

CMS România | Romania clarifies scope of exclusion of bidders for anti-competitive conduct in public procurement



The Romanian Competition Council (RCC) and the National Authority on Public Procurement (ANAP) issued a joint "opinion" on the scope and limitations of public procurement laws requiring exclusion of bidders from public procurement award procedures based on previous infringements of competition rules.

Pursuant to the public procurement laws regulating the award of public procurement contracts and services and works concessions contracts, contracting authorities have a legal obligation to exclude, at any time during the award procedure, bidders who have been previously involved in bid rigging and other forms of cartels. According to the law, however, bidders can provide evidence of their rehabilitation.

RCC and ANAP now clarify the scope of exclusion and the means of rehabilitation that bidders can use to argue that they should be excluded from the public procurement award procedure. According to the Opinion, bidders can provide the contracting authority with decisions issued by the RCC over the previous three years indicating that a more favourable sanctioning regime has been applied to the bidder (e.g. as a result of the application of the leniency policy and/or the recognition of the anti-competitive act). Bidders can also provide evidence supporting the effective implementation of competition law compliance programmes in accordance with RCC Guidelines on Competition Compliance, including measures on the prevention of cartel-type conduct and bid rigging in particular.

With the aim of further assisting contracting authorities in the evaluation of the exclusion grounds, the RCC will publish on its website a list of undertakings previously involved in bid rigging, including information on the date of the RCC's sanctioning decision, whether they follow competition self-cleaning programmes, and whether they benefited by leniency or otherwise admitted their anti-competitive conduct.

While the Opinion is not legally mandatory, contracting authorities must evaluate the exclusion grounds during the bidding stage and take into account the principle of proportionality, which governs public procurement award procedures. The RCC and ANAP's guidance will likely assist in this process, although unanswered questions will likely arise, particularly for those bidders who challenge the RCC decision in court without admitting any infringement. Bidders will have to bring legal arguments in support of their position to prevent a negative exclusion decision by contracting authorities, both during the bidding process and, if needed, in court proceedings.

For further information, contact **Cristina Popescu**, Partner and **Laura Capata**, Senior Associate.