

BULETINUL INSTITUTULUI POLITEHNIC DIN IAȘI
Publicat de
Universitatea Tehnică „Gheorghe Asachi” din Iași
Volumul 62 (66), Numărul 4, 2016
Secția
CONSTRUCȚII. ARHITECTURĂ

NEW LAWS IN ROMANIAN PUBLIC PROCUREMENT THE CONTRACTING STRATEGY

BY

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Received: December 06, 2016

Accepted for publication: December 27, 2016

Abstract. The procedures for awarding public procurement contracts represents the stages to be completed by the contracting authority and the candidates/bidders for the parties' agreement on employment in the public procurement contract to be considered valid. The tender procedures, according to the Romanian legislation are: open procedure, restricted procedure, competitive negotiation, competitive dialogue, the innovation partnership, negotiation without prior publication, design contest, awarding procedure applicable to social services and other specific services or, where appropriate simplified procedure. During 2016, public procurement has undergone significant legislative changes such incidents most important legislative provisions were: until 05.25.2016 the valuable law was the Emergency Ordinance no. 34/2006 on the award of public procurement contracts and after 05.26.2016 came into force Law no. 98/2016 on Public Procurement.

Keywords: bid tendering; contract; explanatory notes; contracting authority; change.

1. Introduction

In general, the term public procurement is used to describe the getting works, goods and services by public authorities, national, regional or local. The

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public procurement rules relate to procedures for awarding public procurement of goods, works and services in the European Union. A generic definition of public procurement is the acquisition, permanent or temporary, by a legal person defined as contracting authority of goods, works or services by awarding a public contract. The public sector, utilities and other entities defined as 'contracting authorities' need to obtain goods, services and works for a wide variety of activities in which they are engaged. Most awarded contracts must be made public both nationally and at European level, in full compliance with all the principles of public procurement. The rules on which the public contracts are awarded are intended to ensure freedom of movement of goods and services in the European Union and to ensure that procedures for awarding public contracts comply with the rules on free competition.

2. The Public Procurement Process

The public procurement process before the new law, Law no 98/2016, came into force was defined as follows in Fig. 1.

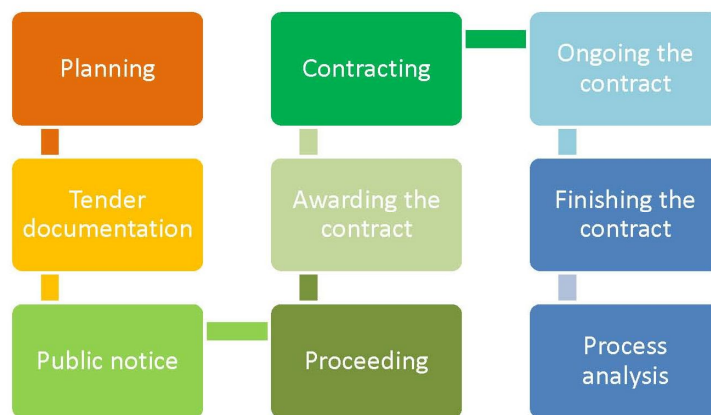


Fig. 1 – Public procurement process until 05/25/2016.

In the stage of development of tender documentation the explanatory notes are the supporting and essential documents of the procurement procedure and prior to actual documentation and which were necessarily the procurement file.

According to the old legislation there were drawn up the following:

- a) the explanatory note on the choice of the award procedure;
- b) the explanatory note on estimating the value;
- d) the explanatory note concerning the minimum qualification criterion;
- e) the explanatory note on the award criterion and the evaluation

factors.

The specialized internal compartment was required to develop the explanatory and supporting notes imposed by the specific procurement, notes that were approved by the Legal Department and also approved by the head of the contracting authority.

For example when the contracting authority required minimum qualification requirements regarding similar experience, it had to be able to motivate these requirements and the need to apply them in relation to the nature and extent of the contract to be awarded, and developed in this respect, the explanatory note on the minimum qualification criterion that was being attached to the procurement file.

Through the explanatory note there were submitted arguments to an operator who does not meet the level of complexity associated requirement by the contracting authority or unable to reach the number of contracts won would not have the capabilities needed to carry out the contract to be awarded.

Similarly, when setting criteria for awarding "most advantageous tender in economic terms" the contracting authority should have been able to motivate how it was determined the evaluation factors, elaborating in this the explanatory note on the award criterion and the evaluation factors, that was being attached to the procurement file.

In case of the note justifying the choice of the award procedure, this was elaborated if that would be applied to the procedure of the "call for proposals" (the procedure of "call for proposals" was not regarded as the "rule" in procurement), and contained only the explanation of the result that assessed the estimated value of public procurement contract that was to be awarded.

From an operational perspective, in the public procurement process, developing tender documentation and supporting documents would be run as follows in Fig. 2.

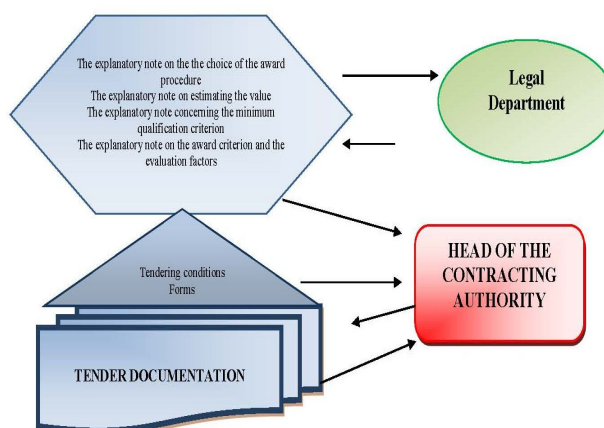


Fig. 2 – Tender documentation.

As the law changed, and came into force Law no 98/2016 the public procurement process was defined as follows in Fig. 3.

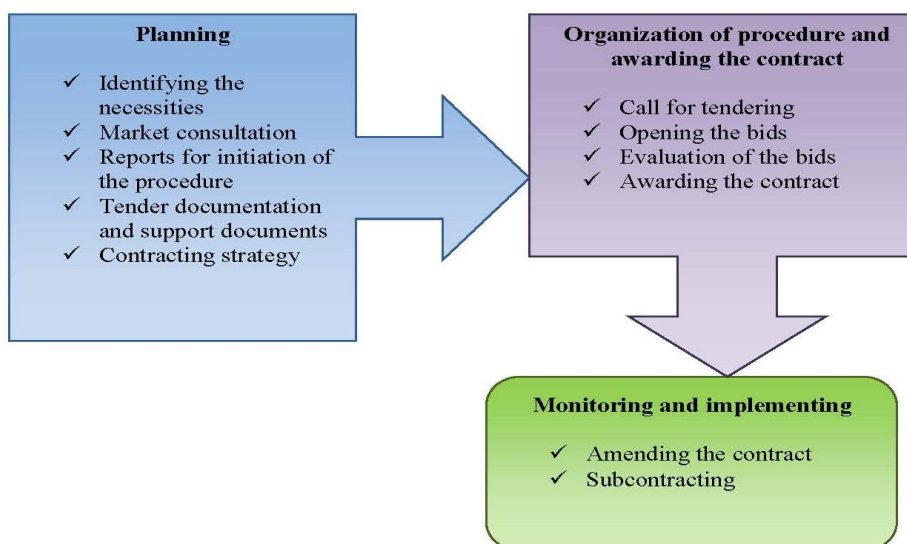


Fig. 3 – Public procurement process after 05/25/2016.

3. The Contracting Strategy and its Benefits

The contracting strategy is a document that is part of the planning / preparation of each public procurement process, through which the contracting authority shall document the decisions they take before the actual organization of each award procedures.

The contracting strategy is drawn up, with the tender documentation for each purchase made through the application of an award procedure and it is approved by the head of authority.

The contracting strategy is developed by the internal specialized compartment in public procurement and covers all needs transmitted by other departments of the contracting authority, based on the requirement reports that contain the products, services and works needed, their estimated value and other information. The contracting strategy should contain at least the following information.

When completing the contracting strategy, the contracting authority has to refer to the constraints and complexity associated to the procurement, in relation to the technicalities, financial and/or contractual aspect as well as to know to implement a future contract. The content of the contracting strategy is represented in Fig. 4.

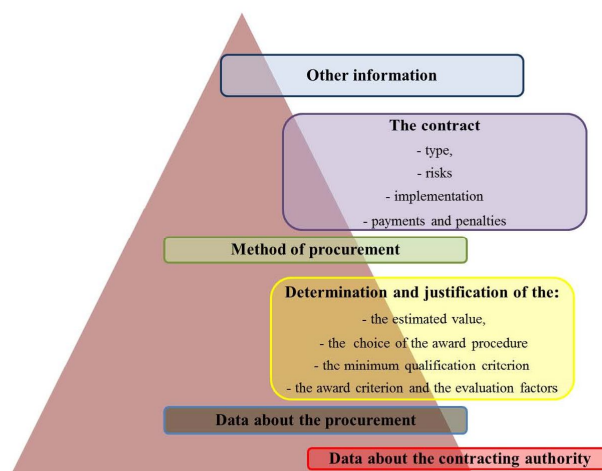


Fig. 4 – The content of the contracting strategy.

When completing the contracting strategy, the contracting authority has to refer to the constraints and complexity associated to the procurement, in relation to the technicalities, financial and/or contractual aspect as well as to know to implement a future contract.

From an operational perspective, in the public procurement process, developing tender documentation and supporting documents would be run as follows in Fig. 5.

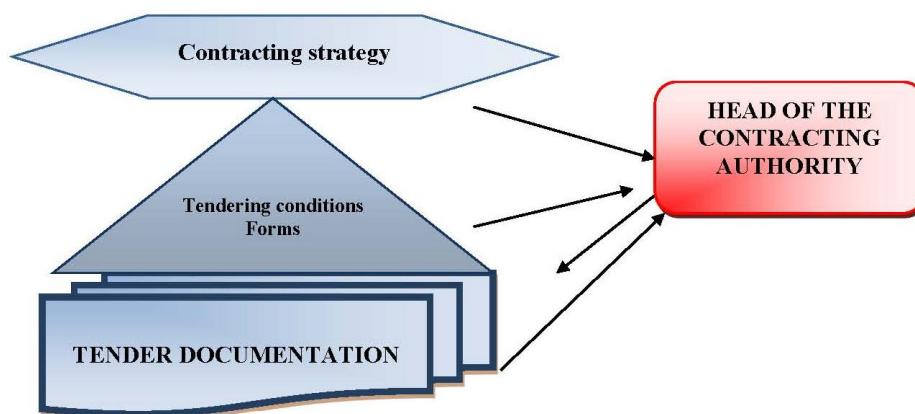


Fig. 5 – Tender documentation.

From the statistical point of view, there is a noticeable reduction in the number of documents prepared, and an increase in quality to justify the award procedure by including complete information on contracting strategy.

Thus, if a contracting authority runs until the effective date of the new law (in May 2016) a total of 50 open tenders and 45 calls for proposals and subsequent entry into force of the new law (May 2016) the same number of open tenders and simplified procedures, the graphs will look as follows in Figs. 6 and 7.

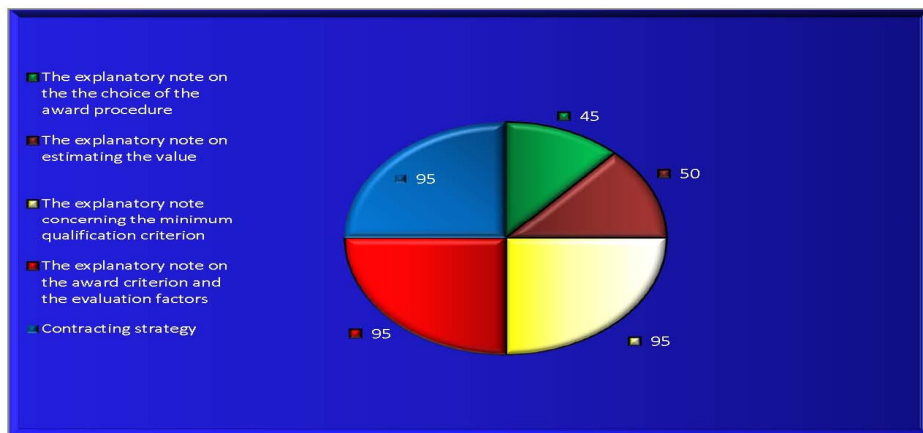


Fig. 6 – The ratio between explanatory notes and contracting strategies.

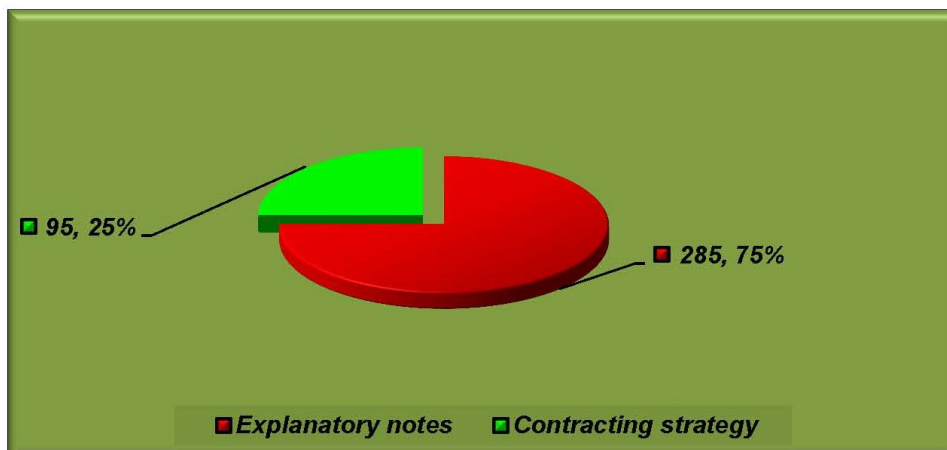


Fig. 7 – The overall ratio between explanatory notes and contracting strategies.

4. Conclusions

The contracting strategy is an essential document in the procurement process which justifies all the decisions made by the contracting authority regarding the awarding of a contract. It reunites all the information contained by the explanatory notes and adds new ones so that the tendering procedure to be better justified.

Through the contracting strategy the number of supporting documents of the tendering documentation has been reduced but also it has increased the information about the procedure.

Thus, the new law in Romanian public procurement has helped the contracting authorities in decreasing the number of elaborated documents as well as increasing the quality of information.

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NOUTĂȚI LEGISLATIVE ÎN ACHIZIȚIILE PUBLICE DIN ROMÂNIA

Strategia de contractare

(Rezumat)

Procedurile de achiziție publică în legislația românească reprezintă pașii care trebuie urmați de autoritățile contractante și de ofertanți în vederea încheierii unui

contract de achiziție publică valid. Procedurile de achiziție, conform legislației românești sunt: licitația deschisă, licitația restrânsă, negocierea competitivă, dialogul competitiv, parteneriatul pentru inovare, negociere fără publicare, concurs de soluții, procedura de atribuire aplicabilă în cazul serviciilor sociale și al altor servicii specifice sau dacă este cazul, procedura simplificată. Pe parcursul anului 2016, procesul de achiziție publică a suferit schimbări esențiale prin intrarea în vigoare de la data de 26.05.2016 a Legii 98/2016 și abrogarea OUG nr. 34/2006. În acest context, strategia de contractare devine o piesă esențială a procesului de achiziție publică prin care se documentează deciziile din etapa de planificare/pregătire a achiziției.