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Conflict of Interests in Public Procurement Procedures – Romanian Law

[Konflikt interesów w postępowaniach o udzielenie zamówienia publicznego – prawo rumuńskie]

Abstract

The conflict of interests in public procurement procedures in Romania is a particularly important subject, having a significant impact on the transparency and integrity of the procurement process. Romania has a legislative framework that regulates conflicts of interest in public procurement, the main normative act being Law no. 98/2016 on public procurement. According to Art. 59 of Law no. 98/2016, the conflict of interest is defined as “any situation in which members of the staff of the contracting authority or of a procurement service provider acting on behalf of the contracting authority, who are involved in carrying out the award procedure or who can influence its outcome have, directly or indirectly, a financial, economic or other personal interest, which could be perceived as an element that compromises their impartiality or independence in the context of the award procedure.”

This article represents an analysis of the current Romanian regulation of the conflict of interest in public procurement procedures and of the measures imposed to prevent, identify and remedy a conflict-of-interest situation.

Keywords: conflict of interest, public procurement procedures, situations potentially generating conflict of interest, equal treatment.

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Introduction

Conflict of interest in procurement procedures is an integrity issue that occurs when individuals involved in the procurement process have personal interests that could affect objectivity and impartiality in decision-making.

Where a conflict of interest arising in the context of a public procurement procedure is not adequately addressed, it has an impact on the regularity of the procedures, leading to a breach of the principles of transparency, equal treatment and / or non-discrimination that any public contract must comply with.¹

In this context, decisions taken may no longer be based on fair criteria and correlated with public benefits, leading to unfavourable results, favouring certain tenderers over others. It is therefore essential that responsible institutions implement prompt and effective conflict of interest prevention and management measures to maintain the integrity and fairness of decision-making.

In addressing the issue of conflict of interest in public procurement procedures, this paper aims to answer the following questions:

1. What are the main regulations in this area?
2. How are the legal provisions in this area interpreted and applied in specialized literature and judicial practice?

For this purpose, the qualitative analysis method will be used, specifically the interpretation of legal text and literature.

Definition of Conflict of Interest and National Legislative Framework

Conflict of interest is defined in Romanian law as “any situation in which the staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority, who are involved in the conduct of the award procedure or who may influence its outcome have, directly or indirectly, a financial, economic or other personal interest, which could be perceived as compromising their impartiality or independence in the context of the award procedure²”.

The legislative framework governing the conflict of interest in public procurement in Romania includes:

¹ Identifying conflicts of interest in public procurement procedures for structural actions. A practical guide for managers developed by a group of experts from the Member States, under the Coordination of Unit D2 – Fraud Prevention – within OLAF, p. 10, <https://sfc.ec.europa.eu/system/files/documents/sfc-files/guide-conflict-interests-ro.pdf> [accessed: 20.10.2024].

² Art. 59 of Law 98/2016 on public procurement.

Law no. 98/2016 on public procurement,³

Law no. 99/2016 on sectoral procurement,⁴

Law no. 184/2016 on the establishment of a mechanism to prevent conflict of interest in the procedure for the award of public procurement contracts,⁵

Law no. 100/2016 on works concessions and service concessions,⁶

Law no. 101/2016 on remedies and appeals in the awarding of public procurement contracts, sectoral contracts and works / services concession contracts, as well as for the organization and functioning of CNSC (National Council for Solving Complaints).⁷

Emergency Ordinance 98/2017 on the *ex ante* control function of the award process of public procurement contracts / framework agreements, sectoral contracts / framework agreements and works concession and service concession contracts.⁸

The Role of the Contracting Authority in Preventing, Identifying and Sanctioning Conflicts of Interest in the Public Procurement Procedure

In the public procurement process, the contracting authority has a crucial role in preventing, identifying and sanctioning conflicts of interest to ensure the integrity and transparency of procedures.

Conflict of interest may seriously affect the results of a public procurement procedure, leading to undue favouring of economic operators or prejudice to the public interest. The contracting authority has the role of ensuring a fair, integral and transparent environment in public procurement, appropriately sanctioning conflicts of interest that may compromise the process.

Identification and declaration of conflict of interest are essential processes in public procurement. These processes are intended to prevent any improper influence on decisions made in procurement procedures. According to Romanian law, there are clear steps that the authorities and persons involved in the procurement process must follow in order to identify and declare conflicts of interest.

Law no. 98/2016 on public procurement provides the importance of preventing conflicts of interest, stipulating in Art. 58 the obligation of contracting authorities “to take all necessary measures to prevent, identify and remedy

³ Published in the Official Gazette of Romania no. 390/2016.

⁴ *Ibid.*

⁵ Published in the Official Gazette of Romania no. 831/2016.

⁶ Published in the Official Gazette of Romania no. 392/2016.

⁷ Published in the Official Gazette of Romania no. 393/2016.

⁸ Published in the Official Gazette of Romania no. 1004/2017.

situations of conflict of interest, in order to avoid distortions of competition and to ensure equal treatment for all economic operators”.

Situations potentially generating conflict of interest are regulated, as an example, in art. 60, paragraph (1) of Law no. 98/2016:

- a) participation in the process of verification / evaluation of requests for participation / tenders of persons holding shares, interest parties, shares in the subscribed capital of one of the tenderers / candidates, supporting third-parties or proposed subcontractors or persons who are part of the board of directors / management or supervisory body of one of the tenderers / candidates, supporting third-parties or proposed subcontractors;
- b) participation in the process of verification / evaluation of requests for participation / tenders of a person who is a spouse, relative or relative-in-law up to the second degree including, with persons who are part of the board of directors / management or supervisory body of one of the tenderers / candidates, supporting third-parties or subcontractors proposed;
- c) participation in the process of verification / evaluation of requests for participation / tenders of a person who is found to or about whom there are reasonable indications / concrete information that they may have, directly or indirectly, a personal, financial, economic or other interest, or are in another situation such as to affect their independence and impartiality during the evaluation process;
- d) the situation in which the individual tenderer / associated tenderer / candidate / proposed subcontractor / supporting third-party has as members of the board of directors / management or supervisory body and / or has significant shareholders or associates persons who are a spouse, relative or relative-in-law up to the second degree including or who are in business relations with persons with decision-making functions within the contracting authority or the procurement service provider involved in the awarding procedure;
- e) the situation in which the tenderer / candidate has nominated, among the main persons designated for the performance of the contract, persons who are a spouse, relative or relative-in-law up to the second degree including or who are in business relations with persons with decision-making functions within the contracting authority or the procurement service provider involved in the award procedure.
- f) the situation in which the individual tenderer / associated tenderer / candidate / proposed subcontractor / supporting third-party organized as a joint-stock company with share capital represented by bearer shares does not comply with the provisions of Art. 53 (2) and (3).⁹

⁹ Art. 53 (2) of Law no. 98/2016 In order to comply with the principles of transparency and equal treatment, the contracting authority has the right to request and the economic operator has the obligation to communicate the identification data of the real holders / beneficiaries of bearer shares, in the situation where the form of organization of the economic operator tenderer / candidate, supporting third-party or subcontractor to

In the *Guidance for Contracting Authorities on Conflicts of Interest in Public Procurement Processes, based on the National Legislation on Public Procurement and National Strategy on Public Procurement*¹⁰ milestones are indicated in the identification of conflicts of interest, from the case-law of the CJEU and the courts of Romania:

- ◆ The concept of conflict of interest is objective by its nature;
- ◆ The conflict of interest (consumed) objectively constitutes a serious irregularity, so there is no need for it to be accompanied by other irregularities in order to be sanctioned;
- ◆ The conflict of interest in the award of public contracts is likely to compromise the effective management of public funds and equal access for all economic operators without the need for it to cause quantifiable material damage;
- ◆ The conflict of interest in the case of a person within the contracting authority who contributes to the selection and award of a contract to a contracting authority, and causes that contract to be awarded directly or indirectly to themselves is representative and unequivocal to define the serious malfunction of that contracting institution / authority;
- ◆ The contracting authority shall bear the burden of proof of the existence or non-existence of a conflict of interest where its decisions in relation to the procurement process are challenged.
- ◆ Employment relations between persons with a decision-making function within the contracting authority and one of the tenderers is a situation such as to attract the obligation of the contracting authority to verify the existence / non-existence of a violation of the law on public procurement regarding the prevention of conflicts of interest. The public procurement contract concluded with non-compliance with this obligation must be cancelled.

In Decision no. 349/2020 of 20 May 2020 pronounced by Pitești Court of Appeal in a public procurement dispute,¹¹ the Court holds that: “The notion of conflict of interest refers to any situation in which members of the staff of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or who may influence its outcome have, directly or indirectly, a financial, economic or personal interest which could be perceived as compromising their impartiality or independence in the context of the procurement procedure.

the procedure is a joint-stock company, with share capital represented by bearer shares. (3) The legal representative of the economic operator submits a declaration on own responsibility regarding the real holders / beneficiaries of bearer shares, under the sanctions provided by art. 326 of Law no. 286/2009 on Criminal Code, with subsequent amendments and additions.

¹⁰ https://anap.gov.ro/web/wp-content/uploads/2017/03/CoI-Guide-Final-Version-17082017-agreed-with-ANA-P-TT_v1.pdf.

¹¹ <https://sintact.ro/#/jurisprudence/534264310/1/decizie-nr-349-2020-din-20-mai-2020-curtea-de-apel-pitesti-litigiu-privind-achizitiile-publice>.

It was appreciated that, by sanctioning the offence of conflict of interest, in applying the provisions of Law no. 98/2016, the legislator sought to protect the social relations related to the proper functioning of the staff within the contracting authorities, an activity that implies a correct behaviour of the one exercising an activity within a public authority, public institutions, etc., as well as the observance of the fundamental principles underlying public procurement, namely the principle of fair competition.”

As regards the prevention of conflicts of interest in public procurement, it is necessary for the persons with decision-making functions to show an ethical and correct behaviour, fulfilling their legal obligations in the event of a potential conflict of interest.

Possible means of preventing conflict of interest:

- ◆ elaboration of the internal policy document on the prevention of conflicts of interest,
- ◆ setting ethical standards for decision-making staff in particular with regard to conflicts of interest,
- ◆ filling out a conflict of interest declaration for each procurement process, etc.

Provisions may be identified in Law no. 98/2016 on the declaration on the conflict of interest and the persons who must sign it.¹²

The conflict of interest declaration in public procurement should include, in addition to the definition of conflict of interest as set out in Law no. 98/2016, as follows:

- (a) identification of the procurement process concerned;
- (b) full name of the signatory, date of birth, position held in the organisation and the tasks in the context of the public procurement procedure;
- (c) date of signature;
- (d) the signatory’s unequivocal declaration certifying whether, to their knowledge, they are in a situation of apparent / potential / real conflict of interest relating to the procurement in question;
- (e) the signatory’s unequivocal declaration of whether, to their knowledge, there are circumstances which could put them in a situation of apparent / potential / real conflict of interest in the near future;
- (f) the signatory’s unequivocal declaration that they undertake to declare immediately any potential conflict of interest in the event of new circumstances.

According to Art. 130 (1), (2) and (3) of Decision no. 395/2016 for the approval of the Methodological norms for the application of the provisions on the award of the public procurement contract / framework agreement of Law no.

¹² Guidance for Contracting Authorities on Conflicts of Interest in Public Procurement Processes, based on National Legislation on Public Procurement¹ and National Strategy² in Public Procurement, page 33, https://pnrr.mmapp.ro/wp-content/uploads/2022/12/FOMULARE_ACHIZITII-PUBLICE.-CONFLICTE-DE-INTE-RESE-SI-INCOMPATIBILITATI_21.12.2022.docx [accessed: 15.10.2024].

98/2016 on public procurement,¹³ the evaluation commission and the co-opted experts have the obligation to sign on their own responsibility a confidentiality and impartiality declaration by which they undertake to comply with the provisions of Art. 129 and confirming that it is not in a situation involving a conflict of interest. The declaration must be signed by the members of the evaluation commission before taking over the specific duties, after the deadline date and time for submitting the requests for participation / tenders, and contains the following identification data: surname and given name; date and place of birth; current domicile; personal number.

If one of the members appointed to the evaluation commission or one of the co-opted experts find themselves in a situation of conflict of interest, then they shall immediately request their replacement from the composition of that commission by another person.¹⁴

According to Art. 62 (1) of Law no. 98/2016, “if the contracting authority identifies a situation potentially generating conflict of interest within the meaning of Art. 59, is obliged to take any steps necessary to determine whether the situation in question constitutes a conflict of interest situation and to present to the candidate / tenderer in that situation a statement of reasons which, in the opinion of the contracting authority, are likely to lead to a conflict of interest”.

In this case, “the contracting authority shall request the candidate / tenderer to convey their view on the situation.”¹⁵

In situations where a potential conflict of interest has been identified, Art. 62 (3) of Law no. 98/2016 provides, first of all, “the elimination of the circumstances that generated the conflict of interest, ordering measures such as the replacement of persons responsible for the evaluation of tenders, when their impartiality is affected, where possible.”

The following measures may be considered, depending on whether or not a conflict of interest declaration exists and the nature of the conflict of interest:

- ◆ discussing clues with the person concerned to clarify the situation;
- ◆ exclusion of the person concerned from the public procurement procedure, whether they are a member of the staff or an external expert / consultant;
- ◆ change of the distribution of tasks and responsibilities between staff members.

The contracting authorities shall also have on hand the cancellation of the procurement procedure.

¹³ Published in the Official Gazette no.423/2016.

¹⁴ See I. Cioboată, Gestionarea transparentă și eficientă a conflictului de interese în achizițiile publice [Transparent and efficient management of conflict of interest in public procurement], <https://www.juridice.ro/656623/gestionarea-transparenta-si-eficienta-a-conflictului-de-interese-in-achizitiile-publice.html> [accessed: 21.10.2024].

¹⁵ Art. 62 (2) of Law no. 98/2016.

In Decision no. 589/2019 of 13 May 2019, Timisoara Court of Appeal,¹⁶ the Court holds that “the novelty brought by the new law is given precisely by the exclusion, as a measure that is taken as a last resort to remedy a conflict of interest, but it should not be lost sight of the fact that, in the event that there are no other remedies necessary to eliminate the circumstances that generated the conflict of interest, the contracting authority has the obligation to exclude from the procurement procedure the tenderer in conflict of interest, in order to protect the respective public procurement procedure and defend the public interest.

With regard to the remedies available to the contracting authority, the Court may conclude that the contracting authority has a legal obligation, in the event of the identification of a conflict of interest, to adopt the remedial measures necessary to protect the public procurement procedure and the subsequent public interest, respectively to eliminate the circumstances that generated that situation potentially generating conflict of interest (these may consist of replacing the person in conflict of interest, revoking the decision to appoint the person in conflict of interest, if such remedy is possible, or removing from the award procedure the tenderer / candidate in conflict of interest if no other remedy is possible anymore).”

Sanctioning persons involved in the procurement process who are in conflict of interest is an essential component of the integrity and compliance framework in public procurement. It is the legal and administrative response to breaches of integrity rules and aims to deter unethical behaviour, ensure fairness of proceedings and protect public interests.

Control Mechanisms in the Field of Public Procurement in Romania

In Romania, two distinct *ex ante* control mechanisms are implemented in the field of public activities.¹⁷

The first mechanism is the one exercised by the National Agency for Public Procurement (hereinafter referred to as NAPP), according to Government Emergency Ordinance no. 98/2017, and refers to the control of the process of awarding contracts and framework agreements for public, sectoral activities, as well as for works and services concessions. NAPP, a pub-

¹⁶ <https://sintact.ro/#/jurisprudence/533263890/1/decizie-nr-589-2019-din-13-mai-2019-curtea-de-apel-timisoara-litigiu-privind-achizitiile-publice>.

¹⁷ See D. Duma-Pătraşcu, Assessing the existence of a conflict of interest in a public procurement procedure; regulating the conflict of interest through special legislation in the field of public procurement and through some special normative acts; *ex ante* control exercised by the National Agency for Public Procurement in order to prevent conflict of interest in the procedure of awarding public contracts, ‘Revista Română de Jurisprudență’ 2021, 1, p. 375.

lic institution subordinated to the General Secretariat of the Government, has as its main mission to ensure the legality, transparency and efficiency of public procurement in Romania. Its duties include *ex ante* verification of award documentation, award procedures and changes to framework contracts / agreements selected in accordance with GEO no. 98/2017 with subsequent amendments and additions, as well as the documents related to their implementation regarding compliance with the legislation in the field of public procurement.

The second mechanism is carried out by the National Integrity Agency (hereinafter referred to as NIA) and focuses on preventing conflicts of interest in award procedures through the integrated IT system for preventing and identifying potential conflicts of interest, called *Prevention system*.¹⁸ The prevention system works on the basis of the data entered in the integrity forms¹⁹, registered in ePPS, on the occasion of the procedures for the award of public procurement contracts²⁰ and processed by integrity inspectors under the law.²¹ NIA issued, through the PREVENT system, between 20 June 2017 and 30 September 2024, 212 integrity warnings for potential conflicts of interest in public procurement procedures carried out by contracting authorities representing ministries, public institutions at central and local level, administrative-territorial units, autonomous administrations, as well as companies in which the state is a shareholder.²²

In accordance with the provisions of article 8 of Law no. 184/2016 on the establishment of a mechanism for preventing conflict of interest in the procedure of awarding public procurement contracts, the integrity warning issued by the NIA is available, through the ePPS, to the contracting authorities / entities, the NIA, as well as to the authorities with powers of verification, monitoring and control of the public procurement procedure, and the head of the contracting authority / entity receiving the integrity warning is obliged to order all necessary measures to avoid conflict of interest, by ordering specific measures, according to the law.

¹⁸ Established within the National Integrity Agency by Law no. 184/2016. published in the Official Gazette of Romania no. 831/2016.

¹⁹ "This prevention mechanism involves analyzing the data and information entered in the integrity form by the responsible person within the contracting authority by interconnecting the PREVENT system with relevant databases (National Trade Register Office – ONRC, Directorate for People's Registration and Database Administration – DEPADB). The novelty of the PREVENT system is given by the fact that it can automatically identify the alleged relationships that may exist between persons from the contracting authority and persons from economic operators who are tenderers in the procurement procedures initiated by a contracting authority. In case of detection of a possible conflict of interest, NIA issues an integrity warning and the contracting authority must take all measures to remove the possible conflict of interest issued by the PREVENT system". <https://integritate.eu/?s=conflict+de+interese+achizitii+publice> [accessed: 20.12.2024].

²⁰ <https://integritate.eu/?s=conflict+de+interese+achizitii+publice> [accessed: 20.12.2024].

²¹ Art. 4 (3), Law no. 184/2016.

²² <https://integritate.eu/?s=conflict+de+interese+achizitii+publice> [accessed: 20.12.2024].

The National Agency for Public Procurement checks whether the necessary measures to eliminate the conflict of interest situation have been implemented, in accordance with its specific tasks.

Failure to take measures as a result of receiving an integrity warning or not completing the integrity form according to Art. 6 (4) initiates *ex officio* the procedure for assessing the conflict of interests, after the completion of the award procedure, exclusively with regard to the persons against whom the provisions of Law no. 176/2010²³ are incident, as amended.²⁴

The findings resulting from the *ex ante* control activity and the measures ordered by NAPP shall be subject to an assent, which may be:

a) unconditionally, where no deviations are found with regard to the quality and / or regularity aspects contained in the checklists; or

b) conditionally, where it is found that there are deviations with regard to the quality and / or regularity aspects contained in the checklists.²⁵

The absolute nullity of the contract concluded as a result of an award procedure that was subject to *ex ante* control and in which NAPP issued a conditional final assent and the contracting authority completed the award procedure without rectifying the serious deviations from the applicable law found by NAPP, except as provided for in Art. 25 (2) of GEO no. 98/2017²⁶ is established by the court of law, which shall examine on the merits the arguments presented by the contracting authority in question for ignoring those retained by NAPP through the respective conditional final assent.

Conclusion

Contracting authorities play a decisive role in creating an environment conducive to objective decisions in public procurement procedures. This is achieved by diminishing the risks of external influence and by strengthening the principles of ethics and transparency. By establishing clear policies for managing conflicts of interest, by adopting an organizational culture that promotes integrity and responsibility, these authorities can ensure the conduct of

²³ Published in the Official Gazette of Romania no. 621/2010.

²⁴ Art. 9 of Law no. 184/2016 on the establishment of a mechanism to prevent conflict of interest in the procedure for the award of public procurement contracts.

²⁵ Art. 14 of the Emergency Ordinance 98/2017 on the *ex ante* control function of the process of awarding public procurement contracts/framework agreements, sectoral contracts/framework agreements and works concession contracts.

²⁶ If the Council or the competent court has definitively ruled on acts of the contracting authority that have been the subject of a conditional assent of ANAP, and the decisions rendered result in the invalidation of the findings of that conditional assent, ANAP will not appeal to Court the contract concluded within the award procedure that was the subject of the final decision of the Council or Court, as it is not struck by absolute nullity on the grounds provided in Art. 14 (8), Art. 25 (2) of the Emergency Ordinance 98/2017.

activity without pressure from personal interests. Thus, proper management of conflicts of interest not only protects public funds, but also improves citizens' trust in state institutions, supporting the development of a society based on transparency, fairness and ethics.

Abstrakt

Konflikt interesów w postępowaniach o udzielenie zamówienia publicznego w Rumunii jest szczególnie ważnym tematem, mającym znaczący wpływ na przejrzystość i uczciwość procesu udzielania zamówień. W Rumunii istnieją ramy prawne regulujące konflikt interesów w zamówieniach publicznych, a głównym aktem normatywnym jest ustawa nr 98/2016 o zamówieniach publicznych. Zgodnie z art. 59 tej ustawy konflikt interesów definiowany jest jako „każda sytuacja, w której członkowie personelu instytucji zamawiającej lub dostawcy usług w zakresie zamówień publicznych działający w imieniu instytucji zamawiającej, [...] zaangażowani w przeprowadzenie procedury udzielenia zamówienia lub mogący wpłynąć na jej wynik, mają – bezpośrednio lub pośrednio – interes finansowy, gospodarczy lub inny interes osobisty, który może być postrzegany jako element zagrażający ich bezstronności lub niezależności w kontekście procedury udzielenia zamówienia”.

Niniejszy artykuł stanowi analizę obecnych rumuńskich regulacji dotyczących konfliktu interesów w postępowaniach o udzielenie zamówienia publicznego oraz środków nałożonych w celu zapobiegania, identyfikacji i zaradzenia sytuacji konfliktu interesów.

Słowa kluczowe: konflikt interesów, procedury zamówień publicznych, sytuacje potencjalnie generujące konflikt interesów, równe traktowanie.

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