

PUBLIC PROCUREMENT -BETWEEN LEGAL CHALLENGE AND ECONOMIC NECESSITY –

ADRIAN CONSTANTINESCU
Lawyer, Vrancea Bar Association, FDC –In association

The harmonization of the European Union legislation regarding public procurement appears as necessary in order to ensure maximum transparency and efficiency in case of public money expenses. The basis of this mechanism should be the idea of free competition, non-discrimination, application of the same criteria and requirements for all economic agents. Applying this concept, even more so under the current economic situation, entails following some clear principles in the management of public funds.

Keywords: European Union, public money expenses, economic agents.

The fact that we are in full economic recession is one that is already recognized on the official level. The malfunctioning of the mechanisms of the European Union state markets have determined the authorities to think out some solutions to revive the economy, for the quick reconstruction through own capital infusion, to continue the development through the modernization of branch policies.

An important segment to this purpose is represented by the public procurements.

By relating to the above mentioned malfunctions, the European Parliament and Council have made the decision to modify the community legislation regarding public procurement, by drawing up a new Directive proposal that is based on the arguments presented in the document *Green Paper regarding the modernization of the EU public procurement policies – Towards a more efficient European Public Procurement Market*¹.

Romania, not only as European Union member country, had to speed up the adoption of the legislation specific for public procurement, through harmonization with the European legislation in the field, for a maximum transparency required by the tutelary community institution, this under the circumstances that nobody else embraces or should embrace the passive and non-coercive attitude regarding the lack of transparency in case of public money expenses. This, even more so, under the current circumstances when the reality we live in shows us how the crisis and economic recession make it impossible for the excessive and non-transparent expenses for goods, services and staff to cohabitate with the creation of new coherent policies for economic regeneration.

The current analysis approach has two sides: one regarding the internal side of public procurement, namely the reporting to the control segment in the field carried out by community forums.

Because the problems occurred in the public procurement system are more numerous and more complex (in particular being said, the problems to which I have made reference are not a trait that is specific for Romania only, the community authorities noticing malfunctions within the entire EU area) “ *The Green Paper regarding the*

¹ Transparency, correctness and competition in the public procurement process in Romania” – Institute for Public Policies Bucharest, March 2012

modernization of EU Public Procurement Policies” imposes objectives which are taken by the Directive project and which will have to then be operated in the national law and applied as such.

As a first objective, we approach the increase of public expenses. In other words, the optimization of quality/price ratio. The way in which the public authorities, infringing the above mentioned principle while fully aware of it, have organized fictitious auctions, or even when the auctions were not mandatory, they have purchased goods of questionable quality for extremely high prices, way over that practiced by economic agents on the market are well known, these practices that were once the rule, being in fact, a reflection of political intrusion and illegal group interests.²

Increasing the efficiency of the procedures will bring benefits to all economic operators³ and will facilitate the participation of small and medium businesses as well, and that of cross-border bidders.⁴

The second objective represents the possibility of the purchasers to use public procurements in favor of fulfilling some common objectives for the use of the society: among these environmental protection, increase of the efficiency of the use of resources and energy and the fight against climate change, the promotion of innovation and social inclusion and the insurance, in the best possible conditions, of the supply of high-quality public services.⁵

Within the context of that presented above, we should mention that the rules of the European Union regarding public procurement should be reformed in order to facilitate the access of small and medium businesses to them, as set in a resolution of the European Parliament, during its Strasbourg session. Thus, these rules would allow the authorities to award contracts not only to the lowest-price bidder, but also to the most innovative, or to those that offer the most important benefits, both social and ecological, considering the concerns of this nature on the highest levels of the institutions.

The data say, that public procurements represent about 17% of the Gross Domestic Product of EU, this implicitly meaning that the use of the public money should be made based on efficiency and transparency criteria⁶.

We should also consider and analyze in short the legal framework that governs public procurement both in the European Union and in our country.

Government’s Emergency Ordinance no. 34/2006 regarding the assignment of public procurement contracts, public works concession contracts and service concession contracts applied by Decision no. 925/2006 modified is the main legal document in the field that governs public procurements in Romania⁷.

² We should say that Romania has, with great difficulty and sometimes with reticence, succeeded to transpose into the internal legislation the *acquis* that regulated public procurements in the EU (2006). Despite all these, the analytical reports carried out later by the European Commission have shown that Romanian authorities have not given up this old approach – The Commission has finished the analysis of the public procurement system in year 2011, and sent it to the Government the previous year, along with the suggestion to solve all deficiencies within a period set between 2014-2020.

³ At present the cross-border participation to the public procurement procedures in the EU remains low

⁴ Quoted works – Institute for Public Policies Bucharest, March 2012 (IPP)

⁵ European Union member states spend, on average about 18.3% of GDP on public procurements per year (http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/costeffectiveness_en.pdf);

⁶ There’s already talk about the creation of an “electronic public procurement passport” to prove that the holder abides by the EU norms in the field

⁷ The context of the Ordinance occurrence is given by the commitments that Romania, as an EU state to be, had to make, set in the “Free Circulation of Merchandise” as well as the recommendations of the European Commission comprised in the Comprehensive Monitoring Report for 2005. Our primary legislation had to also

There has been a lot of talk about the inefficiency of this document, about the fact that the regulations it involves and trances place the contracting authority in the final beneficiary position and not intermediary as it should be, and the citizens are given a more than secondary role, despite the fact that their interests should be protected.

It has been set, in relation to the transparency mechanisms, that the announcement or invitation publication stage, prior and mandatory for public procurements, be made through the Public Procurement Electronic Service (SEAP), and the pure public stage, for the conclusion and execution of the public procurement contracts be managed by the National Authority for the Regulation and Monitoring of Public Procurements (ANRMAP)⁸, whose fundamental role – the promotion and implementation of policies in the public procurement field, representing the central element on which the implementation of the Reform Strategy for the Public Procurement System in Romania, adopted by Government's Ordinance no. 901/2005⁹

Another very important mechanism in the public procurement system is the National Council for Litigation Solving, set up in year 2006, as an alternate solution to the first degree courts for a quick, efficient solving of litigations.

At the same time, we should also mention the National Management Center for the International Company, which, from the point of view of its involvement in the public procurement field, develops and operates the electronic system for public procurement (SEAP)¹⁰.

The Unit for the Coordination and Verification of Public Procurements (UCVAP) is organized and functions on the level of the General Department under the Ministry of Public Finance. The main responsibilities of UCVAP are that concerning the follow-up and verification of the abidance by the legislation in the field, regarding the carrying out of assignment procedures for public procurement contracts, namely it identifies contraventions and applies the sanctions provided by OUG no. 30/2006 regarding the verification of the procedure aspects corresponding to the assignment of public procurement contracts, approved by Law 228/2007 with its later amendments and additions.

The Court of Auditors is a financial control institution, for the way the state's and the public sector's financial resources are formed, managed and used, according to its own presentation the Court of Auditors has a crucial role in supervising the way the public money is spent. Annually, it publishes a detailed report on its control activities, an important source of information for those interested in the verification of public expenses.

The Competition Council is a national authority in the field of competition; the institution applies and insures the abidance by the national provisions and the community competition provisions. At the same time, the Competition Council has the role of a contract national authority in the field of state aids between the European Commission on one side, and the public institutions, suppliers and beneficiaries of state aids, on the other.

be correlated with Directive 2004/17/CE, directive 2004/18/CE, Directive 89/665/CE and Directive 92/12/CE, according to which the member states guarantee the application of these directives through efficient, accessible and transparent mechanisms.

⁸ ANRMAP has actually been setup in October 2005, through the reorganization of the Department for the regulation and monitoring of public procurement within the Ministry of Public Finance and the Public works Procurement Service of the General Department for procurement of public works and rural infrastructure within the Ministry of Transport, Constructions and Tourism.

⁹ Dumitru –Daniel Serban – “Public Procurement – Theory and Practice of Administrative Jurisdiction” Hamangiu Publishing House 2012, page 45

¹⁰ Dumitru – Daniel Serban - quoted works , page 61

The Competition Council has the role of representing Romania in its relationships with the international organizations and institutions in the field; at the same time, it is responsible with the relationship with the institutions of the European Union, according to the relevant provisions of European Legislation, and it also cooperates with other competition authorities. The activity of the Competition Council is carried out on two main components: a preventive one, for the monitoring of the markets and supervision of the actors on these fields and a corrective one meant to reset and insure the development of a normal competition environment.

The Anti-fraud Fight Department (DLAF) with responsibilities for the control of the obtaining, payment and use of European funds, DLAF coordinates all the other institutions involved in the management and control of the European funds, and carries out controls on the field, at the beneficiaries of the European funds. It is the contact institution with the European Office for Anti-Fraud Fight (OLAF) on the level of the European Commission.

Romania has set up an Audit Authority for all Operational Programs based on Law no 200/2005 that fulfills the tasks set in art. 62 of the Council's Regulation no. 1083/2006. The Audit Authority is an organism that is associated with the Court of Auditors, without juridical personality, independent from an operational point of view from the Court of Auditors, and, at the same time independent from the Management Authority and the Certification Authority. According to the provisions of Law no. 200/2005 art. 14, the Audit Authority has the following responsibilities – system audit, basic sample audits and final audit; - verification and external audit for structural funds; - annual verifications of the management and control system; - verification of the declared eligible expenses, based on representative samples; - carrying out of proper verifications for the issue of closing statements at the end of measures and programs; - verification of the existence and correctness of national co financing.

From the short analysis of the importance of the public procurements in an economic environment that is in recession, of the coordination and control mechanisms in the field; of the defining elements of the procurement system, as the abidance of some essential principles is not only welcomed, but even mandatory.

The control and verification authorities at the Union's level focus on and trace concrete directives for this purpose, showing that the basic principles in the management of public funds are essential.

This mechanism could not be perceived otherwise, without the free competition and its promotion among economic agents, non-discrimination, here referring to the insurance of the proper conditions for the manifestation of competition in real terms, equal treatment involving the setting and application of some criteria and requirements that are the same for all economic agents, the insurance of the free circulation of services, the proportionality in the field, efficiency of using the public funds, through which we understand the application of the competitive assignment procedures and the use of criteria that reflect the economic advantages of the bidders.¹¹

SELECTIVE BIBLIOGRAPHY:

1. **M Bojnica O. M. Cilibiu** – *“Verification of the legality and accuracy of the documents and operations carried out during the procedure for the assignment of public*

¹¹ Dumitru Daniel Șerban – quoted works page 97

procurement contracts by the National Council for Litigation Solving “ , in Dreptul no. 11/2011

2. **D.D. Serban** – “*Consideration regarding the conflict of interest in the field of public procurements’ from the Commercial Right Magazine no. 3/2008;*

3 **Daniel Serban** – “*Public Procurement – Theory and Practice of Administrative Jurisdiction*” Hamangiu Publishing House 2012

4. **I. Bacanu** – “*The solving through arbitrage of the litigations stemming from public procurement contract, public works and services concession contracts, as well as from the public property goods concession contracts*” from the Commercial Right Magazine no. 7/2207