PARTNERSHIP FOR TRANSPARENCY

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NATIONAL PUBLIC PROCUREMENT PLATFORM

DRAFT NEW LAW ON PUBLIC PROCUREMENT: BETWEEN ALIGNMENT WITH THE ACQUIS COMMUNAUTAIRE AND IMPROVEMENT OF THE PUBLIC PROCUREMENT PROCESS

January 30, 2025

COMPLIANCE WITH TRANSPARENCY IN DECISION-MAKING

- The draft of the new Public Procurement Law was prepared **and publicly consulted by the Ministry of Finance in compliance with the provisions of the framework for ensuring transparency in the decision-making process,** namely Law 239/2008.
- On August 21, 2024, the Ministry of Finance published the **Announcement on the initiation of the preparation of the draft law.**
- On December 3, 2024, **the Notice on the organization of public consultations** was **published with the annexed documents: the** explanatory memorandum; the draft law and the correlation tables Directive 2014/24/EU, Directive 89/665/EEC and Directive 92/13/EEC respectively.
- The main objective of the project is to transpose EU Directives into national law.

SCOPE OF THE LAW: VALUE THRESHOLDS AND CONCEPTS

Comments:

- **Division of thresholds** - there is no justification to differentiate thresholds between central and other contracting authorities. There should be equal treatment for all contracting authorities (Art.1(1)(b) and (d), similar (c) and (e)).
- **Too many different categories of thresholds** - over-categorization unnecessarily complicates the application of the law and can create confusion for contracting authorities.
- **The high value of the new thresholds** - the 2-3 fold increase compared to the current law (131/2015) is significant. Statistical data for the first semester of 2024 shows that the average value of a contract is about 450,000 lei.

SCOPE OF THE LAW: VALUE THRESHOLDS AND CONCEPTS

Proposals:

- **Uniform thresholds for all contracting authorities,** eliminating differentiation between central, local and other contracting authorities.
- **Simplifying the structure of the value thresholds,** reducing the number of categories to avoid confusion and enforcement difficulties.
- **Reassess and adjust the value of the thresholds, taking into** account the national context and the impact on transparency and competition. The thresholds should be set in such a way that they do not exclude a significant part of public procurement from the application of the legal rules.

MAIN CONCEPTS

- Vaguely or broadly defined concepts: professional misconduct, central public authority, unsuitable application, non-compliant offer.
- E.g. professional misconduct: terms such as 'professional credibility' and 'strictly professional' are not clearly defined and do not provide objective criteria for application. Measurable and verifiable indicators need to be established.
- There is a need for a clear and objective redefinition of professional misconduct, eliminating vague and ambiguous wording.
- We recommend replacing the expression "affects professional credibility", which is subjective, with precise wording such as "demonstrates the economic operator's inability to meet the integrity, competence or performance requirements specified in the tender documentation";

HOW TO CALCULATE THE ESTIMATED VALUE

Comments:

- The phrase "except where justified by objective reasons" is vague and open to misinterpretation. There is no clear definition of 'objective reasons', which allows subjective justifications for split purchases.
- Without precise criteria, contracting authorities could fragment procurement to avoid applying value thresholds and using competitive procedures, undermining transparency and competition.
- Under Directive 2014/24/EU, artificially split procurement is prohibited, but can be justified on technical or economic grounds. A good European practice is the obligation to document in detail the reasons for the split and to demonstrate that the split is not aimed at circumventing legal thresholds.

HOW TO CALCULATE THE ESTIMATED VALUE

Recommendations:

- Clear definition of "objective reasons" in the text of the law and a restrictive list of justified situations.
- Detailed justification of the split of the procurement in the procedure documentation.
- Introduce a control mechanism to prevent abuse.

PROCUREMENT CONTRACTS AWARDED UNDER INTERNATIONAL STANDARDS

Comments:

- Article 7 creates uncertainties regarding the application of national law when international procedures are incomplete or do not cover certain issues. It is not clear whether national rules can fill these gaps.
- In para. (3) does not specify what happens if the parties fail to agree on the applicable procedures, which may create uncertainty in co-financed projects. It is also not clear what rules apply when international funding is below 50%.

PROCUREMENT CONTRACTS AWARDED IN ACCORDANCE WITH INTERNATIONAL STANDARDS

Recommendations:

- Clarification on the application of national law - it should be clarified that national law is additionally applicable in cases where international procedures are incomplete, provided that it does not contravene their rules. E.g.: "Where the international procedures applicable to public contracts or design contests are incomplete or do not cover certain aspects, the provisions of this Law shall apply to the extent that they do not conflict with the applicable international rules."
- Regulating disagreement on procedures in co-financing - it is proposed to establish a clear mechanism in case the parties cannot agree on the applicable procurement procedures in co-financing. E.g. "If the Parties do not reach agreement on the applicable procurement procedures for contracts co-financed under para. (3), national procedures shall apply unless the rules of the international donor provide otherwise."
- Clarification of co-financing below 50% - a provision is needed to regulate situations where international funding is in the minority, e.g. "Where an international organization or international financial institution co-finances a project with less than 50%, national procedures shall apply, subject to the specific requirements of the funder."

CONTRACTS FINANCED OR SUBSIDIZED BY CONTRACTING AUTHORITIES

Comments:

- The term 'funded/subsidized' could be interpreted differently in the absence of a precise definition.
- The current text does not specify whether it also applies in the case of mixed funding (public and private funds), where public funds exceed 50%.
- It is not clear how contracting authorities are obliged to demonstrate compliance with the law when they do not award the contracts themselves.

CONTRACTS FINANCED OR SUBSIDIZED BY CONTRACTING AUTHORITIES

Recommendations:

- Adding a definition for "direct funding/subsidy" in the definitions section of the law. The text could read "Direct funding/subsidy - the allocation of public funds in excess of 50% of the total value of the contract, including by means of transfers, grants, direct contributions or other forms of financial support."
- We suggest adding clarification in the case of mixed funding.

PROVISIONS CONCERNING THE ECONOMIC OPERATOR

Comments:

1. The provision of paragraph (1) may create discriminatory situations between domestic and foreign economic operators, if the legislation applicable to them is different.

2. In paragraph (2), asking for the name and other personal details may lead to confusion and data protection risks.

3. Paragraph (5) does not define the situations where the conversion into a legal form is "necessary for the proper performance of the contract." Moreover, it remains unclear how much time the association has to comply.

PROVISIONS CONCERNING THE ECONOMIC OPERATOR

Recommendations:

1. Introduce an additional paragraph stating that the applicable legislation must be in conformity with the principles of non-discrimination and equal treatment provided by law. In addition, it is recommended to indicate that the applicability of the legislation must comply with international agreements to which the Republic of Moldova is a party, such as the WTO Government Procurement Agreement or other bilateral treaties.

2. Include concrete examples or objective criteria to determine when conversion into legal form is mandatory. It is important to specify a reasonable deadline for compliance (e.g. '30 days after notification of the award decision') so that economic operators have predictability and sufficient time to make the necessary changes. Likewise, it is recommended to add provisions clarifying the consequences if the conversion is not completed within the deadline (e.g. "If the economic operator does not complete the conversion within the deadline, the contracting authority has the right to cancel the award decision").

RULES TO AVOID CONFLICTS OF INTEREST

Comments:

- The definition of conflict of interest in Art. 22 includes the idea of "perception", which introduces subjectivity, without providing objective criteria for determination. In addition, it does not refer to the notion already regulated by Laws no. 132/2016 and 133/2016, which may create confusion and overlap.
- As a general remark, Art. 22 does not refer to Law no. 132/2016 and Law no. 133/2016, although they regulate the general framework of conflicts of interest and impose clear obligations regarding their declaration and management.
- Contrary to the current Law No 131/2015, Art. 22 no longer mentions the obligation of the working group members to submit the Declaration of Confidentiality and Impartiality. This omission may lead to the loss of a preventive mechanism.

RULES TO AVOID CONFLICTS OF INTEREST

Recommendations:

- Revise the definition of 'conflict of interest' to align the term with the existing legal framework and avoid subjectivity.
- Including the obligation for working group members to file conflict of interest declarations, with a rethinking of this mechanism to make it efficient.
- It should be noted that the prevention, identification and remedy of conflicts of interest in public procurement shall be carried out in accordance with this Law, Law No. 132/2016 on the National Integrity Authority and Law No. 133/2016 on the declaration of personal assets and interests.

BRIBERY IN PUBLIC PROCUREMENT PROCEDURES

Comments:

- Art. 23 para. (1) provides that the contracting authority shall reject the tender in the event of a finding of corruption. This is a complex issue and calls into question who has the legal powers and who is legally competent to establish an act of corruption.

- The rejection of the tender on the basis of official findings issued by the competent bodies is legally correct, but impossible to apply in the context where criminal proceedings can take years and the public procurement procedure cannot wait that long.

- Public procurement law and practice in the EU has sought to strike a balance between the need to protect the integrity of the procurement process and to avoid abuse or undue delay. EU practice offers a useful approach based on two key principles: 1) The role of contracting authorities to take provisional decisions on the basis of reasonable evidence; 2) The role of competent bodies to confirm or deny suspicions following a thorough investigation. Note that there are safeguards in EU law to prevent abuse.

BRIBERY IN PUBLIC PROCUREMENT PROCEDURES

Recommendations:

1. Insertion of a provision allowing the contracting authority to reject the tender on reasonable indications. Example text: "The contracting authority may reject the tender of an economic operator where there are reasonable indications that the economic operator has directly or indirectly offered or consented to offer, directly or indirectly, a favour, an offer of employment or any other consideration to a person with authority or an employee of the contracting authority, or to any other person responsible or an employee of the contracting authority, as a reward for actions or decisions of advantage to him."

2. Clarification in the article that rejection must be evidence-based and formally documented. Example text: '"The decision to reject a tender shall be based exclusively on objective and verifiable evidence, such as documents, official statements or other supporting elements. It shall be reasoned in writing, recorded in the record of the public procurement procedure and notified to the economic operator concerned. The economic operator shall have the right to request clarifications and contest the decision in

FRAMEWORK AGREEMENT

Comments:

- The exceptions in paragraph (3), which allow the standard 4-year duration of a framework agreement to be exceeded, are not sufficiently detailed, which may lead to subjective interpretations.
- Paragraph (5) prohibits a substantial modification of the terms and conditions originally laid down in the framework agreement, but does not provide clear criteria for defining what constitutes a "substantial modification".
- The lack of strict rules for adapting the terms of a contract awarded under a framework agreement to market circumstances (e.g. price fluctuations) can cause difficulties in implementation.

FRAMEWORK AGREEMENT

Recommendations:

- Introducing clear and exemplifying criteria for exceeding the standard duration of 4 years (e.g.: a) complex projects involving implementation phases extending over time; b) other objective situations covered by methodological rules approved by the competent authority.").
- Insertion of a clear definition of "substantial amendments" in framework agreements, in line with European practice: "Substantial amendments means any amendments which: a) introduce conditions which, had they been included in the initial procedure, would have allowed other candidates to be selected or tenders to be accepted; b) alter the economic balance of the framework agreement in favor of one of the economic operators; c) significantly extend the subject of the framework agreement or the contract awarded."
- Insert specific requirement for price adjustment of contracts awarded on the basis of framework agreements. This may be done in line with market fluctuations, using official indicators such as consumer price indices or material cost indices, where appropriate.

CENTRALIZED PURCHASING

Comments:

- Alin. (1) gives the Government the right to designate or create central procurement authorities, but does not detail the criteria or conditions for designation, competences, resources, other primary rules on the designation/creation of central procurement authorities.

- Paragraph 1 indicates that central purchasing authorities deal with goods and services, but does not include the procurement of works, which is contrary to para. (2) and (3), which also include works. This inconsistency may cause confusion in the application of the law.
- Alin. (2) and (3) leave room for ambiguous interpretations of the obligations of contracting authorities using the services of the central purchasing authority. It is not clear how it is determined which activities remain the responsibility of the contracting authority; what happens if central purchasing authorities do not comply with the provisions of the

CENTRALIZED PURCHASING

Recommendations:

- Introduction in the text of the law of primary rules with clear criteria for the designation or creation of central procurement authorities, such as: areas of competence (e.g. types of goods, services or works); technical capacity and resources needed (e.g. qualified staff, infrastructure); obligation to respect the principles of transparency and competition, etc. It would also be appropriate to establish a public consultation mechanism or a prior analysis to assess the need for a central procurement authority in a given area.

2. Revise para. (1) to explicitly state that central procurement authorities may also manage works procurement, ensuring consistency with para. (2) and (3).

3. Specify in paragraphs (2) and (3) which activities remain under the responsibility of the contracting authorities and which are fully taken over by the central purchasing authorities. Likewise, it is appropriate to lay down the legal liability in the event that the central purchasing authority does not comply with the legal provisions.

SPLITTING CONTRACTS INTO LOTS

- Article 45 does not mention the possibility of applying batch splitting to prioritize green, digital or innovative procurement, although this is a common practice in the EU.
- While para. (1) indicates that division into lots is at the discretion of the contracting authority, para. (11) allows the Government to establish mandatory award by lots. This approach may lead to legislative inconsistencies and different interpretations between the rules in the law and those in the Government Decision, difficulties in application for contracting authorities and economic operators.

SPLITTING CONTRACTS INTO LOTS

Recommendations:

- Adding a paragraph requiring contracting authorities to consider splitting into lots when it can support national and international strategic objectives such as green transition, digitalization or innovation. If the contracting authority decides not to split the procurement into lots, it must justify the reason in the procedure documentation.
- Integration into the law (Art.45) of all provisions regarding the division into lots and reducing the need for further regulations by Government decisions.
- Elimination of the provision allowing the Government to determine by decree the cases in which subdivision is compulsory. The competence of the Government should be limited to the issuance of technical and procedural regulations for the clear and uniform implementation of the primary rules laid down directly in the law.

OFFER. OFFER GUARANTEE

Comments:

While we consider it absolutely useful to regulate the obligation to request a tender guarantee for public procurement above certain thresholds.

However, for lower-value procurements involving lower risks, a tender guarantee in the form of a declaration of tender guarantee on own responsibility could also be regulated. This would facilitate the access of economic operators and in particular SMEs to procurement procedures as tender guarantees in the form of bank guarantees or transfer to the account of the authority involve high costs.

OFFER. OFFER GUARANTEE

Recommendations:

It should be noted that for contracts whose estimated value does not exceed (xxxx MDL) and involve low risks, the tenderer shall sign a bid guarantee declaration by which he undertakes:

(i) not withdraw the offer during the period of validity of the offer; and

(ii) If it has been informed that its tender has been declared successful:

(a) undertake to sign the contract and

(b) undertake to lodge a performance guarantee, if one has been provided.

INFORMING CANDIDATES

Comments:

The current wording of para. (4) is insufficiently clear, which may give rise to different interpretations and risks in the application of the law. The rule gives the impression that the entire information on the contract award will not be disclosed if it includes information relating to commercial secrecy, state secrecy or fair competition. This interpretation could lead to a total lack of transparency, which is contrary to the fundamental principles of public procurement.

INFORMING CANDIDATES

Recommendations:

We recommend a clear rewording of Article 54(4) to clarify that only specific information that is protected by law (e.g. commercial or state secrets) will not be communicated, but that all other relevant information about the contract award must be communicated.

QUALIFYING CRITERIA

Comments:

- In para. (7) the delegation of the powers of detection to the contracting authority in some cases (lit. a) and c) and to the Competition Council in others (lit. e) may create inconsistency. The transfer of the decision to a specialized authority (the Competition Council) will render these rules ineffective, due to the long duration of the investigations concerned. In this case, it would be appropriate to allow the contracting authority to take a decision based on reasonable indications of the conclusion of agreements distorting competition, with the obligation to refer the matter to the Competition Council for subsequent confirmation

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QUALIFYING CRITERIA

Recommendations:

1. The contracting authority should be empowered to take preliminary decisions based on reasonable indications in all the cases referred to in para. (7), including for situations under point (e) concerning distortion of competition. This would ensure consistency and efficiency in application.

2. Introducing a standardized procedure to be followed by the contracting authority before taking preliminary decisions (informing the economic operator, giving the possibility to submit a written explanation, etc.).

3. Establish a clear obligation for the contracting authority to refer the matter to the Competition Council for investigation and confirmation of the decision.

THE PUBLIC PROCUREMENT CONTRACT

Comments:

- The rule in paragraph 3 is incomplete, not sufficiently clear and will therefore lead to discretion, risks and impediments in implementation. It is not clear what type of monitoring is envisaged and which entity/entities carried out the monitoring. At the same time, there is a lack of clarification on how it will be ensured that the CA closes the contract only after all monitoring findings have been remedied.

- Paragraph (9)(b) is vague and will create implementation risks for both CAs and EOs. Such general regulations create risks of misinterpretation or misinterpretation, which may lead to challenges, failure to award contracts in time, etc. It is not clear what constitutes a "full life-cycle environmental impact" for a procurement contract.

AWARD CRITERIA

Comments:

- In para. (19) the minimum weighting to be given to the price element in the award criterion for the public procurement contract shall be laid down
- b) for public works contracts - 80%;
- The 80% weighting of the price element means a weighting of only 20% maximum for evaluation factors including quality, environmental and/or social aspects. In other words, even if an authority applies the award criterion value for money to the procurement of works, the price element is ultimately the defining element.
- This approach, which is also currently regulated in Law no. 131/2015, is one that does not provide sufficient legal levers to increase the quality of works that are procured by public authorities and to provide advantages to tenders that take into account other environmental/social aspects, etc

AWARD CRITERIA

Recommendations:

We propose to modify the quality-price award criterion for the purchase of works. It is recommended to modify it by decreasing the weighting of the price element when using the best value for money award criterion. It is therefore proposed that the minimum weighting of the price element in the application of the award criterion for public procurement contracts be reduced from 80% to 60%.

- Thus, Article 66, paragraph (19), letter b) shall be worded as follows:
- "b) for public works contracts - 60%"

THE PUBLIC PROCUREMENT CONTRACT

Recommendations:

1. In order to avoid uncertainties and bottlenecks in the implementation of contracts, the law needs to clearly specify the type of monitoring envisaged and the competent entities carrying it out. Also, a procedural mechanism should be established whereby the contracting authority confirms that the problems reported before the contract is signed have been remedied.

2. It is recommended to complete and clarify the rule by specifying "negative environmental impacts" and providing examples (e.g. construction works, road rehabilitation/maintenance; procurement of cars, transportation, electronics, furniture, street/road lighting, food/food services, etc.).

AMENDING CONTRACTS: ADDITIONAL AGREEMENTS

Comments:

Paragraph (2) and (3) provide for a maximum limit of 50% for the increase of procurement contracts (both for additional goods, services or works and for the increase of the initial value of the contract). However, there is no evidence to substantiate this substantially increased limit compared to the current limit (15%) in Law 131/2015.

Law no. 131/2015 currently regulates a maximum limit of 15% which, indeed, in certain specific and objectively justified cases, may be insufficient. However, setting a limit of 50% is far too permissive and will generate high risks of fraud and corruption in a highly vulnerable sector.

AMENDING CONTRACTS: ADDITIONAL AGREEMENTS

Recommendations:

Although Directive 2014/24/EU provides in Article 72 that no price increase shall exceed 50% of the value of the original contract. However, this is a maximum limit, and each country is to set this limit according to the national context, the nature and specifics of the procurement processes, and the related risks, including fraud and corruption.

It is recommended to analyze the data on contract adjustment in the last 2-3 years and set a limit according to it, but not exceeding 20-25% with regulating the possibility of further adjustment based on the experience of law enforcement and the need for adjustment.

WORKING GROUP, CERTIFIED SPECIALIST AND SERVICE PROVIDER

1. Limiting certified specialists only to low-value procedures, with some exceptions (paras. (8) and (9)), does not provide contracting authorities with sufficient flexibility and access to qualified expertise in particular for high value procedures.

- The certified specialist should be used on the basis of competence, not just the value of the contract. Including certified specialists in all types of procedures can ensure uniform application of procurement rules and reduce the risks of errors, irregularities or challenges. In particular for small communities or local authorities with limited resources, access to certified specialists may be the only option to carry out procurement procedures in compliance with the law.

- If a public authority considers it necessary to involve a certified specialist for complex procurement procedures, there is no legal or practical reason to limit this option. The certified specialist is already qualified and certified according to national standards, which gives them legitimacy. The decision to involve a certified specialist should be left to the discretion of the contracting authority.

- Including civil society representatives exclusively per procedure does not provide sufficient flexibility and full involvement of civil society through monitoring

WORKING GROUP, CERTIFIED SPECIALIST AND SERVICE PROVIDER

Recommendations:

1. We recommend rewording the provisions in paragraphs (8) and (9) to allow the involvement of certified specialists in all types of procurement procedures, regardless of the value of the contract, leaving the decision on the need for their involvement to the contracting authority. This would contribute to the professionalization and efficiency of public procurement.

2. Paragraph 3 to be completed with the following text "the contracting authority will involve the representative(s) of civil society at all stages of the procurement process and will provide access to all information and documents related to the contract award process

3. In paragraph 4, after the words 'for each procurement procedure individually', the words 'or for several, as requested or decided by the Authority' are added

RIGHT TO CHALLENGE

Comments:

- Paragraph 1 grants a general right for any interested person to challenge the acts of the contracting authority, reflecting a fundamental principle of wide access to review procedures, necessary for the transparency and legality of public procurement. However, para. (2) limits this right by specifying that only tenderers who have not been definitively excluded may challenge the acts of the contracting authority. This provision may affect the rights of economic operators, reducing the effectiveness of remedies and allowing abuses or errors in the procurement process.

- It is not explained why the right to challenge is restricted and what is meant by "permanently excluded." This ambiguous wording may lead to situations in which bidders are deprived of the possibility to challenge the exclusion decision itself. There is a risk that the contracting authority could quickly exclude bidders in order to limit their right to challenge other acts in the procedure, which may compromise the fairness and fairness of public procurement.

- Directive 2014/24/EU and CJEU case law emphasize the importance of equal access to legal remedies for all economic operators who consider that their rights have been infringed. The restriction imposed could be incompatible with obligations under international agreements, including the WTO Government Procurement Agreement.

RIGHT TO CHALLENGE

Recommendations:

1. Reword para. (2) to ensure that economic operators excluded from the procedure have the right to challenge the exclusion decision itself.

2. Introducing a clear definition in the law for "definitively excluded," specifying that this status cannot be conferred until all remedies available to the bidder have been exhausted.

3. Indication that any interested person, including unsuccessful tenderers, may challenge the acts of the contracting authority if they consider that their rights have been affected.

4. Explain in the explanatory note to the law the reason for the inclusion of para. (2) and how it will be applied in accordance with the principles of fairness and transparency.

5. If there is no clear justification for restricting the right to challenge only to bidders "not definitively excluded," it is appropriate to delete this provision to avoid the risk of incompatibility with international rules.

RIGHT TO CHALLENGE (CIVIL SOCIETY)

Comments (continued):

- The article limits the right to challenge to the economic operators participating in the procedure, excluding the possibility for civil society representatives (e.g. NGOs) to intervene when public interests are affected, especially in cases of corruption or collusion between economic operators.

- Although Art. 108 para. (13) of the draft law allows civil society representatives to request the organization of an open hearing for complaints lodged by economic operators, this right is insufficient to ensure adequate protection of public interests. Civil society representatives do not challenge, even when they identify significant irregularities.

- In practice, civil society plays an essential role in monitoring public procurement, especially in situations where economic operators avoid challenging, either for fear of reprisals or because of tacit understandings. Limiting the right to challenge exclusively to economic operators reduces transparency and the possibility to correct irregularities affecting the public interest.

RIGHT TO CHALLENGE (CIVIL SOCIETY)

Recommendations (continued):

Insertion in the article of a provision allowing civil society, represented by non-governmental organizations, to directly challenge the acts of contracting authorities in cases where the public interest is affected (e.g. corruption, lack of transparency, serious irregularities) and no economic operator has lodged a challenge.

PARTNERSHIP FOR TRANSPARENCY

Thank you for your attention!

CONCLUSIONS. FEEDBACK. QUESTIONS