

# Romania enacts new rules to dissuade challengers of public tenders

On 28 June 2014 the Romanian Government adopted the Government Emergency Ordinance no. 51/2014 amending the public procurement law. The declared purpose of the new Ordinance is to reduce delays by discouraging abusive practices and reduce the high volume of challenges to domestic public procurement procedures. In 2013 the National Council for the Resolution of Complaints ("CNSC") heard 5,739 challenges, most of them seeking to quash tender documentations and affect the outcome of the evaluation.

The new Ordinance which came in force on 30 June 2014 introduces a “guarantee of good conduct” that any person wishing to challenge public procurement procedures will have to provide in order to have its application heard.

The amount of the guarantee is generally 1% of the estimated contract value but is capped at EUR 100,000 for works contracts and EUR 25,000 for services and supplies.

The guarantee may be provided as a letter of bank guarantee, insurance or direct payment in favour of the contracting authority. It must be valid for at least 90 days and can be extended for as long as necessary until the challenge is finally settled. If the guarantee’s validity period is not extended, on the last day of validity the contracting authority will enforce the guarantee. Proof of guarantee issuance must be attached to any challenge.

If the challenge is decided in favour of the claimant, the guarantee will be returned within 5 days from the date that the decision becomes final. Should the challenge be rejected, the guarantee will be enforced by the contracting authority. If the challenge is waived, the guarantee will generally be enforced. However, if the waiver comes as a reaction to the contracting authority’s remedial measures, the guarantee will be returned to the challenger.

Under the previous rules, an unsuccessful challenge of public procurement procedures entitled the contracting authority to draw an amount from the applicant’s participation guarantee, but the available amount was much lower than under the new “guarantee of good conduct”.

It is important to note that even potential tenderers will have to provide significant financial guarantees to criticise public tenders, as the new guarantee will also be needed for simply challenging the tender documentation.

Given the frequent changes enforced by the Romanian Government to the public procurement framework, it remains to be seen for how long the new Ordinance will remain in place. Commentators argue that it may be declared unconstitutional on grounds of obstructing access to justice. It will be also interesting to see how the EU reacts to the new rules. EU institutions and other organisations regularly voice criticism over weaknesses in the Romanian public procurement system, caused by corruption and lack of adequate administrative capacity particularly at the local level. As many of the irregularities are only revealed after judicial control of tenders, an attempt to dissuade challengers by setting high financial barriers could also be a matter of concern to Brussels.

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