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RISKS IN THE MATTER OF PUBLIC PROCUREMENT FROM THE PERSPECTIVE OF LEGAL TREATMENT

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Abstract

Through this article, we aim to highlight the way in which managers from several public institutions in Romania perceive the risks regarding public procurement procedures from the perspective of the legal framework. The public procurement process represents a sequence of stages, following which the product or the right to use it, the service or the work is obtained, as a result of the award of a public procurement contract. The identification of errors/omissions that may occur during the realization of the public procurement process is an essential activity in order to analyze the results obtained in comparison with those expected in the planning stage and to be able to ensure the necessary conditions for the continuous improvement of the entire process. The control mechanism of the public procurement process must be based on specific risk analysis.

Key words: *procedures, public procurement, risks, legal framework.*

INTRODUCTION

The public procurement system contains all the rules that must be respected in relation to the use of funds from the state budget/local budgets, through which the requests for the purchase of products, services or works of the various contracting authorities meet the offers proposed by the various economic operators. These rules are established by the national regulatory authority, taking the form of the applicable rules for carrying out the procedures for awarding contracts/framework agreements. The purpose of the public procurement system in Romania is to facilitate the development of Romanian society through the non-discriminatory and transparent spending of public funds. Both in Romania and

throughout the world, public procurement systems represent an essential point of contact between the economy and the public administration of each state and an important tool through which a series of government objectives can be met.

Public procurement systems that are well designed and function properly contribute to the fulfillment of political objectives such as creating new jobs, supporting small and medium-sized enterprises, environmental protection and supporting the field of research and innovation (*Androniceanu, 2006, p.216*)

The regulatory framework in force in the field of public procurement contains a series of provisions regarding the roles and obligations of the contracting authority with regard to situations potentially generating conflicts of interest, as well as the rules that must be applied to avoid such situations.

Public procurement is defined as: procurement of goods, execution of works or provision of services for the needs of one or several contracting authorities (*Lazăr, 2010, p.116*).

The examination of disputes arising in the process of public procurement is given to the jurisdiction of administrative litigation courts, because the public procurement contract is an administrative contract and is subject to the legal regime of public law.

The public procurement process represents a sequence of stages, following which the product or the right to use it, the service or the work is obtained, as a result of the award of a public procurement contract.

The contracting authority is obliged to plan public procurement contracts, which are to be concluded as a result of public procurement procedures, in compliance with the principles of ensuring competition, efficiency, publicity, non-discrimination and non-division thereof.

The public procurement plan is a useful work tool both for the procurement department and for the financial-accounting department that ensures efficient budget execution (*Nicolescu, 2000, p.219*).

According to the National Strategy in the field of Public Procurement, one of the most frequent problems encountered in the public procurement process is the lack of proper substantiation of internal opinions and the clear separation of functions with responsibilities in its implementation, aspects that can be corrected by using them throughout the process /specific activities, of checklists through which it is possible to ensure the implementation and documentation of compliance with the "4 eyes" principle, which involves the clear division of tasks into two steps: on the one hand, the initiation and on the other hand, the verification, carried out by different people , as well as tracking/verifying compliance and/or quality elements.

The implementation of this principle requires the involvement of at least two distinct people in the process of creating a document, as follows:

RISKS IN THE MATTER OF PUBLIC PROCUREMENT FROM THE PERSPECTIVE OF LEGAL TREATMENT

1) the person preparing a document uses the available internal tools (such as checklists, operational procedures) in order to exercise self-control, respectively to collect the necessary data/information and analyze/process them, taking into account the applicable legal requirements/good practices in the field; once the respective document is completed, its initiator checks its content by going through the steps/elements included, for example, within the checklists used for this purpose, then signs this document with the mention *prepared*;

2) the second person (the second pair of eyes) is responsible for the overall verification of the respective document, using the same internal tools (checklists in the given example), then signs it with the mention "verified"

Also, the legislation in force on public procurement includes a series of mechanisms (such as the market consultation process before the initiation of the award procedure), rules for publicity and transparency, as well as for communication and transmission of data during the application of procurement procedures award, which lead to an increase in the level of transparency on the specific operations and activities carried out by the contracting authorities within the public procurement process, but which are not sufficient from the perspective of the application of the rules of ethical conduct and integrity in public procurement.

1. REVIEW OF THE SCIENTIFIC LITERATURE

The activities carried out within the public procurement process are often complex, involving the realization of a set of homogeneous and/or complementary duties and tasks that must be exercised, depending on their specifics, through the various organizational structures set up at the level of the contracting authority having in view of the stages of the process established within the legislation on public procurement, the completion of which requires the expertise of a wide range of specialists.

The public procurement system represents the totality of rules and actions related to spending public money in order to satisfy a public interest. The component elements of the system are (*Lazăr, 2010, p.89*):

- regulatory authority;
- contracting authorities;
- economic operators;
- system supervisors.

The institutional component includes all institutions designed to ensure the application of the legal framework, monitoring and increasing the efficiency of public procurement procedures. These include (*Minculete, 2005, p.123*):

1. The Ministry of Finance through: the Public Procurement Agency (P.P.A.) and the Directorate of National Economy Finances, Capital Expenditures and Public Procurement;

2. Financial Control and Review Service;

3. Court of Accounts;

4. State Treasury.

The Ministry of Finance – specialized body of the central public administration responsible for carrying out the function of verifying the procedural aspects related to the process of awarding public procurement contracts.

Public Procurement Agency – specialized administrative authority under the Ministry of Finance. The Public Procurement Agency is located at the center of the Public Procurement System, its role and importance being determined by the main attributions established by law. Being established for the purpose of state regulation, supervision, control and inter-branch coordination in the field of public procurement, the Public Procurement Agency, as a specialized administrative authority, has the following attributions (*Șerban, 2011, p.165*):

- ✓ elaborates and proposes to the Government for approval drafts of normative acts necessary for the execution of this law, elaborates proposals regarding the modification and completion of the legislation on public procurement;
- ✓ coordinates, monitors, evaluates and controls the manner in which contracting authorities comply with public procurement procedures and the awarding of public procurement contracts;
- ✓ draws up, updates and maintains the list of qualified economic operators and the list of prohibition of economic operators;
- ✓ elaborates and implements standard documentation for public procurement procedures;
- ✓ examines and registers the tender documents submitted by the contracting authorities;
- ✓ examines reports on public procurement procedures;
- ✓ examines and registers public procurement contracts concluded following procurement procedures, except for those concluded following the procedure by requesting price offers;
- ✓ requests the re-examination or annuls, as the case may be, the results of public procurement procedures;
- ✓ collaborates with international institutions and similar foreign agencies in the field of public procurement;

The Court of Accounts – is the public authority of the state that exercises the external audit in the public sector, as the supreme audit institution.

Financial control and revision service - is a state control and internal audit body in the public sector, which, within the limits of competence, exercises control over the economic and financial activity of institutions, enterprises and organizations, regardless of the form of ownership and the type of activity, uses

RISKS IN THE MATTER OF PUBLIC PROCUREMENT FROM THE PERSPECTIVE OF LEGAL TREATMENT

funds from the national public budget and provides internal audit services to public institutions.

The State Treasury - fulfills duties regarding the implementation of the budget system, the administration of the funds accumulated in the Treasury accounts, the financing of expenses within the limits of budget credits and their special destination, the operative forecasting of budgetary and extra-budgetary receipts, their rational management within the limits of the expenses foreseen for the respective period.

Contracting authorities are legal entities under public law and the associations of these authorities.

Economic operator – Any economic operator with entrepreneur status, resident or non-resident, natural or legal person, has the right to participate, under the terms of this law, in the procedure for awarding the public procurement contract.

The foreign economic operator benefits from the same rights regarding participation in the procedures for awarding public procurement contracts that national economic operators benefit from, in the country where the foreign economic operator is resident.

The leader of the public entity establishes and implements a risk management process, which facilitates the efficient and effective achievement of its objectives. The risk management process represents the sum of the activities of (Stănescu, 1996, p.147):

- ✓ analysis of the context in which the contracting authority operates;
- ✓ identification, analysis and assessment of risks / threats regarding the achievement of its objectives and estimated results;
- ✓ establishment of measures to manage the identified risks;
- ✓ periodic review and monitoring of progress.

In order to implement an effective risk management, both the hierarchical superiors and the execution staff must be involved in this process. Risk management must start from the organizational objectives (strategic and operational) and facilitate the understanding of the risks and opportunities that can derive from the procurement activity, such as the customary practice (good practices) but also the specific activities carried out can be developed and, respectively, improved in this way so that risks are managed in an efficient and effective manner.

Among the responsibilities of the staff involved in risk management are (Drăghici, 199, p.197):

- developing and updating the risk management framework aimed at the public procurement process to which the contracting authority is exposed (depending on the specifics of its activity object), as well as the risk register;

- monitoring of major changes at the level of risk sources regarding public procurement processes managed by the contracting authority that could affect the achievement of objectives;
- application of risk identification and assessment tools and techniques;
- ensuring that the processes carried out at the level of the procurement function and the methodologies used are effective for managing the identified risks;

The risk management system must be strictly correlated with the control of procurement procedures and take into account all the irregularities that occur at each stage, by analyzing the causes of these irregularities and establishing prevention mechanisms or - where this is not possible - measures to management of the unwanted effects of the detected irregularities.

2. RESEARCH METHODOLOGY

The purpose of the article is to determine how managers from several public institutions in Romania perceive the risks of public procurement procedures from the perspective of the legal framework.

The current legislation establishes a series of general principles of the public procurement process, such as: efficient use of public finances, transparency, liberalization and expansion of international trade, free movement of goods, assumption of responsibility in public procurement procedures.

P1- The principle "Efficient use of public finances and minimization of the risks of the contracting authorities" can be carried out by applying competitive award procedures and using criteria that reflect the economic advantages of the offers in order to obtain the optimal ratio between quality and price.

P2 - The "Transparency of public procurement" principle consists in informing the public regarding the application of the award procedure, and providing access to all information related to the public procurement procedure. The principle of non-discrimination means ensuring the conditions for the manifestation of real competition on the market, regardless of the form of organization, nationality or form of ownership of the future contractor, so that any economic operator can participate in the award procedure and have the chance to become a contractor.

P3 - "Liberalization and expansion of international trade as well as the free movement of goods" implies freedom of establishment and provision of services, mutual recognition and acceptance of: products, services, works legally offered on the market; diplomas, certificates and other documents, issued by the competent authorities of other states; technical specifications, equivalent to those requested at national level. The Equal Treatment principle means establishing and applying

RISKS IN THE MATTER OF PUBLIC PROCUREMENT FROM THE PERSPECTIVE OF LEGAL TREATMENT

identical rules, requirements, criteria for all economic operators, so that they benefit from equal chances to become contractors during the award procedure.

In order to comply with this principle, the contracting authority must ensure that:

- ✓ the same information is made available to all economic operators, both through the standard documentation and through subsequent clarifications on its content;

- ✓ the minutes of the bid opening meeting are communicated to all participants in the procedure, regardless of whether or not they were present at the opening meeting;

- ✓ qualification/selection criteria are applied identically to all participants;

- ✓ the established evaluation factors allow comparing and evaluating offers objectively

P4 - "The principle of assuming responsibility" consists in the clear determination of the tasks and responsibilities of the people involved in the public procurement process, provided by the legislation in force and the Regulation of the Working Group for Public Procurement, approved by the contracting authority, which ensures professionalism, impartiality and the independence of the decisions adopted during the entire procurement process.

The deficiencies identified in the verification process of procurement procedures financed from structural instruments consist of:

R1 - "Unjustified reduction of deadlines as a result of the publication of a notice of intent": the reduction of the deadlines for submission of offers is operable only in the situation where all the qualification and selection criteria, as well as the award criterion, are included in the content of the notice of intent, also found at the level of the participation announcement. The evaluation factors will be detailed in the notice of intent only to the extent that they are known at the time of sending the notice.

R2 - "Publication of discriminatory, insufficiently detailed or incomplete qualification and selection criteria": the considered qualification and selection criteria must be objective, non-discriminatory and proportional to the complexity and object of the contract and reflect the concrete possibility of the economic operator to fulfill the contract.

R3 - "Choosing an accelerated procedure for awarding the contract": the acceleration of the restricted tender/negotiation procedures with the prior publication of a participation notice can only be carried out if it was not generated by an action or inaction of the contracting authority and if there is a justification of the emergency situation.

R4 - "Rejection of the request to change the deadline for submission of offers, at the request of bidders": among the frequent mistakes that must be avoided is the establishment of the minimum term provided by the legislation in

the field of public procurement for the preparation of offers, for example 24 days, of which a significant period is covered by legal holidays and, although there were requests from the economic operators to postpone the deadline for submission of offers and the opening, the contracting authority did not comply with them.

Based on the purpose of the scientific research, the following objectives were drawn up:

1. Analysis of public procurement procedures from the perspective of the legal framework;
2. Analysis of risks specific to public procurement;
3. Identifying the links between public procurement procedures and specific risks.

Based on studies and theories in the field of specialized literature as well as personal observations, the following hypotheses were formulated that are the basis of scientific research:

Hypothesis 1: There is a strong correlation between P1- Principle "Efficient use of public finances and minimization of contracting authorities' risks" and R2 - "Publication of discriminatory, insufficiently detailed or incomplete qualification and selection criteria";

Hypothesis 2: There is a very significant positive relationship between P1- Principle "Efficient use of public finances and minimizing the risks of the contracting authorities" and R3 - "Choosing an accelerated contract award procedure";

Hypothesis 3: There is a very significant positive relationship between P2 - Principle "Transparency of public procurement" and R1 - "Unjustified reduction of terms as a result of the publication of a notice of intent";

Hypothesis 4: P3 - "Liberalization and expansion of international trade as well as free movement of goods" and R1 - "Unjustified reduction of deadlines as a result of the publication of a notice of intent";

Hypothesis 5: There is a positive relationship between P3 - "Liberalization and expansion of international trade as well as the free movement of goods" and R4 - "Rejection of the request to change the deadline for submission of offers, at the request of the bidders";

Hypothesis 6: Between P4 - "Principle of assumption of responsibility" and R1 - "Unjustified reduction of deadlines as a result of the publication of a notice of intent"

Data collection was carried out between August 2022 ÷ October 2022, with the help of the questionnaire. A total of 312 valid questionnaires were obtained. In the processing phase, processing and analyzing the collected data, the special statistical research software S.P.S.S. was used. (Statistical Package for the Social Sciences), with which the Spearman rho correlation coefficient was calculated;

RISKS IN THE MATTER OF PUBLIC PROCUREMENT FROM THE PERSPECTIVE OF LEGAL TREATMENT

To validate the hypotheses, we used the most common and by far the most useful, the *Spearman rho correlation coefficient*, with the help of the special statistical research software S.P.S.S. (Table 1).

Table 1 – Spearman rho correlation coefficient values

Spearman's rho		Correlations			
		R1 - "Unjustified reduction of deadlines as a result of the publication of a notice of intent"	R2 - "Publication of discriminatory, insufficiently detailed or incomplete qualification and selection criteria"	R3 - "Choosing an accelerated procedure for awarding the contract"	R4 - "Rejection of the request to change the deadline for submission of offers, at the request of bidders"
P1 - The principle "Efficient use of public finances and minimization of the risks of the contracting authorities"	correlation coefficient	.911**	.921**	.837**	.823**
	Sig. (2-tailed)	.000	.000	.000	.000
	N	312	312	312	312
P2 - The "Transparency of public procurement"	correlation coefficient	.921**	1.000	.800**	.784**
	Sig. (2-tailed)	.000	.000	.000	.000
	N	312	312	312	312
P3 - "Liberalization and expansion of international trade as well as the free movement of goods"	correlation coefficient	.837**	.800**	1.000	.895**
	Sig. (2-tailed)	.000	.000	.000	.000
	N	312	312	312	312
P4 - "The principle of assuming responsibility"	correlation coefficient	.823**	.784**	.895**	1.000
	Sig. (2-tailed)	.000	.000	.000	.000

N	312	312	312	312
**. Correlation is significant at the 0.01 level (2-tailed).				

Source: processing data obtained through SPSS program

Following the analysis of the Spearman rho correlation coefficient, we can observe the following correlations between public procurement procedures and their specific risks:

1. There is a very significant positive relationship between *P1- Principle "Efficient use of public finances and minimization of contracting authorities' risks"* and *R2 - "Publication of discriminatory, insufficiently detailed or incomplete qualification and selection criteria"* ($\rho=0.92$, $df=312$, $p<0.001$). From the scatter diagram (Figure 1) it can be seen that the spread of points is relatively limited, which indicates a strong correlation ($R^2=0.81$). The slope of the scatterplot of results is relatively a straight line, indicating a linear relationship rather than a curvilinear one. It can be stated that Hypothesis 1 has been validated.

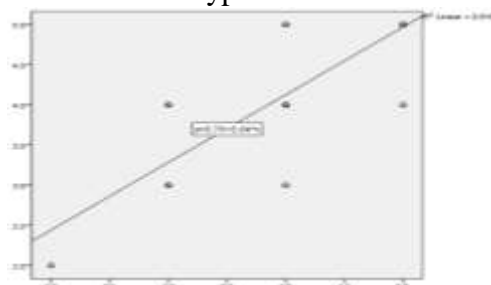


Figure 1 - Scatter plot – correlation between

P1- Principle "Efficient use of public finances and minimization of contracting authorities' risks" and *R2 - "Publication of discriminatory, insufficiently detailed or incomplete qualification and selection criteria"*

Source: processing data obtained through SPSS program

2. It can be seen from Table 1, that there is a very significant positive relationship between *P1- Principle "Efficient use of public finances and minimizing the risks of the contracting authorities"* and *R3 - "Choosing an accelerated procedure for awarding the contract"* ($\rho=0.837$, $df=312$, $p<0.001$). The scatterplot (Figure 2) reveals that the spread of points is relatively limited, indicating a strong correlation ($R^2=0.67$). The slope of the scatterplot of results is relatively a straight line, indicating a linear relationship rather than a curvilinear one. In conclusion, Hypothesis 2 is validated.

RISKS IN THE MATTER OF PUBLIC PROCUREMENT FROM THE PERSPECTIVE OF LEGAL TREATMENT

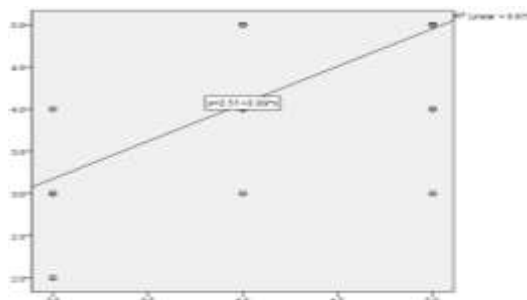


Figure 2 - Scatter plot – correlation between

P1- Principle "Efficient use of public finances and minimization of contracting authorities' risks" and R3 - "Choosing an accelerated contract award procedure"

Source: processing data obtained through SPSS program

3. Between P2 - *The "Transparency of public procurement"* principle and R1 - *"Unjustified reduction of deadlines as a result of the publication of a notice of intent"* there is a very significant positive relationship ($\rho=0.921$, $df=312$, $p<0.001$). From Figure 3, the scatterplot reveals that the spread of the points is relatively limited, indicating a strong correlation. The slope of the scatterplot of results is relatively a straight line, indicating a linear relationship rather than a curvilinear one. It can be stated that Hypothesis 3 is fully validated.

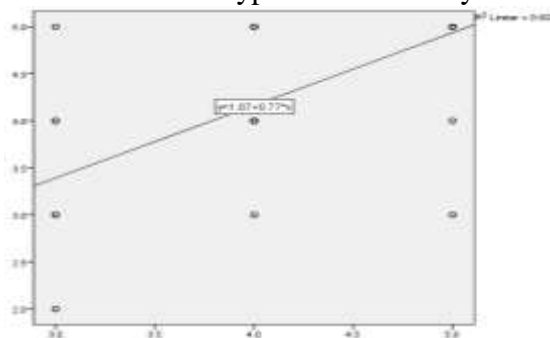


Figure 3 - Scatter diagram - between

P2 - The "Transparency of public procurement" principle and R1 - "Unjustified reduction of deadlines as a result of the publication of a notice of intent"

Source: processing data obtained through SPSS program

4. Analyzing P3 - *"Liberalization and expansion of international trade as well as the free movement of goods"* and R1 - *"Unjustified reduction of deadlines as a result of the publication of a notice of intent"*; results in a very significant positive relationship ($\rho=0.837$, $df=312$, $p<0.001$). The scatter diagram (Figure 4) reveals that the spread of points is relatively limited, which indicates a strong correlation ($R^2=0.61$). The slope of the scatterplot of results is relatively a straight line, indicating a linear relationship rather than a curvilinear one. It can be stated that Hypothesis 4 is validated.

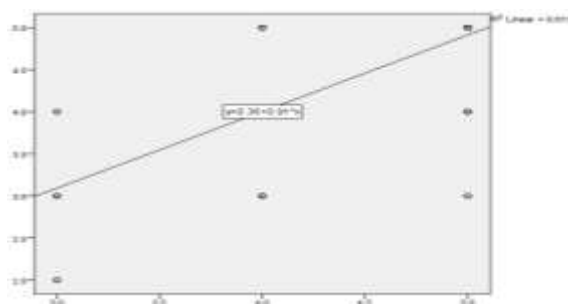


Figure 4 - Scatterplot – correlation between

P3 - "Liberalization and expansion of international trade as well as the free movement of goods" and R1 - "Unjustified reduction of deadlines as a result of the publication of a notice of intent"

Source: processing data obtained through SPSS program

5. Between P3 - "Liberalization and expansion of international trade as well as free movement of goods" and R4 - "Rejection of the request to change the deadline for submission of offers, at the request of the bidders" ($\rho=0.895$, $df=312$, $p<0.001$). The scatter diagram reveals that the spread of points is relatively limited, indicating a moderate to strong correlation ($R^2=0.54$) - Figure 5. The slope of the scatter of the results is relatively a straight line, indicating a linear relationship rather than a curvilinear one - Hypothesis 5 is validated .

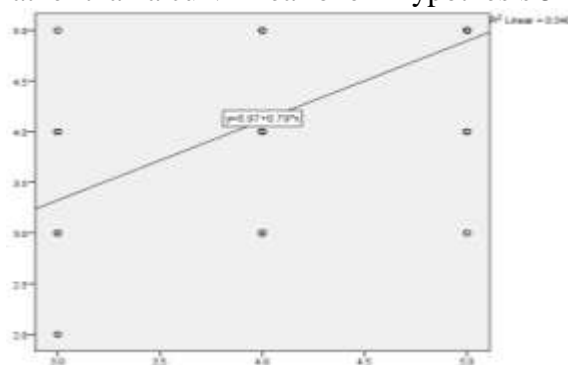


Figure 5 - Scatterplot – correlation between

P3 - "Liberalization and expansion of international trade as well as the free movement of goods" and R4 - "Rejection of the request to change the deadline for submitting offers, at the request of the bidders"

Source: processing data obtained through SPSS program

6. There is a very high significant positive relationship ($\rho=0.823$, $df=312$, $p<0.001$) also between P4 - "The principle of assuming responsibility" and R1 - "Unjustified reduction of deadlines as a result of the publication of an announcement of intent" (Table 1). The scatterplot (Figure 6) reveals that the

RISKS IN THE MATTER OF PUBLIC PROCUREMENT FROM THE PERSPECTIVE OF LEGAL TREATMENT

spread of points is relatively limited, which indicates a moderate to strong correlation ($R^2=0.74$). The slope of the scatterplot of results is relatively a straight line, indicating a linear relationship rather than a curvilinear one - Hypothesis 6 is validated

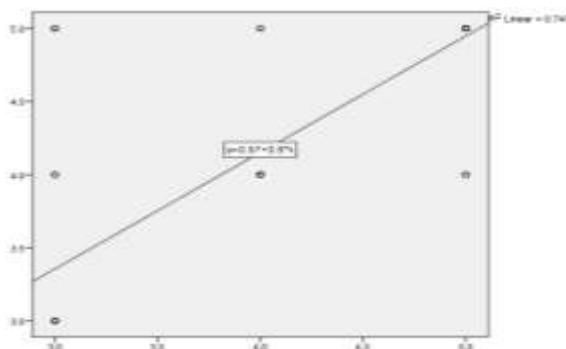


Figure 6 - Scatterplot – correlation between P4 - "The principle of assumption of responsibility" and R1 - "Unjustified reduction of deadlines as a result of the publication of a notice of intent"
Source: processing data obtained through SPSS program

CONCLUSIONS

Public procurement is a vast field of utmost importance. There is no organization in which procurement is not carried out, starting from procurement for carrying out current activities to organizing or participating in tenders. In particular, there is no public institution whose organizational chart does not include at least one procurement department that deals in particular with the public procurement necessary for the institution.

By analyzing the statistical situation of procurement procedures in Romania, the inefficiency of the use of human resources (purchasers), the need for regionalization in the sense of reducing the number of contracting authorities, a very good efficiency of using the number of available positions of the bidding companies in the electronic catalog and strong links were highlighted, significant both between the number of contracting authorities and the number of offers published in the catalog and between the number of bidders and the number of offers published in the catalog.

Public procurement is one of the activities carried out at the level of public administration, as well as of institutions and enterprises operating in the public sector. The effective application of the legal provisions requires personnel with experience in the field of securing material resources in general and public procurement in particular, public procurement representing a symbiosis between legal and economic.

The concept of public procurement is related to the content of legal relations similar to those of sale and purchase, but appreciated in a very broad

sense and with specific connotations. Public procurement differs from private sector specific procurement (in the sense of purchase, rental, construction contract, etc.) through a multitude of direct and correlative purposes related, in the European Union, to the construction and consolidation of the single market, worldwide, the concern of the World Trade Organization to facilitate cross-border exchanges, and at the state level, the need to ensure a judicious spending of public funds. The researchers of the phenomenon of public procurement have identified, during the evolution of the concept, the most diverse facets, noting that public procurement is not only an instrument that ensures the provision of public services to the members of society, directly or indirectly, but also a way of exercising power public, respectively a means of implementing some public policy options.

The implementation of an effective internal control system at the level of each contracting authority is likely to significantly reduce, from the early stage, the risk of irregularities and errors and will lead to a reduction in the need for external controls. In this sense, the unitary execution of the public procurement process and the making of purchases in an ethical and legal way (ensuring compliance with legal requirements) contribute to increasing the quality of the process as a whole and, implicitly, the results obtained. The finality of this endeavor is represented by the achievement of the key objectives, namely to provide on time the quality products/services/works necessary to fulfill the mission of the contracting authority, within the limits of the approved budget, so that it can achieve sustainable economic performance.

From this point of view, the efforts of the contracting authorities should not only be focused on ensuring compliance but also on the efficiency of the public procurement process, for which the internal managerial control system implemented should not aim exclusively at obtaining the lowest price/cost as a result of the application of award procedures, but of the best value for money.

In conclusion, the public procurement system in Romania must be permanently adapted to the new challenges and changes faced by economic operators, regulatory institutions, control institutions and obviously, the contracting authorities.

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RISKS IN THE MATTER OF PUBLIC PROCUREMENT FROM THE
PERSPECTIVE OF LEGAL TREATMENT

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