ASSESSING THE EFFICIENCY, INTEGRITY, AND TRANSPARENCY OF THE ROMANIAN PUBLIC PROCUREMENT SYSTEM

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This report reflects the vulnerabilities identified by the experts within the public procurement process and the results of the public consultations with the relevant stakeholders. This report will be followed by a series of recommendations of public policies on procurement – in the context of the new European Directives – that will be subject to public debate in a videoconference that will take place in March in Bucharest and Zagreb. More details on the webpages of the two organizations, www.integrityobservers.eu și www.expertforum.ro.

Bucharest, March 2014

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TABLE OF CONTENTS

PART A
ASSESSMENT OF THE ROMANIAN PUBLIC PROCUREMENT LEGISLATIVE AND INSTITUTIONAL SYSTEM

1. INSTITUTIONAL AND LEGAL FRAMEWORK [1]

By and large, the Romanian system of public procurement is governed by Government Emergency Ordinance *no. 34/2006 on awarding public procurement contracts, concession contracts of public works and services*. Before its adoption, the Romanian legislation and practice on procurement had experienced serious problems. This is important, because some of the habits from that time left their marks until today, despite the emergence of a new legal framework, for instance by the perpetuation of the habit to tilt the bid to the advantage of a certain winner; manipulate prices; or include post factum annexes to the contract which change substantially the nature of volume of goods and services to be delivered.

Having been prevalent for so many years, the glaring bad practices created a certain *path dependency* which could not be easily changed. For example, if the value of a contract was estimated at €100,000, the previous legislation did not require any publicity. The contracting authority was required only to produce three offers from the economic operators; then it concluded the contract based on the cheapest bid. In many cases, the contracting authority would probably choose the supplier in advance, and

1 This assessment has been written in collaboration with Expert Forum and partially relies on previous work done in 2010 by the team of authors in cooperation with the Competition Council

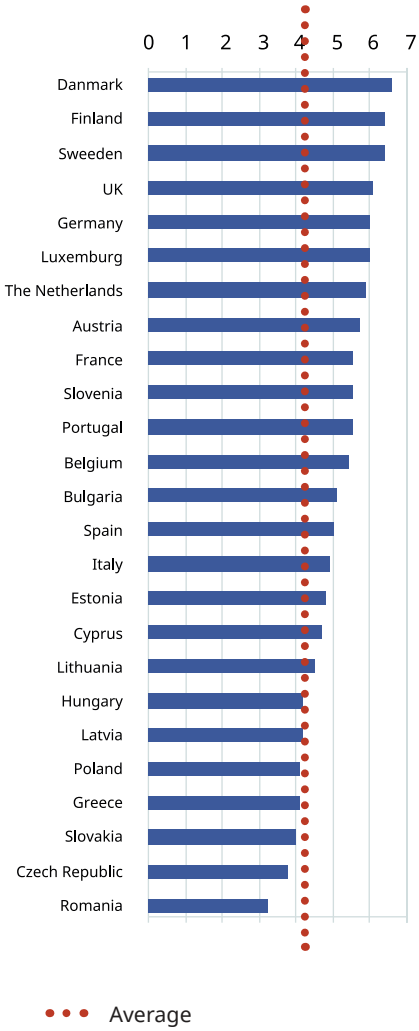
then arranged to receive two phony offers (with higher prices or lower quality) from other competitors. These were either uninterested in the contract, or had to wait for their turn later on, in a clear example of collusion and manipulation of bids.

Thus, the procurement procedures were formally followed, even if they resulted in contracts having overestimated prices (two, three or even ten times higher than the market price) or contracts with bizarre provisions. This strange system has affected the budgets of many contracting authorities and has led to substantial siphoning of public funds. It has worked for so long that the practice of "arranging" the offers between the companies that were in informal communication, or even belonging to the same business group, became entrenched.

The EU *acquis* applicable for the procurement system consists of a set of European directives and regulations . On top of these, there is the jurisprudence of the European Court of Justice containing more than 100 cases on public procurement. As a result, the system is complex and relies significantly on case law – which sometimes creates difficulties of understanding for the Romanian authorities, unfamiliar with this way of thinking. In 2006, when Romania was preparing to join the EU, it was decided that the transposing of the procurement system in the national legislation must be made uniformly, by a single act, namely **GEO 34/2006**. On the other hand, the concession contracts of public property goods were regulated distinctly by *Government Emergency Ordinance no. 54/2006 on the concession of public property (GEO 54/2006)*.

It was also decided that all public policy parameters (thresholds, detailed procedures, etc.) should be specified by the unitary primary and secondary national legislation, even in the case of contracts having a value below the one provided by the EU Directives. The European practice of having a more lax national framework, supplemented by internal rules and procedures adopted by each institution according to its specific activity – system that may have certain advantages

Table 1. Corruption occurrence in public procurement.



OECD, 2007, based on Executive Opinion Survey. Estimates on the frequency of agreements, bribery and extra payments made in public contracts (1 = usually, 7 = never)

– was considered dangerous in a country like Romania, which was just starting to strengthen the rule of law – process that will continue for a good number of years from now on. Consequently, the current system is rather a cautious, prescriptive one.

The EU partners and evaluators regarded this legal framework as reasonably good and functional, and they have recommended that further efforts should focus on its consistent enforcement, on unifying and improving the practice, at the central and local levels, and on permanent monitoring and feedback when problems arise. Recommendations aimed at maintaining a longer period of stability for this framework for the administration to absorb better the principles and the spirit of European procurement system and to gradually eliminate the tendency to abuse it by dubious practices.

INSTITUTIONAL FRAMEWORK: HOW THE PUBLIC PROCUREMENT SYSTEM IS RUN

ANRMAP *was founded in 2005, it is under the direct coordination of the Government Secretary General and it plays the role of a legislation initiator, methodological advisor for the contracting authorities, monitoring factor of the awarding of contracts, the ex-post controller and provider of training programs.*

UCVPP *was founded in 2006 within the Ministry of Finance, at the express request of the European Commission -DG Regio, which wanted to exercise comprehensive control of the EU funds before the finalization of contracts. DG Market vision was slightly different in the sense that a tough ex-ante control may lead to an undesirable slow absorption of the EU funds. In its current form, UCVPP is the compromise between two visions, opting for a so-called ex-ante light control in the pre-conclusion phases: preventive and consultative verification based on samples lying on the actually application of the procedures, starting from publishing the announcement to signing the contract. The ex-ante evaluation was integrated into the Ministry of Finance for two reasons: firstly, DG Market approved the idea to entrust the same institution (ANRMAP) with both ex-ante and ex post controls, and secondly, such a control requires a larger number of staff, including in the territory, and only the Ministry had decentralized structures in counties thus allowing the establishment of these specialized units at a minimum cost.*

CNSC *was established in 2006 and represented, at least at that time, the only practical alternative to the overcrowded courts, providing quick resolution of disputes. The Council is an independent body with administrative and judicial attributions, which settles the complaints submitted against acts issued by the contracting authorities that are considered illegal.*

ASSI *was established under the Ministry of Communications and Information Technology for the operation of the national e-government system. While it functioned, ASSI managed the electronic public procurement (SEAP), i.e. the automatic transmission of announcements to the Official Journal of the European Union and has made available the technical facilities for the partially or fully application of procurement processes through SEAP to contracting authorities. After ASSI was abolished as a result of the 2009 administrative restructuring, its responsibilities were taken over by the National Centre for the Management of the Information Society (CNMSI) and by the National Centre "Digital Romania" (CNRD).*

From that point on, significant improvements in the functioning of the system could be obtained only by increasing the institutional capacity and the implementation of the legislation, at the level of the central institutions managing the system, as well as of the contracting authorities. However, on this scale of application, progress has never been very spectacular, with certain exceptions within the procurement process (the introduction and dissemination of the electronic bidding system, and the system for resolving complaints by means of administrative proceedings).

A serious malaise affecting the system was the usual legislative instability: GEO no. 34/2006 has been amended more than ten times in the past five years. Although the raising of the thresholds so as to reduce the administrative burden of the proceeding for small and medium contracts and the reduction of the possibilities to block the award of contracts by repeated complaints were well-intentioned, these changes have created serious problems for the institutional learning and for achieving uniform practices in the administration. An important fact is that the amendments proposed this year for the provisions of GEO no. 34/2006 - which was called by commentators "***the new Law on Public Private Partnership***", initially adopted by the Parliament, vetoed by the Presidency but finally approved – are of similar nature. As in other cases, the original intention may have been a positive one: to facilitate the conclusion of such PPP contracts, an activity that has not been very successful in Romania until now. However, the initiator has not taken into account that the legislative framework and the rather weak technical capacity of authorities in managing such complex contracts was the main obstacle in the way of concluding genuine public-private partnerships.

2. PROBLEMS REGARDING THE PUBLIC AND PRIVATE SECTORS

Public procurement does not have a good media support in Romania and the general public, including the business sector, is generally cynical about how the system works. For example, even if, statistically speaking, the negotiation procedure without publication is not a big problem (as a percentage, it is below the European average), the size (large) and visibility of contracts awarded in this manner automatically cast a lasting shadow over the entire system. Moreover, if such irregularities affect large contracts, then the proportion of the amounts committed exceeds the percentage of the contracts; therefore, the subject can be a really relevant one.

In fact, the public procurement system is currently facing a substantial problem: poor capacity of the contracting authorities of turning a project idea into a tangible result, even when funding is available (for example, the EU funds) and when all the involved actors have the best intentions. In other words, even if somebody is not necessarily trying to circumvent the law, the lack of planning, the improvisation and the inconsistency result in situations that generate suspicions. Only after overcoming the planning phase, the beneficiaries of funding are facing the need for applying public procurement regulations.
Such problems cannot be resolved by amending the law and they cannot be detected and corrected individually by a central institution with surveillance or technical support responsibilities, especially since a good part of them have no direct link to the procurement regulations, although they are sometimes perceived as such. However, certain dysfunctions truly relating to the system do occur in the subsequent stages of the project planning or of the procurement plan.

Although, theoretically, the legislation in force contains antidotes to the anticompetitive practices prevalent in the past – therefore, their negative effects could be mitigated – these were not completely eliminated. The relevant question is therefore: were they really reduced, or, somehow, they have found new channels of expression?

We are talking about certain **abuses of the contracting authorities**, often used in the past to influence the outcome of the procurement process, such as the case of the unjustified or excessive requirements imposed for the participants to the bidding process, the technical "targeted" conditions introduced in the specifications, the use of irrelevant assessment indexes or which were completely disproportioned scored compared to their importance among the criteria for awarding a contract, or the arbitrary cancellation of the awarding procedure. Such suspicious practices may also appear in the **private sector**, for instance: the pressures on the contracting authority to manipulate the process, by means of the methods listed above (which is a type of vertical anticompetitive agreement) or bid cartelization and bid participation coordination in various forms (which is a horizontal anticompetitive practice).

2.1 FAILURES AT THE LEVEL OF PUBLIC AUTHORITIES

Very few public authorities, especially at the sub-national level, have a true strategy to be followed in case of procurement operations. This is also true for Capital Investment Plans, which theoretically should be mandatory documents and cover the bulk of spending to be put out from the bidding process. In reality these multi-annual documents, when they exist at all, are formalistic and lack any connection with the general budget to be executed in the current year. Included items are not clearly prioritized so the documents look more like a wish list. Even if a new investment is approved, financed and is initiated, maintenance and operational costs for after completion are not factored in, which leads to periodical management crises and hasty procurement "motivated by emergency", with superficial documentation and tight deadlines. Such failures of long term strategy, partly due to the uncertainty of the institutional and financial environment in which authorities operate, reduce the effectiveness of the procurement spending.

When things reach to the procurement stage as such, most problems, as indicated arise from the informal – and hence, hard to pin down and prove – relationship between the public authorities or individuals employed by such authorities, and the economic operators who may bid for contracts. Such sort of clientelism has a long history in Romania and is very difficult to uproot. In bids having a high economic value, the leaking of sensitive information to a competitor, at the right moment, can make a lot of difference for the chances to win.

The usual trick for abnormally restricting the participation in the procedures is by imposing eligibility criteria which are disproportionate as compared to the necessities of the contract. The primary and secondary legislation do not require the contracting authorities to use such criteria and, even less, to use it irrationally. The purpose of the qualification criteria is, for example, to avoid awarding a contract for the construction of a highway to a very small company – but not to block entirely the participation to a bid for the companies with a real potential to carry out a certain contract. The excessive request of irrelevant documents is also a barrier to real competition.

Such bad practices – like requesting trivial documents during the awarding procedures or the disproportionate requirements imposed to the economic operators – do not guarantee in any way the greater integrity or efficiency in spending public money, but only complicate things unnecessarily. For instance:

- The fulfilment of certain financial conditions (liquidity, solvency) for the contracts where the lack of liquidity is not a major impediment to the proper carrying out of the contract, either because monthly advances are anyways provided for (in the case of contracts of works), or because operators have already established a well-structured business

relationship allowing them to work with credit-suppliers;

- Any bidder must have incurred profits over the last three years, which is an unreasonable requirement in almost every imaginable case, because in most instances, during three successive years, there may be a year when the company records losses, not to mention the crisis situations which can affect the financial statements; to demonstrate a sound financial and economic situation other data could be relevant (no remaining debts, the turnover etc.).
- A bidder that trades certain products and which has no processing activity is required to have ISO certification - this is an unnecessary requirement, given that the payment is made after products are formally received;
- ISO 14001 or HACCP certifications are required in procedures having nothing to do with the environment protection or with the occupational safety;
- The proof that the bidder has a minimum number of employees, although many SMEs are using an employment system based on limited duration contracts which is adjusted based on the number of the contracts obtained on the private market or on the public domain;
- To demonstrate that the candidate is experienced in a certain field (which is a correct approach), but which is defined in an extremely narrow manner, such as the following:

  Mandatory experience in building schools, while the experience in constructing apartment blocks was not accepted;

  At least 10,000 computers previously delivered, while 4,000 computers previous delivered were considered insufficient even if, in fact, this was the amount of obligations provided by the contract;

  Experience in delivering a particular type of service to a public institution, while the experience in delivering the same service to a private client was not accepted;

  Experience in constructing a road at altitudes higher than 600 m, while the experience in constructing roads in lowland was considered irrelevant.

The imagination or lack of judgment of the authorities is limitless in imposing unnecessary qualification requirements. In response, a number of operators specialized in doing business with the State acquired all the possible certifications and, as a result, they cannot be eliminated easily from the competition. A large number of companies that have chosen to focus on economic performance and not on investing their resources in accumulating various official certifications and in assembling procurement dossiers are being driven out of the procurement procedures by the excessive and irrelevant bureaucratic demands. It must be carefully examined to what extent this excessive hyper-protective behavior of the contracting authorities is raising serious entry barriers to various actors, thus seriously affecting the competition and the final cost of products, at the expense of the public budgets. Anecdotal evidence such as those mentioned in Section 2.2 below suggests that something like that might happen and it takes a careful analysis to assess the magnitude of the phenomenon and its socio-economic effects.

Conversely, the law includes certain too sloppy articles that may be exploited,

such as the one stating that "the contracting authority has the right to exclude from a procedure for awarding a public procurement contract" (Art. 181) a supplier in bankruptcy, having debts to the State or having previous convictions. In such situations, the formulation of the article - namely stipulating a right, not an obligation - let us believe that the authority may or may not exclude, at its discretion, such candidates.

In addition, the authorities are making costly errors while choosing the assessment factors and describing the score calculation algorithm, namely when selecting "the most advantageous offer from the economic point of view". The gross manipulation of these factors - for example, by requesting unrealistic short deadlines for the implementation, unnecessary delivery deadlines (like 6-12 hours) or unusually long warranties (50 years, a period that exceeds even the average life expectancy for the firms in question, so they are actually an empty promise, etc.) - is common and costly, because it occurs in complex expensive acquisitions and generate irreversible results, since the formula cannot be amended during the procedure.

As with regards to the **regime of concessions**, the competition must ensure a non-discriminatory access to contracts - for example, by eliminating the possibility to transfer valid licenses in milder conditions than in those originally imposed for obtaining them. The current exemption practice from the principles stated in a law, through secondary and tertiary legislation (for example, by regulations of autonomous agencies such as the National Authority for Mineral Resources) without providing the same level of transparency and public debate on the purpose of these exemptions that the one achieved when the law was adopted, is a serious deficiency affecting the competitive environment. Also related to concessions, there are perpetual problems with the "PPP Law", following various initiatives in the Parliament to amend it as an "urgent and necessary tool to unlock the major infrastructure works expected in Romania in the coming years". The ambiguity on what law is applicable must be somehow resolved. This is because, ultimately, PPPs are still just procurement projects under European Directives 17/2004 and 18/2004 and of the large jurisprudence of the European Court of Justice, despite any original ideas transposed into the national legislations of the Member States by the legislative bodies. It is difficult to imagine a PPP not requiring a competitive selection procedure having a procurement or concession nature, so it is not clear what would actually be the application area of these new provisions.

What is more, in the summer of 2013 the basic law on public procurement (OG 34/2006) was controversially amended on two key points:

- it became interpretable which **state-owned companies** (SOEs) will actually continue to fall under the obligation to procure competitively. Thus, currently, state owned companies that operate in "competitive" markets (except for SGEIs: water, energy, communications) are exempted from public procurement legal procedures, but should prepare their "own internal regulations for procurement". There is no detail on who is entitled to verify the application of these "internal regulations" or even their very own existence.

- the thresholds for public procurement were increased to € 30,000 (from €15,000) for goods & services; and to € 100,000 (from € 15,000) for works. The increase is substantial, mainly if one considers contracts at the local level.

The amendment on SOEs took place despite a long public discussion that public companies in competitive environments should also be compelled to sell and/or buy competitively. The discussion followed a scandal of cheap energy sales from an electricity company, on which there are several investigations by the European Commission (DG Comp) for illegal state aid of around 1 billion € between 2007-2011.

2.2 DYSFUNCTIONS IN THE PRIVATE SECTOR

There is an entire body of case law, with high economic significance for Romania, showing that private operators may engage in anticompetitive practices without the direct involvement of the contracting authority. Unfortunately, a systematic analysis of this body does not exist, as it is more difficult to be studied than the public authorities' abuses, such as those listed above. The network of institutions monitoring and controlling the public procurement field has been built primarily to detect and correct the procedural errors or irregularities of the contracting authority, and not the final effects (distortions of the purchasing price). These institutions do not have the required type of human resources or the logistical capacity to undertake effective market analysis.

For example, a typical SEAP public procurement of goods is easily standardized, such as those purchased by hospitals, boarding schools, kindergartens or military units: bulk foods (flour, potatoes, sugar, oil, etc.), maintenance and cleaning products, different materials. Theoretically, on a competitive market, the goods purchased in large quantities and at regular intervals should enjoy substantial discounts. In fact, many times it appears that purchasing prices are actually higher than the retail prices from super markets or markets, sometimes up to 50%. Some other times, low quality products (practically unusable) meet the formal requirements from the bid. The bidders' imagination is endless in this respect and the methods to prevent this situation by ex-ante specifications are relatively reduced.

Managers of contracting authorities may understand and report what happens, but the law forbids them to make simple and cheap direct acquisitions, being forced to carry on the procurement through SEAP. Lacking proper analysis, we can only speculate at this point on the causes of the phenomenon:

- The vertical agreement elements described in Section 2.1, meaning that the acquiring institution discreetly directs the contracts toward the favored bidders, through

specifications, by trading privileged information, by bureaucratic baffles etc., thus allowing the operators in question to exploit the system and to obtain higher prices than it would be the case;

- The cartelization of the producers or of the traders of a particular good, which can control the market for public procurement, even without the help of the contracting authorities, and which may undertake an "entry in a row" coordination (who takes, what takes, when it takes); many times, there is no actual cartelization in the case of direct awarding of contracts, as the competing companies theoretically belong to the same employer or are part of an association;
- The rigidity of the prescriptive framework (with the intent of preventing frauds) generate natural entry barriers (of an economic, bureaucratic, informational, etc. nature) on these markets of public contracts, that are much higher than those for entering on the free market, thus explaining the high prices;
- The business uncertainty in relation to the State (for example, late payments, as the case of medicines or medical materials) is so large that it justifies a higher risk premium;
- Finally, as it is likely to happen in reality, there is a mixture of the abovementioned factors.

The situation is roughly similar on the market of small and medium works contracts. For example, the construction sector shows that services or operations included by a public project unit often have substantially higher costs than the equivalent carried out in a private project. The basis for such a price increase is an agreement between operators. This is favored by: (i) the difficulty of finding proofs for demonstrating the agreement, (ii) the fact that if the authority can, however, prove the anticompetitive behavior, the fines are much lower than the potential gains of the undertaking or than the sanctions applied by the cartel to those disclosing the agreement – which is their final removal from the market.

In all these cases, a strategy of a systematic economic analysis must be urgently prepared. It must be undertaken at different levels (local/ central administration) or to focus on usual sectors (road works, construction works, the office products market, the market of large consumption products and the market of medical equipment). Only such analysis can reveal (i) the magnitude of the price distortion in these areas, if indeed it exists, and (ii) its real causes. Only on the basis of such analysis, corrective measures in the specific policy, the legislation and the law enforcement system can be adopted.

Even the simple "mapping" of the problems in the field so as to get a better picture of what happens would be a valuable result. Otherwise, it is absurd to just report that the system works well, the procedures are followed, and the coverage degree of the SEAP electronic procurement increases from year to year, while the main objective of the entire effort – to increase the competition, to rise the quality of the products and services delivered to the public sector and to lower costs per unit - is not reached.

3. SUMMARY OF PROBLEMS WITH PUBLIC PROCUREMENT IN ROMANIA AT A GLANCE

1 IDENTIFYING THE NEEDS

- Priority given to non-priority areas
- Disclosure of confidential information to favored competitors
- Introduction in TORs criteria that would favor a certain competitor
- Introduction of hidden clauses that lead to an increase of the price of a contract
- Introduction of unnecessary elements that would increase the price of a contract

2 SELECTION OF THE PROCUREMENT PROCEDURE

- Selection of procedures that limit competition
- Excessively shorten timeframes
- Use additional fictitious bidders or address invitations to those unlikely to submit competitive bids
- Award the contract for a low price and allow subsequent increases of the value of the contract

3 AWARDING THE CONTRACT

- Disqualification of competitors without legal grounds
- Awarding the contract to companies that do not meet the criteria
- Influence exerted on the selection committee
- Modification of bidding documents after the completion of the procedure
- Use of highly subjective criteria

4 CONTRACT EXECUTION

- Paid fictitious works
- Lower quality of used materials, thus generating a lower quality product
- Lack of or insufficient inspections
- Delays in payment schedule with a purpose to extort money from the contractor
- Increase the price of the contract

5 OTHER VULNERABILITIES

- Avoidance of procurement procedures, including by splitting contracts
- Secrecy of certain procurement procedures
- Lack of strong complaint resolution mechanisms
- Long procedures in court in case of disputes

PART B
CONFERENCE KEY POSITIONS

JANUARY 28TH, 2014

The above report has been presented during the conference ***Challenges and solutions for improving the legal and institutional framework of the Romanian public procurement system*** that has taken place in Bucharest and has gathered representative stakeholders and decision makers. This section includes answers to some of the questions addressed in Part A.

PANELS

1
OPENING REMARKS

- **Simona Maya Teodoroiu** – State Secretary, Ministry of Justice
- **Horia Georgescu** – President, National Integrity Agency
- **Teodor Dulceață** – Deputy Director, Control Directorate, The Fight Against Fraud Department
- **Sorin Ioniță** – President, Expert Forum
- **Munir Podumljak** – Executive Director, Partnership for Social Development, Croatia

2
THE NEW APPROACH TO PUBLIC PROCUREMENT

- **Munir Podumljak** – Executive Director, Partnership for Social Development, Croatia
- **Silvia Mihalcea** – General Director, National Trade Register Office

3
ROMANIAN LEGAL FRAMEWORK AND CHALLENGES IN THE ADAPTATION PROCESS

- **Radu Puchiu** – State Secretary, Chancellery of the Prime Minister
- **Cornel Călinescu** - Head of National Office for Crime Prevention and Cooperation with Assets Recovery Offices, Ministry of Justice
- **Bogdan Paul Dobrin** – President, National Agency for Oversight on Public Procurement
- **Silviu Cristian Popa** – Settlement Councillor, National Council for Complaint Resolution

4
CHALLENGES AND FRAUD RISKS IN PUBLIC PROCUREMENT AND POSSIBLE RESPONSES TO IT

- **Sorin Ioniță** - Expert in public administration reform, development and local affairs, President, Expert Forum
- **Bogdan Chirițoiu** – President, Competition Council
- **Sorin Fusea** – President, National Association of Public Procurement Specialists
- **Dan Tapalagă** - Investigative Journalist, Hotnews

HORIA GEORGESCU
President, National Integrity Agency (ANI)

Mr. Georgescu presented the development of the prevention system on public procurement, PREVENT. The novelty comes from the fact that the electronic procurement system (SEAP) will include an integrity form, for the decision makers that will be processed by the integrity inspectors within ANI. When the system identifies a conflict of interest, before signing a contract, a warning will be submitted to the head of the institution and to that specific person that may be involved. The system is preventive and has the purpose of reducing the number of files in courts – which are time-consuming, especially when it comes to recovering the prejudice and when the persons are no longer hired in that institution.

The database will be filled in through SEAP (the national electronic public procurement system), during the procurement procedures. ANI will define together with its partners the categories of officials that are subject to the procedure (i.e. the general secretary of an institution, the mayor, the president of the county council and so on). The system does not include the private operators, but it can be anytime extended by ANRMAP and UCVAP in this sense.

If the form is not filled in, the publication procedure of the procurement cannot continue in SEAP. The form will be included in a legislative initiative and will be compulsory. The procedure aims to include a number of officials as large as possible. The consultants will also be included in the system, because in some cases, the consultants are connected to the companies that win the bid.

By now, there is no official decision over the type of notice sent by ANI: conformity or consultative. The contracting authorities must communicate to ANI if they followed the procedure or not. If not, ANI can start an investigation and will also notify other investigative institutions. When the notice is submitted, the envisaged official will be legally responsible.

The conflicts of interests are systemic, even if the legislation includes provisions that allow a certain person to withdraw from the procedure. The legislation includes provisions on direct conflict of interest – when the decision is direct and the decision-maker signs a document, for example – and indirect – i.e. when the decision-maker is responsible for appointing bidding commissions. The impact at the local level is the highest if we take into consideration the importance of investments or services provision in small communities.

Once the public procurement procedure for PREVENT will is finished – as it is now pending - ANI and the institutional workgroup will develop a legislative draft that must be produced in order to solve the issues of the system. After the public procurement procedure is finalized, in a six months period at latest the system will be partially functional and will work at its full capacity in one year period at latest. The CVM reports specify the fact that the system should also be extended for the national funds.

This project is new for ANI and therefore a new department, with specialized integrity inspectors will be created.

As it is a project funded from European funding, it will ensure the publicity of a significant quantity of public data regarding the public procurement system – first for the European money and then for the national funds. The structure is highly adaptable for the national public procurement.

TEODOR DULCEAŢĂ

Deputy Director, Control department, DLAF

The public procurement system is not transparent and does not ensure a competitive market. There are issues with the European programs for both private and public projects.

The participants in the public procurement procedures do not understand that the final beneficiaries are the citizens and therefore the public resources must be judiciously spent.

Mr. Dulceață considers the following as recurring problems:

- **Specifications**: splitting contracts, in order to avoid publicity; the descriptions of the bidders are copied into the specifications. DLAF even encountered one situation in which the specifications were produced by the bidder itself;

- **Human resources**: beneficiaries' lack of experts;
- **Using false documents**: the bidders use false documents, considering that nobody will verify them – on European projects all documents are verified. False declarations are produced when it comes to the creditworthiness of the participants, balances or to prove their experience;
- **Conflicts of interests**: the head of the institution is in potential conflict of interest with the winner or the company has connections with the members of the evaluation commissions;
- **Transparency**: the publicity of the public procurement procedures on European funding is not transparent enough, especially in private sectors.
- **Deals over prices**: although an abridgement of the procedures is aimed at, the beneficiaries make deals with a potential bidder and the values overcome the level of the market. The EU representatives proposed the development of a database providing price limitation – practically, an estimation of the prices will be generated and the beneficiaries are not allowed to exceed the limits;
- **Information and prevention**: more attention should be given to the public procurement procedures, especially for the European funding. More attention should be given to the European directives, to simplify the public procurement procedure and to understand the phenomenon, in order to avoid the EU corrections.

SILVIA MIHALCEA

General Director, National Trade Register Office

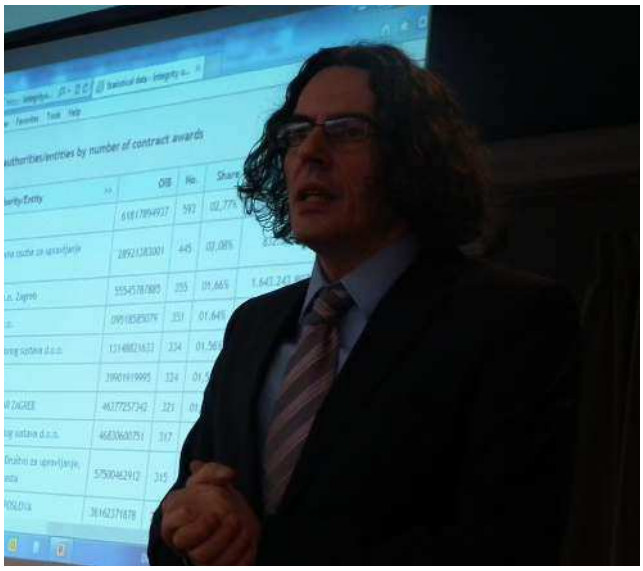
Ms. Mihalcea underlined the support that the National Trade Register Office will offer to Expert Forum in order to develop the public procurement database and specified the contributions (in data) of the Office to the project. Moreover, Ms. Mihalcea announced the transposition of Directive 17/2012 that enlarges the limits of the information given without charge by the Office – the social headquarters. The deadline for transposition in the Romanian legislation is June 7th, 2014.

MUNIR PODUMLJAK

Executive Director, Partnership for Social Development (Croatia)

The Croatian database (*www.integrityobservers.eu*) is a good practice when talking about monitoring public procurement procedures. Also, the Croatian Law on Public Procurement is one of the most modern instruments, especially due to its clarity, functional mechanisms and prevention and fraud combat instruments. The law has clear specifications on the publication of bids, including high penalties for those that do not follow the procedure. For example, the companies that cannot compete must be listed (i.e. conflicts of interest) and if the procedure is not respected, the fine goes up to €150,000. If the procedure is concluded, criminal charges may occur. Moreover, the responsibility of the decision makers is high, as the official might even lose his/her property.

The system cannot be easily bypassed. There are persons who manage to do it,



but they risk high sentences, as they have to commit at least five crimes in order to bypass the system. The database detects anomalies and therefore if a person commits crimes, they can be identifies and report can be filed.

BOGDAN PAUL DOBRIN

President, A.N.R.M.A.P.

The European Parliament approved the new directives on public procurement. The unofficial data states that they will be published in March in the Official Journal of the EU, entering therefore into force in 20 days. Each Member State has at most two years for transposition in the national legislation. After their publication, ANRMAP can produce a legislative draft.

After they are published in the Journal, they will be published on ANRMAP website. The work on the new legislation is already ongoing and three normative acts will probably be produced on the following topics: classic procurement, concession contracts and utilities. The current legislation (GEO 34/2006) on classic procurement is a mix between two directives. The Directive on utilities is more flexible and the GEO includes 'barriers' taken from the Directive on classic procurement that is also applied to

the utilities – therefore the procurement for utilities are cumbered.

The transposition may also generate negative effects. If we look at the European thresholds, there may be three pieces of legislation and not just one, at the national level. It is not excluded to have only one piece of legislation, but with a clear distinction between the public procurement types.

The remedies Directive will also be included in the new pack, with contributions from CNSC, in order to get a more efficient system for public procurements.

Starting from the observation that the public opinion considers that the public procurement is subject to fraud, we can easily see that there is a lack of transparency, in the sense that people do not know much about the process. Procurement represents an important element for the national and European economy. Even if the procedure is complex, people should know more about it. It is important to mention that the directives were finalized after extended consultations with the stakeholders.

Both in Croatia and Romania we can see a good transparency on procurement. Improvements will be made on conflicts of interest. Therefore, we will make a significant step on prevention in Romania [related to PREVENT, see above] and will set an example for the Member States.

We do not have an exact statistics until now, but the fines for public procurement in 2013 are of almost 20 million lei. Cases have been notified to other criminal investigation institutions.

"*There is no institution to monitor the implementation of the contracts. Their implementation is overseen by the Court of Accounts, but only on performance criteria*." - Laura Ștefan.

SILVIU CRISTIAN POPA

Settlement Councillor, National Council for Complaint Resolution

CNSC is a remedy institution that has a visible role taking into consideration the fact that it reduces in a considerable manner the congestion of the courts when talking about complaints during the procurement process.

In 2012, CNSC registered 5,997 complaints, out of which 2,448 regarding the bidding documents and 3,549 related to the results of the awarding procedures. In other terms, 2,644 complaints are related to works, 1,933 to supplies and 1,420 to provision.

The main vulnerabilities when talking about procurement are the following:

- Lack of transparency in the evaluation process;
- The repeated modification of the legislation, a fact that generates ambiguity;
- Lack of experience of the personnel employed by the contracting authorities;
- The limited capacity of implementing the legislation; the faulty manner of

elaborating the bidding documents and reformulating the requirements; contradictory answers of the contracting authority towards the economic agents; the excessive 'formalism' and the rigid interpretation of the legislation and the unfounded cancellation of the awarding procedures

If we talk about *red flags*, CNSC noticed the following issues:

- Emergency situations invoked by the contracting authority (losing funds, the end of the fiscal years etc.);
- The "inadequate" access to information;
- The copy-paste content of the explanatory notes;
- The lack of standard forms of general information;
- The "preference" for some bidders
- Setting the specifications according to the particularities of a certain economic agent;
- The "selective" requests for clarifications during the evaluation procedures.

CORNEL CĂLINESCU

Head of National Office for Crime Prevention and Cooperation with Assets Recovery Offices, Ministry of Justice (MoJ)

There are a few preconditions which were assumed by the current National Anticorruption Strategy as prerequisites for being efficient in fighting against corruption:

- To ensure the stability and sustainability of anticorruption institutions, especially for DNA and ANI;
- To transfer responsibility from DNA and ANI to the management of the public authorities. NAS identifies each new case of ANI and DNA as a failure of management. If cases are opened, it means a manager did not have a good control system in order to prevent corruption.

According to NAS, public procurement represents a vulnerable sector. The measures anticipated in 2012 are still in debate (See measures related to the specific objective 4,6 – *Enhancing the efficiency of the mechanisms for preventing corruption in public bids*). In 2012 we were discussing about SEAP and we proposed to identify and solve the vulnerabilities. We are at the same stage. More than 10 years ago SEAP was considered to be a good practice and international prizes were awarded. Now the trend is to publish information, mostly open data.

The important step that needs to be taken is to put pressure on authorities to become more transparent not only in terms of public procurement, but also with regards to the implementation stages – open contracting. Problems occur not only with the procedure, but also during the execution of a project.

The collaboration with other agencies and NGOs is good, as MoJ is involved in projects with them on public procurement.

MoJ supports the unitary practice related to public procurement cases. To this end, NAS lists the possibility to promote appeals for legal purposes. So far no requests were addressed to MoJ in this sense.

If we talk about figures:

- The recovery of prejudice: data from prosecutors indictments show that we asses the cost of crime at over € 2 billion, reported to the entire criminality . Each year precautionary measures are being taken for more than ½ billion EUR. Our priority is to become more efficient with the confiscation orders and precautionary measures. Romania has a modern legislation – from 2012 we have the possibility of extended confiscation and there some opened cases on this topic.
- The capitalization of seized goods before the completion of a conviction is also covered by our legislation. This might be seen as a controversial measure, but it is constitutional and it replicates an international best practice.
- MoJ aims to know what data the Romanian state possesses on recovery. For the prosecutors the numbers are clear, for the courts the same, and for the terminus point, the capitalization by ANAF exists, but, as it is mentioned in the CVM report, the capitalization percentage is under 10% from the goods that the court confiscates.
- There are also other two statistics that must be compiled: the numbers that the public institutions get as reparations – and it seems that until now this procedure has not been relevant for the stakeholders. MoJ intends to get from each institution the debts and the stage of recovery. Based on empiric data available for the public institutions that recover the debts in the specified prescription period of five years the percentage is of 20-25%.
- Also based on available data the degree of executing penal fines is over 50-60%. If they are not executed, they may be transformed into sentences with execution.
- Until now there are no clear statistics with this data. MoJ intends to create a registry with data from all relevant institutions involved in the process: police, prosecutors' offices, courts, MoJ, ANAF.

Returning to the National Anticorruption Strategy, MoJ has internalised the CMV framework to the national landscape and organized peer-reviewing missions in the public institutions, in mixed teams. A shock is needed, as it is difficult, at the local level to determine the authorities to invest in the ethics councillor, to implement FOIA legislation and so on. Many of the institutions – as the visits proved – have a major deficit of information and the legislative mechanisms are not well understood. The whistle-blower is a good instrument but it does not work, because people do not know their rights. If we talk about preventing and reporting potential conflicts of interests, during our missions DLAF was the only institution that presented a case of an employer in such situation. The institutions are reticent to impose anticorruption clauses to the bidders, by means of signed contracts.

RADU PUCHIU
State Secretary, Chancellery of the Prime Minister

The most significant accomplishment is the release of open data website, data.gov.ro, where sets of open data from central public institutions can be downloaded.

In 2014, a visit from the OGP[3] secretariat will take place. The dialogue with the civil society has been a good one – the Department aims to continue the communication and therefore monthly meetings will take place, starting February

BOGDAN CHIRIŢOIU
President, Competition Council (CC)

Starting with 2010, CC intensified its works on cartels within the public procurement process, but stays tributary to the reports received from outside stakeholders. The council is the sole institution that controls the deals between bidders and not necessarily the vertical relation between the bidder and the contracting authority. Each year, CC issued fines against cartels, there are few cases in work, but all of them start from external actors. CC aims to develop its capacity of analysis, by gathering statistics on procurement that the contracting authorities cannot observe themselves.

It is important to make the law work and not necessarily to produce new legislation. For the Council, the collaboration with the prosecutors' offices is important, especially because they have investigation attributions and tools. Although cartel activities are punishable according to the Criminal Code, no sentences with execution have been

applied to people involved in cartels, so far.

Service contracts (e.g. garbage collection) carried for long periods of time are not effective for the market, as they preclude competition and keep prices high. The legislation allows the establishment of contracts for up to 49 years, but an economical logic dictates that such a long duration should be allowed only for contracts that involve large investments

3 You can read more about the Open Government Partnership on *www.ogp.gov.ro*

(e.g. investments in eco garbage deposits). Simpler contracts for services as garbage collection (e.g. 25 years contracts in the 1st District, Bucharest) or for planting flowers (10 years) are not justified as they do not drag after themselves investments that require such a long period of time for recovering. Moreover, the contracting framework should be aligned to the EU practice that dictates that the contracting period should not be longer than 4 years.

ANRSC - National Authority Regulating for Public Utility Community Services - is an under-developed regulator, not that present in public debate and partially active regarding the procurement area, that should feel encouraged to have an active collaboration with the Competition Council and with other institutions.

DAN TAPALAGĂ

Investigative Journalist, Hotnews

There is no public debate about significant contracts that go beyond 20-30 million and the media (except 2-3 sources) do not publish information or investigations. When the public debate is missing, no pressure can be put on the public institutions, such as ANRMAP or DNA. The media produces a significant number of shows based on political fights, useless talks, but not about the illegally spent money. The discussion about public contracts is missing.

Nobody asks to see the clauses of the contract for the snow removal services or which are the conditions for such intervention, whether there are penalties, or if these penalties apply and so on. There are no debates about the contracts, but just political ones, without having a clear purpose.

Another problem is the access to information, especially when talking about big contracts. The information can be obtained very late or not at all and it requires a great deal of work and

effort. Hotnews is working on developing a database with these big procurement contracts on which there are suspicions with regards to the awarding process. Under these circumstances, there might be public interest to follow such contracts.

It is a bad year for procurement, as there is an election one. The experience shows that during election years, political parties use public money for their own purpose[4]. And therefore, it also might be a bad year for transposing the directives in the national legislation taking into consideration the above aspects.

4 See the Map of Clientelism, developed by EFOR that demonstrates - amongst others indicators - the political distribution of public funds: *http://expertforum.ro/en/clientelism-map/*

NOTES

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