



POLICY PROPOSAL

**The regulation on the activity
of the public procurement working group**

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Introductory note

The need to revise the Regulation on the activity of the public procurement working group came about with the amendment and completion of the primary legal framework, namely the Law on Public Procurement (no.131/2015). Thus, the new legislative provisions approved on 26 July 2018 (through the Law No. 169 amending the Law 131/2015 on Public Procurement) determined the need for a new Regulation laying down the duties, obligations, and rights of the public procurement working groups of the contracting authorities (hereafter PPWG). Therefore, the Ministry of Finance, which regulates the national policy in the field of public procurement by elaborating and promoting the legislative framework, elaborated the draft of the Government Decision amending the Regulation on the activity of PPWG in order to correlate the secondary normative framework to the new provisions of Law 131/2015.

The main provisions of the draft are:

- 1.** The regulation aims to bring about more clarity to PPWG's activity in the process of initiating and conducting public procurement procedures, including:
 - the elaboration of the awarding documentation, the European Single Procurement Document form (hereafter the ESPD) and other application documents in the procurement process.
 - elaboration of the necessary documents for the sanctioning of the economic operators in case of inadequate fulfillment or failure to fulfill the contractual stipulations;
 - launching procurement procedures through the MTender Electronic Procurement System (publication of the notice of intent, of the notice for participation, awarding documentation, receipt of bids, etc.);
- 2.** Regulating the contracting authority's right to use procurement services including those of the central purchasing authority. It should be noted that the contracting authority's right to make employ purchasing of service providers or of central purchasing authority for the purpose of preparing and managing public procurement procedures on its behalf and benefit is stipulated in Law 131/2015.

We would add that the above-mentioned modifications and provisions are welcome (completing PPWG's duties and obligations, the argument against the awarding of batch contracts, the publishing in the Barometer of Public Procurement of the market consultation notice, electronic information exchange, exclusion of the minutes concerning the opening of tenders in the case of procedures conducted electronically by MTender, the obligation to expose the separate opinion of a PPWG member, etc.). These provisions will help improve the quality and efficiency of the procurement process, as well as to ensure the implementation of the value for money principle in line with international trends and practices.

Policy proposals

In addition to the provisions proposed by the Ministry of Finance, we, as representatives of the civil society, come up with a number of policy proposals to be taken into account in the process of adopting the new Regulation on the work of the public procurement working group. At the same time, we recommend that the Ministry of Finance reviews and adopts the new Regulation in compliance with the legal provisions on ensuring transparency in the decision-making process.

1. The participation of the civil society representatives in the PPWG

| ACTUAL PROVISION | POLICY PROPOSAL | ARGUMENT |
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| Point 13. The contracting authority will be obliged to include civil society representatives in the working group if a written application has been submitted two days before the deadline for the submission of tenders, but they can not constitute more than one-third of the total group membership. | It is proposed to exclude the phrase « <i>but they can not constitute more than one-third of the total group membership.</i> » As a consequence, it is also necessary to exclude point 17 of the Regulation | <p>The current provision limits the rights of civil society to participate and monitor the procurement process as required by the law.</p> <p>The cap on the number of civil society representatives in the working group is not justified in the context in which they only have consultative voting rights.</p> |
| Point 14. The application referred to in point 13 shall include at least: the name of the organization, the name and surname of its representative, a copy of the document confirming the authority or the name and surname of the individual; legal and postal address or home address; contact details, including e-mail address; the procurement procedure for which it requests to be included in the composition of the working group | It is proposed to simplify the procedure for inclusion of civil society representatives in PPWG, by providing for the right of any citizen/individual to be part of PPWG. At the same time, it would be expedient to specify the ways in which a civil society representative can submit the application, specifying that the electronic tools (e-mail, Viber, Facebook) available to the contracting authority can be employed. This proposal also refers to point 18, point 23, and point 24 of the Regulation. | The process of including civil society representatives in the PPWG is bureaucratic and does not allow any given citizen, de facto and de jure member of civil society, to participate in the procurement process. At the same time, through the use of classical tools (official letters sent), it is difficult for representatives of civil society to transmit the request, communicate with the members of the working group, and to get back information quickly in order to be able to attend the meetings they are interested in. |
| Point 19. If there are more requests filed than admissible in relation to the number of members with a deliberative vote, the working group will nominate the applicants to be included in the group by drawing lots. Points 20, 21, 22. | It is proposed to exclude these points | See the argument provided above for the point 13. |

2. The powers of the public procurement working group

| ACTUAL PROVISION | POLICY PROPOSAL | ARGUMENT |
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| Point 29. The working group or, as appropriate, the certified public procurement officer shall carry out the following tasks: - monitors the proper execution of public procurement contracts; | It is proposed to complete the assignment with the following: «Reporting on this, quarterly/half-yearly and annually.» | To clarify the role of monitoring the compliant execution of public procurement contracts. |
| Point 29. - keeps track of all documents from public procurement procedures; | It is proposed to include the mention by which, in the case of procedures conducted through the MTender electronic procurement system, the documents can be kept electronically. | In the context of the implementation of electronic procurement, it is necessary to keep the electronic record of the documents related to the public procurement procedure. |
| Point 29. - draws up the necessary documents for sanctioning the economic operator in case of inadequate fulfillment of the contractual clauses. | It is proposed to complement the point with the regulation of the sanctioning mechanism. Similarly, we propose that the expression «in the case» be supplemented with the expression «non-fulfillment or» and further in accordance with the text (Law 131/2015 uses such a formula in art.76 paragraph (6)). | It is welcome to introduce this point, but it is a blurred / evasive rule, which will create difficulties for practical application by contracting authorities. |
| Point 29. - 3) elaborates, amends and publishes the annual public procurement plans; | It is proposed to complement the word «annual» with the words «and quarterly». | The text shall correspond to Article 15 paragraph (1) letter a) of Law no.131 / 2015. |

3. The obligations of the public procurement working group

| ACTUAL PROVISION | POLICY PROPOSAL | ARGUMENT |
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| Point 30. The working group or, as the case may be, the certified specialist is required: - to ensure the preparation and maintenance of the public procurement dossier for a period of 5 years from the initiation of the procurement procedure; | It is proposed to complete this point with the express mention that for the procedures carried out by the electronic system, the file will be kept electronically. | In the context of the implementation of electronic purchases, it is necessary to regulate the keeping of the electronic file. Otherwise, it is inconsistent with the principles of electronic procurement that provide for the minimization of the use of paper in the procurement process. |

4. The minutes of opening the offer

| ACTUAL PROVISION | POLICY PROPOSAL | ARGUMENT |
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| Point 29. Each member of the working group is required to sign the minutes of the bid opening session and the evaluation report of the bids. Upon the request of the representatives of the economic operators, the minutes of the bid opening sessions will be submitted to them for countersigning. | It is proposed to adjust the point and add the mention «except for the awarding procedures carried out electronically in the MTender system» | See the arguments provided for the above points |

5. Access to information

| ACTUAL PROVISION | POLICY PROPOSAL | ARGUMENT |
|---|--|--|
| Point 47. The Working Group provides information on the conduct of public procurement procedures in accordance with public procurement law if this data does not contain technical or commercial secrets, as well as confidential aspects of bids, in accordance with the provisions of Law no. 171-XIII of 6 July 1994 on Commercial Secrecy or of Law no. 245-XVI of 27 November 2008 on State Secrecy. | It is proposed to indicate expressly that in case of requested documents only parts of them constitute state / commercial secret / personal data, and while those parts are hidden, the rest of the text is communicated to the applicant. | It is necessary to develop and decipher the provisions regarding the access to information of individuals / legal persons, including the media, otherwise, as a rule, the information on public procurement is denied, being classified as a trade secret, secret information, or personal data. In particular, the public authorities misinterpret the legal provisions and refuse the submission of the entire requested document, thereby violating the constitutional right of the person to information. One solution in this regard is to specify and describe how public procurement documents can be presented to the public by hiding only parts of the text that could contain personal data, state secret or commercial secret. |

