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**THE RESPONSIBILITY OF THE FACTORS INVOLVED IN
CHECKING THE AWARDED DOCUMENTATION AND MEANS
OF ATTACK WITHIN THE PROCESS OF PUBLIC
PROCUREMENT**

BY

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Abstract. Like all activities covered by the law, the procurement process requires the existence of appropriate controls at all stages of its development. Control is performed by bodies authorized by law and in whose sphere of activity lies their responsibility.

In this paper we will present schematically the stages of public procurement as well as the sequence of activities within these phases provided by the legislation in force governing public procurement, namely G.E.O no.34/2006, as amended by Government Emergency Ordinance 77/2012.

We will also investigate the remedies provided by the regulations in force, which will be used by those who have a legitimate interest in a public contract.

Also, we will analyse the functioning efficiency of some solution operations of bodies responsible for remedies in the procurement process, taking into account the time, but also how these complaints have been resolved in recent years.

Key words: stages; public procurement; complaint; contracting authority.

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1. Introduction

Efficiency and effectiveness of the acquisition process and the conduct and monitoring it are significantly enhanced as steps and activities of this process are identified and carefully planned in advance. G.E.O. 34/2006 provides two types of notices used in public procurement, namely: *the notice of intent* and *the participation notice*.

The notice of intent is published in the Public Procurement Electronic System (SEAP) or, as appropriate, in the Official Journal of the European Union and, optionally, in the Official Journal of Romania, Part VI – "Public Procurement" as soon as possible after the start of the budget year. Publication of the notice is required if the estimated contract value exceeds € 750,000 (excluding VAT) for the supply goods, services and €5,000,000 for execution (Article 51 of OUG 34/2006).

Referring to the participation notice, it shall be published in the SEAP or, as appropriate, in Official Journal of the European Union and, optionally, in the Official Journal of Romania, Part VI – "Public Procurement". It is mandatory to publish the participation notice in the Official Journal of the European Union when the estimated value of supply and service contracts is equal to or greater than the RON equivalent of €130,000 when the estimated value of supply and service contracts is equal or greater than the RON equivalent of €400,000 (these values are related to the category that fits the contracting authority). It is also mandatory the publication in the Official Journal of the European Union when the estimated value of the works contract to be awarded is equal to or greater than the RON equivalent of €5,000,000 (Art. 55 part (2) of OUG 34/2006).

2. Stages of Cheking the Awarded Documentation

The more the stages and the activities within a public procurement process are better identified and rigorously planned, the efficiency and the ongoing manner and monitoring of the entire process are significantly improved.

To have a picture on the responsibility of the institutions involved in the procurement process, we'll present, schematically (Fig. 1), the steps to be taken in checking the conformity tender documentation, but also of the announcement, of participation invitation with legal regulations within public procurement, as well as the terms imposed by the law to set the limits within which they must be solved.

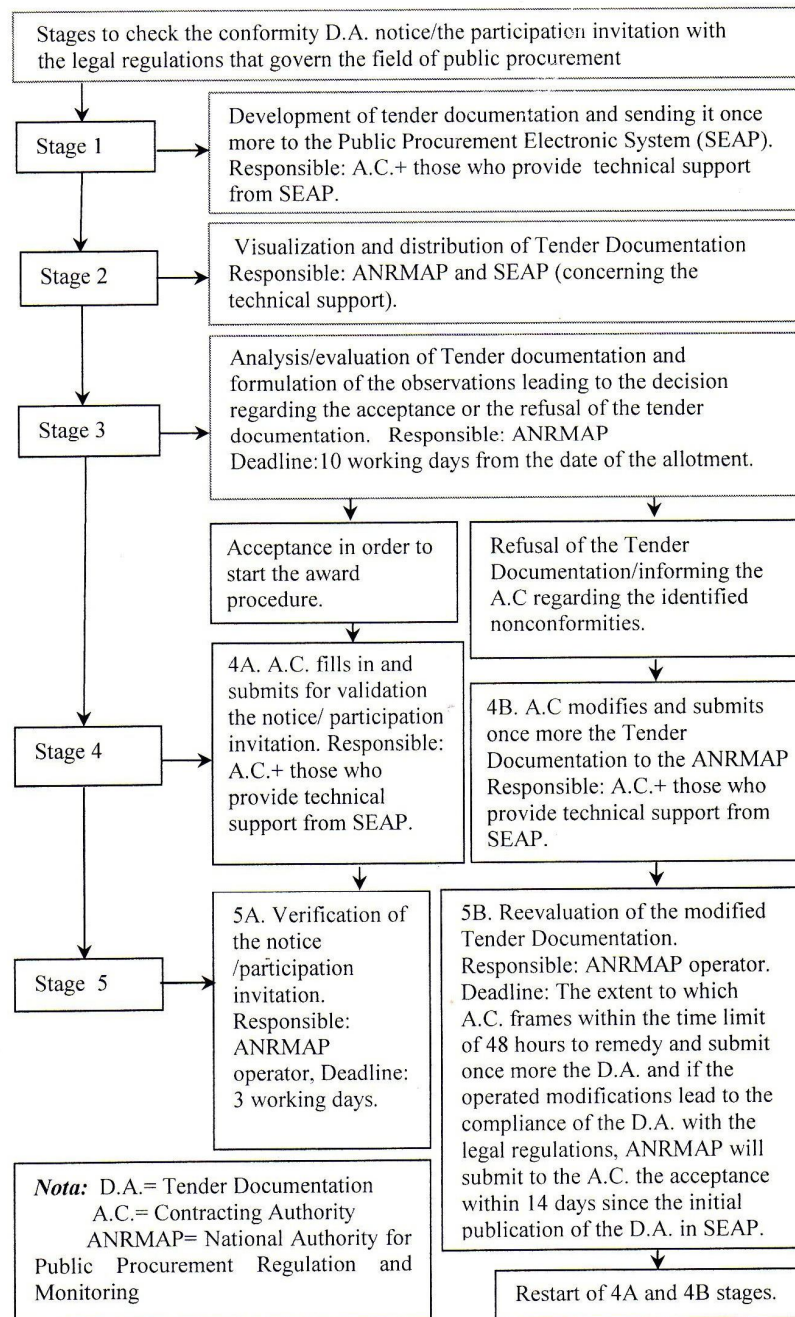


Fig. 1 – Stages to check the conformity D.A./notice/the participation invitation with the legal regulations that govern the field of public procurement.

3. Remedies in Public Procurement Contract

In accordance with the provision of Art.255 parr (1) of the Government Emergency Ordinance 34/2006, any person who has a legitimate interest with a public procurement contract and that suffers, is likely to suffer or has suffered a damage as a consequence of an unlawful act or unlawful decision, has the right to use following remedies: administrative complaint and/or the path of an action in court.

The administrative review form is the complaint. To be admitted, the complaint must meet certain conditions, namely: to be made in writing, make it clear that it is a complaint, to refer to the alleged unlawful act or decision to submit the interests of injured and/or damage that he suffered, is suffering or may suffer, to show how it is expected to be resolved in this case.

The complaint may be brought at any time during the course of the procedure the contracting authority has the right to take action to remedy the complaint (Article 2563 part. (1)). Any such measures must be communicated to the complainant, to other economic operators involved in the award procedure as well as to the National Council for Solving Complaints (NCSC), no later than one working day from the date of adoption.

When the appellant considers that the measures taken are sufficient to remedy the acts alleged to be unlawful, the Council and the Contracting Authority will send a notice of withdrawal of the complaint. In this case, the contracting authority has the obligation to communicate its views to the NCSC.

If the Council and to the Contracting authority receive a complaint for which it wasn't taken into consideration the disclaimer notice, the contracting authority has the right to denounce the contract but only after the decision of the NCSC, but not before the expiration of waiting period. The contract concluded within the suspension period is void.

Where, in the same award procedure, the contracting authority purchase products, services or works divided into lots, the provisions concerning complaints are applicable only on lots the complaint was submitted (art. 2563 (paragraph 5) of G.E.O 34/2006).

To remember is the fact that those who associate together to a complaint have the same rights and responsibilities as one who initiated the complaint. When the complaint was filed only on the premises of the contracting authority, it shall be settled by issuing a reasoned resolution. By means of the reasoned resolution the complaint may be considered, as appropriate: founded, partly founded, unfounded or pointless.

By resolving complaints, the contracting authority may, in the revolution remedies modification, termination, revocation or cancellation of acts and unlawful decisions or activities in connection therewith, in order to comply

with the law. Reasoned resolution is communicated to the complainant and other participants in the proceedings.

4. Solving the Complaints

Jurisdiction to solve the complaint of the victim is given by the option: either the NCSC or the Court.

The NCSC is an independent institution with administrative-jurisdictional activity, which was established following the commitments made by Romania in the accession process to the European Union and aims to resolve complaints formulated in the public procurement procedures before signing contracts. In other words, the NCSC has the right to decide whether an objector of an auction is right or not. The Council is composed of 11 complete. Complaints are handled by a panel of 3 members of the NCSC, one of which acts as president and must complete a law degree.

The complaint shall be made in writing by the party who is injured. Participants in the same award procedure may join the complaint by his own application must contain all the informations required for review. To the complaint will be attached the copy of the contested document if it was issued, and copies of other documents, if available.

The NCSC has the obligation to settle the complaint within 20 working days from receiving the public procurement file from the competent authority. In duly justified cases, the time limit for settling the complaint may be extended only once for another 10 days (art. 276 pat (1) of G.E.O 34/2006).

Submitting of the complaint to the NCSC suspends the award procedure law until the settlement of the complaint. The contract concluded between the suspensions of the award procedure is null and void and in duly justified cases, and at the request of either party, may order reopening the NCSC award.

The complaint against the decision of the NCSC is the competence of the Court of Appeal, Administrative and Fiscal Department, across the seat of the contracting authority. This is judged in emergency and with priority, being solved in the panel of judges by 3 judges.

5. Conclusions

Procurement is now one of the most controversial areas, given the slowness with which resolves disputes by the NCSC.

The NCSC seems to be an institution that has not yet fully proven effective so far, meaning that it requires re-evaluation. This is the conclusion

reached by stakeholders at central, going so far as to propose the abolition of NCSC and the establishment of specialized departments of judges near Bucharest Court. It remains to be seen whether this will happen.

The inefficiency of these institutions would delay the resolving complaints, which in recent years are increasingly more. The fact is that the number of complaints increased dramatically, as if two years ago tenders attracted two to three bidders, currently these engages eight or nine bidders for a work that is tendered. This tough competition turned the complaints into a common practice; few procedures are not being attacked before the NCSC or other competent court.

To have an insight into the number of complaints resolved by this body, we'll make a X-ray of the last two years, as shown in the activity reports of this institution. Thus, the 2011 report shows that the number of complaints resolved this year was 6,000, amounting to 13 billion euros. From the 6,000 decisions of the NCSC only 763 (12.72%) were extended with complaints to the Court of Appeal on whose premises were the headquarters of the contracting authorities. The 2012 report shows that NCSC has pronounced 5,782 (6.9% less than in 2011), of which 750 (12.97%) were attacked with complaint within the competent Court of Appeal that are on the administrative-territorial sector of the contracting authorities. The amount of complaints resolved in 2012 is 13.9 billion euros (NCSC reports 2011 and 2012). However, the revaluation of the NCSC is required so as the settlement of the complaints not to take months, a situation that currently leads to obstruction of large scale common goals such as: building, roads, highways, and so on, so necessary for the development of a country and clearly align with other EU countries, where public procurement problems do not face so many obstacles, relevant legislation is very clear, not leaving room for interpretation.

REFERENCES

- Herea V., *Public Acquisition Contract. Awarding Procedure*. Bul. Inst. Politehnic, Iași, **LIX (LXIII)**, 2, s. Constr. Archit., 132-137 (2013).
- Herea V., *Legea în construcții*. Edit. Soc. Acad. "Matei - Teiu Botez", Iași, 2010.
- * * *Atribuirea contractelor de achiziție publică, a contractelor de concesiune de lucrări publice și a contractelor de concesiune de servicii*. OUG 34/2006.
 - * * *Modificarea și completarea OUG nr.34/2006*. OUG 77/2012.
 - * * *Aprobarea normelor de aplicare a prevederilor referitoare la atribuirea contractelor de achiziție publică din OUG nr.34/2006, cu modificările și completările ulterioare*. H.G. 925/2006.
 - * * *Raportul de activitate al Consiliului Național de Soluționare a Contestațiilor pe anul 2011*.
 - * * *Raportul de activitate al Consiliului Național de Soluționare a Contestațiilor pe anul 2012*.
 - * * www.cnsc.ro

RĂSPUNDEREA FACTORILOR IMPLICAȚI ÎN VERIFICAREA
DOCUMENTAȚIEI DE ATRIBUIRE ȘI CĂI DE ATAC ÎN
PROCESUL DE ACHIZIȚII PUBLICE

(Rezumat)

Ca toate activitățile reglementate de lege și procesul de achiziții publice impune existența unor mecanisme de control adecvat în toate etapele desfășurării lui. Controlul este efectuat de către organismele abilitate de lege și în a căror sferă de activitate revine responsabilitatea acestora.

Se prezintă, schematic, etapele procesului de achiziție publică precum și succesiunea activităților în cadrul acestor etape prevăzute de actul normativ în vigoare care reglementează domeniul achizițiilor publice, și anume, O.U.G.nr.34/2006, modificată și completată prin OUG nr.77/2012.

De asemenea, vom investiga căile de atac, prevăzute de reglementările legale în vigoare, ce vor putea fi utilizate de către cei ce au un interes legitim în legătură cu un contract de achiziție publică. Totodată, vom analiza eficiența funcționării unor organisme cu atribuții de soluționare a contestațiilor în procesul de achiziții publice, ținând cont de termenele dar și de modul în care au fost soluționate aceste contestații, în ultimii doi ani.

