

## THE IMPLEMENTATION NORMS FOR THE NEW PUBLIC AND SECTORIAL PROCUREMENT LAWS WERE PUBLISHED BY THE ROMANIAN GOVERNMENT ON 6 JUNE 2016

On 6 June 2016, the Romanian Official Gazette published two sets of implementation norms adopted by the Romanian Government with regard to the new public procurement package which entered into force on 26 May 2016, as follows:

- (i) Government Decision no. 395/2016 for the approval of implementation norms of the provisions regarding the awarding of the public procurement contract/framework agreement from Law no. 98/2016 on public procurement (the "**New Public Procurement Law**");
- (ii) Government Decision no. 394/2016 for the approval of implementation norms of the provisions regarding the awarding of the sectorial contract/framework agreement from Law no. 99/2016 on sectorial procurement.

Expedited issuance of these norms was critical because without a regulation that would contain provisions on all organizational aspects required for the conduct of new public procurement proceedings, future public procurement activities in Romania were in fact hindered.

The issuance of these norms had as its purpose to: (i) clarify certain aspects of the public procurement laws; (ii) provide the organizational structure required for the conduct of each type of public procurement proceedings; and (iii) regulate all administrative measures that can be taken by the contracting authorities during the awarding process.

It should be emphasized that the norms mainly refer to the awarding proceedings, as also mentioned in their name. They also include certain additional but limited provisions regarding the performance of a public procurement contract, but only referring to: (i) subcontracting activities; (ii) the replacement of personnel appointed for the execution of a public procurement contract; (iii) long term contracts; and (iv) amendment of a public procurement contract.

We note below some of the highlights of these norms which implement the New Public Procurement Law, in relation to the following topics:

### *1. Awarding criteria*

The norms provide exhaustive details on the way in which the awarding criteria "*best report quality-price*" or "*best report quality-cost*" should be applied by the contracting

authorities. Provisions on the available evaluation factors, restrictions regarding the use and appropriateness of such factors and also the weight of a specific factor in the result of the awarding procedure have been clearly provided.

In this respect we note that the norms explicitly provide that for those contracts having as their object intellectual services, the weight of the price factor in the awarding criteria cannot exceed 40%, thus giving an appropriate worth to the quality of the acquired intellectual services.

Also with regard to the awarding criterion "*the lowest price*" the provisions explicitly require the contracting authorities to consider also the costs of the authority for the entire duration of the life cycle--thus providing better visibility on the real costs of a certain acquisition.

## *2. Publicity and transparency rules*

The norms provide that even for those acquisitions for works/products/services that have a value below the thresholds provided by art. 7(5) of the New Public Procurement Law (i.e. 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), these should be conducted primarily through SEAP, by awarding the contract to only those entities included in the electronic catalogue published by SEAP.

Only in those cases where the authority cannot use the electronic catalogue published by SEAP (e.g. the authority cannot identify a provider in the electronic catalogue), can those works/products/services be acquired from any other entity.

SEAP remains the only electronical platform which makes the forms required for the public procurement procedures available and which deals with the publication of tender notices in Romania and in the Official Journal of the European Union. Communications between the authorities and the bidders can only be done through electronical means (i.e. SEAP or other electronical means of communication).

Contracting authorities may communicate with bidders by other means (e.g. fax, post mail) only if there are technical reasons which prevent such communication through electronical means.

## *3. Market consultation procedure*

The norms include a detailed procedure that allows the contracting authorities to conduct a market consultation process, the aim of which is to determine the strategy and the main requirements for a future awarding procedure in a transparent manner, together with the main entities acting on a specific market.

Such a process should be carried out when the contracting authorities must acquire products/services/works with a high degree of technical, financial or contractual complexity.

We note that even if this process is not mandatory for the contracting authorities, the authorities have already started to implement it and indeed have published on SEAP numerous announcements for market consultation, even for acquisitions that may be considered as not having such a high degree of complexity.

#### *4. Amendments of the public procurement contract*

As previously mentioned, the New Public Procurement Law provides specific rules on those amendments that can be made to a public procurement contract after the contract has been signed. The norms further provide that it is not possible to increase the price of a public procurement contract after signature if the new price would have required a different awarding procedure than the one initially applied by the contracting authority.

The norms also provide that any amendment to the public procurement contract must be published in SEAP by the contracting authorities.

#### *5. Supporting third party*

The norms introduce the possibility of the contracting authority to request a contractor that has difficulties in performing its obligations to provide an additional guarantee issued by a supporting third party. Such guarantee should be directly enforceable by the contracting authority against the third party. By such means, the supporting third party may become directly liable for the failure of the contractor to perform under the contract.

Furthermore, the Competition Council has been actively involved in the implementation of the new public procurement legislative package, even if the norms do not provide specific rules for communication between contracting authorities and the Competition Council when there are indications that competition may be distorted.

For example, the Competition Council has recently:

- (i) published a Guide on Detection and Discouraging Anti-Competition Practices within Public Procurement Proceedings;
- (ii) drafted and launched for public consultation another guide on compliance with competition rules when participating as an association in public procurement proceedings;
- (iii) published several position papers in relation to the application and implementation of the public procurement legislative package.

The publication of these norms means that public procurement procedures within the framework provided by the new public procurement legislative package may now proceed.

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There are still many issues related to the implementation of the new procedures that will still need to be clarified and we anticipate that these will be resolved either by amendments to the norms or by interpretive decisions being issued by the Romanian courts.

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