

Public procurement – exclusion from award procedures
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Public procurement contracts are awarded, based on award criteria, to bidders who meet two conditions:

- i. criteria for qualitative selection and
- ii. requirements of the tender to be submitted according to the procurement documents.

Criteria for qualitative selection include grounds for exclusion; reasons for which the bidder could be excluded from award procedures are stated in the public procurement legislation.

We discuss below some practical aspects concerning two important grounds for exclusion.

The insolvency procedure

According to the public procurement law¹, a bidder against whose assets the insolvency procedure has been initiated is, in principle, excluded from tendering. As an exception to the rule, this is not applied when a general insolvency procedure has been instituted, meaning that the bidder

- i. is in the observation phase (rom. *perioada de observatie*) and has taken the steps required to prepare a viable reorganization plan for the sustainable continuation of his business or
- ii. he is properly implementing the reorganization plan that has been legally approved.

In either case, the bidder must prove to the contracting authority, based on relevant documents and information, that he can execute and complete the contract to be awarded.

Of course, the question arises whether the contracting authority has the expertise to decide on the viability of a reorganization plan not yet approved by the court, or whether the bidder is sticking to an approved plan. To avoid such issues and any possible contestations from bidders, the contracting authority may try to exclude the bidder based on the following exclusion ground.

Tax liabilities

A bidder is usually excluded if he has certain tax and social security arrears. To make an exclusion, though, the contracting authority needs either a final and mandatory decision from a competent court or authority, or other relevant proof.

Concurrence of the exclusion grounds

Most companies in insolvency have debts to the state, so the exclusion of a bidder based on this reason may seem easier to justify than for insolvency proceedings.

The law² states, however, that a bidder cannot be excluded if before the contracting authority decides to exclude, the bidder had a repayment plan or other accommodation for payment approved for his liabilities (including interests and late payment fines).

What's more, insolvency procedure can even prevent an exclusion because of tax liabilities.

Insolvency law³ distinguishes between an insolvent company's debts that arise before the start of the procedure and those that arise afterwards. Therefore⁴, all actions towards debt recovery, and all enforcement measures against the debtor that exist when the procedure is opened, will be suspended.

Any debt claims that exist when the insolvency procedure is opened can be recorded in the list of creditors (*rom. tabelul de creante*) (on request). Debt claims arising during the insolvency procedure do not have to be recorded in the list of creditors; they will be settled directly, based on supporting documents.

So, there are 'suspended' and 'not suspended' liabilities. The suspension of a debt affects in principle its due date; such a debt to the state is not enforceable so cannot represent a reason for exclusion from the tendering procedure.

Conclusion

A contracting authority cannot exclude a bidder from an award procedure simply because insolvency proceedings have been opened against his assets. It must make a decision on a case-by-case basis, which would take into account any (possibly) viable reorganisation plan, respectively the settlement date of the debts.

The contracting authority must determine the precise facts of each case, based on the information and the documents received from the bidder; it must know relevant provisions of other laws beyond the public procurement field and apply relevant economic expertise.

It is essential to take a hard look at the bidder's explanation for his situation; so it is vital that the contracting authority is provided with enough coherent, understandable and relevant information to avoid contestations to an exclusion and the delay in awarding the contract.

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¹ Art. 167 par. 1 lit. b) of the public procurement law 98/ 2016

² Art. 165 par. 3 of the public procurement law 98/ 2016

³ Insolvency law 85/ 2014

⁴ Art. 75 par. 1 of the insolvency law