

NEWSLETTER
December 2011

Noutati legislative in domeniul achizitiilor publice

1) Accelerarea procedurilor de licitatie restransa si negociere cu publicarea prealabila a unui anunt de participare

Avand in vedere necesitatea asigurarii unui cadru de implementare conforma a legislatiei in domeniul achizitiilor publice, precum si prevenirea aplicarii posibilelor corectii financiare de catre Comisia Europeana, Autoritatea Nationala pentru Reglementarea si Monitorizarea Achizitiilor Publice a emis o Instructiune privind accelerarea procedurilor de licitatie restransa si negociere cu publicarea prealabila a unui anunt de participare (denumita in continuare „Instructiunea”).

Conform Instructiunii, “accelerarea procedurii” presupune finalizarea unei proceduri de atribuire intr-un timp mai scurt, prin reducerea termenelor de asteptare cuprinse intre data transmiterii spre publicare a anuntului de participare si data limita de depunere a candidaturilor, respectiv intre data transmiterii invitatiei de participare catre candidatii selectati si data limita de depunere a ofertelor (in cazul procedurii de licitatie restransa).

In conformitate cu dispozitiile Instructiunii, nu reprezinta motive de accelerare a procedurii de atribuire urmatoarele:

- invocarea perioadei scurte avute la dispozitie pana la realizarea unui obiectiv/proiect/eveniment;
- complexitatea realizarii unei achizitii, precum si invocarea

Legislative news in the public procurement field

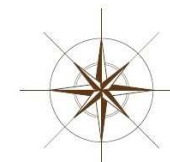
1) Acceleration of the restricted bid and negotiation with the prior publication of a contract notice procedures

Considering the necessity for providing an implementation frame for the public procurement legislation, as well as for preventing the application of possible financial corrections by the European Commission, the National Authority for Regulating and Monitoring Public Procurement issued a Directive regarding the acceleration of the restricted bid and negotiation with prior publication of a contract notice procedures (hereinafter referred to as the “Directive”).

According to the Directive, “the acceleration of the procedure” requires the completion of an awarding procedure in a shorter time, by reducing the waiting terms between the date of transmission for publication of the contract notice and the deadline for submission of candidatures, respectively between the transmission date of the participation invitation to the selected candidates and the deadline for submission of tenders (in case of restricted bid procedure).

In accordance with the Directive’s provisions, the following do not constitute grounds for accelerating the awarding procedure:

- the invocation of the short period covered until the achievement of a goal/project/event;
- the complexity of making an acquisition, as well as invocation



riscului privind pierderea finantarii;

- posibilitatea depunerii de contestatii cu privire la procedura de atribuire ce urmeaza a fi initiata, contestatii ce ar conduce la nerespectarea unor termene asumate de catre autoritatea contractanta si la decalarea termenului de semnare a contractului.

Dimpotriva, poate constitui motiv de accelerare a procedurii situatia in care obligatiile impuse prin reglementari nationale si/sau internationale pot fi indeplinite la termenele stabilite prin acestea doar prin accelerarea procedurii.

In situatia in care se dispune accelerarea procedurilor de licitatie restransa si negociere cu publicarea prealabila a unui anunt de participare, in vederea emiterii acceptului de publicare a anuntului de participare, este necesara incarcarea in sistemul electronic, in sectiunea "Documentatie si clarificari", a unei note justificative privind accelerarea procedurii de atribuire, menita sa sustina situatia de urgenta ce impune reducerea termenelor in cauza, situatie de urgenta ce nu a fost generata de o actiune sau inactiune a autoritatii contractante.

2) Formularea criteriilor de calificare si selectie

Avand in vedere ca:

- se impune prevenirea aparitiei erorilor si combaterea fenomenului coruptiei in domeniul achizitiilor publice, precum si prevenirea aplicarii de posibile corectii financiare de catre Comisia Europeana;
- in sensul unei abordari unitare din partea tuturor partilor implicate in procesul de atribuire a contractelor de achizitie publica, ANRMAP a conceput si structurat o lista a criteriilor de calificare si selectie ce pot fi impuse, fara a fi restrictive si limitative, astfel incat invitatiile/anunturile de participare, precum si documentatiile de atribuire sa poata fi validate,

of the risk regarding the loss of funding;

- The possibility of submitting contestations regarding the awarding procedure that follows to be initiated, contestations that will lead to the non compliance with some terms assumed by the contracting authority and to the delay of the contract's signing date.

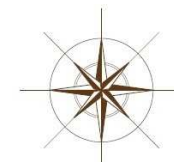
On the contrary, it can constitute a ground for accelerating the procedure the situation in which the obligations imposed by national and/or international regulations can be met within the terms established by those just by accelerating the procedure.

In the situation in which the acceleration of the restricted bid and negotiation with prior publication of a contract notice procedures is imposed, in order to issue the approval for the contract notice publication, the loading in the electronic system, in the "Documentation and clarifications" section, of a justificatory note regarding the acceleration of the awarding procedure, meant to support the emergency situation that imposes the reduction of the terms in question, emergency situation that was not generated by an action or inaction of the contracting authority, is necessary.

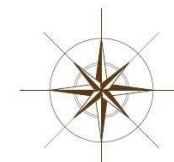
2) The formulation of the selection and qualification criteria

Whereas:

- the prevention of errors and combating the corruption phenomenon in the public procurement field are imposed, as well as the prevention of applying possible financial corrections by the European Commission;
- in the sense of a uniform approach on the part of all parties involved in the process of awarding public procurement contracts, ANRMAP designed and structured a list of the selection and qualification criteria that may be imposed, without being restrictive or limitative, so that the participation invitations/contract notices, as well as the bid documentation



<p>respectiv acceptate;</p> <ul style="list-style-type: none">▪ este esential ca stabilirea cerintelor minime de calificare si selectie sa nu conduca la restrictionarea participarii operatorilor economici la procedura de atribuire sau la incalcarea principiului proportionalitatii, <p>in Monitorul Oficial nr. 687 din data de 28.09.2011 a fost publicat Ordinul ANRMAP nr. 509 privind formularea criteriilor de calificare si selectie (denumit in continuare “Ordinul 509”).</p> <p>In conformitate cu Ordinul 509, la stabilirea criteriilor de calificare si selectie, autoritatea contractanta va avea in vedere urmatoarele elemente: (i) existenta unei legaturi concrete intre criteriile mai sus mentionate si obiectul contractului ce urmeaza a fi atribuit; (ii) limitarea nivelului cerintelor minime solicitate prin documentatia de atribuire, precum si a documentelor care probeaza indeplinirea acestora doar la aspectele strict necesare pentru indeplinirea corespunzatoare a contractului.</p> <p>Mai mult, noua reglementare stabileste obligatia autoritatii contractante de a nu impune conditii ce nu prezinta relevanta sau sunt disproportionale in raport cu ceea ce urmeaza a se achizitiona.</p> <p>In situatia in care operatorii economici participa concomitent la mai multe proceduri de atribuire, autoritatile contractante au obligatia de a solicita si de a permite depunerea documentelor in oricare dintre urmatoarele forme: (i) original; (ii) copie legalizata; (iii) copie lizibila cu mentiunea “conform cu originalul”.</p> <p>De la prevederile de mai sus fac exceptie documentele intocmite/emise de catre candidat/ofertant cu scopul participarii la procedurile initiate in vederea atribuirii contractelor de achizitie publica, precum si angajamentul ferm al tertului/tertilor sustinator/i, care vor putea fi prezentate doar in original.</p> <p>Autoritatea contractanta are obligatia ca, pentru situatia participarii la</p>	<p>can be validated, respectively accepted;</p> <ul style="list-style-type: none">▪ it is essential that the establishment of the minimum selection and qualification requirements to not lead to the restriction of economic operators’ participation to the awarding procedure or to the breach of the proportionality principle, <p>In the Official Gazette no. 687 as of 28.09.2011 the no. 509 ANRMAP Order regarding the formulation of the qualification and selection criteria (hereinafter referred to as “509 Order”) was published.</p> <p>In accordance with the 509 Order, in establishing the qualification and selection criteria, the contracting authority will consider the following elements: (i) the existence of a concrete link between the above mentioned criteria and the object of the contract that follows to be awarded; (ii) limitation of the minimum requirements level required by the bid documentation, as well as of the documents that verify the compliance with those regarding only strictly necessary aspects for the adequate performance of the contract.</p> <p>Moreover, the new regulation establishes the contracting authority’s obligation to not impose conditions that are not relevant or that are disproportionate in relation to what follows to be purchased.</p> <p>In the situation in which the economic operators participate at the same time at several awarding procedures, the contracting authorities have the obligation to request and allow the submission of documents in any of the following forms: (i) original; (ii) legalized copy; (iii) visible copy with the mention “certified copy”.</p> <p>Of the above provisions the documents drafted/issued by the candidate/bidder in order to participate at the procedures initiated for the awarding of the public procurement contracts constitute exceptions, as well as the supporter/s’ commitment, that shall be presented only in original.</p> <p>The contracting authority has the obligation, in case of participation at</p>
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procedura cu oferta comuna, sa prevada in documentatia de atribuire, atat criteriile de calificare si selectie care urmeaza a fi indeplinite de fiecare dintre ofertantii asociati, cat si criteriile care pot fi indeplinite doar de aceia care urmeaza a executa partile din contract avute in vedere la stabilirea criteriilor de calificare.

La criteriul de calificare “capacitatea de exercitare a activitatii profesionale”, obtinerea unei autorizatii de la una dintre autoritatile/institutiile statului, cerinta este considerata indeplinita daca unul dintre asociati/subcontractantul, detine autorizarea solicitata si doar daca acesta urmeaza sa execute integral partea din contract pentru care este solicitata autorizarea respectiva. Trebuie mentionat ca, in conformitate cu prevederile Ordinului 509, prezentarea autorizarii mai sus mentionate de catre tertul sustinator nu poate fi considerata valabila, intrucat acest gen de autorizare nu constituie o resursa transferabila.

Noua reglementare califica drept restrictiva solicitarea unei cerinte minime de calificare si selectie referitoare la prezentarea unui contract similar de furnizare/prestare/executie, semnat/incheiat si/sau inceput in ultimii 3 ani, respectiv 5 ani, avand in vedere ca exista posibilitatea ca un operator economic sa fi semnat/incheiat si/sau sa fi inceput un astfel de contract in urma cu mai mult de 3 sau 5 ani, dar sa poata prezenta experienta similara realizata in perioada solicitata.

Prin Anexa nr. 1 la Ordinul 509 au fost stabilite atat formularile restrictive, cat si formularile nerestictive stabilite prin documentatia de atribuire/anuntul de participare/invitatie de participare.

In continuare vom prezenta principalele formulari restrictive/nerestictive prevazute de noua reglementare cu privire la contractul de lucrari.

A) Urmatoarele cerinte solicitate de autoritatea contractanta sunt considerate formulari restrictive, iar documentatia de atribuire/anuntul de participare/invitatie de participare nu va fi

the procedure with common bid, to provide in the bid documentation, both the qualification and selection criteria which are to be fulfilled by each of the associated bidders, and the criteria that can be fulfilled only by those that follow to execute the parts of the contract that were taken into account at the establishment of the qualification criteria.

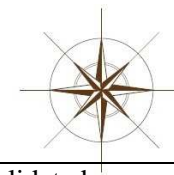
In respect with the “professional capacity” qualification criterion - obtaining an authorization issued by one of the state authorities/institutions, the requirement is considered to be met if one of the associates/subcontractor holds the requested authorization and only if the respective associate/subcontractor will fully execute the part of the contract for which the authorization is required. It must be mentioned that, in conformity with the legal provisions, the presentation of the above mentioned authorization by supporting third party cannot be considered valid, because this sort of authorization is not considered a transferable resource.

The new regulation qualifies as being restrictive a minimum qualification and selection requirement regarding the submission of a similar supply/service/execution contract, concluded and/or started in the last 3 years, respectively 5 years, considering that there is the possibility that an economic operator has signed/concluded and/or started such a contract more than 3 or 5 years ago, but may have the similar experience accumulated in the required period.

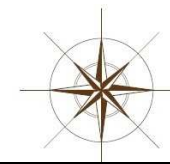
Whereby Annex no.1 to the 509 Order both the restrictive formulations and the non-restrictive formulations established by the bid documentation/contract notice/participation invitation, were established.

Hereinafter we will present the main restrictive/non-restrictive formulations provided by the new regulation regarding the works contract.

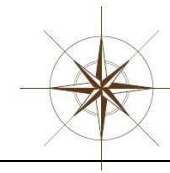
A) The following requests required by the contracting authority are considered restrictive formulations, therefore the bid documentation/contract notice/participation invitation will not



<p>acceptat(a)/validat(a):</p> <ul style="list-style-type: none">▪ recomandari emise in mod special pentru autoritatea contractanta organizatoare a procedurii (care sa indice denumirea acestei autoritati), precum: (i) contract(e) semnat(e)/inceput(e)/incheiat(e) in ultimii 5 ani; (ii) dovada ca a finalizat in ultimii 5 ani un contract care cuprinde atat proiectarea, cat si executia de lucrari; (iii) demonstrarea experientei similarea prin executarea de contracte pentru obiective de investitii identice cu cel care urmeaza a se executa etc.;▪ responsabilul privind asigurarea controlului calitatii intr-un proiect a carui valoare estimata este de X lei/euro;▪ personalul minim de care dispune operatorul economic in vederea derularii contractului trebuie sa fie angajat sau angajat permanent la data depunerii ofertelor. <p>B) Urmatoarele cerinte solicitate de autoritatea contractanta sunt considerate formulari nerestrictive, iar documentatia de atribuire/anuntul de participare/invitatie de participare va fi acceptat(a)/validat(a):</p> <ul style="list-style-type: none">▪ o lista a lucrarilor executate in ultimii 5 ani, insotita de certificari de buna executie pentru cele mai importante lucrari;▪ informatii referitoare la personalul/organismul tehnic de specialitate de care dispune sau al carui angajament de participare a fost obtinut de catre candidat/ofertant, in special pentru asigurarea controlului calitatii;▪ informatii referitoare la studiile, pregatirea profesionala si calificarea personalului de conducere, precum si ale persoanelor responsabile pentru executia lucrarilor;▪ o declaratie referitoare la efectivele medii anuale ale personalului angajat si al cadrelor de conducere in	<p>be accepted/validated:</p> <ul style="list-style-type: none">▪ recommendations issued especially for the contracting authority that organized the procedure (which indicate the name of this authority), such as: (i) contract/s signed/started/concluded in the last 5 years; (ii) the proof for completion in the last 5 years of a contract that includes both design and works execution; (iii) demonstration of a similar experience by performing contracts for investments objectives identical with those which follow to be executed etc.;▪ head of quality control in a project whose estimated value is of X lei/euro;▪ the minimum personnel of which the economic operator disposes for the performance of the contract must be hired or permanently hired at the time of tenders submission. <p>B) The following requests imposed by the contracting authority are considered non-restrictive formulations, and the bid documentation/contract notice/participation invitation will be accepted/ validated:</p> <ul style="list-style-type: none">▪ a list of works executed in the last 5 years, together with proper execution certifications for the most important works;▪ information regarding the personnel/specialized technical body of which it disposes or whose participation commitment was obtained by the candidate/bidder, especially to ensure the quality control;▪ information regarding the studies, professional training and qualification of the leading personnel, as well as of the persons in charge of the execution of works;▪ a statement regarding the average annual effectives of the hired personnel and of the management staff in the
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<p>ultimii 3 ani; declaratia mentionata nu se refera la personalul responsabil pentru indeplinirea contractului;</p> <ul style="list-style-type: none">▪ o declaratie referitoare la utilajele, instalatiile, echipamentele tehnice de care poate dispune operatorul economic pentru indeplinirea corespunzatoare a contractului de lucrari. <p>3) <u>Noi reguli de lansare a procedurilor de achizitie publica in SEAP</u></p> <p>Avand in vedere necesitatea eliminarii criteriilor prin care se directioneaza sau se restrictioneaza participarea operatorilor economici la procedurile de achizitie publica, in Monitorul Oficial, Partea I nr. 563 din 08.08.2011 a fost publicata Hotararea de Guvern nr. 801/2011 pentru modificarea si completarea Hotararii de Guvern nr. 525/2007 privind organizarea si functionarea Autoritatii Nationale pentru Reglementarea si Monitorizarea Achizitiilor Publice, prin care a fost stabilita, incepand cu data de 26 septembrie 2011, o noua atributie in sarcina ANRMAP, respectiv aceea de a evalua conformitatea documentatiei de atribuire aferente contractelor de achizitie publica cu legislatia aplicabila in domeniul achizitiilor publice, inainte de transmiterea spre publicare a invitatiei/anuntului de participare.</p> <p>Conform noii reglementari, functia de evaluare va fi realizata de catre ANRMAP prin mijloace electronice, prin intermediul Sistemului Electronic de Achizitii Publice (S.E.A.P.), dupa incarcarea de catre autoritatile contractante a continutului integral al documentatiei de atribuire (fisa de date a achizitiei, caiet de sarcini, modele de formulare, clauze contractuale obligatorii) si a notelor justificative prevazute de legislatia in domeniul achizitiilor publice.</p> <p>In termen de maximum 14 zile de la data primirii documentatiei in S.E.A.P., A.N.R.M.A.P. are obligatia:</p>	<p>past 3 years; the mentioned declaration does not refer to the personnel in charge of the performance of the contract;</p> <ul style="list-style-type: none">▪ a declaration regarding the machinery, installations, technical equipments of which the economic operator may dispose for the adequate performance of the works contract. <p>3) <u>New rules for launching the public procurement procedures in SEAP</u></p> <p>Considering the necessity to eliminate the criteria by which the economic operators' participation at the public procurement procedures is directed or restricted, in the Official Gazette, no.563 Part I as of 08.08.2011, the no. 801/2011 Government Decision was published for the amendment and completion of no. 525/2007 Government Decision regarding the functioning and organization of the National Authority for Regulating and Monitoring Public Procurement, by which a new attribution for ANRMAP was established, starting with 26th of September 2011, respectively that of evaluating the compliance of the bid documentation corresponding to the public procurement contracts with the applicable legislation in the public procurement field, before the transmission for publication of the contract notice/participation invitation.</p> <p>According to the new regulation, the evaluation function will be fulfilled by ANRMAP by electronic means, through the Electronic System of Public Procurement, after loading the full content of the bid documentation (data sheet of the acquisition, book of tasks, formulation templates, and mandatory contractual clauses) and the justificatory notes provided by the public procurement legislation.</p> <p>Within maximum 14 days as of the date of documentation receipt in S.E.A.P., A.N.R.M.A.P. has the obligation:</p>
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- de a emite autoritatii contractante acceptul in vederea initierii procedurii de atribuire – daca documentatia de atribuire este conforma cu prevederile legale aplicabile;
- de a informa autoritatea contractanta asupra neconformitatilor constatate la nivelul documentatiei de atribuire si a motivelor pentru care acestea nu sunt in concordanta cu prevederile legale aplicabile.

In situatia in care A.N.R.M.A.P. accepta continutul documentatiei de atribuire, verificarea anuntului/invitatiei de participare transmis/a spre publicare de catre autoritatea contractanta se va realiza in termen de 3 zile lucratoare de la data primirii anuntului/invitatiei in S.E.A.P.

- to issue to the contracting authority the approval for initiating the awarding procedure – if the bid documentation complies with the applicable legal provisions;
- to inform the contracting authority on the non-conformities detected at the bid documentation level and on the reasons for which these do not comply with the applicable legal provisions.

If A.N.R.M.A.P. accepts the bid documentation's content, the verification of the contract notice/participation invitation sent for publication by the contracting authority will be fulfilled within 3 working days from the date of notice/invitation receipt in S.E.A.P.

Yours sincerely,
Almaj & Albu, attorneys at law