

New Developments in the Romanian Public Procurement Legislation

By Veronica Vişinescu, Avocat (Attorney at Law RO)

In 2016, the Romanian public procurement legislation was completely changed. The package includes new primary and secondary legislation (four new laws and methodological norms related to three out of these laws). It was already followed by first modifications of the methodological norms concerning classical public procurement as well as public procurement in the water, energy, transport and postal services sectors. Additionally, some guidelines (e.g. the Procurement Guide, which is available on www.achizitiipublice.gov.ro) and templates of relevant documents drafted by the National Agency for Public Procurement ("**ANAP**") in order to streamline the public procurement process were published.

2017 started with the ANAP Chairman's Instruction no. 1/2017 (the "**Instruction**"), which regulates the application of certain legal provisions regarding the qualification and selection criteria (*criterii de calificare si selectie*) and the evaluation factors (*factori de evaluare*). Hereinafter, we summarize the latest developments.

Amendments during the year 2016

In 2016, the Government issued Emergency Ordinance (GEO) 58/2016. This act abrogated advantages for small- and medium-sized enterprises ("**SMEs**") within public procurement procedures (SMEs had to fulfill only 50% of the requirements regarding the value of the bid security, the performance bond, and of the turnover requirement) due to non- compliance with the European public procurement legislation.

However, Government Decision 866/ 2016 brought other advantages for SMEs, as it regulated an exemption from the value of the bid security. In principle, this security must not exceed 2% of the estimated contract value, respectively of the value of the highest subsequent contract, without considering the contingencies. In case of contracts with an estimated value of up to EUR 25,000,000, the amount of the bid security is limited to 1% of the estimated value of the framework agreement/ the contract.

Further Developments in 2017

According to article 179 lit. g) of Law 98/ 2016 (the "**Law**") a bidder can prove the fulfillment of the criteria regarding its technical and professional ability by submitting educational and professional qualifications of the service provider or contractor or of the undertaking's management staff, as long as these do not represent evaluation factors.

Article 187 para 5 lit. b) of the Law and article 32 of the methodological norms thereto stipulate that the organization, qualification and experience of the staff assigned to perform the contract can represent an evaluation factor in cases in which the quality of the mentioned staff can have a significant impact on the level of performance of the contract. In this case, such organization, qualification and experience cannot be used to prove the technical and professional ability of the bidder. Should the contracting authority use both the criteria regarding the technical and professional ability and the evaluation factor as mentioned above within the same public procurement procedure, the criteria regarding the technical and professional ability can be fulfilled exclusively by permanent staff, especially by the

management staff of the bidder, identified in the European Single Procurement Document (ESPD).

Contracts regarding intellectual performances involving extremely complex activities will be awarded based on the best price-quality ratio, whereas the factor „price“ must not carry more weight than 40% for the award decision. The remaining 60% are to be determined on the basis of further evaluation factors such as the ones presented above.

The Instruction also defines the terms "permanent staff, especially the management staff of the bidder" as well as the "staff assigned to perform the contract". The first term refers to the staff in charge with the coordination of the economic activities directly connected to the subject matter of the contract to be awarded, who holds certain positions in the hierarchy of the bidder and thus takes responsibility for the implementation of the contract and for ensuring the interface between the contractor and the contracting authority. The second term refers in principle to key experts (*experti-cheie*) who perform the contract and whose organization, qualification and expertise have a direct impact on the quality of the requested result.

The Instruction explains by means of examples how the contracting authorities may formulate the criteria and evaluation factors mentioned above in the relevant awarding documentation.

Conclusion

The newest practice-oriented Instruction may encourage contracting authorities to formulate qualification and selection criteria as well as evaluation factors which emphasize the quality of the services and works to be acquired. Thus, it follows the general tendency of the new legislation, which aims at enhancing quality. Consequently, it is practice-relevant for all operators who intend to participate in public procurement procedures in Romania.

Despite the wording of the Instruction, which partially can be subject to interpretation, the measures so far taken by ANAP are to be welcomed, as they support the contracting authorities and may develop their expertise. The scope is to improve the quality of the services, products and works to be acquired.

Contact and further information:



STALFORT Legal. Tax. Audit.
Bucharest – Bistrița – Sibiu

Office Bucharest:

T.: +40 – 21 – 301 03 53

F: +40 – 21 – 315 78 36

M: bukarest@stalfort.ro
www.stalfort.ro