

THE CONCEPT OF ABNORMALLY LOW TENDERS AND ROMANIAN PUBLIC PROCUREMENT: A PRACTITIONER'S PERSPECTIVE

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Abstract

The concept of Abnormally Low Tenders (ALTs) is a relevant issue at the practical level in public procurement. This paper examines the need for a rigorous approach in the practice of detection, analysing and making a decision on ALTs, both at the level of process and content related dimensions of the concept. Within the frame of the new legislation governing Public Procurement in Romania, an interdisciplinary approach is identified as required in the practice of ALTs: understanding and applying legal requirements is equally important as understanding economics in assessing a tender as abnormally low.

Key Words: *Romanian Public Procurement practice / abnormally low tenders / public procurement directives*

JEL Classification: *[H57, K0, K10, K40, J0]*

Introduction

Court of Justice of the European Union (CJEU) interpreted EU Directives by giving preliminary rulings based on article 267 of Treaty of Functioning of the European Union (TFEU), and rules on the compatibility of national laws with EU Directives, based on article 258 TFEU. All procedural aspects followed in practice for Abnormally Low Tenders (ALTs) are based on the case law of the CJEU. However, the 2014 Generation of Public Procurement Directives expressly requests contracting authorities/entities to reject ALTs in certain situations. This implies, in practice, a change in the application of (apparently) abnormally low tenders concept at the evaluation committee level. More specifically, there is an implied need to consider beside the process related aspects (procedural aspects), the content related aspects (the economics of prices and the pricing behaviour of economic operators). Therefore, there is an implicit requirement for an interdisciplinary approach in detection, analysing and making a decision on ALTs.

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1. Literature review

The actual EU legal framework in Public Procurement (PP) is the result of more than 40 years development process for. As a concept, “Abnormally Low Tenders (ALTs)” has been recognized starting with the first generation of EU procurement directives in 1971¹. At that time, actions were required only when a tender was obviously abnormally low, but over time, the ALT concept evolved, being in terms of procedural aspects, refined and adjusted in each of the generations of PP Directives, based on the interpretations of the PP Directives issued by the Court of Justice of the European Union.

The judgements provided in the Case 76/81² and in the Case C-103/88³ guided the practice of concept implementation from procedural perspective, and ruled in relation to the application of ALT concept in practice that:

- i. rejecting a tender as obviously abnormally low⁴, without seeking explanation from the tenderer, represents a violation of the PP Directives
- ii. reasonable time in which a tenderer is supposed to submit further details must be allowed
- iii. Member States are allowed to require tenders to be examined when those tenders appear to be abnormally low, and not only when they are obviously abnormally low.

As a consequence, the article 29(5) Council Directive 71/305/EEC, has been re-examined in the light of experience through the Council Directive 89/440/EEC⁵, among others for the consideration of the Court decisions in relation to abnormally low tender.

¹ Art. 29(5) Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, provides as follow: "If, for a given contract, tenders are obviously abnormally low in relation to the transaction, the authority awarding contracts shall examine the details of the tenders before deciding to whom it will award the contract. The result of this examination shall be taken into account. For this purpose it shall request the tenderer to furnish the necessary explanations and, where appropriate, it shall indicate which parts it finds unacceptable." in COMPENDIUM OF THE PRINCIPAL LEGAL TEXTS FOR PUBLIC PROCUREMENT, EDITION: MARCH 1991, COMMISSION OF THE EUROPEAN COMMUNITIES, Brussels, 4 April 1991 available at <http://aei.pitt.edu/41109/1/A5210.pdf>, last accessed on 17.07.2016.

² Case 76/81, *SA Transporoute et travaux v Minister of Public Works* available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61981CJ0076>, last accessed on 17.07.2016.

³ Case C-103/88, *Fratelli Costanzo SpA v Comune di Milano* ("Costanzo"), available at <http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d0f130d5147b85af6aab4ac0ae77d7cb76f863fe.e34KaxiLc3eQc40LaxqMbN4Pa3aSe0?text=&docid=96045&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1039916>, last accessed on 17.07.2016.

⁴ By applying mathematical formulae.

⁵ Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts published in Official Journal L 210, 21.07.1989, p. 1, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1469001693703&uri=CELEX:31989L0440>, last accessed on 17.07.2016.

ECJ continued to rule on “seeking explanation” process related aspects, this time in connection with the provisions of the art. 30(4)⁶ of Directive 93/37/EEC⁷ in joined Cases C-285/99⁸ and C-286/99⁹ and specified that the contracting authority/entity should:

- i. request explanations from the tenderers for the constitutive elements of the tender that give rise to suspicion in the context of the requirements within that specific tender, “in order to allow the undertakings concerned to demonstrate their genuineness”¹⁰ otherwise the tenderer “is not in a position to supply useful and complete explanations in support of the various elements constituting his tender”¹¹
- ii. treat the requests for explanations as well as the assessment of the received answers as part of a “proper exchange of views” process [...] “in order to prevent the contracting authority from acting in an arbitrary manner and to ensure healthy competition between undertakings”¹².

The level of details required for the examination of the tenders at suspicion is detailed by the Court in the Case T-4/01¹³ para. 76, where the Court “observes that, although art. 30(4) of Directive 93/37 does not require [a contracting authority/entity] to check each price quoted in each tender, it must examine the

⁶ „If, for a given contract, tenders appear to be abnormally low in relation to the works, the contracting authority shall, before it may reject those tenders, request, in writing, details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements taking account of the explanations received. The contracting authority may take into consideration explanations which are justified on objective grounds including the economy of the construction method, or the technical solution chosen, or the exceptionally favourable conditions available to the tenderer for the execution of the work, or the originality of the work proposed by the tenderer. If the documents relating to the contract provide for its award at the lowest price tendered, the contracting authority must communicate to the Commission the rejection of tenders which it consider to be too low[...].”

⁷ Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts published in Official Journal L 199, 09/08/1993, p. 54, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0037:EN:HTML>, last accessed on 17.07.2016.

⁸ Case C-295/89, *Impresa Donà Alfonso di Donà Alfonso & Figli v Consorzio per lo sviluppo industriale del comune di Monfalcone, Regione Friuli-Venezia Giulia, Impresa Luigi Tacchino SpA and Impresa Carlutti Costruttori SRL*, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61989CJ0295>, last accessed on 17.07.2016.

⁹ Cases C-285/99 and C-286/99, *Impresa Lombardini SpA v ANAS and Mantovani*, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=46878&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3764600>, last accessed on 17.07.2016.

¹⁰ Para. 55 of the decision Cases C-285/99 and C-286/99.

¹¹ Para. 59 of the decision Cases C-285/99 and C-286/99.

¹² Para. 57 of the decision in joint Cases C-285/99 and C-286/99.

¹³ *Case T-4/01, Renco SpA vs Council of the European Union*, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62001TJ0004>, last accessed on 17.07.2016.

reliability and seriousness of the tenders which it considers to be generally suspect, which necessarily means that it must ask, if appropriate, for details of the individual prices which seem suspect to it, a fortiori when there are many of them. Furthermore, the fact that the applicant's tender was considered to conform to the contract documents did not relieve [the contracting authority/entity] of its obligation, under the same article, to check the prices of a tender if doubts arose as to their reliability during the examination of the tenders and after the initial assessment of their conformity". The judgment in the same Case includes, under the para. 77, the perspective of the Court on the expected behaviour of the tenderer in question, namely to establish the reliability of the prices included in the tender: "the applicant, [...], merely confirmed generally that the prices quoted in its tender were reasonable, without adducing the slightest evidence to establish the reliability of the individual prices".

In the judgement associated to Case T-495/04¹⁴, CJUE expressly specified in the para. 99 of the judgement that "seeking explanation" process in case of detected abnormally low tender is "a fundamental requirement in the field of public procurement, which obliges a contracting authority to verify, after due hearing of the parties and having regard to its constituent elements, every tender appearing to be abnormally low before rejecting it". At the same time, the Court reiterated that the role of the "fundamental requirement" is "to prevent the contracting authority from acting in an arbitrary manner and to ensure healthy competition between undertakings" (para. 97).

It is of relevance for practitioners that in the judgement for the same case (T-495/04), the Court summarised under para. 97 the main steps of the procedure to be followed in case of ALTs. The Court specifies that "where a contracting authority considers that a tender is abnormally low [...], [the rule] obliges it to allow the tenderer to clarify or even to explain the nature of its tender before rejecting that tender. More precisely, [...] it is essential that each tenderer suspected of submitting an ALT should have the opportunity effectively to state its point of view in that respect, giving it the opportunity to supply all explanations as to the various elements of its tender at a time when it is aware not only of the anomaly threshold applicable to the contract in question and of the fact that its tender has appeared abnormally low, but also of the precise points which have raised questions on the part of the contracting authority".

¹⁴ Case T-495/04, *Belfass SPRL vs Council of the European Union*, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=67732&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=96>, last accessed on 17.07.2016.

In relation to the constituent elements of a tender which might raise ALTs concerns, based on the same judgement, the Court clarified that the concept of ALT is not limited to price aspects only. The decision in this case stresses that automatically eliminating a tender from a competition “on the sole ground of the excessively low nature of the total number of hours included in that tender”, without “any hearing of the parties” and “prior to its being eliminated automatically” represents an infringement of what the Court specifies as being a “fundamental requirement in the field of public procurement”, even if “the total price of tender was, by contrast, 3.7% beneath that of that [winner] tenderer”.

The judgement of the Court in Joined Cases C-147/06 and C-148/06¹⁵ brings into the practitioners’ attention a situation addressing the procurement under thresholds while adding to the addressed procedural aspects of the ALTs, also an economic perspective. More specific, in this case, the Court balances the procedural aspects with the interest of a contracting authority/entity and rules that “The fundamental rules of the EC Treaty on freedom of establishment and freedom to provide services and the general principle of non-discrimination preclude national legislation which, with regard to contracts with a value below the threshold¹⁶, which are of certain cross-border interest, imposes an absolute duty on the contracting authorities, where the number of valid tenders is greater than five, automatically to exclude tenders considered to be abnormally low in relation to the goods, works or services according to a mathematical criterion laid down by that legislation without allowing those contracting authorities any possibility of verifying the constituent elements of those tenders by requesting the tenderers concerned to provide details of those elements. That would not be the case if national or local legislation or even the contracting authorities concerned were to set a reasonable threshold above which ALTs were automatically excluded on account of there being an unduly large number of tenders, which might oblige the contracting authorities to examine on an *inter partes* basis such a high number of tenders that it would exceed their administrative capacity or might, due to the delay which such an examination would entail, jeopardise the implementation of the project”.

¹⁵ C-147/06, *SECAP SpA* and C-148/06, *Santorso Soc. coop. arl*, available at <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d54645a5f840794e7b8851a6c7af24ffac.e34KaxiLc3eQc40LaxqMbN4Pa3aSe0?text=&docid=67371&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1117404>, last accessed on 17.07.2016.

¹⁶ Set by Article 6(1)(a) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997.

In the next generation of PP Directives, the content of Article 30(4) of Directive 93/37 was reflected in the Article 55 of Directive 2004/18/EC¹⁷.

Peter Trepte on the analysis of the text of the Directive 2004/18 in conjunction with the content of ECJ decisions explains that: “The terminology of the Directives [...] refers to the requirement to request further details before rejecting an apparently ALT. They do not require rejection of the tender *per se*”¹⁸ but explicitly instruct a contracting authority/entity “which envisages doing so to verify the facts first” (Trepte, 2007).

In the Case C-292/07¹⁹, the Court specified that “although the list in the second subparagraph of Article 55(1) of Directive 2004/18 is not exhaustive, it is also not purely indicative, and therefore does not leave contracting authorities free to determine which are the relevant factors to be taken into consideration before rejecting a tender which appears to be abnormally low” (para. 159 of the decision). The judgement in the Case C-599/10²⁰ Slovensko explicitly reiterated under the para 30 this statement.

In the Case C-599/10, the Court rules that the “Article 55 of Directive 2004/18 does preclude a contracting authority from claiming that it is not obliged to request a tenderer to clarify an abnormally low price”.

In 2014 the new generation of the EU public procurement directives (2014/24 and 2014/25) entered into force, with the declared aims to support the public procurement role of “market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds²¹” within the context of EU 2020 Strategy, but also with the aim to satisfy the “need to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union”²²

Within the preamble of the Directives in relation to the concept of ALTs it is expressly specified that:

¹⁷ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, published in Official Journal L 134, 30.04.2004, p 114, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004L0018&from=en>, last accessed on 17.07.2016.

¹⁸ P. Trepte, *Public procurement in the EU: A Practitioner's Guide*, 2. ed., 2007, Oxford University Press, para 7.256, p. 745.

¹⁹ Case C-292/07, *Commission v Belgium*, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=78001&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=1863>, last accessed on 17.07.2016.

²⁰ Case C-599/10, *SAG ELV Solvensko a.s.*, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=121164&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=772>, last accessed on 17.07.2016.

²¹ Para 2 of Directive 2014/24 and para 4 of Directive 2014/25.

²² Para. 40 of Directive 2014/24 and para. 55 of Directive 2014/25.

- i. “control of the observance of the environmental, social and labour law provisions should be performed at the relevant stages of the procurement procedure, [...] and when applying the provisions concerning abnormally low tenders”²³
- ii. “tenders that appear abnormally low in relation to the works, supplies or services might be based on technically, economically or legally unsound assumptions or practices”²⁴
- iii. “where the tenderer cannot provide a sufficient explanation, the contracting authority should be entitled to reject the tender. Rejection should be mandatory in cases where the contracting authority has established that the abnormally low price or costs proposed results from non-compliance with mandatory Union law or national law compatible with it in the fields of social, labour or environmental law or international labour law provisions”²⁵

The 2014 generation of the PP Directives has been transposed in the Romanian legislation through Law no. 98/2016 on public procurement and Law no. 99/2016 on sectorial procurement. Both primary laws are seconded by government decisions embedding methodological norms for applying the primary legislation²⁶.

2. Discussions

All the above selected information from the judgements of the CJUE addresses the process related aspects which are relevant after the ALTs are detected. However, the actual concern at practical level is the determination of the trigger for ALTs procedural aspects.

Even this concept was included in the first generation of EU public procurement directives, the practice in applying the concept still creates difficulties, since there is no working definition of what constitutes an ALT. Arrowsmith et al. further explained and detailed the concept of ALT from the Directives as “it refers to an offer that, because of its favourable terms, raises a suspicion that the provider will not be able to perform according to the terms offered. In such a case the provider may either not deliver properly or may seek extra payment (either for the

²³ Para. 40 of Directive 2014/24 and para. 55 of Directive 2014/25.

²⁴ Para. 103 of Directive 2014/24 and para. 108 of Directive 2014/25.

²⁵ Para. 103 of Directive 2014/24 and para. 108 of Directive 2014/25.

²⁶ Government Decision no. 394/2016 for the approval of the methodological norms for the application of provisions concerning the awarding of public procurement contract/framework agreement of the Law no. 99/2016 on sectorial procurement and Government Decision no. 395/2016 for the approval of the methodological norms for the application of provisions concerning the awarding of public procurement contract/framework agreement of the Law no. 98/2016 on public procurement.

agreed work or through excessive remuneration from later variations”²⁷ (Arrowsmith, 2005). Trepte (2007) is also in favour of this approach.

The following two opinions are also retained by the authors as being relevant for the content related aspects of (apparently) ALTs:

- i. “A tender is assumed to be abnormally low if: in light of client’s preliminary estimate and of all the tenders submitted, it seems to be abnormally low by not providing a margin for a normal level of profit, and in relation to which the tenderer cannot explain his price on the basis of the economy of the construction method, or the technical solution chosen, or the exceptionally favourable conditions available to the tenderer, or the originality of the work proposed, specifically in the case of works contracts (Robert Andrews, 2011²⁸ apud DG 3 Working Group, 1999²⁹)
- ii. “[...] there is a level below which an offer cannot be considered as being serious having regard to the services provided [...]”³⁰

However, since all nominated judgments of the CJEU addressed the procedural aspects of the concept, it can be concluded that the process component of treating ALT is clarified. Instead, there is no unitary approach recognized and recommended as best practice in the areas of detection of ALTs. There is also a narrow perspective, that of practitioners which applies the legal provision only based on the consideration that once the procedural steps are followed there is evidence of (apparently) abnormally low tender consideration. This is not enough since the practice demonstrates:

- i. there are many reasons for a tender to be low, starting with blameless mistakes, advantageous market and commercial conditions or even subsidies
- ii. following the procedural aspects does not necessarily eliminate the risk of non-performance, since the non-performance is mainly related to the content dimension of the ALTs concepts.

When a contracting authority/entity takes within the boundaries of a procurement process, the initiative to investigate an ALT, then, it must consider the

²⁷ Arrowsmith, et al., *U PUBLIC PROCUREMENT LAW: AN INTRODUCTION*, 2010, p. 179, available at <https://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf>, last accessed on 17.07.2016.

²⁸ R. Andrews, *How long can you go?*, 2011, available at <http://www.surveyorsjournal.ie/index.php/low-can-go/>, last accessed on 17.07.2016.

²⁹ DG 3 Working Group on ALTs, Report on Prevention, Detection and Elimination of ALTs in the European Construction Industry of 19 May 1999, para 3.1

³⁰ European Commission, Guide to the Community Rules on Public Procurement of services, under Directive 92/50/EEC, para. 6.3.2, p. 59, available at <http://www.ecec.net/fileadmin/pdf/law/2/>

guide-to-community-rules-pp-services.pdf, last accessed on 17.07.2016

received explanations in connection to certain aspects explicitly nominated in the legislation: the economic and technical conditions applicable to the operator, its compliance with environmental, social, and labour laws and the rules applicable to subcontracting, and the possibility of it obtaining State aid³¹. According to Abby Semple, this list of aspects requiring consideration may be grouped in two major categories: “those which may legitimate an abnormally low tender (such as exceptionally favourable conditions available to the operator) and those which may render it illegitimate (such as receipt of State aid which is not compatible with the Treaty)” (Semple, 2015)³².

The following are the elements that a practitioner in public procurement in Romania should consider when applying the provisions of the actual legislation:

- i. the determination of the impact of the materialization of the factors which lead to the ALTs is left to the contracting authority/entity discretion.
- ii. the legislation on ALTs is established regardless of the project type or the contract form. However, those parameters have a major impact on the detection of ALTs. For instance, a contract not including provision related to transfer of certain risks to the future contractor, will determine deviations from the market prices.

In Romania under the previous PP legal framework, the most frequently used criterion for contracts awarding was under the previous legislation³³, “the lowest price”. A study performed by IPP (Institute for Public Policies)³⁴ in Romania shows that for the period 2009-2014, “above 97% of the contracts awarded in Romania use as award criterion the lowest price”. According to European Commission³⁵, the award criterion used for procedures addressing the EU market, shows an ascending trend for the lowest price: 88% for 2013, 90% for 2014 and 92% for 2015. The same scoreboard indicates a high score for Romania for the performance indicator “No Calls for Tenders”, showing a high proportion of procurement procedures that were awarded without a call for tender, placing Romania high above EU and EEA average.

Under the 2004 generation of PP Directives, some of the EU Member States treated the concept of ALTs by employing mathematical standards for the

³¹ Art. 210, para. 3 of the Law no 98/2016, transposing art. 69 para. 3 of 2014/24 Directive and art. 222, para. 3 of Law 99/2016, transposing art. 84, para. 3 of 2014/25 Directive.

³² A. Semple, *A Practical Guide to Public Procurement*, 2015, p. 117.

³³ GEO 34/2006, further modified and supplemented and associated secondary and tertiary legislation in force until end of May 2016.

³⁴ White Paper, *Drumul spre achizitii publice sustenabile*, available at <http://www.ipp.ro/wp-content/uploads/2015/11/Drumul-spre-APS.pdf>, last accessed on 17.07.2016.

³⁵ European Commission, *Single Market Scoreboard – Public Procurement Policy*, July 2016 Edition, available at http://ec.europa.eu/internal_market/scoreboard/performance_per_policy_area/public_procurement/index_en.htm, last accessed on 17.07.2016.

identification of ALTs. This was also the case of Romania, which used in the ALTs evaluation relative standards³⁶ for almost 3 years (July 2010 to July 2013) and absolute standards³⁷ for almost 3 years (July 2013 to May 2016). The practice demonstrates that the application of these standards did not eliminate the non-performance risk.

Therefore, contracting authorities/entities embraced in the majority of the situations contracting strategies which stimulated only the price dimension in a competition. Irrespective of the perception of an economic operator on the reality, the appetite of the economic operators for low prices was obviously stimulated. In practice this appetite materialized in significant gaps between the offered prices and published estimated values of the contracts in the contract notice³⁸. However, no matter how low the price offered is, the tenderers were able to provide contracting authorities/entities various ranges of explanations or measures they will be able to implement in order to perform the contract for the low offered price. Often, in practice, two situations were identified at contracting entity level in relation to ALTs:

- i. the contracting authorities/entities do not benefit from an appropriate level of knowledge and experience for making an appropriate judgement of the risks taken through the acceptance of such a tender.
- ii. the risk adverse culture in the area of public procurement determines the contracting authorities/entities to not reject such kind of tender, from reasons such as potential complaints or scrutiny by the Romanian national auditors.

The ability to cope with ALTs becomes of essence in the context of the last generation of the PP Directives, since the obligation, expressly mentioned in the legislation for rejecting ALTs, implies the need to differentiate and document both the procedural aspects as well as the content aspects of ALTs.

In terms of procedural aspects, if within a given transaction resulting in a contract, the received tenders appear to be abnormally low in relation to the

³⁶ Comparing the lowest tender with mean of the tenders: 15% lower than the mean of the tenders excluding the lowest and highest tender if tenders are more than 5 (art. 202 of GEO 34/2006 completed by art. I, para. 38 of GEO 76/2010 and modified by art. I, para. 44 of GEO 77/2012).

³⁷ Based on the contract estimated value established by contracting authority/entity and published in the contract notice.

³⁸ Even not compulsory under the former legislation (GEO 34/2006 and subsequent acts – see for instance Annex 1 to the GEO 34/2006 or Annex 1 to GD 925/2016) the national solution provider for publishing the contract notices in Romania made this field of the contract notice compulsory, while starting with 27th of July 2009, according to former GD 925/2006, the tenders were rejected in case of deviating with 10% above the published contract estimated value, while the ALTs were identified using as reference an absolute or relative standards.

requirements specified by the contracting authority/entity, then, a contracting authority/entity must follow a rigorous procedure. This is an express requirement of the art. 222 of the Law 99/2016 and the art. 210 of Law 98/2016 - part of it written in imperative terms. Above articles requires the practice of contracting authority/entity to demonstrate traceability for the following actions:

- i. identify suspect tenders,
- ii. identify the constituent elements of the tender which generate suspicion of being abnormally low (price is only one of many other components, but in any case not the only one),
- iv. request in writing details in relation to the constituent elements of the tender which is considered relevant in that given context, indicating which parts it finds unacceptable and requesting specific evidence for that specific constituent elements. For such situation a reasonable time must be allowed for tenderers to submit further details on the issue at concern.
- iii. assess the merits of the explanations provided by the tenderer(s) with tender(s) at concern,
- iv. document the decision made for admission/rejection of the tender, taking into account the received explanations and with reference to the received evidence.

According to the legal PP provisions³⁹ in force, the details to be requested in writing include (but are not limited to):

- i. the economics of the price determination with the consideration for that specific construction method, that specific manufacturing process or that specific services provided;
- ii. the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the work, for the supply of the goods or for providing the services;
- iii. the originality of the work, supplies or services proposed by the tenderer;
- iv. compliance with the obligations relating to environment, employment protection and working conditions in force at the place where the work, service or supply is to be performed, as these obligations results from laws, regulations, decrees and decisions, both at national and EU level, as well as from international collective agreements;

³⁹ Art. 222 of Law no 99/2016 and art. 210 of the Law no 98/2016.

- v. payments of the subcontractors (if any), based on (but not limited to), the interpretation of Engel's saying "a fair day's pay for a fair day's work"⁴⁰
- vi. the possibility of the tenderer obtaining state aid.

For contracts for which the estimated value is under threshold, there is an explicit interpretation of the Court to consider the dimension of cross-border interest also. There is an express obligation for contracting authority/entity to reject ALTs for reasons associated with noncompliance with legal provisions in areas of environmental, social and labour regulations. Instead, there is no express regulation for the contracting entity/authority to reject ALT based on state aid evidence, except the situation where tenderer is unable to prove, within a sufficient communicated time limit, that the aid in question was legally obtained, meaning that is compatible with the EU internal market.

Based on the contract and tender specificities as well as on the legal provisions the behaviour of contracting authorities/entities in the area of ALTs within a Romanian culture environment may be anticipated as being the following:

- i. embracing the solution of non-rejection on state-aid ground, in order to avoid delays in conducting a procurement procedure
- ii. embracing the solution of rejection on apparently fixed and strictly regulated components of a tender, such as aspects addressing the observance of the environmental, social and labour laws, regulations, decrees and decisions, at both national and EU level, as well as from international collective agreements, in order to avoid the risk of noncompliance in contract performance or the overall risk of non-performance
- iii. embracing the solution of a specific approach for detection and analysing of apparently ALTs within a governance frame, with significant effort put into the anticipation of the economic operators' behaviour in pricing. This implies efforts during the planning phase of a procurement process in areas of supply market analysis and access to a wide range of up to date primary and secondary data.

There are also other macro-environment elements that must be considered as relevant by the Romanian contracting authorities/entities, such as:

- i. the declared scope of the Romanian PP legislation: "to provide the required legal framework for performing socially and economically efficient

⁴⁰ Adapted from the saying of Friedrich Engels (the founder of Marxist Theory in Economics together with Karl Marx): „A Fair Day's Wages for a Fair Day's Work” in „Articles by Engels in the Labour Standard 1881”, available at <https://www.marxists.org/archive/marx/works/1881/05/07.htm>, last accessed on 17.07.2016.

procurement of supplies, services or works”⁴¹. More specific, compared to the previous generation of the PP Directives, the 2014 Generation, as well as the Romanian PP legislation stress the importance of performance in public procurement, beside maintaining the obligation to comply with „the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency”⁴²,

- ii. changes in the strategies employed at the tenderer’s level for establishing the price for a tender in a public procurement exercise,
- iii. changes in social values, preferences and expectations in the market,
- iv. technological development affecting a particular supply market,
- v. constant amendments and additions to the law and regulation of business activities
- vi. deep and up to date knowledge of the supply market structure: the number of buyers in the market, the number of suppliers in the market, methods of pricing in the market, as well as the degree of supply differentiation in the market.

The requirement, still in place, for complying with the public procurement principles implies an obligation for the contracting authorities/entities to describe the process to be followed for detection and treatment of the ALTs at the level of contracting strategy designed for each specific procurement exercise. This would provide orientation for the members of evaluation committee and would secure uniformity in decision making process within a specific procurement exercise in relation to ALTs during the evaluation process. It is also expected that the contracting authority/entity would include as part of the risk management, in the contracting strategy⁴³ within the procurement process preparation stage, specific risks and associated effects identified in relation to non-performance risk generated as a result of non-detection of ALTs concept in the procedure conducting stage of the process. Further, as part of the risk management process for a specific

⁴¹ Art. 2, para. 1 of Law 99/2016 and art. 2, para 1, of Law 98/2016.

⁴² Para. 1, Preamble, Directive 2014/24 and para. 2, Preamble, Directive 2014/25 or art 2, para. 2 of the Law no 99/2016.

⁴³ Art. 9, para. 3 of GD 394/2016 and art. 9, para. 2, of GD 395/2016: Contracting strategy is a document of each acquisition, initiated by the contracting authority and is subject to evaluation of the National Agency for Public Procurement, together with the tender documentation for initiating the award procedure.

procurement exercise, the contracting authorities/entities should be able to understand in the preparation phase the impact of ALTs on the materialization of the expected benefits following the contract implementation. This in turn implies a certain procurement discipline at the contracting authority/entity level, as well as a minimum level of discipline in risk management.

In terms of transparency principle's application, further considerations should address, on a case by case basis, to the opportunity of the inclusion, in the procurement documents, of a list of tender's constitutive elements which are to be examined within that specific procedure for the detection of ALTs.

But acting on a procurement process base has as a reverse the probability of missing an appropriate level of consistency for the full procurement portfolio processes within a contracting authority/entity. Thus, as part of guidelines issued either at national level (in consideration of the provisions of art. 4 of GD 394/2016 or art. 4 of GD 395/2016) or at the contracting authority/entity level, a description of the process to be followed for activities (such as identification, treatment and documentation of the decision on ALTs) should be considered. This would create uniformity in identification and treatment of ALTs at contracting authority/entity level and at the Romanian PP system level, as the case might be.

In terms of content aspects, professional judgement and supply market analysis data are extremely essential. From the nominated Court interpretations, some guidance can be provided as reference for making an opinion, by identifying aspects which would determine a specific tender to not be "genuine"? (C-285/99) or "sound and viable"? (C147-06) or "reliable and serious"? (T-4/01).

3. Summary, Limitations and Outlook

Under the governance of the previous Romanian legislation in PP, receiving low tenders may have been welcomed in the first instance. The experience demonstrates that in turn, such situations determine either cost escalation at the contracting authority/entity level or a degradation of the promised service level within a contract in relation to its particular scope and specific requirements of the contracting authority/entity. Within the new legal frame, identifying ALTs must be seen within the context of the legislation's scope, as part of economically sustainable procurement policy at the EU and national level, and should be approached interdisciplinary. It is also expected that the new provision on ALTs which impose an obligation on contracting authorities/entities to reject ALTs on specific situations will significantly change the pricing strategies at the economic operator's level for public procurement tendering purposes.

This paper intended to provide knowledge and information about the problem of examining ALTs in practice, in the context of the Romanian cultural environment. The immediate effect of an accepted ALT in practice is cost escalation or reduced contract scope for the purpose of cost cutting at contracting

authority/entity level or efforts to save costs and claim for extra resources at the supply chain level. The management of the contracting authority/entity and contractor relationship would require significant effort during post award stage of a procurement exercise. These aspects in turn affect the declared scope of the 2014 Generation of PP Directives: the express requirement addressed to contracting authorities/entities to perform sustainable procurement.

During the documentation for this paper no study or reports were identified at national level on aspects related to the practice of detection, analysing and making a decision on ALTs. Given the anticipated magnitude of the impact of inappropriate handling of ALTs, a systematic study of the Romanian contracting authorities/entities practices on handling and mapping ALTs should constitute a starting point for the marketing of the need for an interdisciplinary approach in this area of concern.

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