

THEORETICAL AND PRACTICAL CONSIDERATIONS REGARDING THE CONTESTING PROCEDURE IN THE FIELD OF PUBLIC PROCUREMENT

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Abstract: *In the case of the tenderers who took part in the procedure for awarding by public procurement the framework agreement for service contracts whose tender has been declared incomplete or losing, there is the possibility provided by the law to challenge the outcome of the procedure, according to the provisions of the Law no. 101/2016 on remedies and remedies in respect of the award of public procurement contracts, sectoral contracts and concession contracts for works and concessions of services, as well as for the organization and functioning of the National Council for Solving Complaints.*

Thus, the tenderers who consider themselves wronged in a law or in a legitimate interest by an act of a contracting authority or by failure to resolve an application within the legal time limit, may request the annulment of the act by obliging the contracting authority to issue an act or to adopt remedial measures, recognition of the alleged right or legitimate interest, using a administrative-judicial or a judicial way, with the purpose of declaring the offer submitted or the contestant to be winner.

The competent authority at first instance in resolving these complaints is the National Council for Solving Complaints.

Against the rulings issued by the National Council for Solving Complaints, a complaint may be filed, the resolution of which is within the competence of the Administrative and Fiscal Appeal Section of the Court of Appeal in whose territorial jurisdiction the headquarters of the contracting authority is located, according to the provisions of art. 32 par. 1 of the Law no. 101/2016, the decision of the Court of Appeal being final.

Keywords: *Offer, Award Procedure, Contestation, Right, Legitimate Interest, National Council for Solving Complaints.*

1. PRESENTING THE CASES

In the first presented case, the appellant S.C. CVT SRL filed an appeal against the act (decision) by which, following the re-evaluation of the offers by the evaluation commission of the contracting authority, the Academy of Economic Studies of Bucharest, it was ordered to restart the final phase of electronic auction in SEAP, having as service object for promotion for projects funded from non-reimbursable community funds, national scientific research projects, organizational structures of ASE Bucharest, COD CPV

It was requested that by the decision that will be pronounced the cancellation of the contested act would be canceled as unlawful and illegal and consequently the winning declaration of the offer submitted by S.C. CVT SRL, as well as obliging the contracting authority the Academy of Economic Studies of Bucharest at the conclusion of the award contract (framework agreement) with S.C. CVT SRL.

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In motivating the appeal, it was shown that the company CVT participated as a bidder in the procedure for awarding by public procurement the framework agreement for “Promotion services for Lot 2, namely promotion services for:

- a) projects funded from non-reimbursable community funds;
- b) national projects of scientific research;
- c) organizational structures of ASE Bucharest, COD CPV, the contracting authority being the Academy of Economic Studies Bucharest.

By letter of introduction, S.C. CVT expressed its agreement to participate in the auction, following the invitation to participate published in the SEAP. At the same time, the technical offer and the financial offer for Lot 2 were sent to the contracting authority, as well as the related documents.

Regarding the qualification documents requested from the bidders, only CVT SRL made them available to the contracting authority, while the counter-bidder S.C. GA SRL did not present them.

Subsequently, by the address issued by the contracting authority, the Evaluation Commission within it requested clarifications and possibly edifying documents in complement, regarding the following aspects:

- statement regarding subcontractors;
- which is the document under which Mrs. FG was authorized by the legal representative of the company to sign the documents submitted to the public procurement procedure.

In the opinion of the contesting company, the declaration regarding the subcontractors according to form 14 was not completed because in the procurement sheet it was stated that there is the obligation to complete only in case of the subcontracting intention. Therefore, if the tenderer does not intend to subcontract - as is the case here, he was not required to complete form 14. Therefore, the request of the contracting authority in this respect appears to be unjustified.

Regarding the document attesting the capacity of empowerment of Mrs. FG, it was revealed that the empowerment was drawn up and signed according to the model given by the contracting authority, a certified copy for conformity with the original being submitted with the award documentation.

By the address issued by the contracting authority it was communicated that the offer of the CVT company is acceptable and compliant, therefore admissible and declared qualified for the final stage of electronic auction for Lot 2, the same aspects being communicated by e-mail by SEAP.

After the expiration of the duration of the electronic auction, following the accession of SEAP, it was visualized that CVT SRL's offer took the 1st place in the ranking, therefore it is winning, being both technically and financially compliant.

Surprisingly, although the next step should have been the conclusion of the framework agreement, the contracting authority requested by a new address the written agreement regarding the extension of the term of validity of the offer for another 30 days, reasoning that there are “objective needs for the extension. the period of evaluation of the offers submitted by the economic operators participating in the procedure ,’.

Subsequently, although the framework agreement should have been concluded, this did not happen, the company concerned being informed that following the process of re-evaluating the

offers by the evaluation commission of the contracting authority, on Lot 2 of the procedure the authority the contracting party is to restart the final phase of electronic tendering in SEAP.

In the opinion of the contestant, the extension of the evaluation period of the offers submitted by the economic operators participating in the procurement procedure, invoking 'objective needs' is totally unjustified and illegal.

Thus, under the conditions in which it was established that CVT's offer is a winner (according to SEAP), the contracting authority could not return to the decision even invoking the so-called 'objective needs'. Basically, the decision to return to the initial decision by which the winning bid was declared is unmotivated, invoking the 'objective needs' being only a general argument, which is not capable of justifying the decision to resume the final phase of electronic auction.

Moreover, the contracting authority proceeded in an unfounded manner when it decided to re-evaluate the tenders, following the initial evaluation and the SEAP communication of the auction result.

Under the conditions in which a compliant and admissible offer was ranked on the 1st place, the contracting authority could no longer return on the decision, because the return can no longer intervene after the auction result is established. Thus, through the practice of re-evaluation, the right to conclude the framework agreement is violated, as a right gained after completing all the stages of the tender procedure, which is why S.C. CVT SRL, injured in a legitimate interest, understood to file an appeal, based on the provisions of art. 255, 256, 270 et seq. from O.G. no. 34/2006.

The practice of re-evaluating the contestant violated the right to conclude the framework agreement, a right that he won after completing the tender procedure.

As it is considered damaged in a legitimate interest, the contestant requested the admission of the contestation, the annulment of the annulment of the contested act as being unlawful and illegal and as a consequence the winning declaration of the offer submitted by CVT SRL, as well as the contracting authority ASE Bucharest at the conclusion of the contract award (framework agreement) with SC CVT SRL.

In another case, S.C. IGFP SRL filed an appeal against the act establishing and recording the result of the procedure for awarding the public procurement contract for the security service – COD CPV of the Military Unit Bucharest. It was requested that by decision to order:

- annulment of the public procurement procedure as being unreasonable and illegal and as a consequence;
- obliging the contracting authority to resume the procedure under legal conditions and to issue a new act respecting the award procedure.

It turned out that S.C. IGFP SRL participated in the award procedure by public procurement of the contract of services COD CPV of the contracting authority Military Unit Bucharest, having as object service of guard and intervention to military objectives with specialized companies for 1 objective with 3 positions of 24 hours and 1 position of 12 hours (at the headquarters of the contracting unit) and 1 objective with 3 positions of 24 hours (at point of work from Olt county).

Through the communication address they were informed that the company's offer was not declared a winner because the offered price was the highest. At the same time, it was communicat-

ed that the winning bid belongs to another company, because this one “is appropriate in terms of the requirements of the documentation for awarding the offer” and having a lower price.

In fact, in the case of the company declared a winner, only one of the two requirements that had to be met cumulatively is fulfilled, namely the lowest price. But the second condition, considered essential, is by no means fulfilled because the winning bid does not correspond in terms of the requirements of the award documentation.

Thus, according to the attribution documentation elaborated by the contracting authority, the participation criteria and implicitly of eligibility of the economic operators registered in the auction are the following:

- be registered with a competent authority;
- to have as field of activity the provision of security and intervention services;
- to hold the operating license issued by the General Inspectorate of the Romanian Police;
- to hold the emission license issued by the General Inspectorate for Communications and Information Technology (I.G.C.T.I.);
- to have a security notice secret service level, issued by the security authority of the Ministry of Defense.

Of all these conditions, that of holding the emission license issued by I.G.C.T.I. it was only fulfilled by the IGFP company, the holder of its own emission license both in Bucharest and the surrounding areas, as well as in the Olt area. The other two participating companies do not hold such licenses, the holders of licenses for the use of the respective radio frequencies being other companies, providers of public communications networks in the land mobile service. Or according to the chapter „Required documents”, one of the 5 compulsory points is the holding of the operating authorization and the emission license for the frequencies used issued by I.G.C.T.I. This requirement implies implicitly owning a license, on behalf of the company participating in the auction, and not on behalf of another economic operator. Moreover, even if it is admitted that such a license can be rented, the condition is still not fulfilled because the two network providers do not have licenses to use the frequencies for Olt County.

Therefore, the only company participating in the auction that fulfilled all the conditions of demand was S.C. IGFP.

Compared to the ones shown and because they are considered to be injured in a legitimate interest, they request the admission of the present contestation, the cancellation of the public procurement procedure as being unlawful and illegal and as a consequence the contracting authority is obliged to resume the procedure under legal conditions and at issuing a new act respecting the award procedure.

In the third case, SC RPTC SRL filed an appeal against the act establishing and recording the result of the procedure for awarding the public procurement contract for the cleaning services for the Emergency Institute for Cardiovascular Diseases COD CPV and it was requested that the decision be ordered:

- mainly, the cancellation of the procedure for awarding the public procurement contract for reasons of illegality of the procedure in relation to the requirements provided in the specifications;

- in the alternative, annul the result of the procedure for awarding the public procurement contract to S.C. SS S.R.L. and obliging the contracting authority to re-evaluate the offers and, consequently, to issue a new act declaring the subscriber's offer a winner, and the S.C. offer. SS S.R.L. as inadequate.

Along with the company RPTC SRL, at the auction were registered and participated other four companies cleaning services, among which S.C. SS SRL. As a result of the tender, the commission for evaluating the offers from the contracting authority, following the analysis of the offers through the award procedure, has designated our offer as a reform, and the winning one as belonging to S.C. Septiclean Service SRL, the following were contested:

Mainly, it was considered that the contracting authority did not comply with the legal provisions regarding the procedure for organizing the open tender.

Thus, regarding the personnel who were to serve for the fulfillment of the object of the public procurement contract, there is only one mandatory requirement related to the minimum number of requested personnel, respectively 75 persons. However, although the specifications were drafted within the deadline stipulated by the law, after the opening of the procedure, the contracting authority posted on SEAP, among other clarifications and one regarding „the personnel responsible for performing the subsequent contracts”, respectively: „you must present, for the personnel you will make available to the institute, documents, proving that you have it, respectively copies (signed and stamped in accordance with the original) after workbooks, flatbeds, etc.”.

Regarding this „clarification”, it was considered that this is clearly a new requirement and not a simple clarification. In the case of new documents that are required to be submitted within a so-called clarification, which is closely linked to a requirement of the specification, it is obvious that it is qualified as a new requirement.

Regarding the circumstance that the auction was to take place on 14.12.2017, and the contracting authority introduced a new requirement in the specifications on 08.12.2017, it is necessary to cancel the procedure for organizing the auction.

Moreover, even if it is assumed that the request for new documents would not be a new requirement and would be a simple clarification, it does not comply with the provisions of the specifications adapted to the legal provisions regarding the deadline for its adoption and publication. Thus, the alleged clarification, as defined and regulated both by the specifications, and by law, had to be submitted by the contracting authority at least 6 days before the deadline for submission of tenders.

As this clarification was made on 08.12.2017, 08.49 a.m. and the deadline for submission of the offer was on 14.12.2017, 10.00 a.m., the contestant considered that the legal term provided by the law was not respected.

Moreover, the legal term established by the normative act is at least 6 days before the deadline for submission of tenders. This term, following the legal interpretation according to the Civil Procedure Code (general law whose provisions supplement the special provisions of Law no. 101/2016) must be calculated on free days, the first and last days not being taken into account. In this sense, between the day of publication of the alleged clarification and the deadline for

submitting tenders, there are no six full days, which again leads to the non-observance of the tendering procedure.

For all the considerations mentioned above, the appellant requested the cancellation of the procedure for awarding the public procurement contract for reasons of illegality of the procedure in relation to the requirements stipulated in the specifications.

Subsequently, in the event that the main reason for the appeal would be overlooked, it was requested to cancel the result of the procedure for awarding the public procurement contract to S.C. SS S.R.L. and obliging the contracting authority to re-evaluate the offers and, consequently, to issue a new act declaring the contestant's offer as winner.

In conclusion, the only bidder participating in the auction that met all the eligibility conditions was S.C. RPTC SRL.

Compared to the ones shown and because they are considered to be injured in a legitimate interest, they requested the admission of the present challenge and consequently the contracting authority is obliged to award the contract to the company that meets all the requirements in the specifications and implicitly the disqualification of the company that did not submit at the right time all the necessary documents.