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# WHY DO LARGE INFRASTRUCTURE TENDERS FAIL?

Needless to say that large infrastructure projects attract major contractors and put a lot of pressure on public actors to ensure that best value for money is achieved, fact being that large infrastructure tenders are mainly monetarily driven.

Shifting the focus towards basic prerequisites such as having a strong tender documentation, a clear decision-making process and a thorough understanding on how the tendering process should be carried out, is key to success. We have seen too many times now how complaints against tender procedures and tender results lead to unjustifiable delays in awarding contracts and completing infrastructure projects. A recent example is the one of the Domnesti Overpass tender initiated in March 2015 and which, after complaints and appeals that lasted more than one year, has been re-awarded to the initial winning bidder (almost two years after the tender was first initiated).



In the context of the current EU funding for large infrastructure projects (i.e. the Large Infrastructure Operational Program – LIOP) amounting almost EUR 9.5 billion to be used for transport, environment and energy projects in Romania, the need to ensure that large infrastructure tenders are handled correctly should represent a priority. Ignoring this will not only perpetuate Romania’s low absorption rate of EU funds (amongst the lowest rates in the EU), but will only deepen the gap in terms of competitiveness between Romania’s economy and the world’s most competitive economies.

The Romanian Government announced plans to pass a new legislation concerning strategic public procurement meant to ensure that large infrastructure projects (amongst others) are subject to simplified tenders that will allegedly eliminate the delays caused by complaints that are usually filed against tenders having as scope such projects. This initiative comes less than one year after the enactment of the new public procurement legislation framework, which has ensured the transposition of the new European public procurement legislation, and therefore prior to fully assessing the effects of the new legislation and whether or not it has contributed to the improvement of the public procurement process.

This article aims at briefly describing the context in which public procurement complaints currently arise and to show what are the blocking points and the hurdles of the complaints procedure, in the context of the current public procurement legislation framework.



## WHY AND WHEN DO COMPANIES FILE COMPLAINTS?

Usual complaints are the ones against tender documentation and tender results.

When companies notice that requirements in the tender documentation do not fully observe the public procurement legislation, they notify the public actor and request for the respective requirements to be eliminated or amended in order to ensure compliance with the legislation.

This is a very important moment, since the public actor can assess the compliance of the said requirements with the legislation and, in particular, whether they are potentially restrictive of competition, and may adopt appropriate measures to ensure that public procurement principles are observed. Any refusal to eliminate or amend the tender documentation, following such notification, has to be based on grounded reasons and on specific legal provisions. Grounding the refusal on reasons such as “the requirement is necessary in order to satisfy the needs of the authority” might

not be deemed sufficient, absent clear evidence showing that the authority's needs cannot be achieved through less restrictive requirements.

Similarly, when bidders are informed of the tender result which they deem to be issued in breach of the applicable legal provisions, they notify the public actor and request for the decision on the tender result to be revisited.

In this stage, it is the responsibility of the public actor to ensure that the assessment made by the evaluation committee fully observes the criteria in the tender documentation, as well as the applicable legal provisions. Any doubt with regard to the assessment of any requirement in the tender documentation is likely to cast a shadow over the entire evaluation process.

The public actor's actions after receiving the notification shall determine the likelihood for a complaint to be submitted. Hence:

1. If no response is received from the public actor within three days following the notification date, the company may file a complaint.
2. If a response is received from the public actor within three days following the notification date, by which the public actor informs the company that it will not adopt any measures to remedy the alleged breach, the company may file a complaint.
3. If a response is received from the public actor within three days following the notification date, by which the public actor informs the company that it will adopt measures to remedy the alleged breach, the company has to wait seven days during which the public actor has to implement the measures. If the public actor does not implement any measures within the seven days term, the company may file a complaint.
4. If a response is received from the public actor within three days following the notification date, by which the public actor informs the company that it will adopt measures to remedy the alleged breach, and the public actor implements the related measures within the seven days term, the company's decision to file or not to file a complaint shall depend on whether it is satisfied with the measures adopted by the public actor.

Therefore, in two of the four situations describe above, complaints might be triggered solely by the public actor's (in)action, with no fault of or intervention from the private actor' side.

## WHERE ARE COMPLAINTS FILED?

Complaints may be filed either with the National Council for Solving Complaints ("NCSC") or in court.

The procedure in front of NCSC has a shorter duration (around 25 days,

that may be extended up to 35 days); however, the duration of the court proceedings has significantly improved over time, as well (the 45 days term currently provided by the law for settling the complaint is usually observed). The main advantage of the procedure in front of NCSC consists of the fact that the procedure is not subject to any taxes, whereas the court proceedings require the complainant to pay court fees which vary depending on the value of the public procurement contract and might, therefore, prove burdensome. From this perspective, the majority of the complainants choose to file their complaints with NCSC.

## WHAT HAPPENS IF A COMPANY FILES A COMPLAINT?



The filing of the complaint does not preclude the public actor from continuing the procedure if the company has not requested and obtained the suspension of the procedure; however, once a complaint is filed, the public actor will not be allowed to conclude the contract until a decision is made in relation to the complaint. In all cases, the contract cannot be concluded prior to the expiry of the standstill period for concluding the contract provided by

the law (eleven days or six days following the communication of the award decision, depending on the value of the public procurement contract; shorter terms may apply in exceptional circumstances).

The suspension of the possibility to conclude the public procurement contract in this case derives from the EU legislation which imposes an obligation on all member states to ensure that, whenever a body of first instance, which is independent of the public actor, reviews a contract award decision, the public actor shall not be allowed to conclude the contract before the review body has made a decision (and in any case not before the expiry of the standstill period).

Even if a complaint has been filed, the public actor is still entitled to adopt the necessary measures in order to remedy the breaches of the legislation. However, adopting the measures at this point (instead of adopting them following the company's initial notification) does not necessarily end the complaint process, since the decision to renounce to the complaint shall be at company's hand, depending on whether or not it is satisfied with the adopted measures.

If the complaint is rejected, the public actor has the right to proceed with the conclusion of the public procurement contract, even if NCSC's or the court's decision is further appeal (save as in case a suspension of the procedure is obtained). However, in practice, public actors are reluctant in concluding the contract even if they face no legal interdiction, as they fear that by concluding the contract they might become liable should the appeal decision rule in favour of the private actor.

## CONCLUSION



Based on the current rules governing the complaints proceedings, it can be noticed that the filing of complaints may indeed lead to major delays in contract conclusion. In case of infrastructure projects such delays can have a great impact, in particular due to the risks for the circumstances based on which projects were first initiated to become outdated and/or for the initial allocated funds to become unavailable.

On the one hand, it is important to ensure that the delays caused by complaints are properly addressed and minimized to avoid these risks, especially for the cases where the complaints are only made to hinder the procurement process. On the other hand, it is likewise important to safeguard companies' rights to ask for review of awards decision and thus to prevent contracting authorities from making a contract irreversible by concluding it quickly after such decision, even if the award was made in breach of the applicable legislation. Finding a balance between these two aims might prove difficult, but this has become a preoccupation also at European Union level. To this end, the European Commission has noted the need to develop criteria to be applied to lift the automatic suspension of the conclusion of the contract following the filing of a complaint.

Whether or not the lifting of the automatic suspension of the conclusion of the contract will have the desired effect remains to be seen. This might help to minimize the delays caused by complaints, however only if the circumstances in which the lifting of the automatic suspension can occur are defined so as not to affect companies' right to effective remedies, and only if accompanied by an obligation imposed on public actors to conclude the contracts in the absence of any decision or legal provision on the suspension of the contract conclusion.

This will trigger a greater responsibility for the public actors to ensure that tenders are properly conducted, not only as a matter of principle, as it is currently regulated, but as a matter of sound procurement practice.