

## NEW PUBLIC PROCUREMENT LAWS HAVE ENTERED INTO FORCE IN ROMANIA ON 26 MAY 2016

On 23 May 2016 the Romanian Official Gazette published the highly anticipated new public procurement package consisting of four (4) laws, respectively:

- (i) Law no. 98/2016 on public procurement;
- (ii) Law no. 99/2016 on sectorial procurement;
- (iii) Law no. 100/2016 on works and services concessions;
- (iv) Law no. 101/2016 on remedies and appeals concerning the award of public procurement contracts, sectorial contracts and of works concession contracts and service concession contracts, and for the organization and functioning of the National Council for Solving Complaints.

The new public procurement laws entered into force on 26 May 2016 and will apply to all public procurement proceedings initiated after their entry into force and to those public procurement contracts that are concluded after this date.

The new Romanian public procurement laws mirror the newly reformed European regime by implementing the European Directives 2014/23/EU, 2014/24/EU and 2014/25/EU and are intended at reforming the Romanian public procurement system. Until now, Romanian public procurement regime was based on a single main law (Government Emergency Ordinance no. 34/2006 on the award of public procurement contracts, public works and service concession contracts) and certain secondary legislation related thereto.

Each specific area of public procurement is now regulated through a distinct law, a legislative approach which has already triggered some criticism on the grounds that this separation may not contribute to the simplification of the existing procurement system, as was intended.

Some of the most interesting changes brought by these laws to the Romanian public procurement regime that have been already extensively debated by experts are as follows:

- (i) the thresholds below shall hereafter apply to the awarding of public procurement contracts (these shall be further amended in accordance with the thresholds provided by the European Commission):
  - RON 23,227,215 (approximately EUR 5,161,603), for public procurement/ framework agreements concerning works;

- RON 600,129 (approximately EUR 133,362), for public procurement/ framework agreements concerning products and services;
  - RON 3,334,050 (approximately EUR 740,900), for public procurement/ framework agreements concerning social services or other specific services.
- (i) participants in these public procurement procedures will no longer be required to submit all the documents proving their eligibility—rather a European Single Procurement Document will be used for this purpose and only the winning bidder will actually have to submit all the required documents in order to be awarded the public procurement contract. The use of this document should increase competition in public tenders and also simplify participation by small and medium-sized enterprises in the public procurement process;
- (ii) those participants that are under insolvency or bankruptcy proceedings will be excluded from public procurement procedures. However, before deciding on such exclusion, the authorities will have the possibility to assess whether a participant undergoing an insolvency procedure has the capacity to perform the public procurement contract;
- (iii) the new public procurement laws provide for internal control standards aimed at preventing conflicts of interest and bid rigging. Such standards include mandatory checks to be conducted by the beneficiaries within the awarding procedure and outlining the measures that should be taken by the authorities in case of suspicious practices by bidders (including reliance upon information obtained from the Competition Council). This may ultimately result in the exclusion of the bidder from the tender procedure. These provisions are all intended to enhance the monitoring function of the authorities and to ensure an effective prevention, detection and redress of conflicts of interests and bid rigging practices within procurement procedures;
- (iv) the public procurement contract can be amended after it has been awarded in specific cases explicitly provided by the law ( e.g. the possibility to amend the contract was expressly provided in the tender documentation; new works, services, products must be acquired and it is not possible to change the initial contractor; the initial contractor must be replaced by its successor). The total value of the subsequent changes cannot exceed 50% of the initial contract value.

We further note that the public procurement laws will need to be implemented by enacting secondary legislation (i.e. methodological norms). Such methodological norms were published in January 2016 and have been under public debate since then. The

government's commitment is that on June 2 to approve the decisions on methodological norms. It has been already announced that on May 31 the norms have not been approved and that such approval is scheduled once again in the government meeting of June 2. The lack of such norms actually hinders the application of the new laws because there are several procedural issues that need to be regulated or clarified. We will revert with an update once the norms have entered into force.

The new public procurement laws bring significant improvements to the current legislation by promoting increased quality procurement projects, controlling the growth of the budget expenses, reducing bureaucracy and supporting innovation in the development of public projects. It remains to be seen how the authorities will actually apply such new regulation and how the debates that have been already initiated in relation to certain provisions will be resolved by the courts of law.

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