

Public Procurement & Government Contracts 2023

Romania

Trends and Developments

Overview

2022 marked the most active legislative period in public procurement since Romania's accession to the EU in 2006 and the subsequent implementation of EU public procurement legislation. This period saw at least five major amendments of primary public procurement legislation, numerous updates to secondary legislation, the introduction of new tertiary legislation, and complementary regulations.

These legislative changes were primarily driven by the need to adapt the public procurement system for the implementation of Romania's National Recovery and Resilience Plan (NRRP). The amendments aimed to increase flexibility for contracting authorities when selecting and applying specific procedures, accelerate the process of finalising public contracts, establish stricter rules for monitoring contract implementation, and address associated challenges.

Starting from March 2022, these amendments were rolled out almost every month, placing significant pressure on all stakeholders involved in the public procurement system, including contracting authorities, bidders, and courts. In March 2023, following the intense legislative activity of 2022, the National Agency for Public Procurement initiated a public consultation on the National Public Procurement Strategy for 2023-2027 (the "Strategy"), which promises legislative stability as a strategic goal by 2027. However, this stability will likely be achieved after additional legislative amendments, which have been identified as necessary for the Strategy's implementation.

In summary, the past year has seen substantial legislative changes, with the new Strategy indicating further revisions to come. Despite the evolving legal landscape, certain trends and developments originating from the 2022 amendments and the proposed Strategy have emerged and are discussed below.

Main Legal Amendments of 2022 and their Impact

The urgency to implement the NRRP primarily drove the 2022 legislative changes in public procurement. Public consultations were conducted swiftly and were largely formal, resulting in several measures being adopted without proper consideration of existing provisions or developments, creating potential conflicts that may need resolution in the future.

Legal Amendments Facilitating the Choice of Certain Types of Procedures

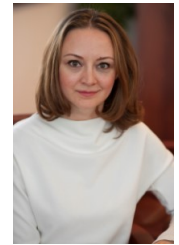
Direct award procedures

One of the most contested amendments concerned the increase in thresholds permitting contracting authorities to directly award a contract. This change essentially doubled the threshold, leading to concerns about potential abuses and diminished transparency in contract awards.

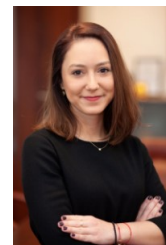
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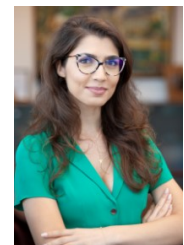
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These concerns may have been warranted, as initial controls uncovered instances of certain authorities illegally adapting to the increased thresholds, primarily by adjusting the award process to conform to the new direct award threshold. While these irregularities could be rectified over time, the new Strategy already contemplates a reevaluation of this amendment.

The use of negotiated procedures without prior publication of an award notice

Throughout 2022, various amendments were adopted, most notably Law No 208/2022, which came into force in September 2022. These amendments expanded the instances in which a negotiated procedure without prior publication of an award notice could be used for certain types of contracts, incorporating additional circumstances arising during contract execution. These supplementary circumstances have been categorised under extreme emergency cases.

For contracts related to trans-European transport infrastructure projects situated on the Central (Core) and Comprehensive (TEN-T) transport networks (as defined in Article 9(1) and Article 1.38 of Regulation (EU) No 1.315/2013), as well as connecting roads and urban bypasses, termination, unilateral denunciation, or early termination due to the contractor's fault were treated as situations of extreme urgency. This entitled contracting authorities to initiate negotiations without prior publication of a contract notice.

The presumed intent of regulating this circumstance was to allow contracting authorities to initiate negotiations without prior publication of a contract notice when a contract in an advanced stage of execution is terminated, and starting a new competitive procedure would result in project delays.

Likewise, in the realm of utilities procurement, new amendments granted contracting entities the right to employ negotiations without prior publication of a contract notice for utilities contracts related to the development of electricity generation capacities, provided the contract's scope represents less than 40% of the physical stage corresponding to the investment objective.

Both amendments pertain to sectors deemed critical in the context of the urgent need for action to secure energy independence and address the delayed implementation of key infrastructure projects in Romania.

These amendments also raised concerns regarding potential overinterpretation beyond the envisaged scope and adherence to the principles of public procurement. So far, no significant abuses have been reported. However, considering the novelty of these amendments and their application to ongoing or soon-to-be-launched projects, we can expect that 2023 and subsequent years of NRRP implementation will present the first tests concerning the application of these rules.

Legal Amendments Regarding Publicity of Contractor's Conduct Under Public Contracts

Romanian Public Procurement, Sectorial Procurement, and Concession laws implement the exclusion grounds stipulated by the EU Directive, making them mandatory for contracting authorities and entities. Concerning the exclusion ground specified in Article 57(4)(g) of Directives 2014/24 and 2014/25 ("where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions"), Romanian secondary legislation – specifically, the implementation norms of the Public Procurement Law and Sectorial Procurement Law – prescribes an "certifying document" (*document constatator*). This document is issued by a contracting authority at the end of a public contract, detailing the contractor's conduct.

These certifying documents are published on the electronic public procurement portal and can be used by contracting authorities when evaluating the incidence of the aforementioned exclusion ground, in comparison to the statements made by the tenderer in the ESPD. Government Decision No 75/2022 introduced a new right for contracting authorities: the ability to issue certifying documents during contract implementation at intervals of at least 90 days.

This new type of certifying document is, in practice, applicable to complex contracts with longer durations and multiple activities, primarily concerning infrastructure contracts in both public and sectorial procurement. As a result, significant pressure has been placed on large contractors, as the periodic issuance of certifying documents has created a new source of information for evaluating the exclusion ground related to prior conduct within a public contract, potentially affecting their participation in other public contract award procedures.

As these amendments are still new, their full impact has not yet become apparent. However, an increase in challenges brought against certifying documents is underway, leading to a rise in challenges related to contract execution.

Specifically, although a general three-year statute of limitations applies to claims related to contract execution, the High Court of Cassation and Justice has deemed the certifying document an administrative act, which can be challenged under administrative law within 30 days of its issuance.

Consequently, the certifying document issued during contract implementation contains statements from contracting authorities about the contract's execution, which, if not challenged within 30 days, may impede a contractor's right to submit claims related to the contract's execution. This means that the deadlines for submitting claims related to contract execution have been indirectly shortened, placing significant pressure on contractors.

Legal Amendments Related to the Remedy System

The Remedies Law has also been amended to ensure faster resolution of challenges concerning both the award procedure and contract execution.

Key amendments include:

- The obligation of contracting authorities to conclude a contract after a first-tier decision confirms the result of the procedure.

To accelerate public contract implementation, the Remedies Law has been amended, mandating that contracting authorities conclude contracts immediately after the procedure's result is confirmed by a first-tier decision, even if that decision is not yet final.

In practice, contracting authorities often weigh the risk of damages if the first-tier decision is overturned against the risk of administrative sanctions for delaying contract conclusion, and are usually inclined to wait for a final decision to be passed. As appellate courts judging the second-tier challenge have been restructured in the recent years through the introduction of specialised public procurement panels, the time between second-tier challenges and final decisions has significantly decreased, with an average of around 31 days. Consequently, contracting authorities can better estimate the schedule of their projects, as the duration of solving the challenges may be better anticipated. The effectiveness of this amendment therefore remains to be seen.

- An extremely short deadline for requesting contract termination.

Similar to the indirect deadline changes resulting from new regulations concerning the certifying document that may be issued during contract implementation, a new 30-day deadline has been established for claims arising from termination, unilateral termination, or early termination of public procurement contracts. Previously, the deadline was three years. This new deadline significantly accelerates decision-making and substantiation of claims related to public contract termination, posing challenges for preparing such claims, particularly for complex infrastructure projects.

- The change of court authority for disputes related to the execution of the public contract.

Since the implementation of new European public procurement legislation, there have been numerous debates about the authority responsible for resolving disputes related to public contract execution, specifically whether this authority should be a civil or administrative court. In 2018, civil courts were granted authority to resolve

such disputes. However, Law No 208/2022 has shifted the competence back to administrative courts after both courts and claimants had already adapted to the initial system.

The change of competence has been met with strong criticism, and its finality is uncertain. The Bucharest Court of Appeal has submitted a request to the Romanian Constitutional Court to review the constitutionality of Article IV of Law No 208/2022, which introduces these new amendments. While the case is pending at the Constitutional Court, the matter of which authority has competence to resolve public contract execution remains unresolved.

Strategies and Envisioned Directions

Following a turbulent 2022, the National Agency for Public Procurement (ANAP) has submitted a Strategy for 2023-2027 for public consultation. The Strategy aims to enhance the public procurement system to support Romania's sustainable development and efficient use of public funds. The main priority areas of the Strategy are examined below.

Increasing the use of sustainable, inclusive and innovative procurement

This priority area addresses numerous tools provided by national and European public procurement legislation that have been underutilised or overlooked by contracting authorities. ANAP plans to implement measures for widespread adoption of green and innovative procurement and the awarding of social contracts, with the goal of integrating them into strategic procurement planning.

These measures involve reviewing legislation related to green and innovative procurement and reserved (social) contracts, as well as adopting national plans for implementing these procurement types. The Strategy also aims to promote the participation of SMEs in public procurement in Romania.

To date, little progress has been made in green procurement, and almost none in social and innovative procurement. As the Strategy anticipates, ANAP must first raise awareness of social, environmental and innovation benefits among contracting authorities, and also encourage dialogue among economic operators in this area. This requires at least a medium-term effort to establish the necessary conditions for these procurement processes and assess their impact.

Within the context of the NRRP, and considering that this area aligns with the pillars of the Recovery and Resilience Facility, green, social and innovative procurement may emerge as a recurring trend in public procurement procedures financed under the NRRP.

Initiatives in this area have already surfaced, even alongside the Strategy. For instance, a legislative project has been registered with the Deputy Chamber to amend public procurement legislation, which seeks to mandate contracting authorities with an annual public procurement programme exceeding RON30,000,000 (approximately EUR6 million) to reserve a minimum of 0.5% of that amount for social inclusion enterprises.

Despite the stated intention to pursue these objectives, the rapid implementation of these measures is unlikely, given Romania's other major NRRP priorities and the high degree of specialisation required for some of the proposed measures.

Expanding centralised procurement

At present, centralised procurement is limited to a few bodies and a narrow range of products. The Strategy aims to broaden the scope of centralised procurement, particularly in the health, education, transport and digitalisation sectors, in line with the directions envisaged for strategic procurements. As these sectors are also NRRP priorities, rapid development can be expected in 2023, particularly for supply contracts and certain types of service contracts.

Improving transparency of the public procurement system

The Strategy proposes an assessment of the current state of information and data publication on public procurement in relation to the Open Contracting Data Standard (OCDS). This assessment will be used to improve the functionality of the

public procurement portal (SEAP) and determine the levels of data sharing to be implemented within the system.

These measures are long overdue as, even if SEAP provides transparency on the essential data of the procurement process, the data provided is underutilised and insufficiently correlated with data from other systems. Moreover, the lack of correlation between SEAP and other systems, as well as the structure of the data contained therein, prevents a comprehensive assessment of the public procurement system.

This priority area in the Strategy aligns with the goals of the NRRP, particularly in enhancing administrative capacity through digitisation. As a result, 2023 may mark the start of a comprehensive review of electronic systems related to public procurement in Romania.

Strengthening the monitoring, supervision and control functions of the public procurement system

This priority area outlines essential steps for a more efficient monitoring function by ANAP, such as proposing clearer regulations for data collection from all institutions involved in public procurement processes, including reports from courts and other control bodies, and integrating this data.

In conjunction with the increased transparency goal, the aim is to achieve better integration and utilisation of data related to the procurement system. However, since this goal requires collaboration among various institutions, the process might be slower than planned, and there is a risk of only partial implementation.

Professionalise public procurement personnel

Professionalising public procurement personnel has been an objective in the previous National Public Procurement Strategy from 2015, with limited notable progress. The Strategy also acknowledges that recent tumultuous years, marked by increased pressure on public procurement personnel during the pandemic and the subsequent demands of the NRRP, have led to significant staff fluctuations, diminishing the impact of previous efforts.

Given the funds available from the NRRP, correlated actions under the public administration reform under the NRPP, and the European Commission's prioritisation of this area, a more noticeable impact might be reported compared to the previous strategy. However, while certain measures proposed within the Strategy might be implemented, it remains uncertain whether the proposed measures will directly lead to visible improvements in the quality of public procurement personnel.

Conclusions

Following a highly active legislative year in 2022 and anticipating a significant push to address delays in the implementation of the NRRP, we expect 2023 and the subsequent period to be even more dynamic.

First, the remaining primary projects to be implemented through the NRRP are expected to be at least initiated, if not already awarded, during this year. As a result, a substantial number of public procurement procedures related to key NRRP projects are expected to begin and conclude this year, also generating a considerable number of challenges related to the award process.

Additionally, given the latest legal amendments concerning certifying documents issued during contract implementation, an increase in disputes related to contract implementation is expected, in order for contractors to avoid exclusion from public procurement procedures, especially during this active procurement period. On the other hand, even if these amendments are debatable, they have already made contractors more vigilant in implementing procurement contracts. While data is insufficient to establish a direct link, there have been more significant infrastructure contracts concluded ahead of schedule since these amendments, and this trend appears to be continuing into 2023.

In parallel, per the priority areas set forth by the Strategy, amendments to the legal framework in underutilised areas of Romanian public procurement will be deployed, specifically in the fields of green, innovative, social and centralised procurement.

Lastly, as an essential milestone in the NRRP, the electronic system for public procurement will undergo a major review starting this year. This review aims to introduce structural changes that will improve visibility and use of public procurement data.

In conclusion, Romania's entire public procurement system is currently undergoing a comprehensive review process, aiming for a significant upgrade. While we anticipate that an upgrade will be implemented, with considerable improvements to the system, we remain cautious about the full implementation of the envisaged changes, based on the experience of previous similar efforts and the current administrative capacity of the Romanian state.

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