The Government Procurement Review

Editors
Jonathan Davey and James Falle

Law Business Research

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CONTENTS

EDITORS' PREFACE

It is our very great pleasure to introduce this first edition of *The Government Procurement Review*. The first edition brings together contributions from eminent procurement lawyers across five continents and provides real insight to the key issues in government procurement across the different jurisdictions.

The importance of government contracts for the economy cannot be overstated. Indeed, these contracts often account for 10 to 20 per cent of GDP in any given state. While Keynesian economic theory suggests that increased government spending will support growth in times of recession, in practice the ongoing downturn has often been accompanied instead by austerity and government cuts have been the byword. Nevertheless, the debate continues as to whether the continuing economic torpor is best treated by tax and spend or by deficit reduction, and there are some signs of possibly changing policy to be gleaned from the rhetoric coming from various institutions. It will be interesting to see in the coming year or so how this affects the opportunities for private sector suppliers to bid for public contracts. Certainly, even though government spending has been curbed, the cumulative value of government contracts remains considerable and they still offer a significant opportunity for many firms.

Against this backdrop of ongoing fiscal stress, it is perhaps not surprising that certain common themes emerge from national chapters. In particular, we note policy considerations aimed at improving efficiencies or at improving the lot of local providers. Additionally, promotion of small and medium-sized enterprises ('SMEs') is a particular focus of attention, whether because the SME is viewed as more efficient or because it is likely to be locally based.

Other noticeable common threads that run through the different national legal systems are worthy of note. The systems of most, if not all, jurisdictions now embrace the key principles of transparency, value for money and objectivity. These principles go hand in hand with the continuing drive against corruption and bribery. These threads are now embedded in the UNCITRAL Model Law on Public Procurement, updated in 2011, and the guidance contained in the 2012 Guide to Enactment, together with the WTO's Government Procurement Agreement ('GPA') and the EU directives.

At the same time, there are some significant divergences in national approaches. Perhaps most notably, some national laws seek to treat all contractors equally without distinction as to the origin of the supplier, or at least give equal access to suppliers from states that are parties to a multilateral agreement – as is the case for all GPA members. Other legal systems overtly favour national sourcing, for example by explicitly reserving certain contracts for national suppliers.

While there seems to be a trend towards disappointed bidders being more willing to challenge authorities' award decisions, it is perhaps not surprising that there is considerable variance in the number of challenges brought within the different jurisdictions and the legal remedies available to disappointed bidders vary hugely from one country to the next. No doubt there are many reasons for this variance in the frequency of challenge, such as the relative complexity and cost of bringing challenges in some states compared with others; whether the jurisdiction has specialist procurement tribunals; the speed with which the courts might be expected to dispose of a claim; and the remedies that could be available (for example, can the courts cancel the award decision or are they restricted to awarding damages to the claimant?).

An often vexed question for procurement lawyers is how land transactions should be treated. In particular, if a public authority sells land with a clear understanding that the purchaser will develop it in a particular way, is this subject to the procurement rules? In some jurisdictions, land transactions are regulated by the same rules as government purchasing; in others, unless the land disposal can be said to constitute a public works contract, then it is unregulated from a procurement law perspective (although other rules may come into play such as those relating to state aid and to obtaining proper value for the disposal).

It is also noteworthy that different jurisdictions take different approaches to the scope of procurement regulation. For example, in the field of utilities, contracts awarded by privately owned utilities are sometimes regulated by national procurement law where the utilities enjoy special or exclusive rights. However, this is not universally the case and, in other jurisdictions, only state-owned utilities are regulated.

Probably the largest cross-border market of all is defence. This remains a key focus for lawyers, following controversies such as the US Air Force's $35 billion tanker contract and, in the EU, the bedding down of the Defence Directive.

Overall, we continue to see procurement law evolving internationally. The UNCITRAL Model Law on Public Procurement was last updated as recently as 2011 and the GPA text was revised in 2012. And there is a major reform package going through the EU institutions at present, which could be on the EU statute books late in 2013 or, perhaps more realistically, in 2014. Among the many EU reforms is expected to be the regulation of service concession contracts, which have hitherto only been lightly touched upon by the EU rules but are of considerable economic importance in some Member States. Meanwhile, UNCITRAL is exploring possible future work in the area of public-private partnerships.

It is worth highlighting that in the European Union, rules are made at EU level and then implemented by each Member State. Underlying these EU rules is the desire to create an EU single market where EU suppliers can compete on a level playing field, whatever their nationality. When considering the rules in Belgium, France, Germany, Greece, Italy, Luxembourg, Portugal, Romania, Spain or the United Kingdom, the

reader may find it helpful to refer to both the European Union chapter and the relevant national chapter, as the authors have sought as far as possible to avoid simply repeating the EU rules when setting out the noteworthy features within their national jurisdiction.

Finally, we would like to thank all the contributors for their hard work in producing their national chapters. We also wish to acknowledge the tireless work of the publishers in collating what we hope you will find is a helpful and interesting publication. We believe that this annual publication will provide a valuable source of comparative information on procurement to international businesses operating or seeking to operate cross-border, policymakers, academics and practitioners alike.

Jonathan Davey and James Falle
Addleshaw Goddard LLP
London
May 2013

Chapter 16

ROMANIA

Oana Gavrilă[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 at Țuca Zbârcea & Asociații.

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 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 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:

a the administrative nature of the public procurement contract;
b the definition of terms and phrases (e.g., data sheet, executives);
c the value thresholds of the contracts to be awarded, where specific rules have been established;
d assessing the value of public procurement contracts (the estimated value to also include sundry and unforeseen expenses);
e the rules for drafting and reviewing the tender documentation;
f the registration rules;
g the extension of the tender evaluation period to 25 days;
h the variation of the abnormally low price threshold (from 85 to 70 per cent of the estimated contract value); and
i the variation of thresholds by which the contracting authority may apply the call for tender procedure.

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 or 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 aforementioned contracting authorities procure the products, services and/or works only through a competitive procedure, direct procurement

of no more than €15,000 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 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. While pre-contractual relationships fall under public law, contract performance is governed in particular by private law. Therefore, 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;

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 mere negotiation procedure without the prior publication of a tender notice. Such a procedure is completed by the execution of an addendum to the initial contract. The price may be thereby 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: (1) the contract is awarded to the initial contractor; (2) the additional works or services are related to the initial contract

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

a A service contract on (1) the purchase or lease of immoveable assets; (2) the purchase/development/production of programmes for broadcasting purposes; (3) the provision of arbitration and conciliation services; (4) the provision of financial services in relation to the issuance, purchase, sale or transfer of securities or other financial instruments; (5) employment; and (6) the provision of research-development services fully paid for by the contracting authority.

b A contract awarded further to (1) 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 contract; or (2) 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.

or are necessary for the fulfilment thereof; and (3) 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 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

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 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/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 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 which 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 partnership is regulated separately under Law No. 178/2010. There is talk of amending this Law, based on the premise that this type of partnership seeks to alleviate immediate pressure on public finance by using, in a first stage, private funds to implement public projects, and to boost the efficiency of public services by drawing on the experience of the private sector.

Essentially, public-private partnership can be implemented by various types of contracts under which the private investor is transferred the obligations of the public partner. 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 the special purpose vehicle ('SPV') where 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:

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, in order to identify one or several solutions that may cater to its needs; based on such solutions, shortlisted candidates are to provide their final tender;[6]

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

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 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 and/or non-compliant.

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; or

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.

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 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, anyone 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 in order 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 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 need to 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 disabled people. 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. In order 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 or (multi)national). 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.

Also, tenderers are entitled to attend the meeting where 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 or not.

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'),[7] and a litigious stage, when the discontented 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. Many such challenges (approximately 6,000) are filed with the NCSC every year.

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. If the NCSC rejects the challenge, public procurement regulations allow the contracting authority to retain sums from the challenger's bid bond, calculated by reference to the estimated value of the contract.

The court of law may award indemnifications for the 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.

7 The CNSC is an independent administrative-jurisdictional body.

X OUTLOOK

Discussions are being held on the possibility of changing the procedure to solve disputes in connection with the awarding of public procurement contracts. The possibility of eliminating the administrative stage and closing down the NCSC is being considered, with all the disputes in this sector to fall under the jurisdiction of general law courts. This measure is intended to avoid as much as possible suspicions around how such challenges are solved; however, it is at least doubtful how general law courts may react to such a significant increase in workload and, also, to the highly technical nature of the supporting arguments.

Appendix 1

ABOUT THE AUTHORS

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Oana Gavrilă is a managing associate at Țuca Zbârcea & Asociații. For the past nine years as a pleading lawyer, she has advised the firm's clients on a wide range of corporate/commercial disputes 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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