

January 2018

AMENDMENTS TO THE PROCUREMENT LAWS ENTERED INTO FORCE ON 22 DECEMBER 2017

On 22 December 2017, the Romanian Government published in the Romanian Official Gazette no. 1022 the Government Emergency Ordinance no. 107/2017 ("**GEO 107/2017**"), which provides for significant changes to the procurement laws package that entered into force in 2016 and other related legislation, namely:

- (i) Law no. 98/2016 on public procurement ("**Law 98/2016**")
- (ii) Law no. 99/2016 on sectorial procurement ("**Law 99/2016**");
- (iii) Law no. 100/2016 on works and services concessions ("**Law 100/2016**");
- (iv) Law no. 101/2016 on remedies and ways of appeal in matters of awarding public procurement, sectorial and works and services concession contracts and also regarding organisation and functioning of the National Council for Solving Complaints ("**Law 101/2016**"); and
- (v) Government Emergency Ordinance no. 13/2015 regarding the establishment, organisation and functioning of the National Agency for Public Procurement ("**GEO 13/2015**").

Expedited issuance of these amendments was justified by the Romanian Government based upon the need for an improved and more flexible public procurement system, so that major investment projects are not delayed or postponed. The Romanian Government's intention was to also create a legal framework that will allow (through details included in the implementation norm), the execution of contracts without any prior publication in SEAP for direct acquisitions by contracting authorities which have a value of less than RON 13,000 (approximately EUR 2,825).

The amendments introduced by GEO 107/2017 are mainly aimed at resolving certain inconsistencies in the public and sectorial procurement laws, with reference to European legislation and also drafting aspects that have been noted during the period when these laws were put into practice. Moreover, the amendments seek to clarify important concepts used in the law that were not sufficiently understood in the day to day practice. Significant amendments to the implementation norms are expected to follow.

We note below some of the most significant amendments that will impact the way in which procurement procedures will be conducted in the future and which may be of interest for participants in such procedures:

1. Amendments to the Law 98/2016 and Law 99/2016

- (i) Law 98/2016 now provides a new threshold for the application of the standard public procurement procedures which will apply to the local public administration when acquiring products and services. Therefore, such authorities (e.g. Local Councils) will be entitled to use the simplified public procurement

procedure if the contract has a value of less than RON 929,089 (approximately EUR 207,000), as provided in the EU Directive 2014/24/UE. The threshold applicable for other contracting authorities, other than local ones, is RON 600,129 (approximately EUR 133,362);

- (ii) bidders are no longer required to present the identification details of their subcontractors at the moment when the offer is submitted if such details are not known at that time;
- (iii) by the amendments done to the provisions regarding the requests for clarifications, a more specific deadline is provided for the contracting authority to respond to such requests received from potential bidders. Hence, the contracting authority must set one or two deadlines for submitting requests for clarifications to which it must in turn respond by no later than 10 days (5 days in emergency situations) before the deadline for submitting the offers;
- (iv) the economic and financial situation required for a certain procurement procedures can be also demonstrated by cumulating the economic and financial situation of the members of the group of economic operators participating jointly in the procedure (e.g. in a consortium) but this will hold the members of the group jointly and severally liable towards the contracting authority for the performance of the public procurement contract;
- (v) It is forbidden to use the lowest price as awarding criteria for contracts referring to works design and execution and also for services related to the trans European infrastructure and county roads;
- (vi) the clarifications required by the contracting authority when an offer has an unusually low value may also refer to explanations on the costs envisaged in that offer.
- (vii) generally, the same amendments have been also made to the provisions of Law 99/2016.

2. Amendments to Law 100/2016

- (i) the specific deadline for the contracting authority to respond to the requests for clarifications received from the potential bidders in a concession procedure has been set to 15 days before the deadline for submitting the offers, provided that such requests were addressed to the contracting authority in due time;
- (ii) non compliance with the ruling of the National Council for Solving Complaints is explicitly established as an offense. Also other infringements of the concession legislation have been specifically determined as being offenses and can be punished with a fine, namely: (a) the use of selection and qualification criteria

other than those provided in Law 100/2016; (b) the improper application, during the evaluation process, of the selection and qualification criteria, the awarding criterion or the evaluation factors; (c) the cancellation of a concession procedure in situations other than those provided by the law or the creation of certain artificial circumstances aiming to the cancellation of the procedure.

The statute of limitation for the application of the fine punishing those offenses mentioned above is 3 years from their perpetration.

3. *Amendments to Law 101/2016*

- (i) the provisions regarding the deadline for the submission of a challenge at the National Council for Solving Complaints was clarified in the sense that: (α) when the contracting authority responds to the preliminary notice within the legal deadline of 3 days, the complaint must be submitted within 5/10 days (depending on the estimated value of the procedure) starting from the next days after the answer is received; (b) when the contracting authority has not responded to the preliminary notice within the legal deadline of 3 days, the complaint must be submitted within 5/10 days (depending on the estimated value of the procedure) starting from the next day after the expiry of the aforementioned deadline;
- (ii) in order to ensure free and effective access to justice, appeals against the decisions issued by the National Council for Solving Complaints can be initiated not only by the parties to the complaint, but also by any party that can be affected by such decisions;
- (iii) it is now explicitly provided that the stamp duty to be paid for an appeal against the decisions of the National Council for Solving Complaints is RON 225 (approximately EUR 49), in accordance with a ruling issued in this respect by the High Court of Cassation and Justice.
- (iv) these amendments have also clarified that it is not necessary to undergo a preliminary procedure (i.e. submitting a preliminary notice) for disputes regarding claims for damages caused during the public procurement procedures or claims related to the performance/cancellation/nullity or unilateral termination of the public procurement contracts.

As already mentioned, the issuance of GEO 107/2017 aims to simplify and clarify the public procurement procedures and to resolve certain problems that were discovered in the day to day practice. Nevertheless, in order for the purpose of such provisions to be fully achieved, it will be necessary to also amend the implementation norms which are the main working tool for the contracting authorities.

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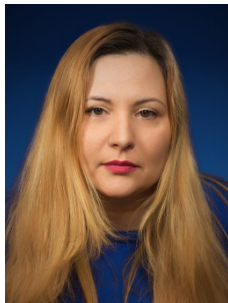
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