

Public Procurement

Contributing editor
Sally Roe



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GETTING THE
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Contributing editor

Sally Roe

Freshfields Bruckhaus Deringer LLP

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

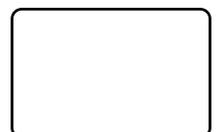


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CONTENTS

Global overview	7	Ireland	99
Marcel Kaufmann, Sally Roe, Sascha Arnold and Diana Harvey Freshfields Bruckhaus Deringer LLP		Patrick McGovern Arthur Cox	
Austria	12	Italy	107
Stephan Denk Freshfields Bruckhaus Deringer LLP		Filippo Satta and Anna Romano Studio Legale Satta Romano & Associati	
Belgium	17	Japan	114
Emmanuel van Nuffel and Kevin Munungu DaldeWolf		Nobuaki Mukai and Norito Ohori Momo-o Matsuo & Namba	
Brazil	25	Kenya	119
Claudia Elena Bonelli and Ana Cândida de Mello Carvalho TozziniFreire Advogados		Jairus Mohammed Nyaoga and Anthony Guto Mogere Mohammed Muigai Advocates	
Bulgaria	31	Korea	125
Boryana Boteva and Emilia Petkova Sabev & Partners Law Firm		Wonil Kim and Jin Kee Jung Yoon & Yang LLC	
Canada	37	Macedonia	131
Paul D Conlin, Ben Mills and Drew Tyler Conlin Bedard LLP		Jasmina Ilieva Jovanovikj and Dragan Dameski Debarliev, Dameski & Kelesoska Attorneys at Law	
China	42	Mexico	137
Christian Zeppezauer and Sherry Xu Freshfields Bruckhaus Deringer LLP		Roberto Hernández García and Adrián Roberto Villagómez Alemán COMAD SC	
European Union	49	Netherlands	143
Sally Roe and David Broomhall Freshfields Bruckhaus Deringer LLP		Winfred Knibbeler and Alvaro Pliego Selie Freshfields Bruckhaus Deringer LLP	
Finland	58	Nigeria	149
Tuija Kaijalainen and Kristiina Hirva DLA Piper		Chike Ekwueme Ekwueme, Ekwueme & Ekwueme	
France	65	Norway	154
Pascal Cuche and Juliette Deslandres Freshfields Bruckhaus Deringer LLP		Trygve Olavson Laake Difi - Agency for Public Management and eGovernment	
Germany	74	Portugal	162
Marcel Kaufmann and Sascha Arnold Freshfields Bruckhaus Deringer LLP		Duarte Abecasis and Lourenço Vilhena de Freitas Cuatrecasas, Gonçalves Pereira	
Ghana	83	Romania	168
David Ofosu-Dorte, Isabel Boaten and Ferdinand Adadzi AB & David Africa		Alexandru Ambrozie and Ramona Pentilescu Popovici Nițu Stoica & Asociații	
Greece	88	South Africa	174
Alexandros A Kortesis, Athanasios S Taliadouros and Vasiliki Karamani Potamitis Vekris		Michael Gwala and Andrew Molver Adams & Adams	
India	95	Spain	181
Sumeet Kachwaha Kachwaha & Partners		Ignacio Borrego and Ana Calvo Freshfields Bruckhaus Deringer LLP	

Sweden	188	United Kingdom	206
Fredrik Linder, Emma Berglund and Mikael Dubois Hamilton Advokatbyrå		Sally Roe and Diana Harvey Freshfields Bruckhaus Deringer LLP	
Switzerland	194	United States	213
Bernhard C Lauterburg and Philipp Zurkinden Prager Dreifuss Ltd		Alan WH Gourley Crowell & Moring LLP	
Turkey	200	Venezuela	220
Ziya Akinci Akinci Law Office		José Gregorio Torrealba R Hoet Peláez Castillo & Duque	

Romania

Alexandru Ambrozie and Ramona Pentilescu
Popovici Nițu Stoica & Asociații

Legislative framework

1 What is the relevant legislation and who enforces it?

The main legislation regulating public procurement includes:

- Emergency Government Ordinance No. 34/2006 (GEO No. 34/2006) related to public procurement agreements and to works and services concession agreements awarding, approved by Law No. 337/2006; and
- Government Decision No. 925/2006 (GD No. 925/2006) approving the application norms concerning the public procurement agreements awarding rules regulated by the GEO No. 34/2006 related to public procurement agreements and to works and services concession agreements awarding.

The legislation is enforced by the contracting authorities, the National Council for Solving Complaints and the courts of law.

2 In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

The relevant public procurement legislation supplements the EU procurement directives mainly in what concerns remedy procedures.

3 Are there proposals to change the legislation?

There are ongoing procedures for amending the existent public procurement legislation in line with the new EU public procurement directives, namely 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; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC; Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts. The deadline for implementing the new legal framework is April 2016.

4 Is there any sector-specific procurement legislation supplementing the general regime?

The procurement of military equipment is regulated by specific legislation, namely Government Emergency Ordinance No. 114/2011 on the award of public procurement contracts in the field of defence and security.

Applicability of procurement law

5 Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

A contracting authority is any entity subject to GEO No. 34/2006, including all state entities (public authorities and public institutions), but also private entities in certain circumstances expressly provided by law.

Consequently, although the general rule is that private entities, including former privatised state utility providers, are exempt from applying the public procurement rules, when deploying certain activities (eg, activities that fall within the utilities sector as per Directive 2004/17/EC) or certain contracts (eg, contracts subsidised by public funds by more than 50 per cent), even a private entity may be compelled to follow public procurement rules.

6 For which, or what kinds of, entities is the status as a contracting authority in dispute?

There are no general disputes related to an entity's status as a contracting authority. Individual disputes may arise, on a case-by-case basis, for private entities.

7 Are there specific domestic rules relating to the calculation of the threshold value of contracts?

All contracts concluded by a contracting authority must observe the specific public procurement rules.

The public procurement legislation allows a direct purchase in the case of supply and service contracts under €30,000 (excluding VAT) and works contracts under €100,000 (excluding VAT). The general rules for calculation of the value of public procurement contracts are applied to these contracts as well.

A contracting authority may not divide its acquisitions such as to favour direct awards and avoid open public procurement procedures.

8 Does the extension of an existing contract require a new procurement procedure?

In principle, any essential amendment to an existing contract requires a new procurement procedure.

The law allows for the extension of the scope and value of an existing contract with additional services or works in exceptional circumstances expressly provided, by negotiation without the prior publication of an award notice.

In what concerns the extension of the duration of an existing contract, such amendment might be exceptionally accepted only if it would not be essential to the initial award conditions. There are no specific legal provisions in this respect. A review of the observance of the principles for the award of the public procurement contract must be performed for each particular case.

9 Does the amendment of an existing contract require a new procurement procedure?

In principle, any essential amendment to an existing contract requires a new procurement procedure.

Until March 2016, the law did not provide for legal criteria for determining the 'essential character' of an amendment. Starting on 2 March 2016, the National Agency for Public Procurement issued an instruction (Instruction No. 1/2016), setting forth the criteria for assessing the essential character of the amendments to public contracts.

According to Instruction No. 1/2016, a change resulted exclusively from the application of contractual clauses does not represent an 'essential change' if the following conditions are met:

- the contractual clauses allowing for a change of contract have been provided in the award documentation, also mentioning the limits and nature of possible amendments or additions, as well as the terms in which the parties may agree such amendments or additions; and
- in order for such amendments or additions not to be considered as an essential amendment to the initial contract, they:
 - must be clearly anticipated in the contract as 'amendment clauses', must be made known to all potential bidders and must indicate an objective method for determining the final price of the contract,

such as to avoid any discretionary amendment throughout the duration of the contract that would infringe the initial free competition; and

- must result in the 'mechanical' enforcement of the 'amendment clauses' from the initial contract, excluding any other amendments to the initial contract. Such enforcement of the amendment clauses is considered as 'mechanical' if it does not imply that any decision be made by a contracting party (or persons acting on behalf of a contracting party, such as the project designer or the engineer within a FIDIC contract) regarding the opportunity of the amendment.

An amendment to the initial contract shall be considered as essential when neither of the above-mentioned criteria is met and at least one of the following conditions is met:

- the amendment introduces conditions that, had they been part of the initial award procedure, would have allowed for the selection of other candidates than those initially selected or would have allowed for the award to be made to another entity;
- the amendment changes the economical equilibrium of the contract in the favour of the private party; or
- the amendment considerably extends the scope of the contract to goods, services or works in a manner initially not provided for.

10 May an existing contract be transferred to another supplier or provider without a new procurement procedure?

The transfer of an existing contract is prohibited by GEO No. 34/2006.

However, the option for such third party taking over the contract has been taken into consideration in the case when:

- the winning tenderer has entered a tender upheld by a third sustaining party (an entity vouching for the experience or economic status of the tenderer, or both); and
- the tenderer was not able to perform its obligations under the contract.

11 In which circumstances do privatisations require a procurement procedure?

The privatisation procedures do not fall under the public procurement legislation. The privatisation procedures are subject to special regulations (Law 137/2002 on certain measures for the acceleration of the privatisation process) distinct from the public procurement framework and do not require a procurement procedure to be followed.

12 In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

The public-private partnership is subject to special regulations (Law 178/2010 on public-private partnerships) distinct from the public procurement framework and do not require a public procurement procedure. Law 178/2010 on public-private partnerships, however, sets forth special award procedures of the public partnership contract, which resemble in character and scope of the public procurement procedures.

13 What are the rules and requirements for the award of works or services concessions?

The works or services concessions agreements are subject to GEO No. 34/2006 and are awarded under the same principles as the public procurement contract.

In brief, the initiation of a concession procedure requires:

- an analysis on the feasibility of the concession;
- the initiation of a public awarding procedure; and
- the award of a concession contract having, by law, the same characteristics as a public procurement contract.

14 To which forms of cooperation between public bodies and undertakings does public procurement law not apply and what are the respective requirements?

The law does not provide for restrictions for the association or cooperation of public entities. However, the general legal rule provides that a public-private partnership shall be implemented according to the public procurement rules.

Nevertheless, the public procurement rules shall not apply for the award of a service contract by a contracting authority to another contracting authority or association of contracting authorities (including the case

when a private entity is a contracting authority) when such authorities have an exclusive right to perform the services, granted by law, to the extent such rights are compatible with the provisions of the EC Treaty.

Consequently, the public procurement rules apply in the case of public-private partnerships with the exception of service contracts awarded to a contracting authority benefiting from an exclusive right granted by law, to the extent such rights are compatible with the provisions of the EC Treaty.

The procurement procedures

15 Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency, competition?

GEO No. 34/2006 expressly states the following principles for the award of a public procurement contract: non-discrimination, equal treatment, mutual recognition, transparency, proportionality, efficient use of funds and undertaking of liability.

16 Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

As per the fundamental principles stated above (especially non-discrimination, equal treatment and proportionality), a contracting authority must be independent and impartial. This obligation is also supported by the special legislation governing the statute of the public functions and the management of public finances.

A breach of independence or impartiality by the public clerks in charge of the procurement procedure may lead to administrative or even criminal sanctions, as per Law 78/2000 on the prevention, discovery and sanction of corruption acts, as well as the Criminal Code.

17 How are conflicts of interest dealt with?

GEO No. 34/2006 specifically provides for the obligation of a contracting authority to check any potential conflict of interest that may arise for each award procedure initiated.

To this end, the names of the public officials involved in a public procurement are published within the award participation notice. The tenderers must declare that they are not in a commercial relationship with any of the public officials involved or with their close relatives.

The members of the evaluation commission named for each public procurement procedure must also check for any potential conflict of interests. To this end, they must submit a statement of conflict of interest compliance.

Any untrue statement constitutes a criminal offence and may lead to criminal sanctions, as per Law 78/2000 on the prevention, discovery and sanction of corruption acts, as well as the Criminal Code.

18 How is the involvement of a bidder in the preparation of a tender procedure dealt with?

A person involved in the drafting of the award documentation is allowed to participate in the public procurement procedure if its participation does not distort the free competition. In such case, the contracting authority usually makes public the identity of the persons involved in the drafting of the award documentation.

19 What is the prevailing type of procurement procedure used by contracting authorities?

GEO No. 34/2006 regulates the following types of public procurement:

- the open tender;
- the restricted tender;
- the competitive dialogue;
- the request for offers;
- the negotiated procedure; and
- the solution contest.

The most commonly used public procurement procedures are the open tender and the restricted tender as they do not require the fulfilment of special terms or conditions for their implementation.

For the other types of procurement procedure, the contracting authority must observe the requirements of the law for choosing such procedure (eg, a competitive dialogue is used only in the case of complex contracts where the tender specification may not be fully and clearly set forth by the contracting authority; the negotiated procedures may be followed in very strict cases where other procedure could not be followed).

20 Can related bidders submit separate bids in one procurement procedure? If yes, what requirements must be fulfilled?

Related bidders may submit separate bids in the same procurement procedure only if such participation does not restrict free competition. To this end, the bidders must include in their offers a list of all related bidders.

21 Are there special rules or requirements determining the conduct of a negotiated procedure?

According to the Romanian public procurement framework, the negotiated procedure may be either with the prior publication of an award participation notice or without the publication of a prior award participation notice.

Both types of procedures are considered exceptional and may be followed only in specific cases and with the fulfilment of specific conditions.

Contracting authorities may award public contracts by negotiated procedure, after prior publication of an award participation notice, in the following cases:

- in the event of non-compliant tenders or the submission of tenders that are unacceptable under national provisions, in response to an open or restricted procedure or a competitive dialogue. In such a case, the negotiated procedure may be launched only after the initial procedure has been cancelled and as long as the original terms of the contract are not substantially altered;
- in exceptional cases, when the nature of the works, supplies, or services or the risks attaching thereto do not permit prior overall pricing;
- in the case of services, financial services and intellectual services such as services involving the design of works, insofar as the nature of the services to be provided is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selection of the best tender according to the rules governing open or restricted procedures; and
- in respect of public works contracts, for works that are performed solely for purposes of research, testing or development and not with the aim of ensuring profitability or recovering research and development costs.

Contracting authorities may award public contracts by a negotiated procedure without prior publication of an award participation notice in the following cases:

- when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator;
- insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the time limit for the open, restricted or negotiated procedures with publication of an award participation notice cannot be complied with. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority;
- when the products involved are manufactured purely for the purpose of research, experimentation, study or development;
- for additional deliveries by the original supplier that are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire products having different technical characteristics that would result in incompatibility or disproportionate technical difficulties in operation and maintenance; the length of such contracts as well as that of recurrent contracts may not, as a general rule, exceed three years;
- for supplies quoted and purchased on a commodity market;
- for the purchase of supplies on particularly advantageous terms, from either a supplier that is winding up its business activities, or the receivers or liquidators of a bankruptcy, an arrangement with creditors, or a similar procedure under national laws or regulations;
- for public service contracts, when the contract concerned follows a design contest and must, under the applicable rules, be awarded to the successful candidate or to one of the successful candidates;
- for additional works or services not included in the project initially considered or in the original contract but which have, further to unforeseen circumstances, become necessary for the performance of the works or services described therein, on condition that the award is made to the economic operator performing such works or services when:

- such additional works or services cannot be technically or economically separated from the original contract without major inconvenience to the contracting authorities; or
- such works or services, although separable from the performance of the original contract, are strictly necessary for its completion.

However, the aggregate value of contracts awarded for additional works or services may not exceed 20 per cent of the amount of the original contract; and

- for new works or services consisting in the repetition of similar works or services entrusted to the economic operator to whom the same contracting authorities awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded according to the open or restricted procedure. The possibility to use this procedure as well as the total estimated cost of subsequent works or services shall be provided for in the award documentation and must be taken into consideration by the contracting authorities when estimating the value of the public procurement contract. This procedure may be used only during the three years following the conclusion of the original contract.

22 When and how may the competitive dialogue be used? Is it used in practice in your jurisdiction?

The competitive dialogue procedure may be used by a contracting authority only when the following conditions are cumulatively met:

- the contract to be awarded is considered to be extremely complex. A contract is considered to be extremely complex when the contracting authority is not objectively able to define the technical specifications necessary to meet its needs or determine the financial or legal set-up for the project, or both; and
- the open or restricted tender procedures would not allow for the contract to be awarded.

This procedure is not extensively used in practice.

23 What are the requirements for the conclusion of a framework agreement?

A framework agreement may be awarded to one or several suppliers for a period that, as a rule, shall not be longer than four years. In exceptional cases, justified by the complex nature of the contract, the framework agreement may be awarded for a period of more than four years.

The framework agreement does not constitute a firm obligation to buy the services, products or works. Throughout the duration of the framework agreement, the contracting authority shall send purchase requests and shall award subsequent contracts having the same object or nature as the framework agreement.

The contracting authority may not conclude, throughout the duration of the framework agreement, contracts having the same object as the framework agreement with any other economic operator than the one or ones to whom the framework agreement has been awarded.

24 May a framework agreement with several suppliers be concluded? If yes, does the award of a contract under the framework agreement require an additional competitive procedure?

A framework agreement may be concluded with several suppliers, usually by open or restricted tender.

When a framework agreement is concluded with several suppliers, the subsequent contracts shall be awarded:

- usually by reinitiating the competition between the economic operators to whom the framework agreement had been awarded; and
- without reinitiating the competition between the economic operators to whom the framework agreement had been awarded. This procedure may be followed only when all the terms and conditions governing the subsequent contracts have already been established in the framework agreement.

In practice, when a framework agreement is concluded with several suppliers, the subsequent contracts are awarded by reinitiating the competition between these economic operators.

25 Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

Changing the members of a bidding consortium in the course of a bidding procedure is, in principle, considered a change in the offer and sanctioned by rejecting the offer.

26 Are unduly burdensome or risky requirements in tender specifications prohibited?

There are no specific legal provisions prohibiting burdensome or risky requirements related to risks imposed on the bidder on a tender documentation. However, the principle of proportionality imposes that a contracting authority would have to draft the award documentation such as to require only what meets its objective necessities.

Thus, any interested tenderer may appeal such award documentation should it consider that certain requirements impose unnecessary risks.

27 What are the legal limitations on the discretion of contracting authorities in assessing the qualifications of tenderers?

The members of a tender evaluation commission must submit a statement of impartiality and confidentiality before the beginning of the evaluation procedure. By such statement, the evaluation commission members must state their lack of conflict of interests and must undertake an obligation of confidentiality regarding the content of the offers submitted and all other information submitted by the tenderers as well as regarding the evaluation procedure and the works of the evaluation commission.

The contracting authority must evaluate the offers exclusively on the terms and conditions stated in the award documentation. The evaluation commission is allowed to request additional clarification and documents related to a certain offer, provided that the acceptance of such additional clarification and documents does not constitute an amendment of the initial offer entered by the bidder and does not favour in any way the position of such a bidder.

28 Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

Small and medium enterprises are encouraged to participate in procurement procedures, by enjoying a 50 per cent reduction on qualification criteria related to turnover, participation bond and performance bond (Law No. 146/2004).

The contracting authority may divide a contract into lots where such action is possible, without limitation to the number of lots. A bidder may participate in any or all lots of the bid, and the evaluation of each offer is independent for each lot.

29 What are the requirements for the admissibility of alternative bids?

An alternative bid may be entered only when this option has been expressly provided in the award documentation. A contracting authority may enter the option of alternative bid into the award documentation when the award criteria set for the procedure is the most advantageous offer.

30 Must a contracting authority take alternative bids into account?

A contracting authority must take alternative bids into account only when the option for submitting an alternative offer has been entered into the award documentation.

31 What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

A bidder may not change the tender specification (except for the case of superior offers that meet the tender specifications and the case where alternative bids are accepted).

A bidder may include in its offer its own standard terms of business, but the contracting authority is not compelled to accept such terms. When the contracting authority finds the business terms included in a certain offer to be disadvantageous, it shall require the bidder to renounce such terms. In the case the bidder maintains these terms, its offer shall be rejected.

32 What are the award criteria provided for in the relevant legislation?

The award criteria may be either the lowest price or the most advantageous offer.

The law does not provide criteria or guidelines for a contracting authority in choosing a certain award criteria.

33 What constitutes an 'abnormally low' bid?

An offer is considered to be 'abnormally low' if it is lower than 80 per cent of the estimated value of the contract.

34 What is the required process for dealing with abnormally low bids?

The contracting authority must request the bidder that has submitted an 'abnormally low' bid to justify the price entered into the bid.

The contracting authority must take into consideration the clarification provided by the bidder, especially those elements regarding:

- the economic basis for the formation of the bid price related to the execution methods used, the production process or the services deployed;
- the technical solutions or advantageous conditions available to the bidder for the implementation of the contract, or both;
- the originality of the offer in complying with the bid specifications;
- the observance of the rules and regulations applicable to labour protection and the work conditions for the implementation of the contract; and
- the case when the bidder benefits from state aid.

If the clarifications provided by the bidder are not conclusive, the contracting authority may reject the offer.

35 How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

The concept of 'self-cleaning' is not regulated under the current law framework. However, the exclusion from public procurement procedures because of criminal offences or other irregularities is limited in time (eg, for five years for a bidder convicted by final decision of a court of law for a criminal offence regarding participation in criminal organisations, corruption, fraud or money laundry; three years for a bidder convicted by final decision of a court of law for a criminal offence regarding misconduct in connection with its professional conduct or for a professional fault; two years for irregularities in implementing public contracts, if such irregularities are attributable to the bidder's fault and have caused grave prejudice to a contracting authority); once the exclusion period has passed, the bidder is able to participate in public tenders.

Review proceedings and judicial proceedings

36 Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

Any decision of a contracting authority may be reviewed either directly before the courts of law, either by a specialised administrative body dedicated to solving complaints regarding public procurement procedures or the National Council for Solving Complaints (NCSC).

In practice, all complaints are entered before the NCSC. The NCSC-issued decisions are compulsory for the contracting authority. Such decisions may be challenged before the competent court of appeal, which shall settle the complaint by final judgement.

37 How long does an administrative review proceeding or judicial proceeding for review take?

The administrative stage of the review procedure – namely the procedures before the NCSC – should be finalised within 20 days from receiving the complaint. This term is not always observed, especially in cases with complex procedures and numerous parties. However, a reasonable estimation could be that the NCSC usually solves a complaint within 30 days of receiving a complaint.

Update and trends

The entire public procurement legal framework is under significant revision, in line with the new EU public procurement Directives, namely Directive 2014/24/EU, Directive 2014/25/EU and Directive 2014/23/EU.

Another novelty is the recent regulation of the criteria for determining the essential or non-essential character of amendments to the public procurement contract during its implementation. Until March 2016, the law did not provide for any legal criteria for determining the 'essential character' of an amendment, and, thus, any amendment had to be evaluated only in the light of the principles for awarding a public contract. Starting on 2 March 2016, the National Agency for Public Procurement issued an instruction (Instruction No. 1/2016), setting forth criteria for assessing the character of amendments to public contracts.

According to Instruction No. 1/2016, a change resulting exclusively from the application of contractual clauses does not represent an 'essential change' if the following conditions are met:

- the contractual clauses allowing for a change of contract have been provided in the award documentation, also mentioning the limits and nature of possible amendments or additions, as well as the terms in which the parties may agree such amendments or additions;
- in order for such amendments or additions not to be considered as an essential amendment to the initial contract, they must:
 - be clearly anticipated in the contract as 'amendment clauses', be made known to all potential bidders and indicate an

objective method for determining the final price of the contract, such as to avoid any discretionary amendment throughout the duration of the contract that would infringe the initial free competition;

- result in the 'mechanical' enforcement of the 'amendment clauses' from the initial contract, excluding any other amendments to the initial contract. Such enforcement of the amendment clauses is considered 'mechanical' if it does not imply that any decision be made by a contracting party (or persons acting on behalf of a contracting party, such as the project designer or the engineer within a FIDIC contract) regarding the opportunity of the amendment.

An amendment to the initial contract shall be considered as essential when neither of the above-mentioned criteria is met and at least one of the following conditions is met:

- the amendment introduces conditions that, had they been part of the initial award procedure, would have allowed for the selection of other candidates than those initially selected or would have allowed for the award to be made to another entity;
- the amendment changes the economic equilibrium of the contract in the favour of the private party;
- the amendment considerably extends the scope of the contract to goods, services or works initially not provided for.

38 What are the admissibility requirements?

A complaint may be entered by any 'injured person' that has suffered a breach or offence to its legitimate interests by an act or omission to act by a contracting authority.

According to the law, an 'injured person' is a person that:

- has or had a legitimate interest regarding the procurement procedure; and
- has suffered, is suffering or might suffer a prejudice as a result of an act issued by a contracting authority or as a result of failure to issue an act, within the legal term applicable, by a contracting authority.

In practice, the NCSC, as well as the courts of law, have recognised the right of any person to file a complaint regarding the acts issued within an ongoing procurement procedure and related to the award documentation. In what concerns the acts issued by the contracting authority related to the evaluation of offers, injured persons are usually other bidders.

39 What are the deadlines for a review application and an appeal?

The deadlines for filing a complaint are:

- 10 days from the day the act deemed illegal has occurred or the omission to issue an act reached the legal deadline, in the case of: classic public procurement supply or services contracts with an estimated value higher than €130,000; utilities public procurement supply or services contracts with an estimated value higher than €400,000; classic public procurement works contracts; and as well as in the case of utilities public procurement works contracts with an estimated value higher than €5 million;
- five days from the day the act deemed illegal has occurred or the omission to issue an act reached the legal deadline, in case of the public procurement contracts (classic and utilities) with an estimated value lower than the ones mentioned above.

When the challenge is directed towards the award documentation, the deadline is calculated from the date the award documentation has been made public.

The same deadlines apply for further challenge of the NCSC decisions.

40 Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

The application for review does not automatically suspend the continuation of the procedure, except for the review requests concerning the result of the procedure.

In what concerns the complaints (review application) regarding the award documentation or other intermediary decisions of the contracting authority, such complaints do not automatically suspend the course of the procedure. The plaintiff may request the suspension of the procedure and this request shall be solved by separate decision.

In what concerns the complaints regarding the result of the procedure, the law provides that the contract may not be signed by the contracting authority, under penalty of absolute nullity, before the NCSC has passed a decision on any potential complaint. Thus, a contracting authority must wait at least six or 11 days (this term represents the appeal term – which, depending on the value of the contract, may be five or 10 days – plus one day) after the result of the procedure has been communicated to all bidders before signing the contract. Only after this period has passed and no appeal has been entered may the contract be signed. If an appeal is entered in this period, the contract may be signed only after the NCSC has passed a decision.

A further challenge of the NCSC decision on the result of the contract does not suspend the procedure.

41 Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

All bidders must be informed of the result of the procedure, immediately after the result is established and before the contract is concluded. As stated in question 41, a contracting authority must wait at least six or 11 days (this term represents the appeal term – which, depending on the value of the contract, may be five or 10 days – plus one day) after the result of the procedure has been communicated to all bidders before signing the contract.

42 Is access to the procurement file granted to an applicant?

The procurement file is considered by the law as a public document and may be consulted by any interested person, including other applicants, in the terms and conditions set for the access to public interest documents.

Access may be restricted to confidential information or other information protected by law.

43 Is it customary for disadvantaged bidders to file review applications?

It is a common practice for rejected bidders to file complaints.

44 May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

As stated in question 40, the law provides that the contract may not be signed by the contracting authority, under penalty of absolute nullity, before the NCSC has passed a decision on any potential complaint regarding the result of the procedure.

Thus, a contracting authority must wait at least six or 11 days (this term represents the appeal term – which, depending on the value of the contract, may be five or 10 days – plus one day) after the result of the procedure has been communicated to all bidders before signing the contract. Only after this period has passed and no appeal has been entered, may the contract be signed. If an appeal is entered in this period, the contract may be signed only after the NCSC has passed a decision.

Consequently, a disadvantaged bidder's complaint should be solved, in the administrative stage by the NCSC, before the contract is concluded, and, therefore, no cancellation would be needed.

If, however, a disadvantaged bidder decides to challenge further the decision issued by NCSC, the legal suspension of the closure of the contracts will no longer operate, so the plaintiff should expressly request the suspension of the procedure, otherwise the closure of the contract might take place. In such a case, the case law is not consistent in ascertaining the right to cancel the public procurement contract concluded, namely, there are courts of law that have admitted the cancellation requests of contracts and others have ruled that the plaintiff is only entitled to damages, as the cases in which a public procurement contract may be cancelled are expressly and limitedly provided by the law.

45 Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Even in the cases where a public procedure for the award of the contract is not followed, the contracting authority must publish an award notice regarding the closure of the contract. Any interested person may appeal this award notice.

46 If a violation of procurement law is established in an administrative or judicial review proceeding, can disadvantaged bidders claim damages? If yes, please specify the requirements for such claims.

The disadvantaged bidders may, after obtaining the cancellation of the illegal act issued by the contracting authority or any other remedies, request damages for the prejudices incurred as a result of the said act or the omission to issue an act by the contracting authority.

In order to obtain damages for repairing the prejudice incurred as expenses for drawing up the offer and participating in the procedure, the injured person must prove that the legal provisions have been contravened and that it would have had a real chance to win the contract had the proven breach of law not occurred.

**POPOVICI NIȚU
STOICA & ASOCIAȚII**
Attorneys at Law

**Alexandru Ambrozie
Ramona Pentilescu**

**alexandru.ambrozie@pnasa.ro
ramona.pentilescu@pnasa.ro**

239 Calea Dorobanti St, 6th Floor
Bucharest, 1st District, 010567
Romania

Tel: +40 21 317 79 19
Fax: +40 21 317 85 00
www.pnasa.ro

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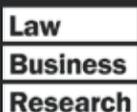
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