

Public Procurement - Practical Issues regarding technical specifications

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Technical specifications are an essential element of any public procurement procedure used by contracting authorities in Romania, as they determine the goods, services or works to be procured.

Legal definitions of technical specifications

The law¹ on public procurement procedures defines technical specifications as “requirements, prescriptions or technical features which enable each product, service or work to be objectively described to match the contracting authority's need”.

This Romanian definition of technical specifications is very general, giving the contracting authorities flexibility to draw up effective technical specifications in the tender documents.

Fraud prevention measures

However, to prevent fraud in public procurement procedures, the legislator has imposed limits and guarantees regarding the way that the contracting authority should set out the technical specifications in the procurement documents.

This includes the following three essential guarantees:

- drafting principles
- drafting methods
- drafting interdictions

Drafting principles and drafting methods

The contracting authority must observe the following drafting principles: (i) free competition, (ii) equal treatment and (iii) accountabilities.

Four methods² of drafting specifications are stipulated by the national Romanian law³ (fully and identically transposed from the European Directive).

Interdictions

Of special note are drafting interdictions in the wording of technical specifications, as they are of practical relevance in determining the legality of a public procurement procedure.

The legislation forbids technical specifications that point to trade marks, patents, types, specific origins or production which give advantage or disadvantage to particular service providers, businesses or products.

There is one legal exception to these interdictions: the contracting authority is allowed to refer expressly to technical specifications as described above, where a sufficiently precise and intelligible description of the subject-matter of the contract is not possible. Such reference shall be accompanied by the words “or equivalent”.

Practical issues – unlawful practices by contracting authorities

In practice, there are cases of authorities intending to award a public procurement contract to a particular company, even before the technical specifications are drafted.

The most common unlawful practice is to include features of a single product or producer in the formulation of technical specifications – perhaps a dimension which no other product on the market can fulfil, or a process or procedure patented by a single manufacturer. Such behaviour can infringe the legal drafting interdictions and principles.

Remedy

Any interested organisation can – within the legal timeframe – complain to the contracting authority about the unlawful procurement documentation, to oblige the authority to eliminate any unlawful technical specification and adopt the necessary remedial measures.

If the contracting authority does not remedy the situation, the complainant can contest the procurement documentation before the National Council for Solving Complaints ("CNSC") or in a court of law.

Summary

For any company which intends to participate in a public procurement procedure, the most important aspect to consider is that the contracting authority does not have a free hand to formulate technical specifications. On the contrary, it is bound to respect the limits and legal guarantees imposed by the public procurement legislation.

If any part of the technical specifications is in breach of the law, any company with an interest in the public procurement procedure may challenge it and request its removal from the procurement documentation, so that every company has a fair chance of winning the public procurement procedure.

NOTES

¹ no. 98/2016

² Drafting methods, according to which the contracting authority formulates technical specifications, are expressly regulated by art. 156 of Law no 98/2016.

³ DIRECTIVE 2014/24/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on public procurement and repealing Directive 2004/18/EC. A complete repetition here is not possible.

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