is called SEAP. The contracting authority must observe SEAP publication procedures, which differ by reference to the type and estimated value of the contract to be awarded.

ii Procedures

Depending on the specifics of the contract to be awarded, the awarding procedure may consist of:[6]

a an open tender, where any undertaking concerned is entitled to bid;

b a restricted tender, where any undertaking is entitled to take part, but only shortlisted candidates are entitled to bid;

c a competitive dialogue, where any undertaking is entitled to take part and by which the contracting authority has a dialogue with the shortlisted candidates, to identify one or several solutions that may cater to its needs; based on such solutions, shortlisted candidates are to provide their final tender;[7]

d a negotiation, whereby the contracting authority consults with the shortlisted candidates and negotiates contractual clauses, including the price, with one or more of them;

e a call for tender, a simplified procedure by which the contracting authority requests tenders from several undertakings when the values of the contract to be awarded are below the regulated thresholds; and

f a solution contest, a special procedure whereby a plan or a project is acquired, in particular in the area of land development, town planning and landscaping, architecture or data processing, by competitive selection of such a plan or project by a jury, with or without prizes.

iii Amending bids

Once the tenders have been submitted in accordance with the tender documentation, the checking process will begin. It is worth mentioning that, after the deadline for submission, the financial and technical proposal can no longer be amended or supplemented, otherwise the tender will be rejected as non-compliant.

The only accepted amendments to the tender are those that may be classified as corrections of clerical, arithmetical errors or minor technical deviations.

VI ELIGIBILITY

i Qualification to bid

A preliminary stage that the contracting authority must complete before the actual evaluation of each tender is to verify whether qualification criteria have been met. Depending on the nature of infringements of legal provisions and the tender documentation, tenders may be rejected as unacceptable, non-compliant, or both.

6 A direct awarding of the public procurement contract is only possible if the value of the public procurement contract to be awarded is lower than certain thresholds regulated under GEO No. 34/2006.

7 This type of procedure is used for the awarding of significantly complex contracts.

Tenders meeting at least one of the following criteria are deemed to be unacceptable:

a they were submitted after the submission deadline or to another address than that provided in the tender notice;

b they are not accompanied by a bid bond in an amount, form and with the validity provided in the tender documentation;

c they were submitted by a tenderer that does not meet one or more of the qualification requirements provided in the tender documentation, or that did not submit relevant documents in this respect;

d they do not comply with the mandatory regulations on specific labour and labour protection conditions;

e the price, excluding VAT, in the financial proposal exceeds the estimated value and no additional funds can be made available or, irrespective, there is a deviation of more than 10 per cent from the initial value and this would circumvent legal provisions providing for particular value thresholds;

f it is found that the tender specifies an abnormally low price, so the contract cannot be fulfilled in the quantity and at the quality standards stipulated in the tender book;

g the tender is a variant of the tender specifications that is not allowed under the tender documentation; or

h on conflict of interest grounds.

Tenders meeting at least one of the following criteria are deemed to be non-compliant:

a they do not appropriately comply with the tender book requirements;

b they contain proposals for the amendment of contractual clauses that are obviously disadvantageous to the authority, and the tenderer, although notified thereof, does not agree to waive such clauses;

c the financial proposals stipulate prices that do not result from a free competition process and are unreasonable; or

d within a procedure for the award in stages, the tender does not draw any distinction between the stages, which renders the application of an awarding criterion for each stage impossible.

If the irregularities fall under one of the above two categories, the tender shall be rejected without any evaluation (by reference to the award criterion provided in the documentation).

ii Conflicts of interest

To avoid suspicion of conflict of interests in the evaluation procedure, individuals or legal entities directly participating in the candidacy, tender checking or evaluation process cannot take part in the procedure as a candidate, tenderer, associated tenderer or subcontractor. On the other hand, any person who contributed to the drafting of the documentation can participate in such procedures, but only if his or her involvement in the drafting of the tender documentation is not likely to distort competition.

The following individuals cannot participate in the checking or evaluation process:

a individuals holding shares or interests in the subscribed share capital of one of the bidders or candidates, or subcontractors, or members of the board of directors, managing or supervisory board of one of the tenderers or candidates or subcontractors;

b spouses, in-laws or relatives up to and including the fourth degree of members of the board of directors, managing or supervisory board of one of the tenderers or candidates;

c individuals found to have an interest that makes them biased in the checking or evaluation of candidacies or tenders; or

d employees of the contracting authority who, acting in accordance with their duties, are in any conflict of interest, as regulated by the special law ensuring transparency in the conduct of public dignitaries, public servants and in the business environment to prevent and punish corruption, as further amended and supplemented.

The tenderer, candidate or associated tenderer or third-party supporter whose members of the board of directors, managing or supervisory board or shareholders are spouses, in-laws or relatives up to and including the fourth degree of decision-making executives of the contracting authority or have commercial relationships with such executives cannot participate in the contract awarding procedure. To avoid such cases, the contracting authority must stipulate in the data sheet, invitation to tender or tender notice the name of the contracting authority's decision-making executives.

iii Foreign suppliers

Domestic laws do not ban the participation of foreign tenderers. On the contrary, contracting authorities are obliged to abide by the fundamental principles governing public procurement, such as equal treatment and non-discrimination. Moreover, special laws define the concept of 'undertaking' (i.e., the person submitting a tender in a public procurement procedure) without drawing any distinction between Romanian or foreign undertakings. Therefore, foreign undertakings are not obliged to establish any subsidiary or branch in Romania to participate in a contract awarding procedure, as such an obligation would be considered restrictive. However, if the foreign tenderer is declared successful, it must register in Romania for tax purposes (including by a tax representative). This registration is purely for tax reasons and does not stem from the applicable special provisions on public procurement.

VII AWARD

i Evaluating tenders

All the minimum qualification requirements, the documents to be provided by undertakings in proving compliance with the qualification and selection criteria, the award criterion, the tender evaluation factors and their proportional weights, as well as the calculation algorithm or the actual methodology used to score the advantages resulting from the technical and financial proposals provided by tenderers, must be

included in the tender documentation. Any amendment or addition to the evaluation factors shall lead to the cancellation of the awarding procedure.

The awarding criterion indicated in the tender documentation may not be changed throughout the duration of the procedure; it may consist of either the most economically advantageous option or the lowest price only.

ii National interest and public policy considerations

The contracting authority must make sure that any undertaking can obtain the tender documentation. Technical specifications contained in the documentation (requirements, prescriptions, technical characteristics that allow each product, service or work to be objectively described in compliance with the requirements of the contracting authority) shall be defined in a manner to meet, whenever possible, the requirements and standards of any user, including people with disabilities. Technical specifications shall afford equal access to tenderers and not result in the creation of unreasonable obstacles to the opening up of public procurement to competition.

The contracting authority must define technical specifications either by reference to national standards transposing European standards, European technical approvals, international standards or other technical reference systems established by the European standardisation bodies, or by specifying the requested performances or operational requirements. No tender may be rejected if the tenderer proves, by whatever appropriate means, that its technical proposal meets in an equivalent manner the requirements of the contracting authority. To prove compliance with the requested technical specifications, the contracting authority must accept certificates issued by bodies acknowledged in any Member State.

Performances and functional requirements may also include environmental characteristics. In this case, the contracting authority has the right to use, in full or in part, specifications defined by 'eco-labels' (European, national or multinational). The contracting authority may not consider a technical proposal non-compliant merely because the tendered products or services do not bear the eco-label required, if the tenderer proves, by whatever appropriate means, that the tendered products or services are compliant with the requested technical specifications.

The tender book may not set out technical specifications referring to a specific make, source, production, or a particular process, or to a brand name or trademark, a patent or a production licence with the effect of favouring or disqualifying certain undertakings or products. Tender documentation may set out special requirements for the fulfilment of the contract, seeking to obtain social effects or environmental protection and to promote sustainable development.

VIII INFORMATION FLOW

In principle, access to the information available in a contract awarding procedure is open to all undertakings, except where special regulations provide for the confidentiality of certain documents or the stage of the procedure does not yet allow the disclosure of particular data. Domestic enactments regulating access to information are consistent with the general principles applicable in this sector. For instance, tenderers are granted access

to the entire tender documentation, to the answers given by the contracting authority to clarification requests made by another tenderer and to the public procurement file. The contracting authority must report decisions on the outcome of the procedure to the undertakings concerned; the information must be communicated in writing, no later than three business days from the making of the decision. The reasons for rejecting a tender shall be provided to relevant tenderers.

Tenderers are also entitled to attend the meeting at which the contracting authority's evaluation commission opens the tenders. The opening meeting shall be documented by a set of minutes recording the formal issues ascertained upon opening the tenders, the main elements of each tender and the list of documents submitted by each undertaking. A copy of the minutes shall be delivered to all the undertakings, regardless of whether they attended the meeting.

Contracting authorities must secure the protection of any information that the undertaking classifies as confidential, insofar as the disclosure of such information would objectively damage the legitimate interests of the undertaking (especially with regard to commercial secrecy and intellectual property).

IX CHALLENGING AWARDS

Decisions made in an awarding procedure (or the tender documentation) may be challenged through a special procedure.

i Procedures

The challenging procedure has two stages: an administrative-jurisdictional stage, when the individual damaged by an act of the contracting authority approaches the National Council for Solving Complaints (NCSC), and a litigious stage, when the aggrieved party appeals to a court of law.

The terms within which such a challenge must be filed vary based on the value of the contract to be awarded, and the window to do so may last for five or 10 days from the service of the instrument considered to have caused damage.

The challenge does not automatically suspend the contract award procedure; however, a suspension may be ordered by the NCSC through a separate motion. Whether it is suspended or not, the procurement contract may not be executed before the NCSC rules on the matter.

The NCSC's decision is binding on the parties; it may be challenged by a complaint before the competent court of law within 10 days. The court judgment is final.

ii Grounds for challenge

The challenge may claim either that an instrument of the contracting authority is illegal or that an instrument was not fulfilled within the legal term.

iii Remedies

The NCSC carries out a legality check of the instruments issued by the contracting authority and may, as the case may be, cancel the challenged instrument, order the contracting authority to issue an instrument or order remedies. The NCSC's decision

is binding to the contracting authority and a complaint by any party does not suspend its enforcement. The NCSC may not re-evaluate the submitted tenders, but it may order a reassessment by the evaluation commission formed within the contracting authority. Matters decided by the NCSC are binding on the contracting authority during revaluation.

The court of law may award indemnifications for damages incurred during a contract awarding procedure. Indemnifications shall be filed for in a separate action and may be awarded only after the prior cancellation of the document considered to be damaging.

If indemnifications are sought for expenses incurred through drafting the tender or participating in the contract awarding procedure, the individual who has suffered damage only needs to prove the breach of the special legal provisions on public procurement, and that he or she would have had a real chance of being awarded the contract, which was thwarted by the relevant breach.

X OUTLOOK

It is expected that the procurement legislation will undergo significant changes, while some pieces of legislation may be even replaced entirely, in the context of the transposition into the national framework of the EU New Directives enacted in the public procurement field.

The deadline set forth in the New Directives for the transposition of the new public procurement rules into national law is April 2016.

Appendix 1

ABOUT THE AUTHORS

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Oana Gavrilă is a managing associate at Ţuca Zbârcea & Asociaţii. For the past 11 years as a pleading lawyer, she has advised the firm's clients on a wide range of corporate, commercial and tax-related disputes. In particular, she has gained an impressive body of expertise in representing clients in complex contentious-administrative disputes, especially as regards the cancellation of administrative deeds connected to the award of concession agreements, public-private partnerships or public procurements.

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Mariana Sturza is a senior associate at Ţuca Zbârcea & Asociaţii, specialising in public procurement, concessions and public-private partnerships (PPPs). With more than six years' practical experience of advising on the application and implementation of procedures for awarding PPP and concession contracts, she has in-depth knowledge of the particularities of public procurement, concessions and PPP regulations in specific infrastructure sectors, such as motorways, national roads, airports and public utilities.

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