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European Single Procurement Document (ESPD): Romanian regulation

[Jednolity europejski dokument zamówienia (ESPD) – uregulowania rumuńskie]

Abstract

Configured as a tool to streamline the procurement procedure by simplifying administrative tasks both for economic operators and for the contracting authority, European Single Procurement Document (ESPD) remains ‘under the magnifying glass’ of jurisprudential debates, in the light of which we intend to explore possible ways of interpreting national legal norms with echo in the modalities of applying and developing additional instruments for harmonizing the procurement procedure.

Keywords: European Single Procurement Document (ESPD), national regulation, exclusion grounds, criteria for tenderer qualification and selection, advantages and barriers to the use of ESPD.

Introduction

Through this research we aim to outline the advantages but also the administrative and competitive barriers reflected in the procedures for the award of public procurement contracts through the implementation of the European Single Procurement Document (ESPD), an instrument made mandatory by automatic generation in the Electronic Public Procurement System (ePPS).

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Structurally, the study starts from the integration of ESPD into the European legislative picture from the perspective of the main source of law, namely Regulation (EC) no. 7/2016 establishing the standard form for the European Single Procurement Document as a legal instrument of the type *hard law*, developed at national level based on Law no. 98 of 2016 on public procurement and Law no. 99 of 2016 on sectoral procurement, and continues with the analysis of the criteria for qualification and selection of tenderers from the perspective of ESPD, as well as the situations of exclusion of the tenderer, in order to conclude the investigation of the casuistry and jurisprudence that arose from the moment of the effective application of this instrument. Thus, casuistry is to define and give meaning to the objectives of our research, which starts from the assumption that ESPD also generates contrasting aspects, an assumption that needs to be confirmed, nuanced or refuted.

In other news, the research also seeks to advance explanatory models and proposals to improve the functioning mechanism of ESPD in an integrative vision that allows equal treatment, transparency and proportionality on the European economic market, the research methodology focusing on the logical-deductive method.

European and National Rules on ESPD

The European Single Procurement Document (ESPD) was established at the level of the European Union through Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document.¹

Among the objectives stated in the Preamble to the Regulation we find the need to simplify and reduce the administrative burden for contracting authorities, contracting entities and economic operators, in particular in the case of Small and medium-sized enterprises (SMEs), by replacing the various national self-declarations with a standard form established at European level and set out in Annex 2 to the Regulation. At the same time, the introduction of this form seeks to avoid contradictory indications in the different procurement documents by requiring that the information presented in the ESPD be clearly stated in advance by contracting authorities and contracting entities in the call for tender contracts or by reference to other parts of the procurement documents, which economic operators are required to examine carefully at the time of submission of tenders.

¹ Published in the Official Journal of the European Union on 2016, Jan. 6 – <https://eur-lex.europa.eu/search.html?scope=EURLEX&text=32016R0007&lang=ro&type=quick&qid=1721041403459>.

As it results from the Instructions in Annex 1 to the Regulation, the ESPD is a “self-declaration by economic operators providing preliminary evidence replacing the certificates issued by public authorities or third-parties. As provided in Article 59 of Directive 2014/24/EU, it is a formal statement by the economic operator that it is not in one of the situations in which economic operators shall or may be excluded; that it meets the relevant selection criteria and that, where applicable, it fulfils the objective rules and criteria that have been set out for the purpose of limiting the number of otherwise qualified candidates to be invited to participate.”

At the national level, the legislator has integrated provisions on ESPD both in the Law no. 98 of 2016 on public procurement² as well as in Law no. 99 of 2016 on sectoral procurement,³ allocating to it a special section called “European Single Procurement Document. E-Certis” under the chapter “Organization and conduct of the award procedure” in both legislative acts.

ESPD is mandatory for both contracting authorities / contracting entities and economic operators participating in award procedures. Starting with 2019, Apr. 8 the European Single Procurement Document (ESPD) is integrated into the Electronic Public Procurement System (ePPS) and is generated automatically. Exceptions to the completion of the ESPD are direct procurement and negotiation without prior publication of a contract notice, since direct procurement is not considered a genuine award procedure, and negotiation without prior publication of a contract notice is carried out offline (outside the ePPS platform).

In this respect, the contracting authority that draws up and defines the award documentation has the obligation to configure the ESPD directly in the ePPS,⁴ while economic operators participating in the award procedure are required to complete the ESPD after authentication in the system. At the same time, economic operators will sign the ESPD electronically, by exporting / importing the document created with the xml extension or by printing it directly from the application. Moreover, we find explanations on these issues also in the Notification on the use of ESPD in procedures carried out exclusively by electronic means,⁵ elaborated by the National Agency for Public Procurement (NAPP), according to which the integration of ESPD into the Electronic Public Procurement System (ePPS) implies the obligation of the contracting authority to configure ESPD directly in the dedicated section of the electronic form for defining the award documentation.

² Published in the Official Gazette of Romania no. 390 of 2016, May 23.

³ Published in the Official Gazette of Romania no. 391 of 2016, May 23.

⁴ As of 2019, May 2 the European Commission no longer makes available the electronic version of the form eESPD, users being directed to use the services of national providers, for Romania ESPD being automatically generated on ePPS (e-licitatie.ro).

⁵ <https://anap.gov.ro/web/notificare-privind-utilizarea-duae-in-procedurile-desfasurate-exclusiv-prin-mijloace-electronice/>.

As regards how to define ESPD by the contracting authorities, starting with 2024, new working functionalities for generating ESPD in ePPS have been outlined. Thus, ESPD will be automatically attached by the system to the respective documentation, as a file in xml format, while the responses to the ESPD of the economic operators participating in the procedure will also be filled in the ePPS directly, after authentication, by each participant, in accordance with the technical guidance received from the Agency for the Digital Agenda of Romania. The ePPS operator shall certify that: the data uploaded as ESPD responses is completed only by tenderer users after authentication, and that the data is completed by each member of the tenderer. In other news, the economic operator that joins the procedure declares the form of participation –individual / in association as well as the composition, the possibility of declaring tenderers, and the others validate that they are part of that association / composition and have the obligation to complete the ESPD in their turn, confirming the position they occupy within the procedure.

A major contribution in streamlining and understanding the functioning mechanism of the ESPD was made by the National Agency for Public Procurement (NAPP), which came in stages to support the participants in the award procedure by publishing guides that structured the rules and steps to follow for completion,⁶ originally published, more precisely on 1 September 2016, an editable form of the ESPD standard form.

According to Art. 20 of Methodological norms for the application of the provisions on the award of the public procurement contract / framework agreement of Law no. 98 of 2016 on public procurement,⁷ the award documentation shall reflect the information necessary to provide economic operators with a complete, correct and accurate picture of the procurement requirements, the subject-matter of the contract and the manner in which the award procedure is carried out consisting of:

- a) ESPD and instructions to tenderers / candidates;
- b) specifications or descriptive document, the latter being applicable to competitive dialogue, negotiation or innovation partnership procedures;
- c) draft contract containing the binding contractual clauses;
- d) forms and models of documents.

Thus, the contracting authority will electronically generate the ESPD, together with the other procurement documents, ensuring that it is completed and the headings are checked in accordance with the qualification and selection criteria established by the award documentation. The specifications capture the technical specifications describing the requirements and characteristics of the products, services or works to be purchased, so as to

⁶ NAPP elaborated in 2016 ESPD user guides – <https://anap.gov.ro/web/ghiduri-de-utilizare-al-duae/>.

⁷ See Decision no. 395 of 2016, June 2 approving the methodological norms for the application of the provisions on the award of the public procurement contract/framework agreement of Law no. 98 of 2016 on public procurement, published in the Official Gazette no. 423 of 2016, June 6.

correspond to the need of the contracting authority, while the descriptive document necessarily includes at least a description of the needs, objectives and constraints of the contracting authority, which will form the basis of the negotiations / dialogue / innovation partnership, but also the minimum technical, performance or functionality requirements necessary to be met by each preliminary tender / solution in order to be admitted to the next phase.⁸

Consequently, economic operators who are interested in participating in a procedure for the award of a public procurement contract will find ESPD in the details of the contract / simplified / competition notice in the related award documentation. Starting with 2019, Apr. 18 ESPD is available both in electronic format, through the online service, made available free of charge by the Digital Agenda of Romania, at the internet address e-licitatie.ro, which requires account and authentication in the system, as well as in editable format, which can be generated on paper, the form model being made available to the contracting authorities / entities by the National Agency for Public Procurement (NAPP) through the Internet page (www.anap.gov.ro) and the ePPS portal (www.e-licitatie.ro).

It should be noted that the online service allows contracting authorities to develop, review and reuse, download and print ESPD for a procedure for the award of a public / sectoral contract, and the participating economic operators to complete, save and print the ESPD document for a procedure for the award of a public / sectoral contract, corresponding to the quality they have in that procedure. At the same time, according to the legal provisions, the participating economic operators have the possibility to update or correct the information from the ESPD until the deadline for submitting tenders / applications.

By the Order of the president of NAPP no. 1554 of 2023, 17 Aug. on the approval of the structure and content of the standard documentation for the award of the public / sectoral product procurement contract⁹ it is stipulated that for the elaboration and completion of the ESPD, the contracting authorities shall use the information included in the Notification on the use of the European Single Procurement Document (ESPD) of 2019, July 2 respectively Notification no. 1/2021 on the possibility to supplement the ESPD conferred by Commission Implementing Regulation (EU) 2016/7 of 2016, Jan. 5 establishing the standard form for the European Single Procurement Document. The Order also provides that the contracting authority has the obligation to review the ESPD related to the procedure for awarding the public procurement con-

⁸ See P. Lăzăroiu, I. Cochintu, M. A. Popescu, M. V. Cârlan, *Curs de achiziții publice. Aspecte teoretice și aplicații practice* [Public Procurement course. Theoretical aspects and practical applications], 2nd rev. and added ed., Hamangiu Publishing House 2018, pp. 145–150.

⁹ <https://anap.gov.ro/web/ordin-nr-1-554-din-17-august-2023-privind-aprobarea-structurii-si-continutului-documentatiei-standard-de-atribuire-a-contractului-de-achizitie-publica-sectoriala-de-produse/>.

tract in question, in the event that the qualification and selection criteria are modified in the sense of decreasing their levels or eliminating them. If there are discrepancies between the information provided in the ESPD and that provided in the contract / simplified / competition notice, the information in the announcement will prevail, the ESPD will be reviewed accordingly.

In a procedure fully conducted online, the economic operator shall sign the ESPD with an electronic signature and upload to the ePPS parts of the offer in the same way as other documents.

The mandatory character of ESPD also results from the content of Art. 193 (1) of Law 98 of 2016 on public procurement, the contracting authority being obliged to accept “at the time of submission of requests for participation or ESPD tenders, consisting of an updated declaration on own responsibility, as preliminary evidence instead of certificates issued by public authorities or by third-parties confirming that the economic operator concerned fulfils the following conditions:

- a) is not in any of the situations of exclusion referred to in Art. 164, 165 and 167;
- b) meets the capacity criteria as requested by the contracting authority;
- c) if applicable, meets the selection criteria established by the contracting authority in accordance with the provisions of this law.”

The legislator also specifies the technical and professional capacity of the tenderer or candidate, in the sense that the ESPD must be completed separately by the third-party supporter on whose capacity it is based or by the subcontractor, in which case the subcontracting agreement is also attached. Thus, the ESPD submitted by the supporting third-party(ies) or by the subcontractor “shall include all the information referred to in paragraph (1) which is relevant to the support granted under the award procedure concerned.” Of course, the economic operator which participates on its own account but relies on the capabilities of one or more entities, be they third-party supporters or subcontractors, remains liable for the submission of its own ESPD in the proceedings, but also of a separate ESPD for each of the entities on which it relies. This is also the case for groups of economic operators, including temporary associations participating together in the public procurement procedure, each of the economic operators participating in the group having the obligation to complete the ESPD separately.

Although the specific legislation on public procurement does not stipulate the obligation of contracting authorities to use the division by lots, resorting to subcontractors and supporting third-parties actually gives an opportunity to SMEs to increase their chances of being awarded public procurement contracts, thus overcoming the ‘barrier’ of complex contracts, not divided by lots. The advantage also arises from the fact that it is possible to replace or introduce new subcontractors even after the contract has been awarded, of

course, provided that a substantial change is not involved, so that the award procedure does not resume.

The overlap of the concepts of supporting third-party and subcontractor should be avoided, and it is essential to note that when the contracting authority takes into account the technical and professional capacity of the proposed subcontractors for their part of involvement in the contract, the subcontractor also becomes a supporting third-party.¹⁰ Thus, with regard to the capacity to exercise professional activity, tenderers can rely only on subcontractors, not on supporting third-parties. Specifically, if the tenderer wants the contracting authority to take into account the economic and professional capacity of the third-party, for its part of involvement in the execution of the contract, then it is necessary that the third-party be declared a subcontractor, not being sufficient to have the quality of supplier.¹¹ Therefore, in such a situation, the tenderer is no longer free to choose whether or not to declare the third-party as a subcontractor. The overlap of the two notions has generated various interpretations regarding ESPD as well. In this respect, judicial practice has established that it is excessive to reject the tender as unacceptable if the third-party supporter does not submit separately and the support commitment, although from the content of the ESPD results the firm commitment.

The National Agency for Public Procurement (NAPP) has also developed a Notification on the use of ESPD in procedures for the award of public / sectoral contracts¹² according to which the following situations can occur during the analysis of the ESPD content:

- a) inaccuracies in the form of the information contained in the ESPD sections, both of the tenderer / candidate and of the supporting subcontractor / third-party, in relation to which there is an opportunity to request clarification;
- b) substantive inaccuracies, respectively errors / omissions of information, in relation to which there is no possibility to request clarification.

Regarding the possibility to request clarifications for form inaccuracies in respect of the ESPD attached to the tender or candidacy, we will refer to the provisions of Art. 209 (1) of Law no. 98 of 2016 on procurement, respectively the provisions of Art. 221 (1) of Law no. 99 of 2016 on sectoral procurement, according to which the contracting authority has the right to request clarifications or additions in order to clarify issues caused by the existence of incon-

¹⁰ Barriers for SMEs in public tenders. Solutions – division by lots, appeal to subcontractors and supporting third-parties, 17/12/2021 – <https://hotnews.ro/bariere-pentru-imm-uri-n-licitatiile-publice-solutii-divizarea-pe-loturi-apelarea-la-subcontractanti-si-terti-sustinatori-155679>.

¹¹ D.-R. Răducanu, I. Titorian, Corecta interpretare a diferenței dintre furnizor și subcontractant în achizițiile publice [Correct Interpretation of the Difference Between Supplier and Subcontractor in Public Procurement], 30 March 2023 – <https://www.juridice.ro/499788/corecta-interpretare-a-diferentei-dintre-furnizor-si-subcontractant-in-achizitiile-publice.html>.

¹² <https://anap.gov.ro/web/notificare-privind-utilizarea-duae-in-procedurile-de-atribuire-a-contractelor-de-achizitie-publicasectoriale/>.

sistencies between the information presented in the ESPD. Clarifications are required if the information is supported by other clarifications existing at the level of the same ESPD or at the level of ESPD submitted by the subcontractor, supporting third-party or associate.

In case of form inaccuracies regarding the ESPD, tenderers or candidates will be forced to revise it, and, in the absence of submission of a revised ESPD, the provisions of Art. 134 (5) of Government Decision no. 395 of 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. 98 of 2016 on public procurement will become applicable, in the sense that the tender will be considered unacceptable.

Also, according to the provisions of Art. 209 (2) of Law no. 98 of 2016, respectively Art. 221 (2) of Law no. 99 of 2016, “the contracting authority does not have the right, through the requested clarifications / additions, to determine the appearance of an obvious advantage in favour of a tenderer / candidate.”

There are also situations that lead to the rejection of the tender without the possibility to request clarifications on the ESPD, respectively in the event that information filled in by the tenderers / candidates is found that does not confirm the fulfilment of the minimum qualification / selection requirements formulated by the contracting authority / entity in the Data Sheet / Procurement instructions.

From the corroboration of Art. 196 (2) of Law no. 98 of 2016 with the provisions of Art. 132 (2) of Government Decision no. 395 of 2016, it follows that prior to the award of the public procurement contract, the contracting authority requires the tenderer ranked first after applying the award criterion to submit updated supporting documents demonstrating the fulfilment of all qualification and selection criteria, in accordance with the information contained in the ESPD. Where a multi-stage procurement procedure is applied, the contracting authority has the possibility to limit the maximum number of selected candidates who meet the qualification and selection criteria and who will be invited to tender at the second stage.

The ranking is established on the basis of the selection criteria and the information contained in the ESPD, the contracting authority making the order in the ranking in compliance with the scoring methodology provided in the procurement instructions, following that, in case of limiting the maximum number of candidates selected, the submission of supporting documents as proof of the information contained in the ESPD shall be requested exclusively to them.

Under Section 8 on the “European Single Procurement Document. E-Certis,” the legislator specifies that the ESPD must also contain “information on the public authority or third-party responsible for drawing up the supporting documents, as well as an official statement attesting that the economic oper-

ator is obliged to provide, upon request and without delay, those supporting documents.”

In order to simplify the mechanism, the legislator mentions that economic operators are not obliged to provide supporting documents or other evidence in support of the information declared in the ESPD, when the contracting authority has the possibility to obtain the requested documents directly by accessing a database, in which case the ESPD will contain the information requested for this purpose, such as, for example, the internet address of the database, any identification data and, where appropriate, the necessary declaration of consent.

Moreover, according to Art. 198 of Law no. 98 of 2016 on public procurement, NAPP has the obligation to make available to the European Commission and to update in e-Certis the complete list of databases containing relevant information on economic operators established in Romania. Moreover, in order to facilitate cross-border award procedures, NAPP shall ensure that information on certificates and other forms of supporting documents entered in e-Certis is kept up to date.

Furthermore, in accordance with the principle of mutual recognition, the contracting authority is required to accept equivalent certificates issued by accredited certification bodies established in other Member States. At European Union level, the series of relevant European standards, certified by accredited bodies, to which the contracting authority will report, must be taken into account. Consequently, the contracting authority will not be able to require the presentation of specific certifications, but will also have to accept certifications equivalent to European standards, granted by independent bodies attesting compliance by economic operators with certain quality assurance standards, including accessibility for persons with disabilities or environmental management standards or systems.

Also, in the idea of simplification, economic operators have the right to reuse an ESPD used in a previous award procedure, provided that the validity of the information is confirmed on the date of its submission.

An overview of the ESPD mechanism, which has become fully functional and at national level, outlines the advantages and prospects for simplifying the procurement procedure, but so far multiple barriers have been identified in the road taken by the tenderers / candidates and even by the contracting authority until the actual award of the public procurement contract.

One of the omissions of economic operators at national level remains the electronic failure of the ESPD in the case of procedures carried out exclusively online. Far from being a formalism, the tender will be rejected as unacceptable if the accompanying documents do not bear the extended electronic signature, based on a qualified certificate issued by a certification service provider accredited in accordance with Law no. 455/2001 on electronic signa-

ture.¹³ Thus, the electronic signature represents a condition of validity of the tender and the failure to sign is equivalent to the lack of assuming the content of the documents uploaded by the tenderer. Even if only one tender has been submitted, but ESPD does not have an electronic signature, the tender will be rejected and the procedure annulled, in which case the contracting authority is forced to resume the procedure.

There were also “short-circuits” at the level of practice regarding ESPD loading, in the sense that it was only loaded in pdf format, not xml, as indicated in the user guide of the National Agency for Public Procurement (NAPP). However, it was found that this could not be a reason for rejection by the contracting authority as it could extract the necessary information from the pdf., the only reasons for rejection being those regarding the electronic signature.¹⁴ At the same time, there is a risk of erroneous ticking in ESPD of additional requirements by the contracting authority, requirements that are not found in the contract / simplified / competition notice. In this case, the solution is regulated by Art. 20 (7) of Government Decision no. 395 of 2016, according to which “if there are discrepancies between the information provided in the ESPD and those provided in the contract / simplified / competition notice, the information in the announcement prevails, and the ESPD will be reviewed accordingly.” Consequently, the economic operator has the obligation to mirror the information in the award documentation, and the contracting authority has the obligation, in turn, to ensure the revision of the initial ESPD, including a clarification of notification of completion. Of course, in this case, the economic operator will have to complete the revised version.

We consider that the biggest barriers are outlined against tenderers from outside the Romanian state, by what means supporting documents. Why? Because the procurement procedure is carried out according to national legislation, which is why potential winners have difficulties in understanding the substance and form of the certificates / supporting documents that they are obliged to submit to the contracting authority to demonstrate the criteria established by the ESPD.

¹³ Republished in the Official Gazette no. 316 of 2014, 30 Apr. It is to be repealed on 8 October 2024 by Art. 35 of Law no. 214 of 2024, July 5 on the use of electronic signature, timestamp and provision of trust services, published in the Official Gazette of Romania no. 647 of 2024, July 8. According to Art. 4 (1) of Law no. 214 of 2024, July 5 “the electronic document signed with a qualified electronic signature is assimilated, in terms of its conditions and effects, with the document under private signature, under the conditions of Art. 25 (2) of Regulation (EU) no. 910 of 2014. The qualified electronic signature produces the same legal effects as the handwritten signature.”

¹⁴ See Ecaterina Milica Dobrotă, DUAE – un ajutor în ofertare sau o barieră? [ESPD – An Aid in Bidding or a Barrier?], 2016, Oct. 26 – <https://www.juridice.ro/475225/duae-un-ajutor-in-ofertare-sau-o-bariera.html>.

Exclusion Grounds, Qualification and Selection Criteria from the Perspective of ESPD

Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC,¹⁵ regulates, in Art. 57, two categories of grounds for exclusion: mandatory grounds and optional grounds. The mandatory grounds for excluding tenderers from the award procedure concern specific offences, listed exhaustively, as well as non-payment of due tax obligations, while the optional grounds for exclusion concern, where appropriate, the breach of applicable environmental, social and labour obligations, the insolvency of the economic operator, the commission of serious professional misconduct that calls into question integrity, the conclusion of agreements aimed at distorting competition, conflict of interest, distortion of competition by the economic operator's participation in the preparation of the award procedure, etc.

It should be noted that with regard to the implementation of these provisions in national law, the Directive allowed the Member States to transpose the optional grounds for exclusion as mandatory grounds, which the Romanian legislator did.

According to Art. 193 (1) (a) of Law no. 98 of 2016 on public procurement, “the contracting authority shall accept, at the time of submission of requests to participate or ESPD tenders, consisting of an updated declaration on its own responsibility, as preliminary evidence instead of certificates issued by public authorities or third-parties confirming that the economic operator concerned fulfils the following conditions:

a) is not in any of the situations of exclusion referred to in Art. 164, 165 and 167.”

Thus, according to Art. 164 of Law no. 98 of 2016 “the contracting authority excludes from the procedure of awarding the public procurement contract / framework agreement any economic operator in respect of which it has established, following the analysis of the information and documents submitted by it, or has become aware in any other way that it has been convicted by a final decision of a court of law, for committing one of the following offences:

a) the establishment of an organized criminal group, provided for by Art. 367 of Law no. 286 of 2009 on the Criminal Code, as subsequently amended and supplemented, or the corresponding provisions of the criminal legislation of the state in which the economic operator was convicted; crimes against the financial interests of the European Union, crimes of corruption, acts of terrorism, money laundering, trafficking and exploitation of vulnerable persons, fraud.”

¹⁵ <https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A32014L0024>.

The exclusion shall also apply where the person convicted by a final judgment is a member of the administration, management or supervisory body of that economic operator or has powers of representation, decision-making or control within that economic operator.

Going further with the grounds for exclusion provided by the Romanian legislation, we will consider the provisions of Art. 165, according to which “the contracting authority excludes from the award procedure any economic operator about whom:

- a) it is aware that it has breached its obligations relating to the payment of taxes, duties or contributions to the general consolidated budget and this has been established by a final and binding court or administrative decision in accordance with the law of the state in which the economic operator is established or those of the Member State of the contracting authority;
- b) or it can demonstrate, by any appropriate means, that the economic operator concerned has breached its obligations relating to the payment of taxes, duties or contributions to the consolidated general budget.”

However, the economic operator shall not be excluded from the award procedure if, prior to the exclusion decision, manages to pay in full the taxes, fees or contributions to the general consolidated budget of the state or even if it benefits, under the law, from their deferral, including any accrued interest or late payment penalties or fines.

Also, Art. 167 of the same normative act states that “the contracting authority excludes from the procedure of awarding the public procurement contract / framework agreement any economic operator who is in any of the following situations listed by law.

In the Notification no. 1/2021 on the possibility of completing the ESPD conferred by the Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document,¹⁶ issued by NAPP, we find in the structure of ESPD, Part III, the following exclusion criteria:

- ◆ Grounds relating to criminal convictions;
- ◆ Grounds related to the payment of taxes and social security contributions;
- ◆ Grounds related to insolvency, conflicts of interest or professional misconduct;
- ◆ Other grounds for exclusion which may be provided for in the national legislation of the Member State of the contracting authority or contracting entity, respectively Part IV on the selection criteria:
- ◆ α: Global indication for all selection criteria
- ◆ A: Ability to meet requirements
- ◆ B: Economic and financial situation

¹⁶ https://anap.gov.ro/web/wp-content/uploads/2021/04/NOTIFICARE-nr-1_2021-eficientizare-completare-DUAE-final.pdf.

- ◆ C: Technical and professional capacity
- ◆ D: Quality assurance systems and environmental management standards.

At the same time, the Notification states that the contracting authority / entity has the choice of two ways of viewing the information at the level of this party, namely:

The option to choose to limit the requested information on the fulfilment by economic operators of all the required selection criteria found at the level of the relevant notice and award documentation to a single question, i.e. yes or no;

The option to choose how the requested information on the required selection criteria is viewed also at ESPD level (not just at the level of announcement and award documentation, and the economic operator is obliged to complete all information on how to meet the requirements).

Moreover, the National Agency for Public Procurement (NAPP) specifies in the Notification that in the procurement process, any additional actions, such as requests for clarification on the completion of ESPD by economic operators, are time consuming, which is why, in order to reduce administrative effort and participation costs, it recommends contracting authorities / entities to use the global indication for all selection criteria, following the steps described in point 1 of the Notification, so as to reduce the burdens arising from the need to produce a significant number of certificates or other documents related to the exclusion and selection criteria.

There were a lot of issues regarding the completion of the ESPD when the economic operator is asked to specify whether “it is in a situation where a previous public contract (...) has been terminated early or damages or other comparable sanctions have been imposed in relation to that previous contract” and, if so, to provide details, including any remedial measures taken. In this regard, the economic operator will have to declare even the aspects related to the alleged non-performance of the previous contract, which although not confirmed by the Court, still represent the unilateral position of the contracting authority. If there is an appeal, the contracting authority organizing the new award procedure will be in the position of holding an ascertaining document that represents an administrative act certifying the proper non-performance of a previous contract in respect of which there is a dispute before the courts or arbitral courts. According to the provisions of Art. 166 (8) of the Methodological norms, “when making the decision to reject a candidate / tenderer, based on such an ascertaining document, the evaluation commission has the obligation to analyse whether it reflects the fulfilment of the cumulative conditions provided in Art. 167 (1) (g) of the law”, among which the remedial measures adopted by the economic operator. For example, if the economic operator considers that it has not performed the previous contract improperly, it will not adopt re-

medial measures, in which case, when completing the ESPD in a subsequent award procedure, the economic operator will have to declare the existence of the negative ascertaining document and equally the absence of remedial measures. In such circumstances, there is a very good chance that the decision of the evaluation commission will be to exclude the economic operator from the procedure. The problem arises if, subsequently, the Court will find that the sanctions applied by the contracting authority in connection with the performance of the previous contract were unlawful, thus cancelling the negative ascertaining document, which makes the exclusion applied to prove to be a measure of violation of the principles that make up the “foundation” of the procedure for the award of public procurement contracts.¹⁷ Or, what would be the option of the contracting authority in such a context, so as not to prejudice either the economic operator or to make a wrong and risky choice?

There is also a Notification issued by NAPP on the situation of exclusion regulated in Art. 167 (1) (g)¹⁸ of Law no. 98 of 2016 on public procurement, according to which “in order to be excluded from an award procedure under Art. 167 (1) (g), the economic operator:

- ◆ has seriously breached its main obligations under a public procurement contract, a sector procurement contract or a concession contract, previously concluded;
- ◆ or has repeatedly breached its main obligations under a public procurement contract, a sector procurement contract or a concession contract, concluded earlier, and at the same time, those breaches have led to:
 - ◆ an early termination of that contract,
 - ◆ payment of damages,
 - ◆ other penalties comparable to one of the two mentioned above.”¹⁹

In the Notification, NAPP mentions that the early termination of the contract must not necessarily be accompanied by the payment of damages / other comparable penalties, but must be a consequence of a serious breach or repeated breach of the main contractual obligations or serious breach of contractual obligations, which must not be repeated, but must have led to one of the consequences listed in the second thesis, as well as repeated breaches, even if they are not serious.

¹⁷ S. Gherghina, M. A. Rațiu, Rolul și efectele documentului constatator în procedurile de achiziții publice [The Role and Effects of the Ascertaining Document in Public Procurement Procedures], ‘Forum Juridic’ 2022, 2 – <https://drept.unibuc.ro/documente/2022/2,%202022,%205.%20Simona%20Gherghina,%20Monica%20Ratiu%20-%20Rolul%20si%20efectele.pdf>.

¹⁸ Similarly applies to Art. 180 (1) (g) of Law no. 99 of 2016 on sectoral procurement, published on 2016, 23 of May and, respectively, Art. 81 (1) (f) of Law no. 100 of 2016 on works concessions and service concessions, published on 2016, 23 of May.

¹⁹ <https://anap.gov.ro/web/wp-content/uploads/2021/06/Notificare-motiv-excludere-art-167-alin-1-lit-g-FINAL.pdf>.

In addition, NAPP states that, when optional reasons for exclusion are applied, contracting authorities should pay particular attention to the principle of proportionality, in the sense that minor irregularities should lead to the exclusion of an economic operator only in exceptional circumstances.

While remaining in the same area marked by multiple challenges for all parties involved in a procurement procedure, namely the rigorous planning of the procedure and the evaluation of tenders, which we consider to be an extremely sensitive stage in relation to the way in which the procurement documentation is drawn up, the way in which economic operators understand to relate to the requirements contained therein or especially the way in which the public authority transposes the legislation and makes the application of those requirements in the exercise of the selection and evaluation operations of tenders, we will continue to lean on the qualification and selection criteria from the perspective of ESPD.

According to Art. 193 (1) of Law no. 98 of 2016 on public procurement, “the contracting authority accepts, at the time of submission of requests for participation or ESPD tenders, consisting of an updated declaration on its own responsibility, as preliminary evidence instead of certificates issued by public authorities or by third-parties confirming that the economic operator concerned fulfils the following conditions:

- b) meets the capacity criteria as requested by the contracting authority;
- c) if applicable, meets the selection criteria established by the contracting authority in accordance with the provisions of this law.”

To tick letter b, we will take into account the provisions of Art. 172 of Law no. 98 of 2016, according to which “the contracting authority has the right to apply in the award procedure only capacity criteria relating to:

- a) ability to exercise professional activity;
- b) economic and financial situation;
- c) technical and professional capacity.”

As the case-law of the CJEU states, the principles of equal treatment, non-discrimination and transparency are of particular importance in order to avoid Artificially restricting competition through requirements favouring a particular economic operator. Why? Because there is a need for a wide range of tenders that reflect the diversity of technical solutions, standards and technical specifications on the market. At the same time, as a general rule, all capacity requirements must be directly related and proportionate to the subject-matter of the public procurement contract, the CJEU also holding that “requiring that acts of the institutions do not exceed the limits of what is appropriate and necessary for the purpose of achieving the objectives pursued, with the understanding that, insofar as a choice between several appropriate measures is possible, the least constraint must be used and the inconvenience caused must not be disproportionate to the objectives pursued.” Also, by vir-

tue of the observance of this balance, the Court holds that it is important that the degree of detail of the specifications complies with the principle of proportionality.²⁰

Furthermore, according to Art. 178 of the Law on public procurement, “the contracting authority has the right to establish, through the procurement documents requirements on technical and professional capacity that are necessary and appropriate to ensure that economic operators have the human and technical resources and experience necessary to execute the public procurement contract / framework agreement to an appropriate quality standard,” as these may concern in particular the existence of an appropriate level of experience, by reference to contracts executed in the past.

It is important to note that the contracting authority may not set participation requirements for subcontractors proposed by the tenderer, but will take into account their technical and professional capacity for their part of involvement in the contract to be fulfilled, if the documents submitted are relevant to that effect.

Law no. 98 of 2016 and Government Decision no. 395 of 2016 distinguish three types of criteria that can be established by the contracting authority through the award documentation, namely qualification criteria, selection criteria and award criteria.

From the perspective of the ESPD, this is a mechanism intended to prove preliminarily that the economic operator fulfils the qualification criteria relating to the exclusion grounds (letter a) the qualification criteria for capacity (letter b) and the selection criteria (letter c). In addition, as mentioned above, where there is doubt about the fulfilment of any criterion, the contracting authority has the right to request from tenderers supporting documents proving the information contained in the ESPD, as laid down in Art. 196 of Law no. 98 of 2016.

Since the delimitation between the qualification criteria and the selection criteria often poses problems in practice, we must distinguish between qualification and selection of candidates, the latter being a distinct process, which materializes after the qualification process and which aims only to limit the number of qualified candidates who will submit the tender in the second stage of the restricted tender or, as the case may be, who will participate in the dialogue / negotiations. According to the law, the selection is carried out by awarding each candidate a score that must reflect their ability to fulfil the contract to be awarded. At the same time, according to the final thesis of Art. 30 (2) of Government Decision no. 395 of 2016, the selection criteria “must relate to the qualification criteria established by the award documentation”. In addition, the qualification criteria are intended to demonstrate, by economic

²⁰ CJEU, Case T-195/08 Antwerpse Bouwwerken NV, 2009, 10 of December, ECLI: EU:T:2009:491 –<https://curia.europa.eu/juris/document/document.jsf?docid=72748&doclang=RO>.

operators, the concrete possibility of completing the contract, while the selection criteria are intended to make a sorting of qualified economic operators in order to select those who have the best economic and financial, technical and / or professional capacity.²¹

It should also be noted that capacity criteria cannot be established outside the categories listed in Art. 172 of the procurement Law, respectively the capacity to exercise professional activity, economic and financial situation and technical and professional capacity. Of course, the authority has the freedom to choose from the three categories of criteria, but it cannot establish criteria that exceed these limits.

Stricto sensu, the steps of awarding a public procurement contract are materialized in the stage of organizing the procedure in which the contracting authority verifies whether the exclusion grounds are incidental, meaning that economic operators who are not in situations of exclusion will be checked by means of qualification criteria. Subsequently, candidates who meet the qualification requirements, are to be selected based on the selection criteria.

In the second stage, the selected candidates submit the tenders and the contracting authority evaluates initially the technical proposals, corresponding to the minimum requirements of the specifications, and subsequently the financial proposals.

After the completion of the selection process, the award criteria shall be applied, with the contracting authority assessing the most economically advantageous tender on the basis of the award criterion and the evaluation factors set out in the procurement documents, namely: lowest price, lowest cost, best price-quality ratio or best cost-quality ratio, according to Art. 187 of Law no. 98 of 2016.

The reality is that in practice we also encounter situations of improper use of qualification criteria or selection criteria, which means the non-adaptation of the criteria to the specifics of the contract. In this context, we must always refer to the provisions of Art. 31 (1) of Government Decision no. 395 of 2016 laying down the conditions to be met by any qualification criteria imposed by the public authority in the light of the principle of proportionality. Thus, “the contracting authority has no right to restrict participation in the procedure of awarding the public procurement contract by introducing minimum qualification criteria, which:

- a) are not relevant in relation to the nature and complexity of the public procurement contract to be awarded;

²¹ E. Sârbu, M. Ionescu, *Stabilirea și aplicarea criteriilor de calificare, criteriilor de selecție și a criteriilor de atribuire în achizițiile publice* [Establishment and Application of Qualification Criteria, Selection Criteria and Award Criteria in Public Procurement], 2020, May 16 – <https://www.oglindapartners.ro/noutati/stabilirea-si-aplicarea-criteriilor-de-calificare-criteriilor-de-selecție-si-a-criteriilor-de-atribuire-in-achizițiile-publice-58>.

b) are disproportionate in relation to the nature and complexity of the public procurement contract to be awarded.”

By establishing these conditions, the legislator has ensured the balance and interdependence between the qualification or selection criteria imposed by the contracting authority and the specifics of the contract to be awarded.

For example, in a case covered by the old regulation and finalized in 2013 by the judgment of Bucharest Court of Appeal, the Court analysed the proportionality of the qualification and selection criteria outlined by the contracting authority in a procedure for awarding a contract having as subject matter services for elaborating local development strategies for 5 localities in Dâmbovița County, criteria that required the members of the team of specialists and the project manager to have professional experience in public administration for at least 3 years. The establishment of such criteria had a negative impact on the award procedure, of the three submitted tenders, two of which being rejected as unacceptable, on the grounds that “the specialist staff and experts who will have essential roles in fulfilling the contract do not meet the minimum qualification requirements required by the award documentation.” For example, the Court held that such requirements are restrictive in relation to the specifics and subject-matter of the contract and “in order to give efficiency to the principle of proportionality, the minimum qualification and selection requirements required by the award documentation as well as the documents proving the fulfilment of such requirements must be limited only to those strictly necessary to ensure the optimal fulfilment of that contract, taking into account the specific requirements imposed by its value, nature and complexity, and the option of the contracting authority to impose such requirements must be motivated by an explanatory note.”²²

Qualification or selection criteria play a key role in the award of the public procurement contract and it is necessary that they allow the tenderer to outline an extremely clear vision of what they are to assume with regard to technical, professional, financial capacities, it is not advisable for the contracting authorities to use the procedure of requests for clarification in order to make genuine changes to the requirements established by the tender documentation. In this regard, the jurisprudence of the National Council for Solving Complaints gives us multiple examples. In a case concerning the award of a contract for the modernization of a thermal power plant, the claimant accused the contracting authority of abusing its right by requesting technical documents that were not included in the award documentation. Settling the case, the Council held that the claimant complied with the request of the contracting entity to submit the list of equipment for the automation and electrical installation containing specifications and technical data sheets, by Answer

²² See E. Sârbu, M. Ionescu, <https://www.oglindapartners.ro/noutati/stabilirea-si-aplicarea-criteriilor-de-calificare-criteriilor-de-selectie-si-a-criteriilor-de-atribuire-in-achizitiile-publice-5858>.

no. 13241 of 2019, Feb. 18. However, the claimant did not specify the “type and model” of each equipment, but the Council noted that “the contracting entity did not establish such a requirement through the award documentation, in which case it cannot impute its non-fulfilment to the claimant either. Requests for clarification, as follows from Art. 140 (1) of Government Decision no. 394 of 2016,²³ concern formal aspects or confirmation of what was requested through the award documentation, and not the fulfilment of requirements that exceed the award documentation.” Basically, a ‘concealed’ modification of the qualification criteria is avoided by using requests for clarification, which would contravene the principle of transparency and the principle of equal treatment outlined by the legal provisions on public procurement.

Also in this area, regarding the addition to the award criteria or their modification after the publication of the award documentation, we find debates also in the judgment in the Lianakis case,²⁴ where exactly such a problem has been dealt with. In the present case, the contracting authority specified in the contract notice only three award criteria, namely the similar experience in carrying out similar activities in the last three years, the staff and equipment of the tenderers and the ability to carry out the study within the prescribed period, without providing for evaluation factors or the relative weight of each of them. During the procedure, however, the contracting authority established weighting coefficients and sub-criteria for each of the award criteria set out in the award documentation, which is why the Court of Justice of the European Union (CJEU) sanctioned this conduct, arguing that “potential tenderers must be able to be aware, when preparing their tenders, of the existence and importance of these elements.” Consequently, “a contracting authority could not apply weighting rules or sub-criteria of the award criteria which it has not previously made known to tenderers.” Furthermore, “tenderers must be treated equally throughout the procedure, which requires that those criteria and conditions governing each contract be the subject of appropriate publicity by the contracting authorities.”

The above examples demonstrate the need to establish and apply diligently the criteria of qualification, selection and award, in the mirror with the exact observance and assumption of the principles established by Art. 2 of Law no. 98 of 2016 on public procurement, namely non-discrimination, equal treatment, mutual recognition, transparency, proportionality and accountability.

²³ Judgment no. 394 of 2016, June 2 approving the methodological norms for the application of the provisions on the award of the sector contract/framework agreement of Law no. 99 of 2016 on sectoral procurement, published in the Official Gazette of Romania no. 422 of 2016, June 6.

²⁴ CJEU, Judgment of the court (first Chamber) Cause C-532/06, Emm. G. Lianakis AE, Sima Anonymi Techniki Etaireia Meleton kai Epivlepseon and Nikolaos Vlachopoulos against Dimos Alexandroupolis and others, 2008, 24 of January, ECLI:EU:C:2008:40, – <https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:%3A62006CJ0532>.

Casuistry and Relevant Case Law Relating to ESPD

The last section opens the ‘picture’ of the investigation of jurisprudence and casuistry under the ‘magnifying glass’ of the National Council for Solving Complaints (NCSC) and the National Authority for Public Procurement (NAPP), which is to define and give meaning to the objectives of our research in which we started from the assumption that ESPD also generates contrasting and nuanced aspects.

A first case that we are leaning towards in this research concerns a methodological advice of NAPP on when the contracting authority has the right to verify the statements of the tenderers from ESPD by requesting supporting documents and additional information.²⁵ In this case, NAPP invokes Art. 193 of Law no. 98 of 2016, in the sense that the contracting authority is obliged to accept ESPD at the time of submission of requests for participation or tenders, as preliminary evidence instead of certificates issued by public authorities or third-parties confirming that the economic operator concerned is not in any of the situations of exclusion and fulfils the capacity and / or selection criteria established by the contracting authority. At the same time, Art. 196 (1) of the same normative act, which transposes exactly the first paragraph of Art. 59 (4) of Directive 2014/24/EU, provides that the contracting authority has the right to require candidates / tenderers to submit all or part of the supporting documents as evidence of the information contained in the ESPD, at any time during the course of a bidding procedure, if this is necessary to ensure the proper conduct of the procedure. Moreover, paragraph (2) of the same Article establishes the obligation of the contracting authority to require the first-placed tenderer, before the award of the public procurement contract / framework agreement, updated supporting documents demonstrating the fulfilment of all qualification and selection criteria, in accordance with the information contained in the ESPD. Consequently, in the case of a single-stage procedure, such as an open tender, the contracting authority is obliged to accept ESPD at the time of submission of requests for participation or tenders as preliminary evidence, but after that time, during the course of the award procedure, it has the right to require tenderers to submit all or part of the ESPD proving documents, if this is necessary to ensure the proper conduct of the procedure. Finally, before awarding the contract / framework agreement, the contracting authority has the obligation to request all documents proving ESPD to the tenderer ranked first after applying the award criterion.

A second case to which we turn our attention concerns a methodological advice given by NAPP to the contracting authority regarding the request for clarifications to tenderers regarding the similar experience, as well as the

²⁵ <https://achizitiipublice.gov.ro/questions/view/92/653/true>.

need to retransmit the revised ESPD with the related information. Given that some of the tenderers responded to the request for clarification by submitting certain letters / evidentiary documents (contracts, reception minutes requested at the same time by the authority) without retransmitting the revised ESPD, the contracting authority requested methodological advice on whether or not the tenders in question fall within the provisions of Art. 134 (5) of Government Decision no. 395 of 2016, respectively if, by requesting the retransmission of the ESPD with the information mentioned in the reply letters, the principle of equal treatment is violated.²⁶

According to the answer offered by NAPP, if, within the award documentation, it was stipulated the obligation to fulfil some qualification and selection criteria, the evaluation commission has the obligation to verify the way of their fulfilment by each tenderer / candidate by analysing the content of ESPD in accordance with the provisions contained in Chapter IV, Section 8 of Law no. 98 of 2016. Accordingly, under Art. 209 (1) of Law no. 98 of 2016, in conjunction with Art. 134 (1) of Government Decision no. 395 of 2016, the contracting authority, through the evaluation commission, has the right to request clarifications / additions in order to clarify some issues determined by the existence of inconsistencies between the information presented in the ESPD, in compliance with the principles of equal treatment and transparency. On the other hand, the contracting authority must take into account in particular the provisions of Art. 209 (2) of Law no. 98 of 2016 according to which it does not have the right, through the requested clarifications / additions, to determine the appearance of an obvious advantage in favour of a tenderer / candidate. At the same time, in this ESPD verification phase, characteristic of the evaluation process, the commission will also take into account the notification of NAPP no. 245 of 2016.²⁷ For example, according to the invoked notification, the situations that lead to the rejection of the tender / candidacy without the possibility to request clarification on the ESPD, concern substantive inaccuracies, respectively represent that information filled in by the tenderers / candidates that do not confirm the fulfilment of the minimum qualification / selection requirements formulated by the contracting authority in the Procurement Data Sheet. In this regard, the provisions of Art. 137(2) (b) of Government Decision no. 395 of 2016 clearly state that the tender is considered unacceptable if it was submitted by a tenderer who has not completed the ESPD in accordance with the criteria established by the contracting authority. On the other hand, the contracting authority has the right to request clarifications for form inaccuracies arising in the completion of the ESPD by tenderers / candidates, provided that the information is supported by other clarifications

²⁶ <https://achizitiipublice.gov.ro/questions/view/92/653/true>.

²⁷ Notification on the use of ESPD in procedures for the award of public / sectoral contracts – <https://anap.gov.ro/web/wp-content/uploads/2016/09/Notificare-utilizare-DUAE.pdf>.

existing at the level of the same ESPD or ESPD submitted by the supporting / associated subcontractor / third-party. NAPP points out that the situations in which form inaccuracies are identified regarding the ESPD presented in the tender / request for participation and which led to the clarification of some information, oblige the submission by the tenderers / candidates of a revised ESPD. At the same time, according to the provisions of Art. 196 (1) of Law no. 98 of 2016, the contracting authority has the possibility to “require candidates / tenderers to submit all or part of the supporting documents as evidence of the information contained in the ESPD at any time during the course of a tender procedure” if this is necessary to ensure the proper conduct of the procedure, and tenderers are obliged to submit the requested documents. If under Art. 134 (5) of Government Decision no. 395 of 2016, the candidate / tenderer, who is requested for clarification, does not submit within the period specified by the evaluation commission the requested clarifications / completions or the submitted clarifications / completions are not conclusive, the tender will be considered unacceptable.

In the case drawn up for analysis, the contracting authority requested clarifications from tenderers regarding the demonstration of the fulfilment of the requirement related to the similar experience, while taking advantage of the above-mentioned legal provisions by requesting the retransmission of the revised ESPD. Thus, some of the tenderers proved the fulfilment of the respective requirement by presenting different relevant letters / documents, but without submitting the ESPD document completed with the specific information requested by the authority. Consequently, to the extent that the information within the letters / documents (contracts, reception minutes) submitted by the respective tenderers are conclusive, demonstrating the fulfilment of the requirement regarding the similar experience, and therefore the purpose for which the contracting authority requested clarifications is achieved, NAPP considers that the incidence of the provisions of Art. 134 (5) of Government Decision no. 395 of 2016 is not justified in this case, regarding the declaration of tenders as unacceptable. The obligation of the authority is to ensure that the information presented in the letters / documents leads to the demonstration of the qualification requirement. In this context, the evaluation commission has the right to submit a new request for the retransmission of the revised ESPD.²⁸

In another case, also submitted for methodological advice to NAPP, the contracting authority, at the stage of completion of the award procedure, respectively at the stage of presenting the specific documents to the financier for approval, found, following the verifications carried out, the existence of deviations in the evaluation of the technical proposals of the tenderers. In these circumstances, methodological advice was requested on the possibility

²⁸ <https://pr2021-2027.adroltenia.ro/wp-content/uploads/2023/05/Ghid-achizitii-Colectie-de-spete-2023.pdf>.

for the contracting authority to resume the assessment at the stage of the ESPD verification, technical tenders and financial tenders, without cancelling the award procedure.

As stated by NAPP, in accordance with the provisions of Art. 127 (2) and (3) of the Government Decision no. 395 of 2016: “(2) The interim reports and the report of the award procedure shall be submitted by the chairman of the evaluation commission to the head of the contracting authority for approval. (3) If he does not approve the report of the procedure, the head of the contracting authority shall give reasons in writing for his decision and may, as the case may be: a) return the report, once, to the evaluation commission for correction or partial reassessment; b) request a full reassessment, in which case a new evaluation commission will be appointed.”

Moreover, according to the provisions of Law no. 101 of 2016, if a prior notification is submitted for an alleged violation of the law on public procurement, the contracting authority may order remedial measures in this regard and in the event that an appeal is filed, the contracting authority has the obligation to implement the decision of the National Council for Solving Complaints (NCSC), a decision through which measures can be ordered to remedy the acts affecting the award procedure. At the same time, in accordance with the legal provisions of Art. 214, (2), Art. 215 (1) of Law no. 98 of 2016, as well as according to the provisions of Art. 65 (3) of Government Decision no. 395 of 2016, the contracting authority has the following obligations: application of Art. 214 (2) Law no. 98 of 2016 according to which “during the evaluation process, the contracting authority has the obligation to transmit to the candidates / tenderers partial results, related to each intermediate stage of this process, respectively the result of the verification of the applications / ESPD and the result of the evaluation of the tenders, in accordance with the specific conditions provided by the methodological norms for the application of this law,” respectively the application of Art. 65 (3) of Government Decision no. 395 of 2016 according to which, “following the completion of each of the verification phases provided in par. (1) and (2), the contracting authority shall communicate to each tenderer who has been rejected the reasons for this decision, and to the others the fact that the next verification phase is to be carried out, in compliance with the provisions of Chapter IV Section 13 of the Law.” At the same time, in accordance with Art. 215 (1) of Law no. 98 of 2016 “the contracting authority shall inform each candidate / tenderer of the decisions taken regarding the outcome of the selection, the outcome of the procedure, respectively the award / conclusion of the public procurement contract / framework agreement or admission to a dynamic procurement system, including the reasons for any decision not to award a contract, not to conclude a framework agreement, not to implement a dynamic procurement system or to resume the award

procedure, as soon as possible, but no later than 5 days after the issuance of those decisions.”

Thus, taking into account the obligation of the contracting authority to communicate to tenderers the partial results of each intermediate stage, communications informing each rejected tenderer of the reasons for this decision, and to the others the fact that the next verification phase is going on, NAPP concluded in this case that the rejected tenderers are no longer involved in the award procedure, by the effect of the partial communication, in the context in which the tenderer does not submit a prior notification / appeal on the decision to reject the contracting authority and by a decision / resolution of the National Council for Solving Complaints / Court there are no measures to remedy the acts affecting the award procedure. In this context, NAPP argued that the possibility of the contracting authority to re-evaluate tenders at all intermediate stages of the award procedure is conditional on compliance with the principles provided by Art. 2 (2) of Law no. 98 of 2016, meaning that the re-evaluation can be done in a unified manner and in compliance with the principle of equal treatment. Concluding, NAPP considers that only to the extent that the report of the procedure was not approved by the head of the contracting authority and no communications were thus sent on the outcome of the award procedure, the provisions of Art. 127 (3) of Government Decision no. 395 of 2016, in the sense of full reassessment, with the appointment of another evaluation commission.

In a similar case,²⁹ the contracting authority requested methodological advice on the possibility of returning to an earlier evaluation stage of a tender procedure, i.e. the ESPD evaluation stage, since the evaluation commission found, after passing into the evaluation phase of technical proposals, that a particular tenderer falls within the grounds for exclusion provided for in Art. 167 (1) (g) of Law no. 98 of 2016. In this context, NAPP invoked the provisions of Art. 166 (8) of Government Decision no. 395 of 2016.³⁰ For example, in the event that the ascertaining document reflects the fulfilment of the cumulative conditions provided for in Art. 167 (1) (g) of Law no. 98 of 2016, the contracting authority has the obligation to exclude from the award procedure the respective tenderer. Furthermore, according to Art. 193 (1) (a) of Law no. 98 of 2016 on public procurement, ESPD serves as preliminary evidence instead of certificates issued by public authorities or third-parties that also confirm that the economic operator is not in any of the exclusion situations referred to in Art. 164, 165 and 167 of the same normative act. At the same time, Art. 169 of Law no. 98 of 2016 establishes the obligation of the contracting authority to exclude an economic operator at any time of the award procedure in which it

²⁹ <https://achizitiipublice.gov.ro/questions/view/92/653/true>.

³⁰ According to para. (8) of Art. 166 of Government Decision no. 395 of 2016: “When taking the decision to reject a candidate/tenderer, based on such a finding document, the evaluation commission has the obligation to analyse whether it reflects the fulfilment of the cumulative conditions provided in Art. 167 (1) (g) of the law.”

becomes aware that the economic operator is in one of the situations provided for in Art. 164, 165 and 167, such as to entail exclusion from the award procedure. In relation to these legal provisions, if the contracting authority finds the incidence of the obligation provided for in Art. 169 of Law no. 98 of 2016, considering that this can happen at any time of the procedure and therefore including in any of the phases of verification of tenders, the respective tender will be rejected at that time, with the notification of the tenderer according to Art. 215 of Law no. 98 of 2016. In the present case, NAPP considers that it is not necessary to return to the evaluation phase of the ESPD, especially since technically, in the system, the evaluation phase of the ESPD and the evaluation phase of the technical proposals are carried out simultaneously, being sufficient to change the evaluation status of the respective tenderer from “Admitted” to “Rejected”.

In another methodological advice, which aims at the possibility of the evaluation commission to consider as sufficient for the evaluation of the ESPD support documents, the presentation of the tax attestation certificates only for the main registered office of the first-placed tenderer and holding a very large number of working points / secondary offices, in order to demonstrate the fulfilment of the requirement regarding the obligations of payment of local taxes and fees, NAPP replied that the contracting entity has the obligation to request and the first-placed tenderer has the obligation to present the tax attestation certificates also for the ONRC certificate. The reasoning is that it is necessary for the contracting authority / entity to relate to the economic operator as a whole, consisting of all the secondary offices / working points that represent / fall into its composition. The fact that the contracting entity has not expressly provided for in the procurement documents the requirement for the presentation of supporting documents also for secondary establishments, if they exist, cannot constitute a ground for non-request / non-submission of the documents concerned, given that, by participating in the procedure, the economic operator must assume responsibility for fulfilling the conditions of participation in relation to the whole entity it represents. These conclusions are also reflected in the decisions of Bacău Court of Appeal (Decision no. 1562 of 2013, Apr. 11 and Decision no. 1865 of 2012, Oct. 5),³¹ where applicable legal provisions outside the legislative framework in the field of public procurement are invoked, which, in conjunction, lead to the conclusion that tax attestation certificates on the payment of local taxes and fees must also be presented for secondary offices / working points. The role of ESPD is precisely that of reducing the administrative effort, but the first-placed tenderer, with whom the contracting entity is to conclude the purchase contract, has the obligation to submit all documents as proof of the information contained in

³¹ <http://portal.cnsr.ro/sivadoc/download.aspx?docUID=ODlhNDM5MzEtZDAwZC00MzJkLTk0NjktMjFiY-jc1OWY4YjMz&pdfa1=ZmFsc2U=&filename=Qk8yMDIxXzI2NS5wZGY=&action=aW5saW5l>.

ESPD, obtaining these documents cannot be considered “unjustified” – given that the conclusion of the contract is conditional on the presentation of these documents.

Practice has also demonstrated types of irregularities at the stage of organizing the procedure and awarding the contract / framework agreement. Thus, in one of the identified cases, the contracting authority declared the winner of the tender of the 2nd place economic operator, since the operator ranked 1st in the intermediate ranking did not respond to the request for the submission of supporting documents to support the information of the ESPD dated 26.11.2021, with the deadline for reply on 09.12.2021. Moreover, on 03.12.2021, the contracting authority returned to the financial evaluation stage due to the finding of inconsistencies in the annex to the financial offer form of the operator SC X SRL and requested clarifications with a reply deadline of 06.12.2021. According to the minutes of evaluation financial offers, the evaluation commission evaluated the responses to the requests for clarification and found that the tenderer SC X SRL responded conclusively to the requests for clarification 2 at the financial evaluation stage, which is why it considered necessary to submit supporting documents to support the information from ESPD. The economic operator SC X SRL did not submit the documents on 09.12.2021, and the contracting authority considered the offer unacceptable, so it requested the supporting documents to the operator in place 2. In the present case, it was found that the contracting authority misled the economic operator to whom additional clarifications were requested at the financial assessment stage, after it had been requested the supporting documents to support the information in the ESPD, and after analysing the answers, it was not informed that: the financial verification activity was completed and that it remains in 1st place in the intermediate ranking, to be required the supporting documents to support the information in the ESPD after the conclusion of the minutes dated 07.12.2021. Thus, the contracting authority declared the tender of SC X SRL unacceptable, without requesting the supporting documents when it completed the verification process on 07.12.2021, choosing to go to the economic operator in the 2nd place, between the two tenderers being a considerable price difference. Or, in accordance with the legal provisions, the contracting authority had the obligation to take all the steps to ensure that it will award a contract in conditions of economic and social efficiency as provided by Law 98 of 2016.

It is necessary to take into account also the declaration of false information by the tenderer at the time of filling in the ESPD, and relevant in this aspect is the Decision 1492/R of 2018, Sept. 4 which involved a procedure for awarding a sector procurement contract under Law no. 99 of 2016 on sectoral public procurement. In the present case, the tenderer, by the way he completed the ESPD, avoided the sanction of exclusion from the procedure by the evaluation

commission, unlike the other two economic operators, in the same situation, who completed the ESPD transparently, and after the checks carried out by the evaluation commission were excluded from the procedure. The economic operator was required to assume the possibility of being excluded from the proceedings, including judicial proceedings in which the relevance of the acts referred to in the ESPD would be examined. In the present case, the Superior Court held that the first instance wrongly treated the exclusion cases regulated by two distinct provisions of Law no. 99/2016, respectively Art. 180 (1) (g) [corresponding to Art. 167 (1) (g) of Law no. 98 of 2016] and Art. 180 (1) (h) [corresponding to Art. 167 (1) (h) of Law no. 98 of 2016]. The two cases of exclusion are different and become incidents in different situations. The case regulated by Art. 180 (1) (g) regulates the assumption of serious violations of previous contracts that have produced negative consequences, while the case regulated by Art. 180 (1) (h) regulates the assumption in which tenderers make false statements.

Thus, the tenderer completed the ESPD in the sense that he would not be in the situation of exclusion provided by Art. 180 (1) (g) of Law no. 99 of 2016 on “early termination, damages or other comparable penalties.” Or, compared to the express request from ESPD, the tenderer had the obligation to indicate in ESPD the existence of such situations, ESPD representing a declaration on own responsibility in which the tenderer has the obligation to present the real and true situation of their status, by the statement made the tenderer knowingly omitting to present an ascertaining document and to fill in the ESPD accordingly. Although that ascertaining document was annulled by a subsequent Court decision, it merely confirms that at the time the ESPD was completed and the tender submitted, the ascertaining document was in force and produced all the effects that the law confers on it, which is why it is obvious that the tenderer made false statements. For example, through the prism of Art. 180 (1) of Law no. 99 of 2016, the contracting entity had the obligation to sanction the economic operator for their false statements by excluding them from the procedure. Although the contracting entity asked the tenderer for clarifications regarding the negative ascertaining document and its non-declaration within the ESPD, the tenderer sent a reply motivating and proving the non-declaration of the existence of this ascertaining certificate, motivated by the decision of the final Court of Appeal annulling the negative final ascertaining certificate, following the annulment of the administrative act which was the basis for its issuance. Related to this aspect, the contracting entity did not consider that the tenderer was within the provisions of Art. 180 (1) (h) of Law no. 99 of 2016.

Furthermore, the tenderer submitted documents showing that the tenderer had done the necessary work to prove that the final ascertaining certificate was unlawful. In the present case, the Court of Appeal held that the mere exist-

tence of an ascertaining document in the history of the activity of a company is not equivalent to the assumption of a serious professional misconduct, of the nature of that regulated by the provisions of Art. 180 (1) (g) of Law 99 of 2016, a deviation that could lead to the exclusion of a tenderer from another procedure. However, the Court held that the tenderer is guilty of making false statements in the content of the information submitted at the request of the contracting entity for the purpose of verifying the absence of grounds for exclusion under the provisions of Art. 180 (1) (h) of Law 99 of 2016 meaning that the Evaluation Commission had the obligation imposed by the law to order its exclusion from the procedure. Such a sanction is automatically imposed when the conditions imposed by the legal text are established, given that the purpose of this regulation is to protect the integrity of the Public Procurement Procedure (see recitals in Decision C-178/16 of the CJEU). The behaviour of the economic operators participating in a procurement procedure, namely the correctness of the information they submit to the contracting entity (in particular the completion of the ESPD in the context of the provisions of Art. 202 of Law 99 of 2016) represent essential elements in the assessment of the existence of exclusion cases concerning their personal situation. From this perspective, the Court held that, if interpreted to the contrary, the provisions governing ESPD and the effects it has in the procurement procedure would be lacking in content.³²

The relevance of this case at this point in the research is reflected in what the Court also pointed out in the judgment, namely, on the one hand, the importance of separately analysing the grounds for exclusion in a public procurement procedure, especially when the sanction of exclusion from the procedure occurs, and on the other hand, the importance of transparency and fairness of the economic operator from the initial moment, that of completing the ESPD. As the CJEU held in the questions referred for a preliminary ruling in case C-387/14,³³ “Article 45 (2) (g) of Directive 2004/18, which allows an economic operator to be excluded from participation in a public contract, *inter alia*, if it has been ‘seriously guilty’ of making false statements by providing the information requested by the contracting authority, it must be interpreted as meaning that it may be applied where the operator concerned has been liable for negligence of a certain gravity, that is to say negligence which is likely to have a determining influence on decisions to exclude, select or award a public contract, independent of the finding of an intentional misconduct in the charge of that operator.”

In reality, the interpretation of the information in the ESPD generates multiple challenges, in particular with regard to the grounds for exclusion.

³² https://www.jurisprudenta.com/jurisprudenta/speta-l6coh7eo/#google_vignette.

³³ CJEU C-387/14, Krajowa Izba Odwoławcza (Poland) – Esaprojekt sp. z o.o. v. Województwo Łódzkie, 2017, May 4, ECLI:EU:C:2017:338 <https://curia.europa.eu/juris/document/document.jsf?text=&docid=190329&doclang=RO>.

For example, in case C-66/22-*Infraestruturas de Portugal S.A.*³⁴ registered at the registry of the Court on 2022, Feb. 2, which concerned the Court's interpretation of the optional grounds for exclusion and the interpretation of Art. 57 (4) (d) of Directive 2014/24/EU (2), under which contracting authorities may exclude an economic operator from participating in a public procurement procedure where it has concluded agreements with other operators aimed at distorting competition, the question of transposition of the directive on Portuguese law has been raised. The referring Court thus asked whether the reason for exclusion referred to in Article 57 (4) (d) of Directive 2014/24 constitutes a 'reserved matter' to the decision of the contracting authority. The Court noted that such a question had already been settled in the sense that "it is apparent from the text of Article 57 (4) of Directive 2014/24 that the EU legislator intended to entrust the contracting authority, and only it, at the selection stage of tenderers, with the task of assessing whether a candidate or tenderer is to be excluded from a public procurement procedure," this finding being consistent with Article 56 (1) (b) of Directive 2014/24, according to which the contracting authority is obliged to ensure that "the tender was submitted by a tenderer who is not excluded in accordance with Article 57." It is therefore, in any event, for it to decide whether a tenderer should be excluded from the public procurement procedure. However, the Court held that that categorical finding must be nuanced where, in an earlier final decision of the competent authority, conduct incompatible with access to public procurement was established or the tenderer was prohibited from participating in such procedures.

Consequently, the question referred for a preliminary ruling concerned three possible scenarios in the context of anti-competitive behaviour attributed to a tenderer:

- ◆ "where the operator concerned has previously been excluded by final decision from participating in public procurement procedures as a result of anti-competitive behaviour, the contracting authority must comply with this prohibition. The sanctioned economic operator shall not be entitled to the possibility of proving its reliability by means of corrective measures or self-cleaning during the exclusion period resulting from the judgment in the Member State in which it is enforceable;
- ◆ where the prohibition to participate has not been ordered by a final decision but by a decision of the contracting authority, the contracting authority shall not be inexorably linked to it: it may verify that the operator concerned has taken the corrective measures and nevertheless allow it to participate in the contract award procedure;

³⁴ <https://curia.europa.eu/juris/document/document.jsf?jsessionid=A96434D29A7E04E63E9D-60A74CD5710A?text=&docid=273622&pageIndex=0&doclang=RO&mode=req&dir=&occ=-first&part=1&cid=295239>.

- ◆ this will also be true *a fortiori* where the contracting authority has not imposed any prohibition on participating in public procurement procedures but has sanctioned the economic operator for collusive behaviour.”

In the present case, the Court held³⁵ that the first subparagraph of Article 57 (4) of Directive 2014/24 contains an obligation for Member States to transpose into their national law the optional grounds for exclusion listed in that provision. At the same time, the Court stated that the EU legislator wished to entrust only to the contracting authority the task of assessing whether a candidate or tenderer should be excluded from a public procurement procedure, verifying the integrity and reliability of each of the economic operators participating in such a procedure. In a situation involving infringements of competition law and where the National Competition Authority is charged with carrying out investigations in this regard, the contracting authority must, in the context of its assessment of the evidence provided, rely in principle on the outcome of such a procedure. Thus, by judgment delivered on 21 Dec. 2023,³⁶ the Court held that point (d) of the first subparagraph of Article 57 (4) of Directive 2014/24/EU must be interpreted as precluding national legislation which limits the possibility of excluding a tender by a tenderer on account of the existence of serious indications of conduct by the tenderer likely to distort competition rules in the public procurement procedure in which that conduct occurred. In addition, the Court held that point (d) of the first subparagraph of Article 57 (4) of Directive 2014/24 must be interpreted as precluding national legislation which confers on the national competition authority alone the power to decide on the exclusion of economic operators from public procurement procedures as a result of an infringement of competition rules. Moreover, the Court held that point (d) of the first subparagraph of Article 57 (4) of Directive 2014/24, read in the light of the general principle of sound administration, must be interpreted as meaning that the decision of the contracting authority as to the reliability of an economic operator, adopted on the basis of the grounds for exclusion provided for in that provision, must be reasoned.

These cases reflect, on the one hand, the importance of the moment T₀, that of the completion of the ESPD, followed by its verification by the evaluation commission, and on the other hand, the extensive range of “levers” within the contracting authority’s reach to remedy any omission in the analysis of the information completed in the ESPD and to redress and ensure that

³⁵ CJEU, C-66/22, *Infraestruturas de Portugal and Futrifer Indemnstrias Ferrovi Emnrias*. Public procurement in the transport sector, 2023, Dec. 21., Jud. dr. Octavia Spineanu-Matei, member of the panel of judges, 2023, Dec. 22 – <https://www.juridice.ro/718927/cjue-c-66-22-infraestruturas-de-portugal-si-futrifer-industrias-ferroviarias-achizitii-publice-in-sectorul-transporturilor-jud-dr-octavia-spineanu-matei-membru-al-completului-de-judecata.html>.

³⁶ <https://curia.europa.eu/juris/document/document.jsf?text=&docid=280770&pageIndex=0&doclang=RO&mode=req&dir=&occ=first&part=1&cid=8294583>.

the legal conditions for exclusion and selection criteria are met at any time of the procurement procedure. Moreover, the contracting authority is obliged to relate to everything declared by the tenderer in ESPD.³⁷

Conclusions

The often-flawed practice shows that there are still administrative barriers and uneven interpretations that make the public procurement procedure more difficult. The reality is that most of the time, the participants in the public procurement procedure depart from the purpose and rationale of the regulation, precisely from the desire to expedite the purchase and to conclude the contract, neglecting, in reality, the observance of the principles governing the matter of public procurement such as transparency, non-discrimination, equality, proportionality.

Moreover, practitioners say that no matter how much they insist on the initial verification of the information declared by the ESPD document in order to evaluate the tenders and subsequently the supporting documents for demonstrating the information from ESPD, the reality is that ESPD can represent more of a formal barrier, since the true technical and professional capacity of an economic operator is materialized at the time of the execution of the contract, when the impediments and inability to complete the assumed contract are actually 'revealed'.

At the same time, we must admit that practitioners, especially members of evaluation committees, are very burdened in terms of administrative management of an award procedure, in the sense of elaborating and loading the award documentation, which in reality makes the procurement process more difficult.

Furthermore, it is difficult for the evaluation commission to legally interpret and evaluate each individual supporting document, and there is no template for this, in particular with regard to tenderers outside the country (who are also subject to national legislation, specific and applicable to the authorities of the country of origin, issuing authorities of those documents), to which a legal regime similar to that of tenderers outside the country also applies. For example, due to the complexity of the applicable regulations and the interdependence with numerous other national legal provisions, there are multiple discrepancies at Union level regarding the form, substance and issue of the supporting documents underlying the information in the ESPD com-

³⁷ Collection of cases in the field of procurement carried out by beneficiaries and to avoid irregularities in the management of projects financed by the regional Operational Programme 2014-2020 – <https://pr2021-2027.adroltenia.ro/wp-content/uploads/2023/05/Ghid-achizitii-Colectie-de-spete-2023.pdf>.

municated by that tenderer. For this reason, it is necessary, on the one hand, unification measures regarding the certificates issued, so that there is a form accepted by all EU countries, and on the other hand, a laborious training of public procurement practitioners for the interpretation of these documents. *De lege ferenda*, forms for standard certificates accepted at EU level, laborious working procedures for interpreting the information contained in the ESPD and explanations on the entries found / entered in the documents submitted by tenderers would be useful, especially dedicated to insolvency practitioners who encounter extremely many interpretation problems, especially in providing guidance to potential tenderers who are often unable to understand the substantive and form aspects of the certificates / documents requested by the Romanian contracting authority in order to demonstrate the criteria established by the ESPD.

Equally, taking into account the practical problems generated so far but also the option of the Romanian legislator to tighten the regime proposed by the European Directives, keeping in the national law of public procurement and the optional reasons for excluding tenderers as mandatory reasons, it is necessary to constantly refer to the case law of the CJEU for a harmonization that seems to be far more within the reach of the practitioners of the law than to that of the legislator’.

Abstrakt

Skonfigurowany jako narzędzie usprawniające procedurę udzielania zamówień publicznych przez uproszczenie zadań administracyjnych – zarówno dla wykonawców, jak i dla instytucji zamawiającej – ESPD pozostaje pod lupą debat w nauce prawa; w ich świetle zamierzamy zbadać możliwe sposoby interpretacji krajowych norm prawnych i to, jak odbija się to na trybach stosowania i rozwijania dodatkowych instrumentów harmonizacji procedury udzielania zamówień.

Słowa kluczowe: jednolity europejski dokument zamówienia (ESPD), regulacje krajowe, przesłanki wykluczenia, kryteria kwalifikacji i wyboru oferenta, zalety i wady stosowania ESPD.

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