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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
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## **Working Party No. 2 on Competition and Regulation**

### **HEARING ON THE USE OF TENDERS AND AUCTIONS**

**-- Paper by Romania --**

**15 December 2014**

*This paper by Romania was submitted as background material for Item IX at the 58th meeting of Working Party No. 2 on 15 December 2014.*

*The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Organisation or of the governments of its member countries. More documents related to this discussion can be found at <http://www.oecd.org/daf/competition/tenders-and-auctions.htm>.*

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## ROMANIA'S EXPERIENCE ON HOW TO DESIGN TENDERS TO ACHIEVE DESIRED OUTCOMES INCLUDING EFFECTIVE COMPETITION

### 1. Current challenges

1. The lowest price is the most used criterion in awarding public procurement contracts in Romania but, unfortunately, it does not always ensure a proper quality of the acquired works/services or goods.

2. A study prepared by Institute for Public Policies on "*Transparency, fairness and competitiveness of public procurement in Romania: Case study on central contracting authorities*", dated 2012, reveals that the terms of reference do not contain too many specifications as regards the quality of the work/service and only the offered price is practically taken into account.

3. In this context, it deserves to be emphasized that under public procurement legislation [Government Emergency Ordinance 34/2006 (GEO) on the awarding of public procurement contracts, public works concession contracts and services concession contracts], the awarding of public procurement contracts is based on the exclusive application of one of the following award criteria: a) the most economically advantageous tender or b) the lowest price.

4. One of the fundamental principles in the awarding of public procurement contracts under GEO 34/2006 is efficiency (i.e. efficient use of funds). According to the National Authority for Regulation and Monitoring Public Procurement's operational manual for the awarding of public procurement contracts, this principle means the use of the competitive system and economic criteria in the awarding of a contract for the purpose of achieving value for the money spent.

5. Further, in Romania, the contracting authority has the freedom to choose between the two available award criteria [except for competitive dialogue as per art. 198 (2) under GEO 34/2006, when the use of the more complex criterion becomes mandatory]. It must nevertheless always observe the principle mentioned above and implicitly ensure value for money.

6. Thus, according to the Regulation<sup>1</sup> regarding the qualification and selection criteria related to the procedures of granting public procurement contracts, public works concession contracts and service concession contracts regulation, the qualification and selection criteria established by the contracting authority must be specifically connected to the object of the agreement to be granted, and the level of minimum requirements provided in the granting documentation, as well as the documents attesting to the fulfillment thereof shall be limited only to those strictly required for the appropriate performance of the agreement. Nonetheless, the minimum qualification and selection criteria remains to be determined by the contracting authority, the latter having the obligation to consider the complexity, volume, duration, value and nature of the public procurement contract to be concluded.

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<sup>1</sup> See National Authority for Regulation and Monitoring Public Procurement's Order no. 509/2011 on the qualification and selection criteria, published in the Official Gazette of Romania no. 687 dated September 28, 2011.

7. When the contracting authority elects to apply the lowest price, the contract will be awarded to that tender which, having met the qualification criteria, provides the lowest price. In this context, cost or quality considerations are often disregarded.

8. Another important aspect bringing about increased efficiency in the Romanian public procurement has to do with the conflict of interest. In this area, current legislation covers in a satisfactory manner this issue and the fines are enough deterrent. Nevertheless, efforts are currently deployed in order to ensure the implementation of the legislative framework in place especially related to uncovering, proving and sanctioning of the conflict of interest.

## 2. What have been the main triggers of the occurrence and development of this phenomenon?

9. In the aftermath of the global financial crisis, governments worldwide were compelled to reconsider how public money was spent. The public procurement system was directly targeted.

10. The main catalyst for the large-scale use of the lowest price award criterion appears to have its roots in public procurement practice itself, at an operational level. It is obvious that the use of the most (economically) advantageous tender supposes not just a simple selection of this criterion but a complex process (even a laborious one, depending on each project) to define/select the most relevant factors for the object of procurement, decide the importance of each defined factor and determine the importance of the price and quality elements in the final calculation algorithm.

11. It appears also that the way the contracting authorities design the “most (economically) advantageous tender” award criterion has been found often defective. Thus, the National Authority for Public Procurement Regulation and Monitoring, as a monitoring and regulatory authority, has frequently rejected award documentation due to the inadequacies discovered. Moreover, auditing bodies, such as the Court of Accounts, have imposed drastic penalties for these defective procedural aspects.

12. As a result, the lowest price criterion has become the most convenient and efficient procedure used by the contracting authorities to procure goods, services or work.

## 3. What can be done?

13. The new EU Directive creates, even if indirectly, the conditions for a constructive approach to the current national challenges in public procurement field, in relation to **the implementation of the new Directives into national legislation**. Thus, Member States may establish in their national legislation that the contracting authorities should not exclusively use price/cost as an award criterion or may restrict its use to certain contracting authorities only or for certain types of contracts only. So, the optimal solution is left to the discretion of the national legislators. It depends on them to adapt this new “facility” to the specifics and problems typical of their own public procurement system.

1. The lowest price criterion should be used when the elements to be procured are highly standardized and where no qualitative variations between tenders are possible or the differences are irrelevant (e.g. procurement of pens).

Perhaps in case of simple acquisitions or in case of contracting a certain type of goods, services or work, the contracting authority having acquired at the lowest price the same office supplies or furniture items, etc. represents a best practice model.

2. On the contrary, in complex award procedures or concession cases, the lowest price criterion should be accompanied by other factors playing a major part in assessing the offer, i.e.: characteristics related to the qualitative, technical or functional level, operating costs, cost/efficiency ratio, delivery or execution deadline, environmental characteristics etc. The accurate consideration of such factors together with the lowest price, therefore well documented terms of reference, can lead to the selection of the optimum offer.

14. Taking into consideration the development of the public procurement system, the magnitude of this phenomenon and the important role it plays at economic level, increased attention is currently paid to the professional training of the specialized staff from contracting authorities. On the other hand, one cannot disregard that it is not easy to attain this goal as long as specialized knowledge about the products/services is owned by the supplier and not by the customer in our case the contracting authority. As it is the contracting authority the one who has to write the Statement of Requirements often without the input of the potential suppliers, it should not be a surprise that the requirements are not written as well as they could be. Knowledge about relevant markets could be gathered from suppliers directly but this would mean increase communication between suppliers and contracting authorities and implicitly stifled competition and corruption issues in the tendering process.

15. The best option would be for the contracting authority to contract more frequently external experts with good knowledge of respective relevant markets.

#### **4. Study case**

##### ***4.1 RCC's involvement in ensuring best price-quality ratio in the design of tenders for allocation of bus routes in the local/metropolitan area and among different communities***

16. The national legislation provides that urban public transport is part of the community services of public utility and of economic and general social interest and it shall be provided within administrative-territorial units under the supervision, management and coordination of local public administrative authorities. That means that public utilities services enjoy a special regulatory framework even if this sector is shaped on the same principles as those stipulated by the public procurement law.

17. The National Authority for Regulation of Community Services of Public Utilities is the regulatory authority that sets the legal framework for the organization and provision of passengers local public transport. The Romanian Road Transport Authority is also entrusted with competences related to the organization of the service (design of routes), the quality of the transport means and that of the service.

18. Currently, a new law is being drafted by the Romanian Ministry of Regional Development and Public Administration and will replace the law no. 92/2007 on local public transport services. The new law shall observe the provisions of Regulation 1370/2007 regarding railway and road passenger transport services that sets the conditions in which the competent authorities, when they impose or contract public service obligations, compensate the public services operators for the shouldered costs and/or award exclusive rights in exchange for the fulfillment of public service obligations, but also the provisions of the Law on public utility community services 51/2006.

19. The legal framework for local transport of passengers by regular routes allows for two models. On the one hand, local/metropolitan transport may be carried out exclusively by the local authorities, which will both organize and provide transport services through an internal entity (i.e. an entity controlled by the local administrative authorities), using their own means of transportation. On the other hand, local authorities may satisfy themselves with the role of an organizer, laying out the transport plan and awarding, on the basis of open competitive tenders, the contracts for transport services.

20. Under the later model, a contract for the delegation of passenger local public transport services through regular trips is concluded following the awarding of service. In such contracts, the authority transfers to the transport operators its own duties and responsibilities regarding the actual provision of the service and also the operation, maintenance, rehabilitation and upgrading of assets that are publicly-owned related to the local public transport system. Throughout the term of the contract, the road transport operator avails of exclusive rights of using the routes assigned to him. This model seems to be particularly prevalent in large agglomerations, where co-operation between different communities is required and in small towns.

21. Award documentation of a contract for delegation of the administration of the service must contain at least the following documents: an opportunity study for service delegation, the resolution setting the award modality for the delegation of public transport service, the regulation for the performance of the local passenger public transport through regular trips including book of specifications for the performance of service and local passengers public transport program, model of Recording registry of the transport operators and of the local passengers public transport means, the requirements regarding the eligibility, performance indicators for the execution of passengers public transport, the selection criteria for the bids, the form of contract for delegation of local passengers public transport service. Depending on the specificity of the planned routes, a single tender may encompass one or several routes.

22. The tariffs of local transport are regulated by local public administrative authorities with the possibility to set different tariffs for different routes.

23. Under the regulation, the tariffs must be based on reasoning by the carrier of the costs and other elements such as the revenues from the tickets sales and obligations foreseen in the delegation contract made by authorized operators. The tariffs are periodically revised.

24. The operator retains the incomes generated by ticket sales and subscriptions. He is also responsible with making investments in the transport fleet owned by the operator.

25. Failure to abide by the terms of the contract and in particular to maintain the agreed standards of service is subject to penalties such as the compensation paid by transportation operators/authorized operators for the damage caused due to non-compliance with the requirements regarding quality and environment-related conditions and/or termination of contract and withdrawal of transport license.

26. Yet, delegation contracts do not include bonus systems.

27. The authorities ask for a guarantee of participation to the tender to secure the bids before the election of the winner and the signing of the contract for delegation in administration of the service.

28. According to the law on local public transport in force, the contract for the delegation of passenger local public transport services cannot exceed more than 6 years. The maximum length of the contract is therefore fixed for all local authorities. Each local public administrative authority is free to choose the length of the contract within this limit.

29. The same law further provides that any alleged clauses of the contracts for the delegation of services providing for their extension are void, a new tendering procedure being required. The duration of the contract has to be correlated with the average length of amortization of all transport means owned by the operator.

30. If new routes have to be added in the course of the validity of the contract because demand changes, new concession procedure through open competitive tender will be organized and new delegation contracts of service will be concluded.

31. By means of its advocacy attributions, Romanian Competition Council (hereinafter referred as *RCC*) has had the opportunity to positively influence the design of tenders for allocation of bus routes in the passengers county transport sector.

32. This occurred following the conclusion this year of a sector inquiry in this area. Some road transport operators from Constanta county operating on this market complained to *RCC* that other operators resorted to dumping prices through acts of unfair competition like stealing of the customers on the routes having the same arrival/stop stations.

33. *RCC* found the complaints unjustifiable because public transport is a major ingredient of the city life, therefore, a public utility regulated market. In such a regulated market, the tariffs are set up, adjusted or amended by the county council, on the basis of the methodology issued by the regulatory authority in the field.

34. Nevertheless, *RCC* acknowledged the presence of signs revealing a possible defective provision of metropolitan passengers transport services through regular trips in Constanta County, which could be found in other counties as well. That is why it decided to open a sector inquiry in this field. The sector inquiry targeted all 6 counties covering South-East region of Romania.

35. On the occasion of the sector inquiry, *RCC* found that in the secondary legislation the tariff at which the service will be provided by the operator is not part of the evaluation criteria of the bids for the award of the bus routes at county level.

36. Actually, this contradicts the law which regulates public utilities services that provides that the existence of professional and financial guarantees by the operators as well as the performance indicators and the level of the tariffs applied for the provision of the service in terms of adequate quality and quantity represent the main criteria for the award of the delegation contracts.

37. That means that the most economically advantageous tender criterion should apply meaning that local authorities should take into account qualitative or social criteria as well as price in awarding the concession of the local transport of passengers by regular routes.

38. Further, the law on local public transport services provides that the tariff of the service to be applied by the carrier will represent a criterion for the award of the delegation by means of the concession.

39. The criteria currently pointed out and detailed by the methodology for scoring bids and their weight for the award of bus routes through regular trips applicable to county public transport are the following: the age of the bus fleet, accessibility of buses, comfort conditions, air-conditioning equipment and the uninterrupted experience of the transport operator on the route.

40. Taken into account that the price could exercise competitive pressure on potential bidders, *RCC* recommended the introduction of the price of the service as one of the elements to be taken into account by the local authorities when scoring bids as well as their weight.

41. Another recommendation of *RCC* was the replacement of the criterion "*uninterrupted experience of the transport operator on the route*" with the criterion "*the experience in the field of passengers road transport*" in order to ensure reasonable quality and traffic safety conditions of the service without imposing territorial restrictions aiming at excluding potential bidders from the selection procedure and creation of a *de facto* monopoly by existing transport operators in the market.

42. Overall, *RCC* recommended to all central authorities with attributions in this field as well as to the local administrative authorities targeted by the sector inquiry that the designing of the scoring and the weight given to different criteria for the selection of bids for the award of bus routes should find the proper balance between the price and quality of service so to incentivize innovation without restricting the access of new entrants in the market.