

CONDUCTING AND USING MONITORING IN PUBLIC PROCUREMENT CONTRACTS

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Abstract: *Demand is a major potential source of innovation in public procurement contracts, yet the critical role of demand as a key driver has still to be recognized in contracting authorities' policy. This article discusses contract's monitoring as one of the key elements of public procurement contract performance. The paper starts by signalling the requirements of the new European rules in public procurement. It then defines the public procurement contract and embeds this concept within the taxonomy of monitoring. The rationales and justifications of public procurement monitoring to spur performance are discussed, followed by a consideration of the challenges of contracting authorities in institutionalizing it. The aim of this paper is to develop a framework for measuring the performance of public procurement contracts. It also provides significant insights into the development of key performance indicators for measuring the performance of a contract.*

Keywords: *contract management, life-cycle factors, performance indicators.*

INTRODUCTION

The purpose of this paper is to study ways in which contracting authorities can improve their performance through public procurement contract management. While public procurement legislation is under change in Romania and the National Agency tries to implement standard frameworks, contracting authorities should evaluate their aim - the public interest, and the desired quality of goods, services and works necessary to acquire.

Like any other organization, it has become essential for public organizations to measure their performance effectively. Therefore, it is imperative for them to know about various performance measurement factors that influence their performance. However, our study is focused more on the public procurement contract performance and on identification of factors for measuring performance. In the Romanian system of public procurement we have a significant variation among the contracts used by the contracting authorities and most of them do not have performance indicators included. Our research hypothesis is that even if, in the Romanian public authorities we do not have a culture of performance based on key performance standards and indicators, public procurement contracts cannot be consider anymore without them. The findings may allow refinement of existing contract awarding strategies and of current regulations. We conclude that economic operators could benefit from monitoring contract using performance approach rather than seeking to acquire more new contracts.

THE CENTRALITY OF PERFORMANCE IN THE PUBLIC PROCUREMENT DIRECTIVES

More than any other public sector issue the public contract supports the influence of the European Union (EU) law to varying degrees, depending on the ‘phase’ the contract is in. The public procurement contract’s strategy can be divided into three phases: (1) the definition of a need for a good, service or work, (2) the procurement procedure leading to the award of the contract, and finally (3) the contract management. (Cărăușan, 2017) As we already mentioned our interest for this paper is for the third phase, more precisely the importance of monitoring in public procurement process. The Directive 2014/24/EU brought innovations on procedural rules on negotiation, on the regime of contracts for certain social and health and some other services, on the electronic procurement technique, on the rules on social and environmental aspects, on the safeguards from corruption and on the ones to enhance small and medium enterprises participation. Besides these, now for our interest is the performance of the contract and the key performance indicators.

According to the Directive 2014/24/EU the contracting authorities may “lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract¹”. Special conditions may will include economic, innovation-related, environmental or social considerations if they have been foreseen in the initial procurement documents.

The Court of Justice of the European Union (CJEU) recently quashed the use of this provision in the minimum wage requirements, see *Bundesdruckerei C-549/13*² and in the environmental requirements, see the *Dutch Coffee C-368/10*³. In *Bundesdruckerei* case according to paragraph 28⁴ CJEU stated that the minimum wage requirements can be classified as “special conditions relating to the performance of contract”, in particular “social ... considerations” only to the extent to a which is compatible with the Community/EU law. Likewise, in paragraph 36⁵ of the same decision it was established that in the situation of a

¹ Article 70 of the Directive 2014/24/EU

² Case 549/13 *Bundesdruckerei GmbH and Stadt Dortmund* available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=157851&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=240317> retrieved on December 12, 2017.

³ Case 368/10 *European Commission and Kingdom of the Netherlands* available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=122644&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=222031> retrieved on December 12, 2017.

⁴ Paragraph 28 of the Case 549/13 *Bundesdruckerei GmbH and Stadt Dortmund*: “In addition, although, as the European Commission maintains, the public contract at issue in the main proceedings appears, in the light of its objective and the amount of the contract, to come within the scope of application of Directive 2004/18, and assuming that the requirements relating to the minimum wage laid down in Paragraph 4(3) of the TVgG-NRW can be classified as ‘special conditions relating to the performance of a contract’, in particular ‘social ... considerations’, which are ‘indicated in the contract notice or in the specifications’, within the meaning of Article 26 of that directive, the fact remains that, in accordance with that latter provision, such requirements may be imposed only to the extent to which they are ‘compatible with Community law’.”

⁵ Paragraph 28 of the Case 549/13 *Bundesdruckerei GmbH and Stadt Dortmund*: “In the light of all of the foregoing, the answer to the question referred is that, in a situation such as that at issue in the main proceedings, in which a tenderer intends to carry out a public contract by having recourse exclusively to workers employed by a subcontractor established in a Member State other than that to which the contracting authority belongs,

tendered which carry out a public contract with employees of a subcontractor from another Member State the contracting authority may require to the subcontractor to pay its workers a minimum wage fixed by the state legislation of the authority.

As it concerns the decision of the Court in the Case 368/10, paragraph 102⁶ clarifies the ‘criteria of sustainability of purchases and socially responsible business’ to which a tenderer must comply as condition of contract performance and consider it, at the Commission submission, a general policy related to the technical and professional ability of the tenderer. Moreover, in recital 104⁷ of the Directive 2014/24/EU, the Commission shapes the contract performance as fixed objective requirements which have no impact on the assessment of tenders and they should not be directly or indirectly discriminatory and are linked to the subject-matter that comprise the entire life cycle of goods, services and works. Everything is under the condition of being in the contract notice, the prior information notice used as a means of calling for competition or the procurement documents.

The solution set out in the text of the Directive is relatively friendly for contracting authority, but it might be misinterpreted. Competition could be distorted and equal treatment not guaranteed by means of the introduction of requirements that are not possible to validate at tender evaluation stage by the contracting authority. The distortion might be in the ex-ante compliance of tenderer and the breach of the contract clauses ex-post by being subject of penalties or other remedies. On the other hand, the Directive states, the situations in which the economic operator “has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract liability for damages or other comparable sanctions”⁸ are foreseen as motive for the exclusion. Even though, it is allowed that any applicant who finds itself in this situation “may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability

Article 56 TFEU precludes the application of legislation of the Member State to which that contracting authority belongs which requires that subcontractor to pay those workers a minimum wage fixed by that legislation.”

⁶ Paragraph 102 of the Case 368/10 European Commission and Kingdom of the Netherlands: “The parties disagree regarding the classification of the requirement at issue, according to which the tenderers must comply with the ‘criteria of sustainability of purchases and socially responsible business’, inter alia by contributing to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production. The Commission submits that that requirement concerned the tenderers’ general policy and therefore related to their technical and professional ability within the meaning of Article 48 of Directive 2004/18. By contrast, according to the Kingdom of the Netherlands, that requirement applied to the contract at issue, meaning that it was a condition for performance of the contract within the meaning of Article 26 of that directive.”

⁷ Recital 104 of the Directive 2014/24/EU: “Contract performance conditions are for laying down specific requirements relating to the performance of the contract. Unlike contract award criteria which are the basis for a comparative assessment of the quality of tenders, contract performance conditions constitute fixed objective requirements that have no impact on the assessment of tenders. Contract performance conditions should be compatible with this Directive provided that they are not directly or indirectly discriminatory and are linked to the subject-matter of the contract, which comprises all factors involved in the specific process of production, provision or commercialization. This includes conditions concerning the process of performance of the contract, but excludes requirements referring to a general corporate policy. The contract performance conditions should be indicated in the contract notice, the prior information notice used as a means of calling for competition or the procurement documents.”

⁸ Article 57, paragraph 4 (g) of the Directive 2014/24/EU.

despite the existence of a relevant ground for exclusion”⁹. This aspect must not be neglected by the contracting authorities when they select a tender and think of the contract management.

This new integrated vision of the Directive may open the way to significant improvements in the Romanian public procurement market. Consequently, the contracting authority should not forget about the limits of such a clause in the procurement process. The clause should be established in a way which do not disturb the competition and the equal treatment is guaranteed. Procurement management is traditionally considered as the most valuable part of procurement process affecting many aspects of the organizational performance. Even if, the tendency to measure the contract based on criteria of time, cost and quality do not accommodate, anymore, to the complexity of life-cycle performance we will start the research from these criteria. In future researches we will try to study how a contracting authority could ensure that the procured assets (goods, services and works) are ‘future proofed’.

WHY MONITORING OF PUBLIC PROCUREMENT CONTRACT AND NOT JUST THE ADMINISTRATION OF IT?

Legal scholars look at the public procurement contract through the lens of the administrative contract and usually identify instruments in the “regulatory toolkit” to address the administration of the contract. Closely connected with the market requirements and the need to accomplish the wider public interest with goods, services and works with a better quality, we will enhance in this section the necessity of monitoring based on the contract performance requirements. In a competitive market, a supplier can choose not to meet or follow the standard, and simply decide not to do business with the contracting authority imposing the performance standard. Viewed in this light, procurement shares some features with the market-leveraging approach of subsidies (Light and Orts, 2017:4). As we mentioned before, the substantive Directives 2014/24/EU, 2014/25/EU and 2009/81/EC allow contract performance conditions, as long as these comply with EU rules and are indicated in the procurement documents.

To fully understand what performance standards and indicators are, the first step is to know what performance is. Neely et al. (2005), defines performance measurement as: “the process of quantifying the efficiency and effectiveness of action”, and performance measure as, “a metric used to quantify the efficiency and/or effectiveness of an action”. Furthermore, in literature is stated that performance might act as a motivation driver and a driver for continuous improvement and help achieve strategic objectives (Olsen et al., 2007). The answer for procurement performance might be found in the factors which influence the entire procurement process. Among them the quality and quantity ones (Q-factors), are the most common used and provide to the contracting authority a better tracking of the variation between the desired good, service and work and the actual one, the received one. It enhances accuracy in the process and decreases deviation from contract clauses. The purpose of quality factor is to verify existence, relevance and comprehensiveness of the standards established in procurement documents. A common error in the Q-factors is deviation in the amount received and the amount in the purchase order.

⁹ Article 57, paragraph 6 of the Directive 2014/24/EU.

The Q-factors are followed closely by the time one (T-factor), which measures how often there are deviations of the contract clauses, how much extra time is required to correct them or how often there are deviations on the invoices received that require extra work. The T-factor is about the entire life-cycle of the goods, services and works procured by the contracting authority and it is directly influenced by the life-cycle costing (LCC). The LCC methodology is an instrument for assessing the costs over time. The Directive 2014/24/EU¹⁰ in art. 67 paragraph 2¹¹ corroborated with art. 68¹² recommends the use of life-cycle costing methodology which evaluates all of the costs over the life-cycle of works, goods and services. We recommend the use of the LCC methodology by the contracting authority, but, as we already mention, in the present research we will not study it.

Equally important, as we demonstrate above for the Directives outlook, are the ones which concerns sustainability – either they are financial, social and/or environmental (S-factors). The procurement budget and financial factors are the most common factors used as trigger of contracting authority decision to terminate a contract. Life-cycle costing methodology in public procurement helps to support sustainable growth. The contracting authorities are becoming far more aware of the fact that the life-cycle costing represents a better indicator of value for money than the price alone. Besides, the conventional approach of the life-cycle as financial assessment, the environmental one gets ahead, with the support of the CJEU case law (see the above section). The environmental impact may entails significant costs for the contracting authority in certain circumstances, even if, they are external and not directly born as the financial one. In general, materials and products used for services or constructed facilities, may have environmental impacts (e.g. emission of greenhouse gases) due to the processes done during the life-cycle of them, such as: manufacture, transport, assembly/disassembly, maintenance and disposal. A comprehensive LCC analysis also takes into consideration the life-cycle costs of reducing environmental impacts in the society. Because, generally, the contracting authority is a public institution which has as main purpose the accomplishment of wider public interest the social impact of procurement process should also be considered. The social impact could be analyzed directly through specific indicators or through the financial or environmental ones. Anyhow, the

¹⁰ The same life-cycle costing rules and definitions apply under the special sectors Directive. The classical sector Directive and the special sectors one have parallel provisions: the text of articles 82 and 83 of the last is identical to the text of articles 67 and 68 of the first one.

¹¹ “The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question.”

¹² “Paragraph 1. Life-cycle costing shall to the extent relevant cover parts or all of the following costs over the life cycle of a product, service or works: (a) costs, borne by the contracting authority or other users, such as: (i) costs relating to acquisition, (ii) costs of use, such as consumption of energy and other resources, (iii) maintenance costs, (iv) end of life costs, such as collection and recycling costs. (b) costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified; such costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs. Paragraph 2. Where contracting authorities assess the costs using a life-cycle costing approach, they shall indicate in the procurement documents the data to be provided by the tenderers and the method which the contracting authority will use to determine the life-cycle costs on the basis of those data.”

social costs are measured based on the burdens brought by the procured goods, services and works to the public services.

The QTS-factors foresee the inaccuracy of goods, services and works delivered in a procurement contract and if they are not monitored, they may will influence the goals of the contracting authority, and probably the wider public interest. They should be tracked by all contracting authorities because in terms of performance they assess the five E-criteria – economy, efficiency, effectiveness, ethics and employees’ empowerment (QTS-E). Besides, they stand for an efficient, effective, ethical, economical and empowered contracting authority, they back up the modification of the contract (see, for more on modification of public procurement contracts, Carausan, 2017).

Economy focuses on paying the cheapest price for similar goods, services and works, whereas efficiency is getting the maximum output of goods, services and works for a given input of resources or minimizing the input of such public resources for a given output of the procurement procedure (Sigma Brief 28, 2016:2). As Peter Drucker indicated there is no efficiency without effectiveness, because it is more important to do well what you have proposed (the effectiveness) than do well something else that was not necessarily to (Drucker, 2001, p.147). So, effectiveness assesses whether the performance obtained meets the objectives that were set, while ethics is about the conflict of interests and corruption prevention. The added empowerment criterion is much more important for the Romanian public procurement system than for other European countries, because even the public employees are the ones called to implement the entire procurement process the public authority leaves their training and the costs of it on their shoulders. The employee should be ready to undertake procurement activities on an ad-hoc basis grounded on the knowledge they have or on the access to professional staff who can provide this knowledge. Moreover, delegation of authority and responsibility is the key for having a well-functioning system especially when procurement is decentralized. If delegation is not provided, it can lead to the concentration of decision making under few individuals who have neither the training nor knowledge to take procurement decisions. Between the employees’ knowledge and the contract performance there is a systematic matching.

For assessing the E-criteria, but not limited to them, the contracting authority must define a set of responsibilities which may include: drafting the documents of the procurement process; providing advice to economic operators; managing public procurement and developing contract management plan; reporting on procurement to other institutions/organizations; providing instruments and mechanisms for monitoring and evaluation, and supporting employees’ training and knowledge development. The purpose of this last competence is to assess the degree of professionalism and knowledge of those responsible for implementation of procurement process. Everything should be backup by a system for safekeeping of all records and documents, elaborated and agreed in the procurement process. The QTS-E measurements in the contract management are the ones which take us beyond the simple administration of the contract. The QTS-E lead us to the implementation of the Key Performance Indicators (KPI) in the public procurement contracts as the answer to the contract performance. Most purchasing contracts include specific indicators, but most of the time they are buried in the contract details and poorly

tracked (see for example the projects of the framework contracts established by the Romanian National Agency for Public Procurement¹³).

Contract performance will be measured against KPIs and associated criteria which must be upon the beginning of the procurement process advanced and agreed.¹⁴ Monitoring throughout the implementation of public procurement contract indicates the compliance degree of the parties, contracting authority and economic operator, with the KPIs. Monitoring aims to collect data during the implementation of the contract, mainly to answers to questions such as: how much has been spent, what are the goals achieved so far, who are the beneficiaries, are their differences between the proposed timetable and the actual one? Monitoring refers to the entire evolution of the contract, and it helps the contracting authority, and also the economic operator, in: providing qualitative observations and data on how well the goods and services are delivered or the works performed; verifying the achievement of the results/needs through the goods, services and contracted works; determining the degree of need to be reached as a result of the activities carried out by the supplier, provider, executor; determining the impact of the goods, services and works on the contracting authority's activity (e.g. providing better services to customers/citizens).

THE QUEST FOR KEY PERFORMANCE INDICATORS

Procurement operates have become a lot more structured and systematic during recent years and there are well defined instructions for how the decisions in regard to design changes should be made. Evens so, procurement does not create the plans or the forecasts, but order the quantity specified in annual or multiannual procurement plan. It is important that key performance indicators to be identified, in procurement documentation, and the assessment of them to be a requirement of the contract. This may be required for subcontractor(s) also. Moreover, key performance indicators may be of particular importance where the contract stipulates that the contractor will be rewarded or penalized based on their performance relative to certain indicators.

The “quest” for KPI in public procurement contracts should be done under few limits which we recommend to contracting authority to consider them when wants to enact performance indicators. Among them we can mention:

- only performance indicators that are really important to the authority must be select to be included in the contract. Each indicator must reflect concrete benefits for the contracting authority.
- use simple indicators, it is not advisable to use complex performance indicators which require sustained work to determine them (such as the organization of complicated research and analysis etc.)
- each indicator must be easy to understand by the supplier. For example, using the "document delivery time to contracting authority or other beneficiary" parameter does not fully reflect the

¹³ They can be retrieved in Romanian at <http://anap.gov.ro/web/category/transparenta-decizionala/proiecte-in-consultare/?future=false>.

¹⁴In the Law no.98/2016, which transpose the Directive 2014/24/EU, it is stated in art. 221, paragraph 11 that the performance and quality conditions cannot be subject to the modification of public procurement contract, along with other elements of it.

tender's activity, as the delivery of documents is often carried out by courier companies. In this context, the "timeline for transmission of documents to the courier company" is more appropriate.

- performance indicators must not be subjective, but they must be appreciated and measured. For example, for the use of the "quality" indicator, the measurement scale and the compliance criteria against the required parameters must be provided. Several compliance factors should be used to assess the activity (such as the percentage ratio vs. the expected result). Even if, the tender exceeds the time terms or made a mistake in the quality and/or quantity of goods, services or works, should be aware of the fact that the payment(s) are done only after the correction of them. Moreover, remedies may be established by the contracting authority. The payment of economic operator(s) is a control in itself, but the power that contracting authorities have at this stage of the procurement process must not be used to unjustly delay or withhold payment to economic operators that have delivered the goods, services and/or completed the work (Sigma Brief 22, 2016:6).

- the task of regularly reporting the status of the main performance indicators should be done by the tenderer. In this way, the time allocated for calculating the indicators will be reduced, and the economic operator will be stimulated to better fulfill its obligations.

- flexibility to change performance without going through a new procurement procedure might be necessary in order to fulfill needs and obtain savings, but such flexibility could also represent a distortion of the competition and a breach of the equal treatment principle. Such flexibility, according to the Romanian public procurement rules is not allowed.

During the public procurement process a contracting authority puts a lot of time and effort into identifying reliable economic operator(s), negotiating favorable terms, and ensuring a strong basis for the award decision. Despite the best preparations, however, existing contracts often require modifications either based of the compliance with QTS indicators, or on the: requirement of additional works; tender's demand for higher prices, subcontractors change. The contract terms and conditions should include mechanisms to cope with permitted modifications during the life of the contract. Currency fluctuation clauses and price indexation clauses are common examples where the need to make a modification can be foreseen and accommodated within the contractual clauses (Sigma Brief 22, 2016:5). Using KPIs for performance measurement ensures contracting parties that the contract is always under evaluation. This means that contract fluctuations are immediately visible and if performance is not reached, quickly the situations are redressed.

In procurement contracts, unlike any other activities, when the KPI shows that performance is consistently meets or exceeds the required level, the contracting authority cannot decide to raise the bar and set a higher standard to aspire to. For this reason, KPIs are essential for monitoring of the contract and not for the improvement of the contracting authority procurement process, at least not when it is underdevelopment. But, KPIs provide visibility of contract performance and allow objective ex-post evaluation of the contract and supports ex-ante evaluation of future procurement processes. When aligned with procurement goals of the contracting authority, KPIs take away the guess work and enable focus on progress towards the goals. A regular planning exercise instituted by law, or Directives, and trailed with KPIs augment a better preparation of multiyear plans for the contracting authorities, from which

annual procurement plans and estimation of the associated expenditures are derived and culminates to the contracting strategies.

CONCLUSIONS

Nowadays the biggest challenge for most of the Romanian public institutions is a real and substantial application of performance measurements. Definitively, it is necessary to pursue performance through the measurements of specific indicators and control the variables that influence the state public procurement system issues. The aim of this paper was to contribute to the development of a comprehensive, yet practical and reliable tool for a systematic public procurement contract assessment, based on key performance indicators. The recommendations are according to the new regulatory procurement system of the EU. The outcome is an integrated analysis on the necessity to implement the contract monitoring based on key performance indicators.

As pillar of our research was in large the issue on how to conduct and use monitoring in public procurement contracts. And, in order to use it contracting authorities are advised to have standard procedures in place for the monitoring activities and to seek advice from other competent authorities in the case of large or complex contracts. Once the contract has been concluded, public procurement regulations are no longer applicable. In this phase the monitor may focus only whether the contract is duly executed, while safeguarding the rights of the public authority or may see the influences produced on the goals of the organization or on wider public interest. Romanian public authorities do not have the culture of performance measurements and many of them may face the challenge of implement them. For this, the pro-active role in elaborating a Guide for contracting authorities, and also for the economic operators, on how to use the key performance indicators in public procurement contracts and to manage, in general, a contract through monitoring is longed-for in the Romanian system.

Public procurement performance measurement systems and indicators allow public employee to check the E-criteria and provides for the wider public data that are required for the analysis of the public sector performance. The performance measurement based on E-criteria is a must in this area of knowledge, either with the development of specific methodologies or to traditional performance measurement. The performance measurement in public procurement system cannot be imposed by law or by economic operators. The performance interdependency within the national system, the contracting authority and the contract monitoring must internalized, even if, the needs, objectives and methodologies for measuring contract performance at each level can differ.

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