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# Newsletter

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*Motto:*

*“Leges humanae  
nascuntur, vivunt, et  
moriuntur. - Laws of man  
are born, live and die.”*

➤ **New rules in the public acquisitions area**

## **New rules in the public acquisitions area**

On 31.12.2010 it was published in the Official Gazette Part I no. 898, and entered into force on 03.01.2011, the Law no. 278/24.12.2010 regarding the approval, with amendments, of the Government Emergency Ordinance no. 76/2010 for amending and supplementing Government Emergency Ordinance no. 34/2006 on public acquisition contracts, the public works concession contracts and services concession contracts.

The Law no. 278/2010 is introducing several changes of which, in what follows, we will highlight the most important ones.

**A) It has become mandatory for the contracting authority to ask tenderers that take part in the tender procedure, to present a guarantee of participation,**

in order to protect the contracting authority against the risk from any improper behavior of the tender, during the entire period, until the public acquisition contract is signed.

The quantum of the participation guarantee, should be a fixed amount of up to 2% of the estimated contract value, but in any situation, not less than:

- a) if the estimated contract value is between 63,000 and 420,000 lei including - 1% of this amount;
- b) if the estimated contract value is between 420,001 and 4.2 million lei, including - 4200 lei + 0.1% of which exceeds 420,001 lei;
- c) if the estimated contract value is between 4,200,001 lei including 42 million lei - 7.980 lei + 0.01% of amount exceeding 4,200,001 lei;
- d) if the estimated contract value is between 42,000,001 and 420,000,000 lei including - 11 760 lei + 0.001% of what exceeds 42,000,001 lei;
- e) if the estimated contract value is between 420,000,001 and 4,200,000,000 lei including - 15 540 lei + 0.0001% of what exceeds 420,000,001 lei;
- f) if the estimated contract value is over 4,200,000,001 lei - 119.320 + 0.00001% of what exceeds 4,200,000,001 lei;

**B) Another amendment refers to reducing the thresholds value for the contracts for which is mandatory the publication by the contracting authority of the participation announcement and of the award notice in the Official Journal of the European Union.** Thus, the publication is mandatory, if:

- a) the estimated amount of the supply or services contract to be awarded is equal or higher than the lei equivalent of EUR 125,000 or equivalent in lei of 387,000 euros (depending on the type of contracting authority);
- b) the estimated value of the works contract to be awarded is equal to or greater than the lei equivalent of EUR 4.845 million.

**C) Regarding the applicability for the request of offers procedure,** the new regulation provides that the contracting authority has the right to apply this procedure only if the estimated value, excluding VAT, of the public acquisition contract is less than the equivalent in RON of the following **thresholds value**:

- a) for the supply contract: EUR 125,000 (compared to 100,000 euros, the previous threshold);
- b) for a service contract: EUR 125,000 (compared to EUR 100,000 the previous threshold);
- c) for a works contract: 4.845 million euros (compared to previous threshold of 750,000 Euro).

**D) Among the cases that lead to exclusion from the tender procedure** has been included the situation when the tenderer has as members of the Board of Directors / management or supervisory body and / or the shareholders or associates, persons who are the spouse, relative or by-laws including the fourth degree or who has trade relations with people who hold decision-making positions within the contracting authority. Also to the situations that lead to exclusion from the tender procedure, it was expressly provided that is appropriate to exclude only in the situation in which the tenderer is declared bankrupt by the bankruptcy judge's decision, and not situations in which the tenderer is in other proceedings governed by insolvency law. As such, if a

claim is brought against the tenderer for opening the insolvency proceedings or is declared opened the general procedure of insolvency, this does not entail the removal of the tenderer from the tender procedure. Only, if it has been decided the entrance of in bankruptcy, by the bankruptcy judge's decision, the contracting authority has the right to exclude that tenderer from the tendering procedure.

**E)** A significant change is made in respect to **the applying of the direct negotiating procedure**. Thus, if the contracting authority is applying direct negotiation procedure, without prior publication of a notice in cases where it is necessary to acquire additional / supplementary works or services, which were not included in the original contract, but due to unforeseen circumstances have become necessary for the fulfillment of the contract in question, direct negotiation procedure may be applied only if the aggregate value of contracts to be awarded and addenda that will be concluded for additional or supplementary works and / or services shall not exceed 20% of original contract value (compared to 50% applicable until the entry into force of Law no. 278/2010); in duly justified cases it may be approved up to a maximum percentage increase of 50% of the initial contract on the basis of a note in which will be given the reasons which led to overcoming the 20% and that is part of public procurement file.

**F)** The new regulation includes **the definition of the seemingly unusually low price's notion**. If an offer has an apparently unusually low price compared to what is to be supplied, performed or provided, the contracting authority is obliged to ask the tenderer, in writing, and before taking a decision for rejecting that offer, details and explanations which are considered to be significant on the offer, and also, has to check the answers that are justifying that price. An offer has a seemingly unusually low price compared to what is to be supplied, performed or provided when the tender price, excluding VAT, is less than 85% of the appraised value of the contract or, in the case in which, in the tender procedure are at least five offers that aren't considered unacceptable and / or inaccurate, and when the price offered is less than 85% of the arithmetic average of the bids, which shall be calculated without regard to the lowest and the highest financial proposals.

**G)** Another important change is related to the **settlement of the appeals regarding the tender procedure**. Thus, any person who considers that is injured in a right or a legitimate interest, by an act of the contracting authority, done with the violation of the legal provision in the area of public acquisitions, can request, through an appeal, the cancel of the act, the coercion of the contracting authority to issue an act or the recognition of the alleged right or interest. The appeal is solved only by the National Council for Solving the Appeals, without being possible anymore for the appeals to be solved, at the appellant choice, by the courts of law, like it was until now. The Decision of the National Council for Solving the Appeals can be appealed, in front of the Appeal Court of law, administrative section, from the territorial area where is located the head office of the contracting authority.

Before introducing an appeal in front of the National Council for Solving the Appeals, the injured person must notify the contracting authority upon the alleged violation of the legal provisions in the area of public acquisitions and upon its intention to approach the national council for solving the Appeals. Though, the lack of the notification does not hinder the appeal in front of the National council for Solving the appeals, so, the notification mentioned above is in fact deprived of any legal effects.

The notification does not have as effects the suspension of the tender procedure. After receiving the notification, the contracting authority may take any measures considered necessary for retrieving the alleged violation, including the suspension of the tender procedure or the revoke of an act issued in the respective procedure.

A new provision in the legal text is stipulating that, in justified cases and for preventing an imminent loss, **the Council can, until the appeal is solved, to decide, within 3 days after receiving the request from the interested party, the suspension of the public acquisition procedure**. The Council solves the suspension request taking into consideration the consequences of such a measure upon all categories of interests that could be damaged, including the public interest.

**H) Related to the access to the documents from the public acquisition file, the new settlement provides that, at the express request, the appellant has access to the documents that are to be found the public acquisition file, except for the technical proposals of the other agents that take part in the tender procedure. The latest documents can be revealed to the appellant only with the written agreement of the respective agents, agreement that is attached to the request of the appellant addressed to the Council.**

**I) In case the Council rejects the appeal, the contracting authority will retain from the participation guarantee of the appellant, the following amounts, depending on the estimative value of the contract:**

- a) if the estimative value of the contract is between 63.000 lei and 420.000 lei - 1% from this value;
- b) if the estimative value of the contract is between 420.001 lei and 4.200.000 lei - 4.200 lei + 0,1% from what is over 420.001 lei;
- c) if the estimative value of the contract is between 4.200.001 lei and 42.000.000 lei - 7.980 lei + 0,01% from what is over 4.200.001 lei;
- d) if the estimative value of the contract is between 42.000.001 lei and 420.000.000 lei - 11.760 lei + 0,001% from what is over 42.000.001 lei;
- e) if the estimative value of the contract is between 420.000.001 lei and 4.200.000.000 lei - 15.540 lei + 0,0001% from what is over 420.000.001 lei;
- f) if the estimative value of the contract is over 4.200.000.001 lei - 19.320 lei + 0,00001% from what is over 4.200.000.001 lei.

**J) The litigations and claims regarding the indemnities for covering the prejudices caused during the attribution procedure, as well as the ones related to the execution, nullity, cancellation, or termination of the public acquisition contracts are solved in the first stage by commercial sections of the territorial courts of law from the area where is located the head office of the contracting authority (and not by the administrative sections of the courts of law, as it was until now).**



The Decision pronounced by the first court of law can be appealed within 5 days after the decision is communicated to the party. The appeal is solved by the commercial section of the appeal court of law. The appeal does not suspend the execution of the decision and has to be judged urgently and with priority.