

Romania Guidance for Public Procurement procedures in times of COVID-19

On 16 March 2020, the Romanian President declared a state of emergency for the next 30 days to limit the spread of COVID-19 and manage its effects (the “State Emergency Decree”). Neither the State Emergency Decree, nor the subsequent military ordinances that followed included the amendment of the public procurement legal framework in Romania. However new emergency measures, as well as certain gradual/progressive measures, which may be taken in the future, depending on the developments, have a significant impact on public procurement procedures, ongoing and future, as well as existing public procurement contracts. The guidance below addresses stringent questions at present:

1. Ongoing procurement procedures are not automatically suspended

Neither the State Emergency Decree, nor the subsequent measures taken by the Romanian Government contain provisions whereby deadlines in public procurement award procedures are suspended. Thus, relevant deadlines applicable in the context of an award procedure (such as the deadline for submitting offers) continue.

According to public records, for the time being procuring authorities in Romania continue to carry out public award procedures, but one can expect that this may not happen in the near future with increased security measures in the pipeline as COVID-19 develops further in Romania. Contracting authorities have the right under current circumstances to extend relevant deadlines and bidders can also request such extension. Given increased security measures applicable in Romania which affect the activity and work conditions of private and public companies, bidders are likely to resort to such requests and contracting authorities are expected to accept them, considering that bidders are constrained in their business activity and possible access to necessary documents due to restrictions imposed by law.

In any event, suspension of the award procedure does not automatically suspend the validity period of an offer once this has been submitted and the offer submission deadline has elapsed. Consequently, in these circumstances, bidders will need to extend their offers and the participation guarantee attached to cover the extension of the award procedure.

As concerns contracts financed by EU funds, the Presidential Decree provides that beneficiaries of EU funds affected by the emergency measures may decide – jointly with the management authorities – to suspend the relevant financing agreements. In these particular circumstances, it is likely that suspension measures will be reflected both in ongoing award procedures, as well as performance of contracts financed by EU funds which will be likely impacted.

2. No extended use of regulated simplified procurement procedures is allowed, except for limited circumstances when direct awards are permitted

Pursuant to the State Emergency Decree, the procurement of materials and equipment necessary in the fight against COVID-19 may be done through *direct procurement* (without a tender or award procedure) by the following contracting authorities:

1. central public authorities, as well as legal entities where the state is the majority shareholder;
2. the local public healthcare authorities and sanitary units (i.e. hospitals, clinics);
3. ministries with a separate healthcare system (such as the ministry of defence and military healthcare units/hospitals);

In all other cases, direct procurement (without a prior award procedure), will be subject to the general thresholds of approximately EUR 28,000 for products and services contracts and approximately EUR 93,000 for works.

Furthermore, the Romanian Public Procurement Law no. 98/2016 (the “**Public Procurement Law**”) provides for the possibility to make use of the negotiated procedure without prior publication if strictly necessary for reasons of extreme urgency brought about by events unforeseeable by the contracting authority (and not attributable to the contracting authority), when the time limits for the open or restricted procedures or a negotiated procedure cannot be complied with. Pursuant to the law, where immediate intervention is required, the contracting authority can carry out the public procurement in parallel with the direct negotiation procedure.

In our view, the current circumstances related to the corona-pandemic can justify procurement by public authorities in specific situations where supplies are urgently needed for securing the functioning of activities or services in the public interest. In these cases, contracting authorities can invite a minimum of one eligible economic operator to participate.

4. Taking special measures and extending the use of electronic means during a procurement procedure

In addition to direct negotiated procedures or direct procurement pursuant to the Presidential Decree, contracting authorities are entitled to shorten the minimum deadlines for submitting a request for participation or an offer in case of urgency. The minimum deadline for submitting an offer in an open procedure is 15 days; the minimum deadlines of a restricted procedure and negotiated procedure with prior publication are 15 days for submitting a request to participate and 10 days for submitting an offer. The contracting authority is required to document the reasons of urgency that prevented it from complying with the regular minimum deadlines.

In case of simplified procedures applicable for public procurement contracts set below the legal thresholds (i.e. approximately EUR 135,000 for supplies and services and approximately EUR 5.2 million for works), the minimum deadlines set by the Public Procurement Law can be reduced in case of urgency to 9 days (for works contracts) or 6 days (for supplies or services contracts), provided that the grounds of urgency are substantiated and documented.

It is yet to be decided whether ongoing procurement procedure rounds of negotiation or presentations can be replaced by using electronic means (video conferences). If possible, these would need to observe the general public procurement principles, and in particular, the principles of equal treatment (i.e. the same conditions apply to all bidders), non-discrimination and transparency, and should be appropriately recorded (e.g. by written minutes of the meeting).

5. Automatic suspension of certain deadlines for remedies

The State Emergency Decree impacts the deadlines for remedies in public procurement procedures. Based on this Decree, statutes of limitations and peremptive terms shall not start to run (and if they have started to run, shall be suspended) for the entire duration of the state of emergency. As a result, court proceedings have been suspended and court hearings postponed in Romania, except for limited proceedings.

Consequently, the deadlines for filing public procurement complaints with the judicial courts are arguably suspended over the period of the state of emergency. It is, however, uncertain whether the same is valid for all public procurement proceedings since the Decree does not specifically address: (i) public procurement procedures in general (which are usually considered urgent and bearing a public interest), (ii) administrative jurisdictional courts (such as the National Council for Solving Complaints (“CNSC”)) which continues to settle public procurement complaints throughout the state of emergency period. To mitigate potential harmful consequences, it is recommended that public procurement complaints continue to be filed with CNSC while the activity of the judicial courts is restrained. Similarly, further appeals as well as specific claims relating to a public procurement contract or damages should be filed with the competent judicial courts within procedural deadlines set forth by the law.

6. Which possibilities does a contracting authority have, if no offer has been submitted?

If no (suitable) tenders or no (suitable) requests for participation have been submitted in response to an open procedure or a restricted procedure, a contracting authority may choose the negotiated procedure without prior publication, provided that the initial conditions of the contract are not substantially altered. If this condition is met, contracting authorities may award the contract (after having revoked the initial procurement procedure) based on a negotiated procedure without prior publication of a contract notice. In these cases, the contracting authority can carry out the procedure with a minimum of one eligible economic operator.

7. Modifications of existing contracts in the context of COVID-19

Pursuant to the Romanian Public Procurement Law, a public procurement contract is subject to limited amendments after its award. Modifications due to unforeseen circumstances and the replacement of a contractor are possible, provided legal conditions are met.

If the need for modification has arisen from circumstances that a diligent contracting authority could not foresee and (i) the modification does not alter the overall nature of the contract and (ii) any increase in price of each modification (provided that consecutive modifications are not aimed at circumventing the law) does not exceed 50% of the value of the original contract (this does not apply in the utilities sector), a modification is lawful. These modifications must be published at national level, as well as in the Official Journal of the European Union, after being made.

In addition to this, changes to contracts are admissible up to 10% (for supplies/services contracts) or 15% (for works contracts) of the initial contract value, provided that the value of the modification is set below the legal thresholds (i.e. approximately EUR 135,000 for supplies and services and approximately EUR 5.2 million for works) and the amendments do not alter the general character of the contract.

Changing the contractor is possible, however, only in very limited cases. Such cases are either (i) an unequivocal review clause contained in the initial contract or (ii) universal or partial succession into the position of the initial contractor following corporate restructuring (including mergers, acquisitions and insolvency), provided that (a)

this does not entail other substantial modifications to the contract, (b) this is not aimed at circumventing the law, and (c) the new contractor fulfils the criteria for qualitative selection initially set out by the contracting authority.

We note that under the current law, neither the state of emergency declared by the President, nor the COVID-19 pandemic automatically qualify as *force majeure*. If they have been qualified as such by way of a contract, then the affected party can rely on the COVID-19 pandemic to excuse itself from performance, provided that all the conditions of force majeure are met. These are that the event be external, unforeseeable, absolutely invincible / unsurmountable and unavoidable. If the parties to a public procurement contract cannot escape liability for non-performance on grounds of *force majeure*, there may be other legal remedies that can be invoked to limit its liability and exposure under a contract given present unforeseeable circumstances affecting the contract (*e.g.* the doctrine of hardship or frustration), subject to certain conditions being met.

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