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MILESTONES ON THE IMPORTANCE OF APPLYING THE GENERAL PRINCIPLES GOVERNING PUBLIC PROCUREMENT

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Abstract: At national level, the development of the concept of public procurement involves a transparent path, based on the achievement of specific principles, objectives, methods and procedures. In this respect, the European directives applicable to public procurement involve certain principles absolutely necessary to be followed when performing public procurement contracts themselves. Therefore, we mention the role and importance of the correct application of principles such as: non-discrimination, equal treatment, proportionality, mutual recognition, the principle of transparency, the principle of avoiding unfair competition, accountability, impartiality, confidentiality. The aim of the study is to identify the importance and relevance of these principles governing public procurement from the first to the last stage of their implementation. Therefore, the general consequences of violation of the above-mentioned principles, irregularities, but also fraud in public procurement are conclusive. At the same time, we cannot fail to mention that these principles determine the approaches of public procurement, namely: administrative, managerial, legal, economic, systemic and, of course, ecological. The research methods are: observation, comparative analysis, co-relational analysis, analogy, induction and deduction, prediction, generalization, didactic and practical experience, but also other modern methods of study. Research results: The general principles governing the entire spectrum of public procurement, at national level, are finding more and more application, or the harmonization of legislation in the field of public procurement is an important premise for the continuous development of public-private partnerships. Undoubtedly, the reform in the field of public procurement is one of the major priorities of the Republic of Moldova, which will contribute to ensuring a better functioning of the market economy, combating corruption, strengthening integration efforts in the European Union and achieving optimal capitalization in terms of goods and services purchased by a wide range of public institutions.

Keywords: principles, approaches to public procurement, access to legal remedies, harmonization of legislation.

JEL Classification: K34, K39.

Introduction

Public procurement currently accounts for 19% of EU GDP and is part of everyday life, perceived as a general concept of 'activity to obtain goods or services for a contracting authority'. Public administrations purchase goods and services for their citizens, and these purchases must be made in the most efficient way. Public procurement also offers opportunities for businesses, thereby encouraging private investment and contributing concretely to growth and jobs. Public procurement therefore plays an important role in channelling the European Structural and Investment Funds. It is estimated that around 48% of the European Structural and Investment Funds are spent on public procurement.

In this scientific approach, the importance of applying the general principles governing public procurement has been analyzed through several **research methods**, namely: observation, comparative analysis, co-relational analysis, analogy, induction and deduction, prediction, generalization, didactic and practical experience, but also other modern methods of study.

Results and discussions

Public procurement has historically undergone continuous changes and development, in terms of specific institutions, legal instruments and legislation that permanently undergo indispensable changes. From its origin until now, public procurement has taken various forms, the essence, purpose and importance remaining the same – to capitalize on the public interest for the proper functioning of public services (Codreanu, A., 2017, p.45).

With the aim of simplifying procedures and making them more flexible, in 2014 Parliament and the Council adopted a new public procurement package aimed at encouraging SMEs' access to public procurement contracts and ensuring greater attention is paid to social and environmental criteria.

Thus, the current legislative framework includes: ***Directive 2014/24/EU of 26 February 2014*** on public procurement (repealing Directive 2004/18/EC), ***Directive 2014/25/EU of 26 February 2014*** on procurement by entities operating in the water, energy, transport and postal services sectors (repealing Directive 2004/17/EC), ***Directive 2014/23/EU of 26 February 2014*** on the award of concession contracts complement the first two and creates an appropriate legal framework for the award of concessions, ensuring that all economic actors in the EU have effective and non-discriminatory access to the EU market (Dumitru, I., 2019, p.26).

In this context, we align with the opinion of researcher Victor Guțuleac who states that: "The only way in which public law can acquire some freedom of action is the administrative contract, an instrument through which the administration enters into a contractual relationship with private individuals, in order to ensure the functioning of a public service, to highlight public goods, or to purchase products. services and works" (Guțuleac, V., 2013, p.42).

In their studies, Dumitru A.P. Florescu and Lucică Coman reveal that public procurement contracts are awarded by contracting authorities for obtaining goods, works or services, in exchange for equivalent considerations, usually in money. The procedures for awarding public procurement contracts are regulated and are carried out including for consultancy or technical assistance, studies, as well as for conducting information and communication campaigns (Florescu, D.A.P., Coman, L., 2013, p.16).

The importance of knowledge of the principles of public procurement by all those involved results from the fact that, whenever there is a situation or circumstance without express regulation in public procurement legislation, it will be treated in the light of public procurement principles. Therefore, the principles governing public procurement relations are expressly provided for in Art. 7 of the Law on Public Procurement [2, art. 7]: a) efficient use of public money and minimization of risks to contracting authorities; b) transparency of public procurement; c) ensuring competition and combating anticompetitive practices in the field of public procurement; d) environmental protection and promotion of sustainable development through public procurement; e) maintaining public order, morals and public safety, protecting health, protecting human life, flora and fauna; f) liberalization and expansion of international trade; g) free movement of goods, freedom of establishment and

provision of services; h) equal treatment, impartiality, non-discrimination with regard to all bidders and economic operators; i) proportionality; j) mutual recognition; k) assuming responsibility in public procurement procedures.

We will describe below the essence of some principles, in order to underline, once again, the importance of applying the general principles governing public procurement. Therefore, "efficient use of public money" means the application of competitive award procedures and the use of criteria reflecting the economic advantages of tenders in order to obtain the optimal ratio between quality and price (Florescu, 2013, p. 14).

"Non-discrimination" means ensuring the conditions for effective competition so that any economic operator, irrespective of nationality, can participate in the award procedure and have the chance of becoming a contractor. The legal basis for this principle is Article 18 of the Treaty, which prohibits any discrimination on grounds of nationality, plus Article 34 of that Treaty, which prohibits quantitative restrictions and measures having equivalent effect, including both direct and indirect restrictions on the free movement of goods and services.

Requirements imposed by the contracting authority may be regarded as breaches of this principle, such as: *the undertakings concerned by the contract are established in the same Member State or region as the contracting entity; the nationality of the tenderer; inclusion of technical specifications likely to favour domestic undertakings; setting qualification requirements favouring certain participants in the procurement procedure; favouring a tenderer by laying down discriminatory conditions in the tender specifications.*

The principle of "equal treatment" implies that, at any time during the award procedure, identical rules, requirements and criteria are established and applied for all economic operators in order to give them equal opportunities to become contractors. If we take as an example the situation where, in a new award procedure, the contractor who has so far executed the service or work or supplied the product participates, it is obvious that he has more information than other possible competitors regarding strategies, plans of the contracting authority, way of working, financial situation, etc. Some of this information is at least sensitive, if not confidential. However, they can clearly influence the outcome of the new procedure by disadvantaging other competitors. The contracting authority is in a position to ensure that all competitors are treated equally, therefore it has a difficult and delicate task from this point of view, having to ensure that it does not create a competitive advantage (Dumitru, I., 2019, p.33).

"Mutual recognition" - this principle requires that goods legally produced in one Member State are accepted for sale in the other EU Member States. Of course, services legally provided in the territory of one Member State may also be provided in the territory of another. The principle of mutual recognition does not prohibit the existence of national standards, but only the acceptance of similar standards from another Member State.

Researcher Dumitru Ilie, in his works, denotes that in the field of public procurement, the observance of the principle of mutual recognition presupposes the acceptance by the contracting authorities of the following: products, services, works lawfully offered on the European Union market; diplomas, certificates and any documents issued by the competent authorities of other States; technical specifications, equivalent to those required at national level. Therefore, whenever candidates for a procurement procedure are required to submit certificates, diplomas or other written forms of

evidence, then documents issued in other Member States and offering an equivalent level of guarantee must be accepted in accordance with the principle of mutual recognition (Dumitru, I., 2019, p.34).

The principle of "transparency" ensures adequate information for all participants in the award procedure, being important from the perspective of access to legal remedies. Compliance with this principle ensures the elimination of the risk of favoritism and arbitrary behavior by the contracting authority. In order to apply this principle, all information on the procurement procedure needs to be made clearly, precisely, unequivocally in the contract notice/invitation and in the award documentation, giving economic operators an equal position both during the preparation period and during the evaluation by the contracting authority; the visibility of the rules will also have to be ensured, opportunities, processes, records and results related to the public procurement procedure.

The principle of "proportionality" requires that the measures taken by the institutions do not exceed the limits of appropriate and necessary measures to achieve the objectives pursued, it being understood that, where a choice between several appropriate measures is possible, the least restrictive shall be used and the inconveniences caused must not be disproportionate to the aims pursued. This principle requires the contracting authority that, when faced with an ambiguous tender, and a request for clarification on the content of that tender could ensure legal certainty in the same way as the immediate rejection of the tender in question, to request clarifications from the candidate concerned rather than simply opting to reject his tender.

In Romania, in the judicial practice, the following types of violations of the principle of proportionality were found: - conditioning the qualification of an annual turnover in excess of an amount, in relation to the difficulty and the estimated value of the contract; - requesting an excessive number of documents or information regarding the demonstration of technical and/or professional capacity; - request for human resources, machinery or equipment not relevant for the proper performance of the public procurement contract or in an excessive number; - the condition of presentation in original or authenticated form of a large number of documents, although a certified copy would be sufficient; - setting a deadline for the submission of tenders insufficient to draw them up, in relation to the complexity of the object of the contract; - description of technical specifications specific to products that exceed the needs of the contracting authority; - assigning a very high score to an evaluation factor, relative to the importance of the factor in fulfilling the contract; - the request for inadequate guarantees to the risk involved in the award and proper performance of the contract (Dumitru I., 2019, p.38).

The principle of "liability assumption" implies the obligation of those involved in the conduct of public procurement procedures to assume the decisions taken and to be responsible for the consequences of their actions. This principle is not a transposition of the EU Directives, but a creation of the Romanian doctrine. It presupposes a clear determination of the tasks and responsibilities of the persons involved in the public procurement process, ensuring the professionalism, impartiality and independence of the decisions taken during this process. The responsibility lies exclusively with the evaluation committee and the decision-makers in the contracting authority, regardless of the views expressed by ex ante or ex post control bodies in the field of public procurement or the recommendations of the authorities with competences in the field or in other fields.

The administrative perspective of public procurement makes possible the existence and applicability of a fundamental principle, the principle of taking responsibility, with regard to administrative acts issued for the purpose of initiating, conducting and completing public procurement. That principle

thus finds its applicability in the administrative sphere of public procurement, by issuing administrative acts expressing the manifestation of express will of the contracting authority under public power (Dumitrica, C., 2021, p.19).

According to the regulatory framework, the procurement plan of the contracting authority represents the set of needs for goods, works and services for the entire budget year, needs to be met by concluding one or more public procurement contracts, depending on how they are planned. A problem worth mentioning is the non-compliance with the basic conditions and principles applied to public procurement planning, a fact also recorded in the audit reports of the Court of Auditors. Thus, the procurement plan must correspond to the principles of annuality; grounding on real needs; financial coverage; accessibility and transparency. At the same time, when planning public procurement, the working group is obliged to respect the principles of ensuring competition, efficiency, transparency, equal treatment, non-discrimination and non-division.

In this context, the audit revealed that, within the contracting authorities in the system of 6 ministries, the quality level of public procurement planning was low, and the way of developing/publishing the respective public procurement plans was non-compliant (9).

Thus, these entities did not ensure the implementation of public procurement in accordance with the principles set out above and admitted deficiencies and irregularities that totaled 1244.7 million lei. Among them, it is specified:

• non-publication of regular notices of intent on public procurement envisaged within ministries in the amount of 258.8 million lei;

• failure to update and publish annual procurement plans on the website of contracting authorities worth 296.5 million lei, as well as carrying out public procurement procedures with a total value of 198.8 million lei. lei not included in the annual procurement plans;

• lack of exhaustive data on low-value acquisitions (those reported to GPA amounted to 121.3 million lei), as well as the lack of a system for monitoring and informational interaction of these public procurements at all stages of planning, implementation, award and reporting of contracts;

• non-capitalization by some contracting authorities within the system of 3 ministries of financial means for public procurement in the amount of MDL 369.3 million. lei, some of the causes being the allocation at the end of the budget year of financial means mainly for works, as well as the reduced absorption capacities of funds, including from external sources;

• Inadequate planning, by a contracting authority, of the needs of financial means for reimbursed medicines (596.0 million lei), does not provide data on facilitating the coverage of several groups of citizens who require reimbursement of medicines.

In another context, in the same audit report, the Court of Auditors pointed out the non-compliance of the contractual clauses with the technical specifications proposed by the winners. Thus, it was pointed out that the clauses of the contracts concluded with economic operators do not correspond to the technical specifications of the winning tenders, and the contracting authorities within the system of 7 ministries did not receive the goods, works and services according to the conditions of the concluded contracts, deficiencies and irregularities amounting to 403.2 million lei in total being admitted.

The management of public procurement within the system of some ministries was affected by irregularities, with a negative impact on the performance of procurement in economic conditions, the initiation and conduct of public procurement procedures not being ensured in a regular manner. Thus, it was attested the application of the procedure for the procurement and award of the contract for the procurement of equipment for the construction of the radio communication network in TETRA standard with the value of 163.5 million lei by negotiation method without prior publication of a participation notice referring to the "technical reason for creation", which is contrary to Law no. 131/2015, the contracting authority not respecting the principles of legality, transparency, competition, efficiency and economy. At the same time, exaggerated final costs of the radiocommunication network were admitted due to the application on the customs territory of illegitimate trade margins, which at some equipment positions reached the maximum quota of 229% of the initial purchase price, being spent from the state budget by 24.4 million MDL more, as well as being caused budget losses in the amount of 14.5 million MDL (9).

At the same time, the Court of Auditors also found some violations in which payments were made for works in the absence of reports of receipt of works for the construction of the radiocommunication network, documents supporting the quantitative and value standard on the execution of network construction works (30.6 million lei). In the context of the audit, the construction of the radiocommunication network for operational purposes within the Police was not completed, as well as the procurement budget approved according to the Financing Agreement was exceeded by 27.9 million lei.

Therefore, the audit missions carried out by the Court of Auditors on the compliance of public procurement executed during 2019-2020 revealed that contracting authorities with attributions and responsibilities in the field of public finance management did not comply with the regulatory provisions in public procurement procedures for goods, works and services, reducing the transparency of the procurement process, the degree of efficiency in using public money.

In the same vein, in her research, author Kováčiková Hana analyzes several practical situations about the connection of public procurement regulatory principles. In her work, she mentions the Connexxion Taxi Services case the Court of Justice dealt with the conflict between principle of proportionality and principles of equal treatment and transparency, which arise when contracting authority hesitate to exclude a tenderer from the procuring procedure due to disproportionality of such act, despite such procedure was noticed in tender conditions. The Court of Justice prioritised the latter with establishing, that Public Procurement Directive read in the light of principle of equal treatment and the obligation of transparency must be interpreted as "precluding a contracting authority from deciding to award a public contract to a tenderer which has been guilty of grave professional misconduct on the ground that the exclusion of that tenderer from the award procedure would be contrary to the principle of proportionality, even though, according to the tender conditions of that contract, a tenderer which has been guilty of grave professional misconduct must necessarily be excluded, without consideration of the proportionality of that sanction" (Kováčiková, H., 2021 p. 398).

The regulation of public procurement involves taking into account two arguments, one economic and the other legal, in order to create an integrated public market at European Union level. Thus, the existence of the principles of transparency, non-discrimination and equal treatment in awarding public procurement contracts implies that the regulatory system of public procurement will ensure: competition in relevant geographic or product markets; penetration of imports of products and

services to the public sector; flexibility of public contracts within the common market with impact on price convergence, as well as on rationalisation and restructuring of the European industrial sector (Mardale, F.E., 2015, p.17).

Conclusions

For the Republic of Moldova, the harmonization of legislation in the field of public procurement is an obligation assumed, in the context of the negotiation process of accession to the European Union. However, Member States have the obligation to transpose European directives on public procurement at national level and to monitor their implementation, in order to avoid legislative violations that may occur when implementing EU-funded projects, in particular, and public funds, in general.

Thus, as a result of what we researched in this study, we believe that it is necessary to rethink the public sector and especially to resize its expenses, starting from the most judicious use of the resources available and up to increasing the quality and efficiency of the services offered. At the same time, I noticed that the way of developing and publishing public procurement plans, at the level of ministries, does not ensure the existence of a clear, complete and transparent vision on how public money is used. Of the 11 principles regulating public procurement relations provided for in the Law on Public Procurement, the most frequently violated principles are the efficient use of public money and the principle of transparency of public procurement.

Therefore, the issue of public procurement is gaining an increasing magnitude and connotation, which is why it is necessary to perceive the importance and relevance of the correct application of the principles governing public procurement, applied from the first to the last stage of procurement. These, taken as a whole, will determine the essence of public procurement approaches: administrative, managerial, legal, economic, systemic and environmental.

The reform in the field of public procurement is one of the major priorities of the Republic of Moldova, which will contribute to ensuring a better functioning of the market economy, fighting corruption and achieving optimal capitalization in terms of goods and services purchased by a wide range of public institutions.

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