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## PUBLIC ACQUISITION CONTRACT. AWARDING PROCEDURE

BY

**VIOLETA HEREA\***

“Gheorghe Asachi” Technical University of Iași  
Faculty of Civil Engineering and Building Service

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**Abstract.** Romania’s adhesion to the European Union at the 1<sup>st</sup> of January 2007 was conditioned, among other things, by the adoption of the legislation in the area of public acquisition. This imposed drawing up a normative act which regulates the public acquisition and has materialized in the OUG No. 34/2006 in regard with the award of public acquisition contracts, public works concession and service provision contracts.

In designing the legal framework of the public acquisition in Romania, the principles generally accepted in Europe, in this field, were considered. The legislation in force stipulates that at the adoption of any decision in the public acquisition process, the following principles are to be satisfied: principle of non-discrimination, principles of efficient utilization of public funds, mutual recognition, transparency, equal treatment, assuming the responsibilities, and proportionality.

An analysis of the awarding procedures for the public procurement contract is performed, through the angle of the main normative act in force, *i.e.* OUG No. 34/2006 modified and completed by Emergency Ordinance No. 77/2012.

**Key words:** contract; acquisition; procedure; auction; law.

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\* Corresponding author: *e-mail*: violeta.herea@gmail.com

## 1. Introduction

The object of a public acquisition can consist in one or several products, one or several construction works, and one or several services. Depending on the activities which make the object of public acquisition, we mention the types of contracts stipulated in the OUG 34/2006, namely: supply contract, service provision contract, work execution contract, the last one being the most often found in the field of construction work execution.

Like any other contract, the acquisition contract is concluded between the two entities, namely the *Contracting Authority* and the *Contractor*. The *Contracting Authority*, as defined by the law, can be an institution of local or general interest, a legal person other than the previously mentioned ones, established for the purpose to carry out activities of public interest without a commercial character, a legal person of private law, as well as a natural or legal person who obtained a financing from a public law body.

The *Contractor* can be any legal or natural person of private law, of Romanian or foreign nationality, who was awarded a public acquisition contract in his capacity of supplier, works doer or service provider.

## 2. Types of Procedures

According to Article 18 of OUG No. 34/2006, the awarding procedures for the public acquisition contract are: open auction, restricted auction, competitive dialogue, negotiation, with the two forms: negotiation with previous publication of the information notice, and negotiation without previous publication of the contract notice, as well as the call for tenders. To this, another situation is added, covered by Art. 18, item (2), in which the Contracting Authority has the right to organize a solution contest, namely a special procedure according to which the acquisitions are made, especially in the fields of land development, city and landscape planning, architecture or data processing, through a competition- based selection made by a jury, with or without awarding a prize.

Exceptions from the compulsoriness to organize an awarding procedure are represented by all the acquisitions of goods, services or works, whose value does not exceed the equivalent of 15,000 € for each acquisition of goods, services or works, as long as there is a justifying document (Art. 19).

The *rule* for awarding any public acquisition contract is represented by the application of the procedures of open auction or restricted auction. *Exceptions* from the rule are: negotiation, call for tenders and competitive dialogue.

In the case of sector contract, the *rule* consists in the application of the procedures of open auction or restricted auction, or negotiation, with publication

of a *prior* information notice, and the *exceptions* are represented by the negotiation without publication of *prior* information notice and the call for tenders. The sector contract is the public acquisition contract which is awarded with the purpose of execution of a relevant activity in the public utility sectors, such as: water supply, energy supply, transport, mail.

It is worth remembering that it is completely forbidden to sub-divide a contract in several contracts of a lower value, in order to avoid certain procedures of public procurement.

In the following, we shall make a short presentation of each type of procedure

### **2.1. Open Auction**

The open auction represents the awarding procedure for the public acquisition contract to which is entitled each economical operator interested to submit a tender (Art. 18 line (1) let. *a*). It usually proceeds in a single stage. One can decide to organize an additional electronic auction but only this has been specified in the participation notice and the awarding documentation.

The open auction starts by sending for publication the call for tenders requesting the interested economical operators to submit tenders.

The limit times to put forward the candidature, stated in OUG 34/2006, are minimum and they can be extended. Under certain emergency situations stipulated by the law, the times can be reduced. Yet, the practice has shown that most of the times the emergency is invoked without a thorough justification, especially to avoid the law and, implicitly, to obstruct equal participation of all those interested in the auction.

### **2.2. Restricted Auction**

The restricted auction represents the awarding procedure of public acquisition contract in which any economic operator may request to participate, and only candidates invited to do so may submit a tender (Art. 18, line (1), let. *b*) of OUG 34/2006).

As a rule, the procedure proceeds in two stages (Art. 81) namely

a) candidates screening, by applying screening criteria;

b) assessment of tenders submitted by the selected candidates, by applying the awarding criteria.

If the notice of participation and the awarding documentation specify this, an additional stage can be organized, namely the electronic auctions. Restricted tender is initiated by sending for publication of a participation notice, where the interested economic operators are required to submit applications for the participation in the tender. Of these, only the nominations who meet the conditions specified in the announcement are selected. In order to select the

tender which is closer to the conditions imposed by the contracting authority, in the second stage is transmitted only to the candidates selected in the first stage, a participation invitation accompanied by the tender documentation (Article 82).

The lawful minimum number of selected candidates is 5, and the selected candidates are invited to submit tenders (Art.85, line (4)). In the end will be selected the most advantageous offer in financial terms for the contracting authority.

### **2.3. Competitive Dialogue**

The competitive dialogue represents the awarding procedure of public acquisition contract to which each economic operator is entitled to participate, and by which the Contracting Authority conducts a dialogue with the accepted candidates, with the purpose to identify one or more solutions able to respond its necessities. At the end of the dialogue, when the solutions are defined, the selected candidates submit their final tenders (Art. 18 line (1), let. c) of OUG 34/2006).

The procedure is only applied when the following cumulative conditions are satisfied (Art. 94):

- a) the concerned contract is considered of a special complexity;
- b) application of the procedure of open or restricted auction does not permit the awarding of the corresponding public acquisition contract or it can not be precisely elaborated.

A complex contract is the one for which the Contracting Authority is not able to define the technical specifications able to satisfy neither the needs and exigencies, nor the judicial of financial assembly of the project.

The procedure of competitive dialogue occurs in three stages (Art. 96)

- a) candidate pre-selection;
- b) dialogue with the candidates admitted, following the pre-selection, in order to identify the solution/solutions able to answer the necessities of the Contracting Authority and on whose basis the candidates are invited to the final tender;
- c) evaluation of the final tenders submitted.

The competitive dialogue is initiated by sending for publication the contract notice requesting the interested economic operators to participate. The limit time to submit the final tenders is established in agreement with the selected candidates.

### **2.4. Negotiation**

The negotiation is the procedure by which the Contracting Authority conducts a dialogue with the selected candidates and negotiates the contractual

clauses, price included, with products suppliers, service providers or, accordingly, work performers (Art. 18, line (1), let. *d*). The negotiation can be with or without previous publication of the contract notice.

*a) Negotiation with previous publication of the contract notice*

As a rule, this procedure is getting on in three stages: selection of candidates, negotiation and tenders assessment. It starts by sending for publication a contract notice requesting the economic operators to participate.

The negotiation with *prior* publication of the contract notice is only justified under certain circumstances stipulated by the law (Art. 110, line (1) OUG 34/2006), namely

a) when after canceling the previous procedures of open auction, restricted auction, competitive dialogue or the call for tenders, no other tender for submitted or only unacceptable or non-conform tenders were submitted, and only if the initial terms from the awarding documentation were not substantially altered, in which case the call for tenders is not published;

b) when the nature of the contract prevents *prior* pricing;

c) when the specifications can not be drawn up (here are included financial or intellectual services);

d) when the object of the negotiation consists in works with exclusively research purpose.

As an exception, no call for tender is sent when only the applicants qualified in the previous procedures are invited.

*b) Negotiation without previous publication of the contract notice*

The procedure is only applied in certain strictly stipulated by the law (Art. 122 OUG 34/2006), namely

a) when the public acquisition contract may be only executed by a particular economic operator;

b) in cases of emergency induced by unforeseeable events;

c) for works performed solely for purpose of scientific research, without getting any benefit or cost covering;

d) procurement of additional quantities for replacement or extension, within at most three years from completing the initial contract;

e) in the case of products acquired at a bargain price, for instance at liquidation sales;

f) after the organization of a solution contest, at which all the wining competitors are invited;

g) for additional services or works not included in the initial contract;

h) for services or works similar to those from the initial contract, but predicted when establishing the value and specified in the contract notice, applicable within three year lapse.

i) when talks are with one or more economic operators are invited to participate in negotiations.

### **2.5. Call for Tenders**

The call for tenders is a simplified procedure by which the Contracting Authority require tenders from several economic operators, either as suppliers, service providers or doers. It proceeds in a sole stage and starts with the publication of a invitation of participation (since the 1<sup>st</sup> of January 2007, the publication is compulsory done in SEAP – the Electronic System of Public Acquisition).

The call for tenders is only applied if the estimated value (without VAT) of the public procurement contract is smaller than the equivalent in Lei of the following thresholds (Art. 124 of OUG 34/2006):

- a) for supply contract: 130,000 €;
- b) for service contracts: 130,000 €;
- c) for works contracts: 5,000,000 €.

### **3. Conclusions**

Approaching this topic is very important, since the public acquisition field in Romania raises at present so many controversies concerning the disobedience of the law in the area of acquisition activities, by most of the factors with abilities to engage in public procurement. This resulted in repeated modifications of the main normative act that brings under regulation the public acquisition field, irrespective of the fact that these modifications concerned the contract values or setting up authorities to monitor the compliance with procedures, such as ANRMAP – National Authority for Public Acquisition Regulation and Monitoring, etc.

Nevertheless, we consider that the “waste” of terms, motivated by the possible urgency that can appear for the organization of an auction, does not result in increasing efficiency in this field, since the majority of the economic operators do not comply with these terms. These urgencies are usually invoked at the end of the year, when the acquisitions tend to be rather “dedicated” to certain companies, than to comply with the law and, implicitly, to solve problems concerning the acquisition of high quality goods at the right price, the acquisitions being made in the detriment of the direct beneficiary and, implicitly, to the state that allocate the money.

As confirmation of the claims above stated, the findings of the European Commission come here and they are inserted into the Report Regarding the Cooperation and Control Mechanism of Romania at the end of

January 2013 which mentions that the acquisition field in our country is dominated by corruption.

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#### CONTRACTUL DE ACHIZIȚIE PUBLICĂ. PROCEDURI DE ATRIBUIRE

(Rezumat)

Aderarea României la Uniunea Europeană, la 1 ianuarie 2007, a fost condiționată, pe lângă altele, și de adoptarea unei legislații în domeniul achizițiilor publice. Acest lucru a impus elaborarea unui act normativ care să reglementeze achizițiile publice și care a fost materializat în OUG nr. 34/2006 privind atribuirea contractelor de achiziție publică, a contractelor de concesiune de lucrări publice și a contractelor de concesiune de servicii.

În proiectarea cadrului legal al achizițiilor publice din România s-au avut în vedere principiile general acceptate în Europa, în acest domeniu. În legislația în vigoare se stipulează că la adoptarea oricărei decizii în procesul de achiziții publice trebuie avute în vedere următoarele principii: principiul nediscriminării, utilizării eficiente a fondurilor publice, recunoașterii reciproce, transparenței, tratamentului egal, asumării răspunderii și al proporționalității.

Se efectuează o analiză a procedurilor de atribuire ale contractului de achiziție publică, prin prisma principalului act normativ în vigoare – OUG nr. 34/2006, modificată și completată prin OUG nr. 77/2012.