

THE POSSIBILITY OF THE CONTRACTING AUTHORITY TO ESTABLISH QUALIFICATION, SELECTION, AND AWARD CRITERIA FOR THE AWARD OF PUBLIC PROCUREMENT CONTRACTS

Ioan-Gabriel POPA
popaigabi@gmail.com

“NICOLAE BĂLCESCU” LAND FORCES ACADEMY, SIBIU, ROMANIA

ABSTRACT:

The process of public assurance is a sequence of stages, following which you can obtain the right to use it, the service or the work, as a result of the award of a public procurement contract. The contracting authority carries out in the framework of the public insurance process various ways of awarding public service contracts in order to award contracts for products, services or works. On choosing the course of the process to make public, the contracting authority uses those qualification and/or selection criteria as well as award criteria, at different moments of the process. Most of the time in the development of the ways of assigning the specifics of the domain and the public ones, even specialists “impede” the understanding of three categories of previously mentioned criteria, and that is why it is necessary, on the one hand, to clarify the concepts of qualification criteria and/or of selection. and award criteria, and on the other hand it is necessary to identify the moment in which they are applied but also the way in which they are applied in this way depending on the method of award assumed by the contracting authority.

KEYWORDS:

Contracting authority, qualification criteria, selection criteria, award criteria

1. Introduction

In the course of the public procurement process, which consists of three successive stages of award procedures, namely the planning/preparation stage including market consultation, the stage of organization and award of the procurement contract and the post-contract award stage, respectively execution and monitoring its implementation, the contracting authority runs various ways of awarding public procurement contracts in order to grant contracts for products, services or works.

During the process, the contracting authority uses both qualification and/or selection criteria and award criteria, at different stages of the process.

Most of the time, in the course of award procedures specific to the field of public procurement, even specialists are “impeded” by the understanding of the three categories of the previously-mentioned criteria, and that is why it is necessary, on the one hand, to clarify the concepts of qualification and/or selection criteria and award criteria, and on the other hand to identify the stages at which they are

used as well as the way in which they are used depending on the method of award used by the contracting authority.

2. Conceptual delineations between qualification criteria, selection criteria and award criteria used by contracting authorities for the award of public procurement contracts

In order to identify and analyse the meaning of the phrase “*qualification criteria, selection criteria and award criteria used for the award of public procurement contracts*”, we can break it down into its component elements (words and expressions) as follows: criterion, qualification, selection, awarding, contracting authorities and public procurement contracts.

The explanatory dictionary of the Romanian language (DEX, 2009) defines *criterion* as “*a point of view, principle, norm on the basis of which a classification, a definition, an assessment is made...*”; *qualification* as “*... training in a certain field of professional activity (usually attested by an official document...*”; *selection* as “*choice made according to a certain criterion and with a certain purpose...*”, and *assigning* as “*granting, conferring*”.

Law no. 98 of May 19, 2016, on public procurement defines contracting authorities as “*a) central or local public authorities and institutions, as well as the structures in their composition that have been delegated the capacity of credit authorising officer and that have established competences in the field of public procurement, b) public law bodies, c) the associations formed by one or more contracting authorities from those provided for under letters a) or b)*” (Law no. 98/2016, art. 1, paragraph (1), point m), while the public procurement contract is defined as “*the contract with onerous title, assimilated, according to the law, to the administrative activity, concluded in writing between one or more economic operators and one or more contracting*

authorities, whose object is the execution of works, the supply of products or the provision of services” (Law no. 98/2016, art. 4, para. (1)).

If we supplement the previously mentioned with statements from the legislative package in the field of public procurement: Law no. 98/2016 on Public Procurement; Law no. 99/2016 on Sectoral Procurement; Law no. 100/2016 on Work Concessions and Service Concessions; Government Decision No. 395/2016 for The Approval of the Methodological Norms for the Application of the Provisions Relating to the Award of the Public Procurement Contract/Framework Agreement from Law No. 98/2016 on Public Procurement; Government Decision No. 394/2016 for The Approval of the Methodological Norms for Application of the Provisions Relating to the Award of the Sectoral Contract/Framework Agreement from Law No. 99/2016 on Sectoral Procurement; Government Decision No. 867/2016 for The Approval of the Methodological Norms for the Application of the Provisions Relating to the Award of Works Concession Contracts and Service Concessions from Law No. 100/2016 on Work Concessions and Service Concessions, then we obtain a unified vision about the qualification and/or selection criteria as well as about the award criteria.

2.1. The qualification criteria

The qualification criteria are minimum requirements used by the contracting authorities, hereinafter referred to as the CA, relating to the demonstration of the capacity of economic operators, i.e. they refer to those requirements imposed by the CA, which have the stated purpose of making the economic operators participants in an award method to demonstrate their technical, financial and organizational potential. This potential should lead to the accomplishment of the contract. Here we can specify that these requirements are used in a market that is not in excess (meaning that there are enough interested economic

operators) and that by using these requirements, the CA defines the limits of the implementation of procurement methods and provides the necessary information to the interested economic operators so that they are able to formulate their offer.

2.2. The selection criteria

The selection criteria are requirements used by the CA in order to select the candidates with the greatest economic and financial, technical and/or professional potential among the economic operators who submitted a request to participate. Here we can specify that these requirements are used on a surplus market (meaning that there are many economic operators) and can only be applied where the CA uses procurement procedures along several stages, one of which is the selection of candidates, that are complementary to the qualification criteria. After it has been established which of the participants fit the qualification criteria, the selection criteria will distinguish between the candidates.

It should be noted that the use of qualification and selection criteria is not mandatory for CAs. Such requirements will only be used insofar as they are relevant to the award procedure. The CA is also free to choose which categories of qualification or selection criteria to use, but it is not required to impose criteria from each category or to impose all criteria from a given category.

If we refer to the provisions of Government Decision no. 395/2016, which specifies that *“The selection of candidates represents a distinct process that follows the qualification process and which aims only to limit the number of qualified candidates who will submit the offer in the second stage of the restricted bidder or, after case, who will participate in the dialogue/negotiations. The selection is carried out by giving each candidate a score that must reflect their ability to fulfil the contract to be awarded”* (GD no.

395/2016, art.29, paragraph 3) and also to the provisions that *“The contracting authority establishes selection criteria within the award documentation when applying the candidate selection stage within the award procedure and must refer to the qualification criteria established by the award documentation”* (HG no. 395/2016, art.30, paragraph 2), then we can conclude that the legislator’s intention about the qualification criteria is clear, namely that they can be used in any award procedure, while the selection criteria are used when the CA wants to limit the number of qualified candidates. Consequently, selection is only necessary when applying multi-stage award procedures such as restricted bids, competitive negotiation, competitive dialogue, and innovation partnership. That is why the selection criteria must complement the qualification criteria by referring to the latter. Precisely because of this reporting, but also because it is often very difficult to have a clear demarcation between qualification and/or selection criteria in practice, the two categories of criteria are overlapping and create confusion. The use of the selection criteria by reference to the qualification ones practically implies that the qualification requirements represent minimum criteria that the economic operators must meet in order to be able to submit offers, and then the selection criteria will be the ones based on which the CA will determine the candidates who will have qualified for the second stage.

2.3. The award criteria

The award criteria are requirements used by the CA in order to evaluate the offers submitted by the bidders in general, and after the selection process has been completed, in particular. Thus, the CA evaluates and determines the most advantageous offer from an economic point of view, according to the award criteria.

Compared to the qualification and/or selection criteria, the award criteria are mandatory for use in the bid evaluation process.

The following section will present the content of the three categories of criteria and their function in the public procurement process.

3. The content of the qualification and/or selection criteria and the award criteria used by contracting authorities for the award of public procurement contracts

In accordance with the provisions of Art. 163 of Law no. 98/2016 on Public Procurement, the CA has the right to apply in the award procedure only qualification and/or selection criteria related to reasons for excluding the candidate/bidder and the capacity of the candidate/bidder.

The CA may exclude bidders/candidates from the procurement procedure, following the analysis of the information and documents provided by them (taken from the legal and/or tax records), or if it became aware in any other way that they were convicted for various crimes through a final decision of a court. The offenses referred to in the law (Law no. 98/2016, art. 164) are: the establishment of an organized criminal group, corruption offences, offenses against the financial interests of the European Union, acts of terrorism, money laundering, trafficking and exploitation of vulnerable persons, and fraud.

Furthermore, the CA can exclude from public procurement procedures only candidates/bidders who (Law no. 98/2016, art.164 and art.167):

- have failed to pay their fiscal obligations (taxes, duties or mandatory social contributions) to the general consolidated budget or are known to have established this by a court decision. CA can ask economic operators to prove that they have paid their taxes, by requesting their fiscal record and/or tax certification (for

fiscal obligations both to the state budget and to the local budget);

- have violated the obligations in the fields of environment (environment certificate), social and labour relations, established by the legislation adopted at the level of the European Union, the national legislation, by collective agreements or by treaties, conventions and international agreements in these domains;

- are under insolvency proceedings or under liquidation, under judicial supervision or in the process of cessation of activity;

- have committed serious professional misconduct that calls into question their integrity, and the CA can demonstrate this through any appropriate means of proof, such as a decision of a court or an administrative authority;

- have signed agreements with other economic operators aimed at altering competition within or in connection with the procedure in question;

- are in a situation of conflict of interests within or in connection with the procedure in question, and this situation cannot be effectively remedied by other, less severe measures;

- had previously participated in the preparation of the award procedure, which subsequently led to a distortion of competition, and this situation cannot be remedied by other less severe measures;

- have seriously or repeatedly violated their main obligations under a public procurement contract, a sectoral procurement contract or a previously concluded concession contract, and these violations led to the early termination of that contract, payment of damages, or other comparable sanctions;

- have been found guilty of false statements in the content of the documents submitted at the CA's request in order to verify the absence of reasons for exclusion or the fulfilment of the qualification and/or selection criteria and have not presented

this information or are unable to present the requested supporting documents;

- have tried to illegally influence the decision-making process of the contracting authority, in order to obtain confidential information that could give them unjustified advantages in the award procedure, or they negligently provided erroneous information that can have a significant influence on the CA's decisions.

From this perspective, the CA uses the *European Single Procurement Document (ESPD)*, provided electronically using the standard format established by the European Commission), a document through which the bidder/candidate declares on their own responsibility that they meet all the qualification and/or selection criteria established by the CA, including that there are no reasons why they could be excluded from the procedure, following that when the bid submitted is determined to be the winner, they must also provide the supporting documents.

If we refer to *the qualification criteria* regarding the capacity, the CA can only use criteria related to the capacity to exercise the professional activity, the economic and financial situation, and the technical and professional capacity. These criteria can be imposed by the CA to ensure that a candidate/bidder has technical and professional skills but also the legal and financial capacity to execute the public procurement contract to be awarded. All these requirements of the CA must be related to the object, nature, and complexity of the public procurement contract/framework agreement and be proportionate in relation to its purpose.

The ability to exercise the professional activity refers to the demonstration by the bidder/candidate of the registration form (verifying certificate issued by the National Office of the Trade Register), which defines the object of activity of the respective candidate/bidder and, as the case may be, of attestation or membership from a professional point of

view to a professional body (the illustrating document can be presented in the form of certificates, attestations, or authorizations).

Economic and financial situation takes into account requirements related to the existence of a certain minimum level of the annual turnover, including a certain minimum turnover in the field of the object of the public procurement contract/framework agreement, at certain levels of other relevant economic-financial indicators, such as the annual liquidity level or at a certain corresponding level of professional risk insurance. The documents requested by the CA may refer to statements or bank statements, proof of professional risk insurance, presentation of financial statements or extracts from financial statements, statement regarding the total turnover for at most the last three available financial years, depending on the date of establishment or the start of the economic operator's activity, to the extent that information on turnover is available, etc.

Technical and professional capacity refers to a certain level of human and technical resources and experience necessary for the bidder/candidate to execute the public procurement contract/framework agreement at an appropriate quality standard. In this regard, the CA may request a list of the works carried out during a period covering at most the last 5 years, accompanied by certificates of good execution for the most important works, a list containing the main deliveries of products made or the main services provided during a periods covering at most the last 3 years, indicating the values, data, and public or private beneficiaries, indicating the technicians or technical bodies involved, whether or not they are part of the economic operator's organization, especially those responsible for quality control and, in the case of public work procurement contracts, of those available to the contractor in order to execute the works, the description of the technical facilities and the measures used

by the economic operator in order to ensure the quality and of their study and research facilities, specifying the management and traceability systems (ISO – International Organization for Standardization) within the supply chain that the economic operator will be able to apply during the execution of the contract, specifying the environmental management measures that the economic operator will be able to apply during the execution of the contract, educational and professional qualifications, statement regarding the average annual number of personnel of the economic operator, statement regarding the machines, installations, and technical equipment at the disposal of the economic operator that provides services or performs works for the execution of the contract, samples, descriptions or photos of the products to be delivered, the authenticity of which must be certified at the request of the CA, etc.

As far as selection criteria are concerned, we must consider only those requirements related to the economic and financial situation and/or the technical and professional capacity of the candidate/bidder which must refer to the qualification criteria established by the CA through the documentation of assignment. The same requirements used in the selection criteria cannot be used as qualification criteria.

The documents containing the information requested by the CA regarding the qualification and/or selection criteria can be internal documents such as the contracting strategy or external documents, published in the *Electronic Public Procurement System* such as the *Notice of Intent*, *Notice of Participation*, *Invitation to Participate*, *Award Notice*, *Award Documentation*.

The award criteria are used in the bid evaluation process, after the selection process is completed. This does not mean that all procurement procedures have a selection process in which case the CA can use the award criterion unrestrictedly.

Regardless of the situation, the CA assigns the future public procurement contract to the bidder who submitted the most economically advantageous bid based on the award criteria established by the procurement documents and based on the evaluation factors.

In order to evaluate the offers from the point of view of the most economically advantageous offer, the CA has the right to use one of the following award criteria:

- the best quality-price ratio;
- the best quality-cost ratio;

The two award criteria mentioned above usually include a price or cost element and use evaluation factors that include qualitative, environmental and/or social aspects, in relation to the subject of the public procurement contract/framework agreement and are based on the application of a system of evaluation factors for which relative weights or a specific calculation algorithm are established. The CA is obliged to use only evaluation factors that are directly related to the nature and object of the contract and reflect an advantage that can be obtained by using the respective evaluation factor. Evaluation factors can refer to quality, including technical advantages, aesthetic and functional characteristics, accessibility, design concept for all users, social, environmental and innovative characteristics and the commercialization and its conditions, the organization, the qualification and the experience of the personnel appointed for the execution of the contract, if the quality of the appointed personnel may have a significant impact on the quality level of contract execution and after-sales services, technical assistance and delivery conditions, such as delivery date, delivery process and delivery or completion time.

- the lowest cost, which considers the determination of the lowest cost based on profitability considerations, using factors such as the calculation of life cycle costs;

- the lowest price, which is used only by comparing the prices presented

within the admissible offers and does not apply to the open and restricted auction.

The CA specifies in the procurement documents the relative weight given to each evaluation factor that will be applied to determine the most economically advantageous offer, unless the most economically advantageous offer is determined by applying the criterion of the lowest price.

4. Conclusions

It should be noted that the CA cannot carry out a public procurement process in order to award a public procurement contract without the correct and timely use of the entire array of qualification and/or selection criteria and especially the most suitable award criterion for the procurement of products, works and services to the standards desired by the CA. We must bear in mind that the beneficiary of the product, work or service is not the department specialized in public procurement but the specialized department. If the specialized department initiates the need for the purchase of products, works or services, prepares the specification or descriptive document and subsequently monitors and implements the public procurement contract, the specialized department in public procurement proposes the method of assignment to the credit authorizing officer and carries out this approved method indicating in the documentation of award, in collaboration with the specialized department that identified the need, qualification and/or selection criteria and award criteria used in the evaluation of offers.

If the qualification criteria are used by the CA to demonstrate the technical, financial, and organizational potential of the bidders/candidates, then the selection criteria intervene only to reduce the large number of candidates on the market, having a role complementary to the qualification

criteria. The choice of the most suitable capacity criterion for the future purchase depends on the professionalism of the specialists in the department specialized in public procurement and their ability to understand the mechanisms of the free market.

The choice of the award criterion depends on the one hand on the legal provisions that condition or restrict the use of the award criterion on the method of award used, and on the other hand, is contingent on the way the specialized department understands the product, work or service.

For example, in the bidding or open bidding procedure, only the best value for money or the best value for money award criteria can be applied, while direct procurement can use price or the lowest price.

Against this background, it is clear that in the public procurement process the use of qualification and/or selection criteria and award criteria can generate risks for the CA, such as:

- the use of discriminatory, insufficiently detailed or incomplete qualification and/or selection criteria;
- the use of the award criterion "*the most economically advantageous offer*", with the inclusion of irrelevant and/or unquantifiable evaluation factors;
- disqualification of bidders/candidates based on the use of inappropriate qualification and/or selection criteria and award criteria.

Based on this, I believe that when the CA uses qualification and/or selection criteria and award criteria, they must be objective, non-discriminatory, and proportionate to the complexity and object of the contract and reflect the concrete possibility of the economic operator to fulfil the public procurement contract.

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