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Comments on the New Public Procurement Law Package

These comments on the draft public procurement laws published for consultation on the site of the Ministry of Public Finance represent the consolidated positions of the participants to the conference organized by Expert Forum and Freedom House Romania on August 24th and 25th, 2015. The event was financially supported by the UK Embassy. It belongs to a bigger project financed by the European Commission- - `Law, Economics, Competition and Administration- Building a multidisciplinary approach to fight fraud in public procurement` . The high number of representatives of public institutions and the business environment encouraged substantial debates on several key aspects of the draft laws. Without holding a comprehensive analysis of all the matters that may give cause for comment, we hereby report the main observations offered by the participants. Expert Forum and Freedom House will remain interested in the legislative process of these legal acts and in facilitating their enforcement after the bills pass.

1. Art. 3, para (1), point 2 let. a), b), c) the **definition of bodies governed by public law** has to be clarified, as institutions submitted to the procurement law.

The direct takeover from the Directive of the definition of bodies governed by public law causes serious interpretation problems, thus one may understand that for autonomous regimes for instance, it is not mandatory to enforce the public procurement law. It is only after having read the recital and knowing the EUCJ case law on the understanding of bodies governed by public law that one can understand the situation. This definition, as it stands now, causes problems and gives rise to criminal liability. In order to give rise to criminal liability, the norm has to be clear, the persons that may be subject to the law have to be clear whether the law applies to them or not, without having any European case law background or having read the recital of the Directive.

The wording of the definition of bodies governed by public law has to be revised, so that it may clearly read to whom this public procurement law applies.

2. **The most economically advantageous offer**

Under art 181 the new law sets that `the contracting authority awards the public contract/ the framework-agreement to the bidder who submitted the most economically advantageous offer`, the criterion `the lowest price` being only secondary to it.

This is a commendable initiative, as in the past many contracts were awarded at very low prices, the final results being many times catastrophic- sub-standard works, non-payment of taxes, nonpayment of subcontractors.

In order to successfully implement this award criterion, but also in order to ensure that contracting authorities would not misuse the criterion `the most economically advantageous offer`, clear legal provisions have to be enforced, that should not allow using assessment factors to confer advantage on a certain tenderer. This happened in the past and the NAC (National Appeals Council) as well as the first instance courts could not remedy to these problems for want of clear legal regulations. Here is a list of criteria leading to favoring certain bidders to the detriment of others:

- ☒ the longest warranty period;
- ☒ the shortest period of execution;
- ☒ the largest number of risk factors identified within the project .

If the award criterion `the most economically advantageous offer` is improperly applied by shifting the focus from the lowest price to other technical assessment factors, large scale frauds and much damage in the public procurement award procedure may come from nominating this time the winner with the highest price (methods will be found to prove the technical factor prevails over price).

Proposals:

- Create the framework and provide technical assistance to civil servants who will implement this new criterion as of January 1.
 - guidelines, trainings on legislation organized at national level
 - facilitate access to financing in order to develop such instruments through the Public procurement strategy
 - standardize the award documents on sectors, especially those where problems were identified

3. Intuition of the supporting third party

Debates have shown that there is an institution that is abused in Romania- there is a market of the supporting third parties, giving rise to a situation in which one third party supported all the tenderers in a procurement.

It is stringent to detail the legal framework so that the institution of the supporting third party may strictly serve the objectives it has been created for and accepted by the European procurement law.

First of all, there are gaps between the terms used: the directive reads -rely on the capacity of other entities/ use the resources of other entities and `professional experience`, whilst the draft law uses the notions of `supporting third party` and `similar experience`.

We consider that the mechanism created by the previous legislation has led to abuses. For instance, a tenderer who ran one or several public procurement contracts, paid taxes, has specialized staff for the execution of the contract, for whom all the related taxes on revenues are paid, enters into competition with an inexperienced bidder, who has a minimum number of employees (director, secretary, etc.) who buys a reference and who submits an offer at a dumping price in order to win the public procurement contract at `the lowest price` - the most often used criterion in the public procurements in Romania.

On the other hand, encouraging such practices of selling references will seriously hinder the contracting authorities' efforts to use a larger share of the European funds available to implement various projects, as any inexperienced `apartment` company can be `technically and financially supported` and can win a public procurement procedure for complex works, which it would not be able to pursue to a successful conclusion.

It is therefore obvious that the absorption rate of the funds will be impaired and that the projects will not be implemented according to the commitments in the financing contracts.

Benefitting from the very permissive language of the act, `technical and financial support` has currently become a very profitable business for some `smart guys` - ensuring a safe revenue as compared to the bidder performing works and who may even show a loss by the end of the contract period.

From the data obtained from the economic environment, the supporting third party claims around 1,000 euro upon handing over of referrals (if in a procedure it supports 5 bidders, its immediate gain will be of 5,000 euro) to which adds around 3% of the total value of the work adjudicated by the supported business operator, with payment in installments, each one being guaranteed with a savings bank (CEC) sheet - (all CEC sheets are issued in favor of the supporting party immediately after the signature of the contract with the Contracting Authority - at the signature of an acceptance protocol of the CEC sheets).

The new Directive 24/2014 reads clearly that :

„With regard to criteria relating to economic and financial standing as set out pursuant to Article 58(3), and to criteria relating to technical and professional ability as set out pursuant to Article 58(4), an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. With regard to criteria relating to the educational and professional qualifications as set out in point (f) of Annex XII Part II, or to the relevant professional experience, economic

operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.”

Thus, as stated in the EUCJ judgment in the case C-176/98 *Holst Italia Spa – Comune Cagliari* – in order for an ‘inexperienced’ business operator to participate to the award procedure of a procurement contract, it has to prove the Contracting Authority that it has the resources needed to perform the contract.

However, when a mere sheet of paper is provided with only the mention of a similar work performed by the ‘supporting third party’- that is the referral, we ask ourselves how the business operator can prove that it ‘actually has available the resources of those companies which are necessary for carrying out the works’ (quote from *Case Ballast Nedam Groep I*) – the professional experience gained through performing and finalizing a similar contract.

On the other hand, if we compared the Directive to the new public procurement provisions on the third supporting party institution, we notice that the new law has largely taken over wordings of the EU Directive 24/2014; ‘largely’, because ‘professional experience’ regulated under art. 63 para. (1), is transcribed into the new act as ‘similar experience’- art. 176 para. (2) , thus enlarging its scope.

After having read through the directive, we think that the main reason of having introduced the notion of technical support is that it enables to prove to the contracting authority that the bidder will perform some parts that require specific know-how relying on a supporting third party, based on its resources and capacities, and not by using instead a ‘statement/commitment’ of a third party, which is a purely formal document, deprived of any legal force or effect.

Under the new law, para (4) of art. 176 reads that : *„The Methodological enforcement standards of the current law standard provisions or requirements can be set on the conditions of meeting the criteria related to the economic and financial situation and to the technical and professional capacity by support granted by a third party.*

We consider that by introducing this paragraph, of course related to the ‘similar experience’ provision, a door will be left open to be explored by a future government decision, so that the situation related to the supporting third party may be at least identical to the one regulated by the Government Emergency Ordinance 34/2006 and the Government Ordinance 925/2006. All the previously mentioned problems will not be eventually remedied by the new law, on the contrary, they will persist and perhaps get worse.



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The new law does not mention by virtue of what title or qualification the supporting third party will have to perform part of the works (subcontractor?), just as it does not mention the sum, as long as according to art. 176 para (2) it can make available all the `similar experience` necessary to perform the entire contract, an experience lacking to the economic operator, and which is absolutely essential to the contract performance.

Another shortcoming of the new law is that the supporting third party can be replaced (art. 177 para. 2) : *If the third party does not fulfill the relevant criteria on capacity or eligibility as set under Art. 161 - Art. 163, the contracting authority can ask the business operator to replace its supporting third party .*

This provision favors the business operator inexperienced in performing the contract which resorts to a supporting third party, to the detriment of the business operator who directly and without intermediaries all qualification criteria (breach of the principles of equal treatment and free competition between business operators). The new law opens the door to keeping replacing the supporting third parties by other third parties, until the inexperienced business operator gets the referrals needed to be awarded the contract.

Given the defects that the institution of the third supporting party has produced so far, it is our view that technical and financial support should be eliminated from the new public procurement act (in order to put more emphasis on the business operators association). In case total elimination is not sought for, it should be strictly used only to the purpose foreseen by this concept's originators :

- a) to develop subsidiaries abroad (transfer of referrals within the same group of companies);
- b) to support SME development ;
- c) to use professional experience of supporting entity for spot, specialized works within complex contracts and not for referrals trade.

In our view, this technical and financial support, as implemented by Government Emergency Ordinance 34/2006 and taken over by the new public procurement draft law, under public debate, does not grant free and real competition between the business operators participating to public tenders, actually encouraging unlawful competition.

4. **Subcontractors having under 5% of the contract do not have to be declared** – the activity performed by the respective subcontractor should be under 5% of the contract value and should not cover essential activities (art. 55)

According to the bill, it is not mandatory to declare the subcontractors performing activities amounting less than 5% of the estimated contract value, an exception that does not exist in the Directive.



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The representatives of the Competition Council have identified in this provision a possible form of compensation between companies. One of the bidders becomes undeclared subcontractor in the case of an anti-competitive prior agreement as a compensation for the bidder participating as `dead hand` to the public procurement process.

Moreover, although the 5% threshold is an objective criterion, the evaluation of the subcontractor's activity as essential or not, probably by the contracting authority, may lead to inconsistent practices under presumption of `legality`.

The representative of the National Integrity Agency shows that not declaring certain subcontractors makes it impossible for the NIA- the PREVENT programme- to prevent certain conflicts of interest, the more so as in the big projects, 5% mean a large sum and thus presents a high risk of corruption.

On the other hand, art. 215 of the draft law provides that the contracting authority shall request the subcontractors' details `after the award of the contract, but the latest at the beginning of its performance`. We consider that both from the perspective of effective competition, and of preventing conflicts of interest, this obligation has to exist already when submitting the bid.

5. **Similar experience of subcontractor**

The current practice of many contracting authorities has shown that if a general contractor has used subcontractors in a contract, the parts of work performed by them are `erased` from the total experience acquired by the contractor within the respective project, and will be transferred to subcontractors.

European legislation does not impose to a business operator to perform a contract directly with its own resource, but it requires to have the capacity to make all the necessary arrangements in view of performing the respective contract and to provide the appropriate guarantees (case C339/98) – i.e. ensure contract management, materials and equipment supply, coordinate works, manage contractual relations with the Contracting Authority.

As subcontracting is not banned by the Romanian law, we do not understand why general contractors are practically sanctioned for having used subcontractors. The practice of other countries (tenders organized by the EBRD, the World Bank, KFW, ADB, EU with IPA funds etc.) has shown that in all cases experience gained within a contract fully belongs to the general contractor, irrespective of the number of subcontractors used during the performance of works (with issuance of similar experience certificates to its subcontractors- to the extent they participated to the performance of works subject to the main contract).

On the other hand, various contracting authorities, either from lack of awareness or due to lack of interest, do not require to the general contractor to declare subcontractors used (except for those listed upon contract signature), to arrive at a situation in which not all general contractors will benefit from the same equal treatment when evaluating similar experience.

These aspects will require consistent regulation in the new legislation, to avoid from the onset infringement corrections/procedures that trigger losses of important sums of money for Romania. Lacking a clear regulation, the general contractors will try to find various tricks to remedy the situation, some of them being :

- a. Lawful-> no longer using subcontractors (in which case SMEs will disappear from the market)
- b. Unlawful -> nu longer declaring the subcontractors (high risks of nonpayment for them/ subcontractors will no longer be provided with any referrals) .

Our proposal is to introduce clear provisions `that cannot be interpreted` expressing the fact that the entire experience gained in performing a contract belongs to the business operator to whom the contract was awarded, irrespective of how the works were performed (with or without subcontractors). The contracting authority can confirm the fact that it used subcontractors and depending on the circumstances, it can list them and can detail the parts of work they performed. Subcontractors will benefit in turn from referrals for works actually performed, without adversely affecting the general contractor's referral who finalized the contracted works, to the satisfaction of the contracting authority.

6. **Publication in view of consultation of the terms of reference**

This new provision is commendable in our view, as it allows the contracting authority to hire an advisor in view of drafting the terms. In the case of artificial criteria, specialists may censor when advising on the documents.

However, just as shown by the NIA representative during the debate, the problem is that in Romania many public authorities do not have websites (at all, or not functioning), which will impede on the enforcement of this provision. We therefore suggest that secondary legislation to clearly stipulate the way this obligation is to be implemented and the sanctions to be applied if not.

Moreover, the situation should be taken into account when the advisor used to develop the terms of reference submits a bid to the tender, which is allowed by the new draft law. In this case we will have to decide whether we are in the situation of a conflict of interests and if so, how to avoid such a situation.

7. **Distribution on batches** – art. 139 para. (4)



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Although this is a worthy provision, we consider that there are some problematic aspects related to it. The contracting authority organizes a tender per batches and from the onset states that one can submit bids on all batches, but that one can be awarded a maximum of 2. How will the contracting authority select the winner of the contract in the case of the other batches? Just as noted by the representative of the Competition Council, the provision favors possible agreements among competitors and ineffective use of contracting authority resource. On top of it a comprehensive effort will be required, to raise the awareness of those dealing with public procurement, as the new rule is substantially different from the current one.

8. Tender evaluation

The new draft law takes over a series of rights of the contracting authority during the tender evaluation period from the old act. Thus, the proponent of this bill leaves to the Contracting authority to decide whether to request clarifications from the bidders or not (i.e. art. 204: **The contracting authority has the right** to request clarifications from the bidders/tenderers within a certain deadline , and as the case may be, to complete the documents submitted within the bids or requests for participation, by observing the principles of equal treatment and transparency), instead of clearly and unequivocally which are the obligations regarding the evaluation of the bids. Out of the new law you get very few practical things actually related to how to evaluate tenders, opening the door this time again to completing the legal provisions by methodological norms, which has been many times criticized in the past.

We can expect that the new act will regulate the following area: how many times and at what point the Contracting Authority can reevaluate a tender. There have been many cases when although the National Appeals Council or the Courts of appeal competent to act upon and resolve the complaints against the National Appeals Body rulings decided to reevaluate only one tender, the Contracting Authority decided that apart from reevaluating the respective tender, to reevaluate the complainant's tender, for not having focused enough on the tender ranked second during the first evaluation. This ex officio reevaluation only aims at punishing the tenderer who challenged the decision of the Contracting authority to award the contract to another tenderer. As there is no clear and precise regulation on the limits of reassessing tenders, it is up to the Contracting authority's discretion to decide when and how to reevaluate other tenders than those specified in the NAC or Courts of appeal rulings.

9. **Related to the tenders evaluation deadlines, both the market and the representatives of the civic society feel the need to have clear deadlines set by law.** The evaluation report

should be published in real time on the site of the contracting authority for each public procurement contract, in order to render the procurement procedures more transparent.

10. The inspection body must comply with NAPP instructions/opinions

In the current legislation we identified a problem in the way institutions involved in the public procurement process cooperate; they would rather sanction the business operators or the contracting authorities than look for and provide solutions. In this view, the opinions of the NARMPP (National Authority Regulating and Monitoring Public Procurement) are only advisory for the inspection bodies.

We consider that the regulatory and the control bodies should be aware that they have to give answers and to support, and not to provide non-responses. And when they decide, to do that based on what was proposed.

We therefore welcome the initiative of the NAPP (National Agency for Public Procurement) representatives during the debates around the cooperation protocol to be concluded by 7 public institutions involved in public procurement in Romania in order to organize quarterly consultations and to ensure consistent practice throughout the public procurement management and control.

However, we think it should become mandatory for the inspection bodies to take into account the NAPP opinions.

We would also like to draw your attention on the fact that after setting a new evaluation criterion of the tenders (‘the most economically advantageous offer’), alternative criteria the contracting authority will choose will be checked as opportunities by the control bodies, which may produce quite different solutions and cause some anxiety among the civil servants of the administrative staff. We once again underline the need to develop technical guides and substantial trainings.

The control bodies should check the legality and not the appropriateness of public procurements.

11. The annulment of the procedure

The new draft law, just like the old one, sets out the possibility that the Authority might annul the procedure. From prior experience, the Contracting authority used to abuse the possibility to annul the procedure on the ground that ‘serious breaches of the legal provisions impair the award process’. We note that the same provision was taken over into the new act: the Contracting authority must annul the award process of the public procurement contract/framework-agreement in the following cases: ... *serious breaches of the legal provisions impairing the award process or if it is impossible to conclude the contract* (art. 207 para. 1 point. c).

We think this provision has to be clarified by including the specific conditions in which the contracting authority can do this. We will otherwise keep going on with the practice of annulling the public procurements which have not been won by the preferred tenderer.

12. Situations of exclusion of business operators from the award process

Another new provision which we think cannot be applied and which could give rise to doubt is the **possibility to replace the contractor during the performance of the contract**: *`when the contracting party to whom the contracting authority initially awarded the public procurement contract/ framework agreement is replaced by another contracting party, in order to avoid the termination of the contract and further to a revision clause or of an option set by the contracting authority according to para . (2) – art. 217 para.11`*. We consider that this provision needs to be clarified and set the conditions of such a replacement.

Art. 163 para. (1) point. d) provides that the contracting authority has the right to exclude certain operators from the public procurement process where there are plausible indications to decide that the business operator concluded agreements with other business operators aiming at distorting competition. It gives **the contracting authority the possibility to exclude a business operator from the award process** where *`there are plausible indications`* of having *`concluded agreements`* with other business operators aiming at disturbing competition`.

The participants underlined the need of **detailing more in depth the legal framework in order to avoid possible abuses** by the contracting authorities. More specifically, the Competition Council highlighted that it is difficult to obtain and analyze the ***`strong indications`*** **(with which the CC already works)** to trigger the presumption of anticompetitive agreements leading to excluding business operators.

The Competition Council has to involve in supporting the contracting authorities when assessing the *strong indications* on anticompetitive agreements either by issuing an opinion or by publishing relevant guidelines.

13. The tender dossier – art. 212– the tender dossier will be kept 3 years and not 5.

From the point of view of the Competition Council this provision is not favorable as the time barred period applicable in case of breach of competition law is 5 years. Therefore, if the contracting authority keeps the dossier only 3 years, the Competition Council will no longer be able to investigate a tender because the contracting authority no longer has the dossier.

14. Appeals:

A. National Appeals Council (NAC)

Regarding the novelties related to the challenge before the NAC, we have noted the obligation to **notify** the contracting authority. However the law does not clarify how many times you can notify it. We think such a limitation should be introduced because otherwise this may give rise

to an abusive practice of protracting resolution, which is serious enough, as contract conclusion is legally suspended the moment a challenge is submitted to the NAC.

B. In court

Firstly, we appreciate the detailing of the administrative litigation courts competence.

However, as it has resulted from the debates, there is doubt about how effective provisions on **`specialized formations of the court`** are. We can only speak of such specialized formations in the Court of Appeal of Bucharest, not in courts and tribunals. Anyway, only few courts have administrative litigation sections, while the smaller courts of appeal often have two administrative litigation formations at the most. It will therefore be very difficult to create specialized formations.

Regarding the **suspension of the award process during the court proceedings** the 2% is, in our view, too small a deposit for the suspension of the award process. The representative of the HCJC (High Court of Justice and Cassation) noted that in the tax disputes the amount is higher, up to 10% of the challenged sum, and highlighted that 2% is too low comparing to the decision taken- to suspend the award process.

It has also to be clearly set whether in challenges against the NAC decisions **the regularization procedure from the Civil Procedure Code** shall apply or not. If in direct actions and damages actions it is specified that the regularization procedure from the Civil Procedure Code shall not be applied, there is no such provision in the case of complaints against the NAC. For want of a specific provision art. 200 Civ.proc.c. should apply, but this would make the process of regulating the writs of summons of the Civil procedure code too cumbersome. If the procedure from the Civil procedure code is not explicitly waived, as foreseen in case of direct and damages action, there can be a shorter deadline, as provided for the claim submitted to the NAC. For want of a specific provision, this accelerated procedure before the Council cannot be assimilated. Therefore the procedure of the Civil procedure code has to be applied regarding regulating the writ of summons, which could lead to an extension settling the litigation.

Regarding the deferment of issuing and drafting the judgment, the law should provide for a specific deadline, just as it is in the case of the other judgments in the matter taken by the courts, in order to correlate these provisions. If there is no express provision the Civil procedure code applies, with subsequent longer deadlines than those stipulated in the draft law for the other situations.

We also consider a **`less happier`** wording art. 49, last paragraph of the Law on remedies, regarding the **law on public judicial assistance**, a better reference being made to the Law regarding the judicial stamp duties, the Government Emergency Ordinance , OUG 80/2013, art.

43 on the conditions for exemptions and installments for the payment of the judicial stamp duties.

15. The obligation to provide any tenderer, upon request, the report of the award procedure as well as the information contained in the technical and/or financial proposals of the tenderers that have not been declared as confidential, classified or protected by a copyright (art. 10 para. 5)

We consider this too much freedom which will be exercised in an abusive manner by both sides. On the one hand, the non-winning tenderers will require to have access to this report to get information about the other tenders and will 'steal' the information to their benefit. On the other hand, the winners will want to declare as much information as possible as confidential, to the detriment of transparency of the entire process.

Our proposal is to find a way to grant different levels of accessibility through the public procurement electronic system SEAP.

16. Applying complementary sanctions suspending the right to organize award procedures - art. 221 para. (1) gives the possibility to give the contracting authority a 'complementary sanction consisting of suspending the right to organize award procedure between 2-5 years'.

Such a sanction may lead to totally blocking the activity of the contracting authority. Power supply contracts for instance, are concluded based on a procedure regulated by the procurement law. Suspending the right to organize award procedures and actually banning the signature of power supply contract means that the contracting authorities are condemned to dissolution.

17. Specific labels- art. 154

Representatives of the Competition Council noted a possible limitation of the competition by favoring some of the competitors. Although the Directive contains this provision, we consider that its transposition has not taken over all the specific conditions of granting these labels.

18. Increase of transparency of the entire public procurement procedure

Just as noted by the representative of the Anticorruption authority (DNA), the entire process should become more transparent, which includes the phase before the award, i.e. the way contracting authority decides to finance or not, as well as the implementation of the contract.

The lawmaker has to take into account creating clearer provisions in view of a more transparent decision taking to finance a procurement or a local authority. This will cut clienteles and preferential treatment, and will oblige the contracting authorities to justify the opportunity of the procurement.

A more detailed description of the relationship between contractors and contracting authorities during the implementation of the contract should be provided in order to diminish the likelihood of abuse, preferential payments and to prevent corruption.



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19. We are worried by the lack- so far- of **draft laws regarding concessions and special acquisitions**. These draft laws which now will benefit from a larger scope (the law regarding concessions will comprise PPPs) will need public consultations.

To conclude, we consider that draft laws submitted to consultation can be improved in order to meet the objectives of the regulation: improve the contracting authorities activity flow, unblocking mechanisms of using national and European public funds.