

# Public Procurement

*Contributing editor*  
**Totis Kotsonis**



2017

GETTING THE  
DEAL THROUGH 

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*Contributing editor*  
**Totis Kotsonis**  
**Eversheds Sutherland**

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# Romania

Alexandru Ambrozie and Ramona Pentilescu

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## Legislative framework

### 1 What is the relevant legislation regulating the award of public contracts?

The main legal framework applicable to public procurement contracts consists of:

- Law No. 98/2016 on public procurements (Law No. 98/2016);
- Government Decision No. 395/2016 on the approval of application rules of the legal provisions regarding the award of the public procurement contract/framework agreement regulated by Law No. 98/2016 on public procurements (GD No. 395/2016); and
- Law No. 101/2016 on remedies and appeals regarding the award of public procurement contracts, sectorial contracts and works and services concession contracts, as well as for the organisation and functioning of the National Council for Solving Complaints (the NCSC).

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

The legal framework applicable to public procurement contracts is supplemented by the following legislation, regulating the other types of public contracts:

- Law No. 100/2016 on the concession of works and services (Law No. 100/2016);
- Law No. 99/2016 on the sectorial (utilities) procurement (Law No. 99/2016);
- Law No. 233/2016 on the public-private partnership (Law No. 233/2016); and
- Government Ordinance No. 114/2011 on the award of certain public procurement contracts in the field of defence and security (GO No. 114/2011).

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

The relevant legislation adopted for public procurement contracts, as well as for utilities, concession and remedies, mostly supplements the new EU procurement directives in what concerns the regulation of remedy procedures.

### 4 Are there proposals to change the legislation?

The relevant legislation adopted for public procurement contracts, as well as for utilities, concession and remedies, has been recently adopted (May 2016) and is 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 2014/24); 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 2014/25); Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (Directive 2014/23).

Consequently, new substantial amendments to the legal framework are not expected in the near future. However, tertiary legislation might be adopted in order to provide interpretation or detailed rules for the implementation of some legal provisions.

## Applicability of procurement law

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

In principle, a private entity, including privatised former public companies, is not considered to be a contracting authority. However, a private entity might be subject to public procurement legislation for the award of certain contracts, in the conditions regulated by Law No. 98/2016 (ie, if it receives financing for more than 50 per cent of the value of a certain contract and the value of such contract is situated above the thresholds applicable to public procurement contracts).

Any new entity in a utility sector must apply Law No. 99/2016 for the award of contracts related to the deployment of the relevant utility activity. National legislation provides for the exemption regulated by article 34 of Directive 2014/25, regulating that Law No. 99/2016 shall not apply if the relevant activity for which the contract is to be awarded is exposed directly to competition on a market with unrestricted access. Such circumstances shall be ascertained by the European Commission at the request of the interested party, which shall submit written notification in this respect.

### 6 Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

The awarding procedures regulated by Law No. 98/2016 are applicable when the value of the contracts to be awarded is situated under the following thresholds:

- 23,227,215 lei – for works public procurement contracts or framework agreements;
- 600,129 lei – for services or supply public procurement contracts or framework agreements; and
- 3,334,050 lei – for works public procurement contracts or framework agreements concerning social services or other services presented in Annex 2 to the law (ie, health, legal, social security services).

Under these thresholds, the contracting authority shall implement a simplified awarding procedure regulated by GD No. 395/2016, with the observance of the general principles for a awarding the public procurement contract.

A contracting authority may award directly product and services contracts if the estimated value is under 132,519 lei, and works contracts if the estimated value is under 441,730 lei.

### 7 Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

The new public procurement legislation regulates the following cases when the amendment of a concluded contract may be done without a new procurement procedure:

- when the amendments, regardless if they are valuable in money or not and regardless of their value, have been provided in the initial award documentation throughout clear, precise and unequivocal reviewing clauses, such as price review clauses or any other options;
- when the initial contractor is replaced by a new contractor (this could be done only in certain circumstances, expressly provided by the law, namely, as the reorganisation of the initial contractor leading to a new entity, or the case when the option to replace the initial contractor has been provided in the initial award documentation);

- when the amendments, regardless of their value, are not substantial (the law providing for express criteria to determine the substantial nature of an amendment); and
- when the following conditions are cumulatively met:
  - the value of the amendments is lower than the thresholds provided by the law; and
  - the value of the amendments is less than 10 per cent of the contract's initial price in the case of supply and services contracts and less than 15 per cent of the contract's initial price in the case of works contracts.

#### **8 Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?**

As the legal framework has recently been adopted, no relevant case law in this respect has been noticed so far.

#### **9 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 No. 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.

#### **10 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 233/2016 on public-private partnerships) distinct from the public procurement framework and do not require a public procurement procedure. Law No. 233/2016 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.

#### **Advertisement and selection**

#### **11 In which publications must regulated procurement contracts be advertised?**

Public procurement procedures announcements, award notices, as well as all communications related to public procurement procedures are to be published in an integrated public procurement informatic system – SEAP (the Electronic System for Public Procurements). Also, most contracting authorities publish such announcements on their websites.

#### **12 Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?**

The law specifically regulates the criteria and conditions that a contracting authority may set for the qualification of an economical operator to a public procurement procedure. Such criteria and conditions may refer only to:

- exclusion grounds, as regulated by the law; and
- the capacity criteria of the economical operator (legal capacity to perform, economic and financial capacity, technical and professional capacity).

#### **13 Is it possible to limit the number of bidders that can participate in a tender procedure?**

In certain public procurement procedures – such as restricted procedure, competitive dialogue, competitive procedure with negotiation, innovation partnership – the numbers of bidders may be limited throughout a prior selection procedure.

The numbers of bidders qualified to be invited to submit an offer after the selection procedure must be expressly provided in the award documentation and shall not be fewer than three candidates, for competitive dialogue, competitive procedure with negotiation, innovation partnership, and five candidates in the case of the restricted procedure.

The contracting authorities shall invite a number of candidates at least equal to the minimum number. However, where the number of candidates meeting the selection criteria and the minimum levels of ability is below the minimum number, the contracting authority may

continue the procedure by inviting the candidates with the required capabilities. In the context of the same procedure, the contracting authority shall not include economic operators that did not request to participate, or candidates that do not have the required capabilities.

#### **14 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?**

If any of the exclusion criteria regulated by the law (ie, criminal convictions, grave professional misconduct) apply to a bidder, such bidder may provide evidence of undertaking the necessary measures for proving its credibility in relation to the applicable exclusion criteria.

In this respect, a bidder could provide proof that: it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct; clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The contracting authority shall analyse the proof provided by the bidder and, if it considers such proof to be sufficient, may decide not to exclude the bidder from the procedure. However, a bidder which has been excluded from participating in public procurement or concession award procedures by a final judgement of a court of law shall not be entitled to make use of the possibility to self-clean its credibility during the period of exclusion resulting from that judgment, if such judgement is enforceable in Romania.

#### **The procurement procedures**

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

Law No. 98/2016 provides that: (i) its purpose is to ensure the legal framework for the procurement of goods, services and works, with economic and social efficiency: and that (ii) the award of public procurements contract and of design contests shall be made according to the following principles: non-discrimination, equal treatment, mutual recognition, transparency and undertaking of liability.

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

Law No. 98/2016 expressly provides that the contracting authority shall elaborate the award documentation such as to ensure unrestricted access to the procedure to all potential bidders. Also, the law specifically provides that a contracting authority may not, in any way, favour or create unfair advantages to a specific bidder, the principle of equal treatment being applicable all throughout the procedure.

#### **17 How are conflicts of interest dealt with?**

The law specifically regulates the cases that are considered to have a conflict of interests and also provides for the obligation of the contracting authority to undertake, all throughout the procedure, all measures in order to prevent, identify and remedy any potential conflict of interest, so as not to obstruct competition and to ensure equal treatment for all bidders.

One example of a conflict of interests is a situation in which members of the contracting authority staff or of any service provider that acts in the name of the contracting authority that are implicated in the implementation of the public procurement procedure or that can influence its result have, directly or indirectly, a financial, economic or personal interest, that might compromise their impartiality or independence.

The law regulates also some examples of potential conflict of interest situation, such as:

- participation to the offers/participation requests control/evaluation process of persons who own social parts or interests, shares to the capital of a bidder or candidate, third sustaining party, proposed subcontractor, or persons from the administration board, management or supervisory body of one of the bidders or candidates, third sustaining party or proposed subcontractor;

- participation to the offers/participation requests control/evaluation process of a person who is a spouse, relative or affiliate, up to the second degree inclusively, with persons from the administration board, management or supervisory body of one of the bidders or candidates, third sustaining party or proposed subcontractor;
- participation to the offers/participation requests control/evaluation process of a person regarding whom it is established or there are reasonable grounds or specific information that it might have a direct or indirect financial, economic or personal interest or any type of interest, or that it is in a position that might affect its impartiality and independence throughout the evaluation process;
- if the individual or associate bidder/candidate/proposed subcontractor/third sustaining party has members in the administration board/management or supervisory body or has significant shareholders or associates (ie, who have at least 10 per cent of the social capital or at least 10 per cent of votes) who are a spouse, relatives or affiliates, up to the second degree inclusively, or who are in commercial relationships with decision making persons from the contracting authority or with the procurement service supplier for that public procurement procedure; and
- when the bidder or candidate has nominated, amongst the main persons designated for the implementation of the contract, persons who are a spouse, relatives or affiliates, up to the second degree inclusively, or who are in commercial relationships with decision making persons from the contracting authority or with the procurement service supplier for that public procurement procedure.

The contracting authority must specify, in the award documentation, the names of the clerks that are to be involved in the decision process related to the procedure, in order to provide all information needed for a conflict check.

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

In principle any economic operator, including one that has participated in drafting the award documentation, may submit an offer. The contracting authority may exclude a bidder that has participated in drafting the award documentation only if its participation to the procedure has led to a distortion of competition and such distortion could not be remedied by less severe actions.

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

Contracting authority mostly use the open procedure. However, depending on the complexity of the contract to be awarded, other procedures are seldom used in practice also.

#### **20 Can related bidders submit separate bids in one procurement procedure?**

Related bidders are not expressly excluded from participation to public procurement procedures. However, the situation when either the same persons or persons that are spouse, relative or affiliate up to the second degree inclusively or have a personal, financial, economic or any other type of common interest hold a position in the management bodies of two or more bidders, is considered to be a sign of unfair competition agreements and might lead to exclusion from the procedure. In such a case, the contracting authority must request the opinion of the Competition Council before excluding a bidder.

#### **21 Is the use of procedures involving negotiations with bidders subject to any special conditions?**

Procedures involving negotiations with tenders may be used in the cases expressly regulated by Law No. 98/2016. Thus:

The contracting authority may use competitive procedure with negotiation or a competitive dialogue in the following situations:

- works, supplies or services fulfilling one or more of the following criteria:
  - the needs of the contracting authority cannot be met without adaptation of readily available solutions;
  - they include design or innovative solutions;
  - the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the

complexity or the legal and financial make-up or because of the risks attaching to them; and

- the technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, European Technical Assessment, common technical specification or technical reference within the meaning of points 2 to 5 of Annex VII; and
- works, supplies or services where, in response to an open or a restricted procedure, only irregular or unacceptable tenders are submitted. In such situations contracting authorities shall not be required to publish a contract notice where they include in the procedure all of, and only, the tenderers that satisfy the qualification criteria set out in the award documentation and that, during the prior open or restricted procedure, submitted tenders in accordance with the formal requirements of the procurement procedure.

The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:

- where no tenders or no suitable tenders or no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission where it so requests;
- where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons:
  - the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance;
  - competition is absent for technical reasons; and
  - the protection of exclusive rights, including intellectual property rights; and
- insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. The circumstances invoked to justify extreme urgency shall not, in any event, be attributable to the contracting authority.

The negotiated procedure without prior publication may be used for public supply contracts in the following cases:

- where the products involved are manufactured purely for the purpose of research, experimentation, study or development; however, contracts awarded pursuant to this point shall not include quantity production to establish commercial viability or to recover research and development costs;
- for additional deliveries by the original supplier that are intended either as a partial replacement of supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire supplies having different technical characteristics that would result in incompatibility or disproportionate technical difficulties in operation and maintenance; the duration of such contracts as well as that of recurrent contracts shall not, as a general rule, exceed three years;
- for supplies quoted and purchased on a commodity market; and
- for the purchase of supplies or services on particularly advantageous terms, from either a supplier that is definitively winding up its business activities, or the liquidator in an insolvency procedure, an arrangement with creditors, or a similar procedure.

The negotiated procedure without prior publication may be used for new works or services, if the following conditions are met:

- the award is made to the initial contractor and the works or services consist in the repetition of similar works or services that comply with the requirements of the initial award documentation;
- the estimated value of the initial contract was determined taking into consideration the value of the additional works or services;
- the option to award additional works or services from the winning bidder has been provided in the initial award documentation; and
- the negotiated procedure without prior publication is used within the three years following the conclusion of the initial contract.

**22 If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?**

The new legal framework has been in force for less than a year. Based on the old practices, we can assume that negotiated procedures involving a public notice shall be more frequently used than the negotiated procedure without prior publication.

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

The contracting authority may award a framework agreement, throughout the procedures regulated by Law No. 98/2016, for a period of maximum of four years (in exceptional cases, justified by the nature of the contract, for a longer period), to one or several suppliers or contractors.

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 framework agreement does not constitute a firm obligation to buy the services, products or works. However, 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 had been awarded.

**24 May a framework agreement with several suppliers be concluded?**

A framework agreement may be concluded with several suppliers, by any of the procedures regulated by law.

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

- 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, as well as the terms establishing which one of the contractors shall be awarded a particular subsequent contract had been already established in the framework agreement.
- By reinitiating the competition between the economic operators to whom the framework agreement had been awarded when the specific terms for the award of a subsequent contract have not been set forth in the framework agreement.
- Partially, by either reinitiating or not initiating the competition, when such an option has been provided in the award documentation for the framework agreement and the framework agreement contains all terms and conditions for the execution of works, services or the supply of products it refers to.

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

The law does not expressly provide for this specific situation. However, based on common principles and the practice set out in the former legal framework, changing one of the members of a consortium during the procurement procedure may be interpreted as a change of the offer, leading to the rejection of the offer.

**26 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?**

In the former legal framework, small and medium-sized enterprises were granted reduction from participation and execution bonds. These advantages have been ruled out in the new legal framework.

However, Law No. 98/2016 sets out the rule that the award of a public procurement contract must be made by division into lots. If a contracting authority decides not to divide the contract into lots, it has to justify its decision in this respect.

In the case where the procedure is divided into lots, the contracting authority shall provide in the award documentation if the offers may be submitted for only one, more or all lots. Even if an offer may

be submitted to more or all lots, the contracting authority may limit the number of lots that may be awarded to the same bidder. The maximum number of lots to be awarded for the same bidder must be provided in the award documentation.

**27 What are the requirements for the admissibility of variant bids?**

A contracting authority may allow or request variant bids only if this option has been expressly provided within the award documentation. In such a case, the award documentation must also provide for the minimum requirements or specific conditions when a variant offer may be submitted.

**28 Must a contracting authority take variant bids into account?**

A variant offer may be taken into account only if the option to submit such an offer has been expressly provided in the award documentation and the variant offer meets the minimum requirements provided in the award documentation.

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

The bidders may not change the tender specifications that are minimum and compulsory, but they may propose higher specifications.

The bidder's terms of business may be included in the offer, as proposal to amend the contractual clauses. However, the contracting authority may reject such terms if it considers them to be obviously detrimental. In such a case, the contracting authority shall inform the bidder that it does not agree with the proposal to amend the contractual clauses. If the bidder does not retract its proposal, its offer shall be rejected.

**30 What are the award criteria provided for in the relevant legislation?**

Contracting authorities shall base the award of public contracts on the most economically advantageous tender.

For the identification of the most economically advantageous tender, the contracting authority may apply the following criteria:

- the lowest price;
- the lowest cost;
- the best price-quality ratio; and
- the best cost-quality ratio.

The contracting authority may not apply the lowest price or cost criteria for the award of the following contracts:

- certain works or services contracts or framework agreements that have in their scope intellectual services and that imply high complexity activities; and
- certain works or services contracts or framework agreements that are awarded in relation to trans-European transport infrastructure projects or district roads.

**31 What constitutes an 'abnormally low' bid?**

The new public procurement framework does not provide criteria for determining 'abnormally low' bids, leaving this operation to the appreciation of the contracting authority.

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

Law No. 98/2016 provides for the obligation of a contracting authority to request clarifications on the price offered for any potential 'abnormally low' bid it identifies. Such clarification may include:

- economic grounds for the price, in respect to production process, services or building methods used;
- technical solution adopted or any other favourable conditions the bidder benefits from;
- originality of the works, services or products offered;
- the observance of the environment, social and labour rules and regulation;
- the observance of payment duties to subcontractors; and
- the possibility that the bidder benefits from state aid.



In case the clarifications submitted by the bidder do not justify the cost offered, the contracting authority shall reject the offer.

### Review proceedings

#### 33 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 the public procurement procedures – The NCSC.

#### 34 If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

Only one authority may rule on a specific review application on the same procedural stage and for the same decision of a contracting authority.

In case review applications of the same decision of a contracting authority are sent, either by the same plaintiff or by different plaintiffs, both to the court of law as well as to the NCSC, the review file shall be sent to the court of law.

#### 35 How long do administrative or judicial proceedings for the review of procurement decisions generally take?

Both administrative and judicial review proceedings are considered to be urgent proceedings and short terms are applicable in both jurisdictions.

The NCSC has to pass a decision on a complaint within 20 days of receipt of a complaint, when a full review is made, or 10 days of receipt of the review application when a procedural ground does not allow the application to be reviewed in full.

The court of law seized with a review application shall set the first hearing no later than 20 days of receipt of the review application. The subsequent hearings may not be set more than 15 days apart and the entire judicial proceeding may not last longer than 45 days.

#### 36 What are the admissibility requirements?

Any injured person that considers his or her rights or legitimate interests have been injured by an act issued by a contracting authority or by failure to solve a request within the legal term may request the cancellation of the act, the compelling of the contracting authority to issue an act or to adopt remedy measures, the recognition of its right or legitimate interest, either in front of the NCSC or in front of a court of law.

Any economical operator that cumulatively fulfils the following conditions is considered to be an injured person:

- has or has had an interest regarding an award procedure; and
- has suffered, is suffering or may suffer a prejudice as result of an act issued by the contracting authority, which may have legal effects, or as a result of failure to solve a request within the legal term, regarding an award procedure.

Prior to entering an application review, an injured party must first send a prior notification to the contracting authority stating its demands. If the contracting authority does not answer to the prior notification or its answers are not considered satisfactory or complete, the injured person may submit a review application. If the prior notification procedure is not followed, the review application shall be dismissed as inadmissible.

The review application shall be made in writing and must contain specific elements provided by the law (ie, identification of the parties and of the award procedure, identification of the act deemed to be illegal, the legal and factual grounds for the review, any evidentiary proof). In case the review application is incomplete, the NCSC or the court of law may ask for the plaintiff to remedy it, under sanction of annulment of the application.

#### 37 What are the time limits in which applications for review of a procurement decision must be made?

A review application may be submitted within:

- 10 days, if the estimated value of the public procurement procedure is equal or higher than the thresholds for publishing a notice in the Official Journal of the European Union (23,227,215 lei for works, 600,129 lei for products and services and 3,334,050 lei for social services and other specific services); or

- five days, if the estimated value of the public procurement procedure is lower than the thresholds for publishing a notice in the Official Journal of the European Union.

The terms are calculated either from the date the plaintiff has been informed of the contracting authority's reply to the prior notification (either a negative or a positive reply); or from the date that the legal term for replying to the prior notification has expired.

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

An application review does not automatically suspend the procedure but it automatically suspends the right of the contracting authority to conclude the public procurement contract until a decision of the NCSC or of the court of law – in first instance, is passed. The contract concluded without observing this suspension is null.

In all other cases, the interested person may request either by administrative or judicial procedure the suspension of the procedure if it proves a justifiable case and the necessity to prevent an imminent prejudice.

#### 39 Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

An automatic suspension of the procedure may not be lifted either by review application or any other means. It operates de jure.

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

The contracting authority must inform all bidders of the result of the procedure, as soon as possible, but no later than five days from the issues of its decision.

The communication regarding the result of the procedure must contain:

- for every rejected candidate, the reasons for rejecting its participation request;
- for every bidder that has submitted an unacceptable or non-compliant offer, the reasons sustaining the contracting authority's decision;
- for every bidder that has entered an admissible offer which has not been declared winner, the characteristics and advantages of the winning offer or offers in relation to its own offer, as well as the name of the contractor or contractors to which the public procurement contract or framework agreement has been awarded; and
- for every bidder that has entered an admissible bid, information related to the development and progress of negotiations and dialogue with the other bidders.

#### 41 Is access to the procurement file granted to an applicant?

The public procurement file becomes a public document after the procedure is closed. Until then, access to the procurement file is restricted.

However, after the communication of the result of the procedure, the contracting authority must grant the bidders participating to the procedure access to the procedure report, as well as to the information within the qualification documentation, technical and financial proposals entered into the procedure, with the exception of the parts that have been declared by the bidder as confidential, classified or protected by an intellectual property right.

#### 42 Is it customary for disadvantaged bidders to file review applications?

It is customary for disadvantaged bidders to file review applications. According to the data published by the NCSC, during 2016, 2,348 review application files have been solved by the Council, while 19,079 procedures have been registered in SEAP.

#### 43 If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

The law provides that disadvantaged bidders may request to be compensated for damages resulted from illegal actions within a public procurement procedure, before the competent court of law (tribunal). No

other special conditions to be met for such a request are regulated by the public procurement legislation, thus the common law applies.

However, we note that, in practice such actions are rarely seen and that the courts of law tend to set the damages very low.

**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?**

Any interested person may request a court of law to ascertain the nullity of the contract or addendum to the contract that has been concluded with the infringement of the requirements of the public procurement, utilities or concession legislation as well as to reinstate the previous situation, in the following cases:

- the contracting authority has awarded the contract without observance of the rules imposing the publication of a notice, according to the public procurement, utilities or concession legislation;
- when the contracting authority aims at obtaining the execution of works, services or supply of a product that would place the contract as one subject to public procurement, utilities or concession legislation, but the contracting authority awards a different type of contract, not observing the law;
- the contract or addendum has been concluded in less favourable conditions than those provided in the winner's technical or financial offers;
- the qualification and selection criteria or evaluation factors provided in the contract notice have not been observed in relation to the winning offer, thus the result of the procedure being altered, by diminishing or cancelling competitive advantages; and
- the contract has been concluded prior to receipt of the NCSC or the court's decision on a review application.

Nevertheless, in the even that, after review of all relevant issues, the court appreciated that imperative norms of general interest demand the continuation of the contract, it may decide not to cancel the contract but to apply alternative sanctions such as:

- limitation of the effects of the contract, by reducing its execution term; or
- apply a fine to the contracting authority, between 2 per cent and 15 per cent of the value of the contract.

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

As per the answers provided above, any interested party may request the cancellation of the contract awarded without following a procedure regulated by the law.

**46 What are the typical costs of making an application for the review of a procurement decision?**

A review application to NCSC is free of charge.

A review application submitted directly to a court of law, shall be charged with a judgement tax of:

- 2 per cent of the estimated value of the contract when such value lies below 450.000 lei inclusively;
- when the estimated value of the contract lies between 450.001 and 4.500.000 lei inclusively - 9.000 lei plus 0.2 per cent of what surpasses 450.001 lei;
- when the estimated value of the contract lies between 4.500.001 and 45.000.000 lei inclusively - 18.000 lei plus 0.02 per cent of what surpasses 4.500.001 lei;
- when the estimated value of the contract lies between 45.000.001 and 450.000.000 lei inclusively - 27.000 lei plus 0.002 per cent of what surpasses 45.000.001 lei;
- when the estimated value of the contract lies between 450.000.001 and 4.500.000.000 lei inclusively - 358.000 lei plus 0.0002 per cent of what surpasses 450.000.001 lei;
- when the estimated value of the contract is higher than 4.500.000.001 lei - 45.000 lei plus 0.00002 per cent of what surpasses 4.500.000.001 lei.

Application reviews that are not evaluable in money are charged with a 450 lei judgment tax.

Appeals against the NCSC decisions are taxed with 50 per cent of the taxes listed above.

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