

## THE RISKS OF PUBLIC PROCUREMENT IN ROMANIA

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### ABSTRACT

*The risk analysis is very important in every organization. The identification, evaluation, taking measures for risk treating and risk monitoring can contribute to decrease the probability of occurrence of some undesirable events or their impact. Unfortunately, in most cases, the efficiency of working methods currently used is very limited, lots of time public procurement risks being appreciated in an empirical manner, based on the experience of employees of the Procurement Department within the contracting authority. The risks related to public procurement have been barely analysed in the studies conducted so far. In fact, so far no scientific research have been identified which analyse the risks regarding carrying out public procurement procedures from Romania or another country. This study examines in a comprehensive and objective way the most important risks that appear during the conduct of each stage of the public procurement procedures in Romania. For this purpose a risk matrix for public procurement was developed. In the article are identified and assessed public procurement risks, as a result of which treating and monitoring measures can be developed by every contracting authority.*

**KEYWORDS:** *evaluation, identification, procurement procedure, risks, risk matrix*

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### 1. INTRODUCTION

According to article 2 of Government Decision nr. 395/2016, every contracting authority has the obligation to establish its own Public Procurement Department.

The Procurement Department's objective is the realization under legality, efficiency, effectiveness and economical conditions of the procurement procedures which have as object the supply of products and provision of services or works.

With regard to public procurement's risks, the risk manager is the Head of the Procurement Department who has the following responsibilities:

- coordinates at the Department's level the risk identification and risk analysis activities;
- identifies, evaluates risks qualitatively and quantitatively, proposes and takes measures for risk reduction and cooperates for this purpose with the beneficiary structures;
- monitors at the Department's level the risk evolution and control;
- assists the contracting authority's management and the beneficiary structures leaders to realize specialized analysis;
- reports in detail the exposures by categories of risks and provides support to contracting authority's management regarding strategically risk management for future purchases;
- identifies and evaluates emerging risks.

It should be mentioned that, in the field of public procurement, the most important risk identified during the conduct of public procurement procedures in Romania is the **risk of fraud**. This risk can manifest itself in every stage of the procurement procedure and that's why is treated separately in what follows.

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The generic name of the fraud is: the act by which a person is trying to realize a material profit from breaking the law (for example by deception, embezzlement, theft etc.) or in disregard for other person's rights (for example fraud in the contract) (LegeAZ, 2019).

The apparent signs depending on what it can be deduced the possibility of the existence of a fraud risk are the following:

- receipt of a single tender;
- repeatedly awarding of several contracts to the same tenderer;
- purchase of products / services unnecessary to contracting authority;
- appearance of some situations of conflict of interest;
- filing a high number of appeals compared to the number of procurement procedures carried out;
- manifestation of unpermitted "indulgence" or "friendships" towards some tenderers, or "exaggerated exigency" which implies non-compliance with equal treatment principle;
- very slow or very fast evaluation of the offers by the selection board;
- receiving of some offers which exceed estimate value of the procurement;
- establishing of reduced duration for submission of offers, in the cases of complex procedures which contain many technical specifications;
- selection of types of procedures, selection and qualification conditions, awarding criteria less transparent / open (negotiations, according to the provisions of article 68, letter f) of the Romanian Law no. 98/2016);
- selection of technical specifications, selection and qualification conditions, awarding criteria or evaluation factors which do not result from the advantages / benefits which the contracting authority wishes to acquire as a result of its needs, in order to advantage an economic operator;
- accepting at the reception of a product with technical characteristics inferior to the product specifications.

The heads of procurement departments and contracting authorities managers shall give great importance to the identification of signs from which can be deduced the existence of a fraud risk. These must do necessary verifications and must take legal measures in order to reduce / eliminate this risk.

## 2. LITERATURE REVIEW

Project Risk Management contains the processes of risk planning, identification, analysis, response planning, monitoring and controlling project's risks. Project risk management's objectives are to increase the probability and impact of some positive events and reduce the probability and impact of some negative events which may occur in the project (PMI, 2013).

The processes of project risk management are: risk planning, risk identification, qualitative analysis of risk, quantitative analysis of risk, planning response of the risk, risk monitoring and risk controlling (PMI, 2013).

For infrastructure projects, Bruzelius et al. (2002) distinguished four important categories of risks: demand risk, cost risk, political risk and financial market risk.

Also for infrastructure projects, Little (2011) has identified eight categories of risks: construction risk, maintenance and operation risk, contractual and legal risk, financial risk, income risk, political risk and force majeure.

Furthermore, Irimia-Dieguez et al. (2014) classified the infrastructure project's risks in nine categories:

- design risks;
- political and/or legal risks (granting of authorisations, changes of government regulations, annulment of a concession);
- contractual risks (renegotiations, imprecisions of the contract);
- construction risks (cost overruns, overcoming completion deadlines, accidents);

- maintenance and operation risks (operator incompetence, higher costs, poor quality);
- labour risks (culture, language, training, cost of accidents);
- society / users / clients risks (inflation, changes in the client's requirements, environmental risks, reputational risks);
- economic and/or financial risks (lower profitability than expected, liquidity risks, availability of funds, foreign-exchange risk, interest-rate risk);
- force majeure (extreme weather conditions, natural disasters, war, terrorism) (Irimia-Dieguez et al., 2014).

Studies regarding risks have been also carried out by ECEG (2010) who identified five major categories of risks for the public procurement for innovation:

- technological risks are the risks which can appear because of the delivery of under-performance products or when the supplier has chosen a suboptimal or wrong technology;
- market risks refers to the situation in which the economic operator's offer doesn't respond to contracting authority's necessities. Therefore, public markets stay fragmented or there is no companies which can deliver innovations (the specifications of the contracting authority can be too radical);
- organisational risks are those risks which can appear because of public authority that procures. Taking into account that procurement for innovation is a time-consuming and costly effort, a good coordination between stakeholders and constant evaluation is very necessary. When results are unclear, the innovative process can be perceived as a very expensive solution. Furthermore, the non-acceptance or acceptance with great difficulty of the new solutions constitutes a organisational risk.
- financial risks can manifest themselves through cost overruns or the incapacity to secure the needed funds;
- turbulence risks are characteristic for large-scale projects and can appear as a result of some unforeseen events that may lead to reassessment of priorities and to changes in client's expectations (ECEG, 2010).

ECEG (2010) have identified different methods to manage risks of procurement for innovation: training schemes, early supplier involvement, awareness measures, contract design etc.

Kalvet & Lember, (2010) indicated the tools for risk-management of procurement for innovation: feasibility studies, field-testing of the final prototypes, encouraging competition, comprehensive calculations on future maintenance and repair costs and correlating payments to performance quality.

In addition, (Georghiou et al., 2013), came to the conclusion that public authorities are much more reticent to take risks in comparison with private firms.

### **3. IDENTIFICATION AND EVALUATION OF PUBLIC PROCUREMENT RISKS IN ROMANIA**

#### **3.1. Identification of public procurement risks**

The identification of public procurement risks can be made by the Procurement Department employees and by beneficiary structures employees using Brainstorming and Delphi methods and by auditing documents and activities.

The identified risks of public procurement procedures in Romania are:

#### **I. Risks regarding public procurement planning**

##### **1.1. Risks regarding identification of the necessities**

**1.1.1.** Deficiencies of establishment and approval of necessities which may lead to overcoming deadlines for contracting, delivery and payment: delaying the elaboration of the annual necessary of products and services, incomplete or incorrect elaboration of technical requirements, incorrect

estimation of necessary quantities and of estimated values, interventions of politicians or other officials in deciding whether the purchase should be made or not;

**1.1.2.** Subjectivity of technical specialists which can lead to the receipt of a high number of clarification requests: establishing necessities and starting procurement procedures without proper consultation of the market in order to be identified products / services which can fulfill the necessities of the contracting authority. It is well known the fact not every need of the public authority can be satisfied by products or services that exist on the market. Very important are the availability of products, providing capacity of services, the domain's dynamic, the stage in which the product is located on life-cycle curve (release, growth, maturity, decline) and levels considered unacceptable by tenderers for risk transfer. For example, regarding domain's dynamic and the stage in which the product is located on life-cycle curve, in the case of motor vehicles acquisitions, a car model is maintained in fabrication for a period of 2 – 3 years, after which a new model is released, with other characteristics, which implies that a framework agreement can be concluded for a maximum of three years period;

**1.1.3.** Inclusion of unjustified purchases (invented or falsified needs) that can have as a consequence the purchase of some unnecessary products or services and the waste of financial resources;

**1.1.4.** Lack of communication between the contracting authority's structures for correct determination of necessities, which can have as a consequence the occurrence of inconsistencies of technical specifications and the receipt of many clarification requests from the potential bidders;

**1.1.5.** The identification of needs after budget approval, which can lead to overcoming deadlines or even to failure to conduct the purchase because needed funds cannot be identified;

### ***1.2. Risks regarding evaluation of estimated value and selection of procedure***

**1.2.1.** The superficial evaluation of estimated contract value without taking into account all costs which can lead to budgetary funds overcoming. The superficial evaluation may result in wrong application of procurement procedures: for example in the case of an open bid, when a simplified procedure is enough, or in the case of a simplified procedure when a direct acquisition is enough;

**1.2.2.** Incorrect estimation or exceeding estimated costs for execution of works due to appearance of new constructive variants of some products or unexpected works that can result in final price increase;

**1.2.3.** Overstatement of a bid in order to favour a particular tenderer, which can lead to inefficient spending of public funds, infringement of the equal treatment principle and affectation of the evaluation impartiality;

**1.2.4.** Division of contract with similar objects in contracts with lower values which can lead to sanctions. The division can be made in order to avoid threshold values and application of procurement types stipulated by the legislation;

### ***1.3. Risks regarding the identification of funds***

**1.3.1.** Unrealistic allocation of budget, estimated only based on the history of expenditures which can result in deficient allocation of budget or even in the impossibility of the purchase;

### ***1.4. Risks regarding the elaboration of procurement's calendar***

**1.4.1.** Deficient planning of procurement process which can lead to overcoming deadlines for contracting, delivery and payment: wrong planning of necessary time to carry out all the stages of procurement procedure in accordance with the time limits stipulated by the legislation, insufficient deadlines for responding to clarification requests;

**1.4.2.** Allocation of insufficient time for proper carrying out of each procurement procedure which can lead to overcoming deadlines. This risk may occur especially in the cases when several procurement procedures are conducted by the same purchaser at the same time or in the case of a procedure that can be initiated only after another procedure is finalised.

## ***II. Risks regarding elaboration of tender documents***

### ***2.1. Risks regarding establishment of technical specifications***

**2.1.1.** Adjustment of specifications in such a manner that they correspond to only one tenderer which can lead to favouring a particular economic operator and receiving a high number of appeals regarding procurement documents: copying in detail technical specifications of an existing product, situation which affects procedure's competition and leads to higher prices, unjustified intervention of a decisional factor of the contracting authority;

**2.1.2.** Establishing specifications too general or which are not in line with desired level of performance that may lead to the purchase of inferior products or to receiving a high number of clarification requests: technical characteristics insufficiently defined, absent or unclear technical conditions (warranty, delivery time, approvals, authorizations etc);

**2.2. *Risks regarding establishment of contractual clauses***

**2.2.1.** Establishment of contractual clauses with a character too general unrelated to the needs of contracting authority or to contract's subject, which can have as a consequence the receipt of a high number of clarification requests or appeals regarding procurement documents, clauses regarding execution of performance guarantee, technical conditions to be met;

**2.2.2.** Imposition of excessive penalties by the contracting authority which can lead to the receipt of appeals regarding procurement documents: high penalties for lack of delivery or exceeding delivery term, penalties uncorrelated with performance guarantee, attempting to transfer unacceptable risks to tenderers;

**2.3. *Risks regarding establishment of minimum requirements for qualification, awarding criteria and evaluation factors***

**2.3.1.** Establishment of requirements in order to match the possibilities of certain economic operators: qualification and selection conditions much too restrictive or unclear, solicitation of similar experience way too high, solicitation of authorisations or certifications not related to procurement's object, establishment of awarding criteria which do not comply with European and national laws, irrelevant evaluation factors which do not reflect the advantages that public authority wishes to obtain;

**2.4. *Risks regarding the establishment of closing date for submission of tenders***

**2.4.1.** Providing a insufficient period of time for preparing the offer, which may lead to the receipt of no offers (meaning failure of procurement procedure) or to receipt a solicitation for extension of deadline for submission of tenders: providing a insufficient period of time in the case of high complexity procurements or providing a period for submission that coincide with minimum period required by the law;

**III. *Risks regarding the call in competition***

**3.1. *Risks regarding answers to clarification requests***

**3.1.1.** Presenting evasive answers which can lead to receiving inappropriate offers or to receipt of additional clarification requests from the tenderers: answers which don't clear up tenderer's ambiguities unintended or even deliberately in order to facilitate further rejection of the submitted offer;

**3.1.2.** Presenting answers that change specifications from tender documents without allowing sufficient time to bidders to adequately adapt their offers which may lead to receiving a reduced number of offers or receiving no offers at all (failure of procurement procedure): presenting answers which have not been verified by the Romanian National Agency for Public Procurement (ANAP) or after the expiration of submission deadline in Romanian Electronic Public Procurement System (SEAP);

**IV. *Risks regarding conduct of the procedure***

**4.1. *Risks regarding receipt and selection of candidates***

**4.1.1.** Declaring as *qualified* some economic operators which present authorizations / certifications that do not corresponds to reality which can lead to receiving appeals or sanctions;

**4.1.2.** Declaring as *qualified* some economic operators which do not present requested authorizations / certifications which can lead to qualifying an economic operator that does not meet the legal conditions, receiving sanctions, delivering of unauthorised or inferior services;

#### **4.2. Risks regarding conduct of dialogue or negotiation stages**

**4.2.1.** Revealing confidential information which may lead to impairment of rights and interests of economic operators, court actions for damages, receiving sanctions: revealing information regarding offered prices, technical characteristics of tendered products, expiration dates, delivery terms especially when these are evaluation factors;

#### **4.3. Risks regarding examining and evaluating the offers and establishing the winning bid**

**4.3.1.** Manifesting familiarity for some economic operators that contracting authority knows well, manifesting personal interest which may lead to favouring certain tenderers, ignoring omissions, arithmetical errors of the financial offer, repeated winning of the contracts by the same economic operator;

**4.3.2.** Manifesting animosity for some economic operators which can lead to disadvantaging bidders: soliciting clarifications that are unnecessary, rejecting of compliant offers;

**4.3.3.** Committing errors or omissions in the evaluation process for the purpose of favouring certain tenderers which may lead to receiving appeals filed by dissatisfied economic operators;

#### **V. Risks regarding the award of the contract**

##### **5.1. Risks regarding signing of the contract**

**5.1.1.** Appearance of changes compared to tender documentation and offer at the time of contracting, which can lead to signing of the contract with a delay, not having concluded any contract at all, blocking the procurement procedure, late delivery: motivation of changes by omitting important elements of the procurement documentation or that the necessity of contracting authority was not correctly appreciated, introduction of new contractual clauses;

#### **VI. Risks regarding implementation of the contract**

##### **6.1. Risks regarding fulfilment of assumed obligations**

**6.1.1.** Lack of contract monitoring in terms of cost-quality ratio and delivery time which may lead to failure to comply with delivery deadlines or to an increased value of the contract;

**6.1.2.** The acceptance of changing technical specifications below the level of procurement standards which may have as a consequence the delivery of inferior products compared to public authority requirements: speculation by the bidders on some undefined or unclear characteristics;

#### **VII. Risks regarding completion of the contract**

##### **7.1. Risks regarding final reception**

**7.1.1.** Fictional invoicing for something that wasn't finalised which can lead to prejudicing the state budget with penal consequences;

#### **VIII. Other risks**

##### **8.1. Risks regarding human resources**

**8.1.1.** Lack of specialized personnel in the public procurement domain;

**8.1.2.** Cumulation of functions or overload of personnel with other tasks that may lead to affecting the quality of public procurement procedures. For example, the cumulation with planning, financial or technical functions may result in delaying initiation or to inadequate conduct of the procurement procedure;

##### **8.2. Financial risks**

**8.2.1.** Affectation of contracting authority activities due to deficiencies of organization and inadequate use of financial resources which can lead to inefficient spending of the budget;

**8.2.2.** Affectation of contracting authority activities due to financial restrictions that may lead to non-fulfilment of some objectives. If budgetary funds are allocated too late or through budgetary amendments, there may be no sufficient time for carrying out the procurement procedure, contracts cannot be finalized and products or services cannot be delivered by the end of the budgetary year;

##### **8.3. Risks regarding the affectation of activities**

**8.3.1.** Affectation of contracting authority activities as a consequence of inadequate organization / conduct of procurement procedures which can lead to non-fulfilment of some objectives.

### 3.2. Evaluation of public procurement risks

The team for risk evaluation is composed by the risk manager (Head of Procurement Department), Procurement Department employees and by beneficiary structures employees. The risk manager can attribute each risk to a member of the team and this will estimate the probability and impact of those risks (on a scale from 1 to 5, according to the following models).

In Table 1 is described the probability of public procurement risks.

**Table 1: Description of the probability of public procurement risks**

Level	Frequency of occurrence of the event	Description	Interval in which probabilities take values
1	Very rarely	Can appear in exceptional circumstances	(0 – 0.1)
2	Rarely	Can appear sometimes	[0.1 – 0.4)
3	Medium	Chances of appearance almost equal	[0.4 - 0.6)
4	Probably	Appear quite often	[0.6 - 0.9)
5	Almost certain	Appear very often	[0.9 – 1)

*Sources:* authors' conception

In Table 2 is described the impact of public procurement risks.

**Table 2: Description of the impact of public procurement risks**

Level	Descriptor	Description	Interval for increasing the allocated budget
1	Insignificant	Does not produce losses of reputation, the financial losses are very small or non-existent	< 2%
2	Minor	Does not generate significant problems and implies reduced financial losses	2% - 5%
3	Moderate	Can cause operational problems, but can be resolved by allocating appropriate budgets	5% - 7%
4	Major/ critical	Create difficulties in the realization of strategy or in achieving the objectives and can cause significant financial losses	7% - 10%
5	Unacceptable/ catastrophic	Jeopardize strategy or objectives, the financial situation or even people's health	> 10%

*Sources:* authors' conception

After risk evaluation, the risk matrix for public procurement was developed (Figure 1).

Depending on the risk matrix is determined the risk state: low risk (green area), moderate risk (yellow area) or critical risk (red area).

As can be seen from the risk matrix, moderate risks situated in the yellow area are the following:

- risk value 9: risk no. 1.1.5. - identification of needs after budget approval and risk no. 8.1.1. - lack of specialized personnel in the public procurement domain;
- risk value 8: risk no. 1.1.1. - deficiencies of establishment and approval of necessities;
- risk value 6: risk no. 1.1.2. - subjectivity of technical specialists, risk no. 1.1.4. - lack of communication between the contracting authority's structures for correct determination of the necessities, risk no. 3.1.1. - presenting evasive answers and risk no. 8.1.2. - cumulation of functions or overload of personnel with other tasks.

After risks matrix development, must be identified and applied measures for risk treating and risk monitoring. For each risk, will be identified measures for risk treating which will influence either the probability or the impact.

Probability (P)	Risk = P x I				
5					
4					
3			1.1.5., 8.1.1.		
2		1.2.1., 1.3.1., 2.3.1., 4.3.1., 5.1.1.,	1.1.2., 1.1.4., 3.1.1., 8.1.2.	1.1.1.,	
1		1.2.2., 1.4.1., 2.2.1., 2.2.2., 4.3.2.	1.2.3., 1.4.2., 2.1.1., 2.1.2., 2.4.1., 3.1.2., 4.2.1., 4.3.3., 6.1.1., 8.2.1., 8.2.2., 8.3.1.	1.1.3., 1.2.4., 4.1.1., 4.1.2., 6.1.2., 7.1.1.	
	1	2	3	4	5
	<b>Impact (I)</b>				

**Figure 1: Risk matrix for public procurement**  
 Sources: Based on the data in Tables 1 and 2

Furthermore, during procurement procedures, the risks must be monitored by the Procurement Department employees and by the heads of beneficiary structures who will transmit information related to risk evolution to the Head of the Procurement Department.

#### 4. CONCLUSIONS

The Public Procurement Department is a organisational structure in which must be implemented risk management tools such as Risk Matrix. This can be periodically reviewed, modified and completed, depending on procurement procedures carried out and legislative changes in the procurement area.

In the study, the most important procurement risks have been identified and evaluated, respectively :

- identification of needs after budget approval;
- lack of specialized personnel;
- deficiencies of establishment and approval of necessities;
- subjectivity of technical specialists;
- lack of communication between the contracting authority's structures;
- presenting evasive answers;
- cumulation of functions or overload of personnel.

This study is useful and necessary both to Public Procurement Department and contracting authority, contributing to achievement of the objectives by providing a complete picture of existing risks.



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