Deutsch-Rumänische
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Translation from Romanian

Mr. Prime Minister
Sorin Grindeanu
Romanian Government
Bucharest

With copy to:

Mr. President Klaus Iohannis, Romanian Presidency
Mrs. Vice-Prime Minister Sevil Shhaideh, Ministry of Regional Development, Public Administration and European Funds
Mrs. Delegate Minister Rovana Plumb, Ministry of Regional Development, Public Administration and European Funds
Mr. Minister Viorel Ștefan, Ministry of Public Finance
Mr. Minister Tudorel Toader, Ministry of Justice
E.S. Ambassador Cord Meier-Clodt, German Embassy Bucharest
Mr. Bogdan Pușcaș, President of the National Agency for Public Procurement
Mr. Silviu-Cristian Popa, President of the National Council for Solving Appeals
Mr. Bogdan Marius Chirițoiu, President of the Competition Council

Bucharest, March 30, 2017

Ref.: Position paper of the working group "Public procurement practice" within the Romanian-German Chamber of Commerce and Industry regarding the new legislation in the field of public procurement and Law no. 233/2016 on public-private partnership

Dear Mr. Prime Minister,

In spring 2013 the Romanian-German Chamber of Commerce and Industry founded a working group regarding the "Public procurement practice", which includes some of the most important German construction companies in Romania, but also companies from other economic sectors, such as industry, health etc.

The abovementioned working group has regular meetings, in which the evolution of the fields of public procurement in general, concessions, public-private partnerships, legislative

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amendments are analysed, the experience of the represented companies having as primary aim drafting proposals and **constructive measures** with respect to the framework and operating manner of the said fields, including the aspects which influence positively or negatively the manner of preparing, developing and implementing projects. In this respect we recall the position papers published in the past by the working group "Public procurement practice" within the Romanian-German Chamber of Commerce and Industry:

- 17.12.2013: Observations and proposals with respect to the preparation, procurement and development phase of the projects;
- 17.09.2014: Observations regarding GEO 51/2014: NCSA appeals and the obligation to submit the guarantee of good conduct;
- 31.08.2015: Observations and proposals regarding the draft of the Public Procurement Law and of the Law on the remedies and appeals regarding the award of public procurement agreements and of the concession agreements and on NCSA organisation and functioning.

In this respect and in the context of the experience of the working group members accumulated in the development of public procurement procedures during the last 6 months, based on the new legislation in the field of public procurement[1], please find the following:

a) our feedback with the intention of helping the authorities and institutions involved to constantly correct and improve this field and
b) some regulatory proposals of fields or topics adjacent to the public procurement, which significantly affect the quality of the initiated procedures and of the chances of success with respect to their implementation, as expected by their initiators.

a) Feedback:

1. The new legislation in the field of public procurement led to substantially reduction of bureaucracy as regards the manner of development of the award procedures, in particular by preparing and submitting tenders by electronic means (for the procedures which currently allow

[1] **Law no. 98/2016** on public procurement, **Government Decision no. 395/2016** on the approval of the Methodological Norms for enforcement of the provisions regarding the award of the public procurement agreement/framework agreement of Law no. 98/2016, **Law no. 99/2016** on sectoral procurement, **Government Decision no. 394/2016** on the approval of the Methodological Norms for the enforcement of the provisions regarding the award of sectoral agreement/framework agreement of Law no. 99/2016, **Law no. 100/2016** on works concessions and services concessions, **Government Decision no. 867/2016** on the approval of the Methodological Norms for the enforcement of the provisions regarding the works concession agreements and services concession agreements of Law no. 100/2016, **Law no. 101/2016** on the remedies and appeals regarding the award of public procurement agreements, sectoral agreements and works concession and services agreements, as well as the organisation and functioning of the National Council for Solving Appeals.

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the use of electronic means) and by submitting the European single procurement document (ESPD) in the first phase.

This aspect is in full accordance with the strategy at European level, being likely to generate increased efficiency, reflected in: reduced costs for the parties involved, shortening the duration of the procurement process, increased transparency and facilitating the access of the economic operators (including SMEs) to the procurement procedures.

2. After initiating the new legislation there was a period of time in which no procedures were initiated; however, many central and regional projects have been initiated during the last 4-6 months.

Given the intention of the legislator to have tenders accurately assessed in terms of price, we are today in the position to bid without knowing the tenders of the other bidders immediately after their presentation. Theoretically, this should be a positive aspect, each bidder performing its assessment without being influenced by the price used by the competitors in temporally close situations or projects, in the next tender. In practice, however, if we analyse the situation and note that there are **many tenders** in progress, but **very few of them were awarded during the last months** (at least in the field of infrastructure), the companies experience a decrease of transparency and a high degree of uncertainty, having many tenders submitted, but without completing these procedures and without publicly releasing the rankings. This aspect may affect the economic environment, especially the small and medium companies depending on the continuity in the implementation of projects. Up to a certain point, the encryption of the value of the tenders can be beneficial, **but in case the result of the tenders is uncertain for a long period of time**, this aspect will affect the functioning of a competitive market, having severe effects on prices and on the chances of success of the tendered projects.

Although Art. 214 para. 3 of Law no. 98 and Art. 227 para. 3 of Law no. 99 stipulate a maximum period of 25 calendar days as of the deadline for submitting the tenders, in which the authorities/ contracting entities establish the winning bids, the second sentence of the same paragraphs provides the authorities/ contracting entities with the possibility to extend the abovementioned period, in exceptional, duly justified cases. The second sentence becomes problematic in case the authorities/ entities **abusively use this legislative text, thus inclining to turn the exceptions into rules.**

We opinion that *it is necessary to identify solutions to reduce or at least to observe the assessment periods and to avoid the prolongation of the assessment period repeatedly by the authorities/ contracting entities,* for example by stipulating in the law an express sanction for breach, without justification, of the terms provided by the law and by constantly monitoring the

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observance of the legal terms by the competent authorities, as well as by defining the exceptional cases in which the assessment period can reasonably be extended.

3. If, in terms of tender presentation, we speak about an unquestionably reduction of bureaucracy, the same cannot be said about the technical content of some tender books, which should represent the central point of every procedure, given its influence over the general quality of the products/ works and services and over the competitiveness of the entire public procurement process. Some authorities and contracting entities **express excessive and formalistic technical requirements, without adding value to the real requirements regarding the quality of the tenders**, but only increasing the work volume regarding the drafting of the technical documents for the bidders. This aspect is even more counterproductive, as these excesses are acknowledged in case of *simplified procedures* (the old "request for offer").

In the same context, we note that most of the tenders (in particular for the construction sector) are developed based on the "**lowest price**" criterion, in spite of the repeated critics and disadvantages noted in connection with the use of this criterion on a large sale and of the objectives of the legislator to conform the agreements having a high level of complexity (such as those in the field of infrastructure) to award criteria adapted to the said level of complexity. (*e.g.*: the best value for money criteria).

Hopefully it is not intended to differentiate the quality of the bidders/tenders from another point of view other than in terms of price, based on excessive formal requirements and following a discretionary assessment of the compliance of the technical bids, **in absence of alternative elements of differentiation** (which might be however established based on the criteria "**the best value for money**", as already noted in our previous position papers).

4. We welcome the entry into force of the new legislation on public procurement, but its real benefits can be attained only if **progress is made in the secondary legislation and in its concrete manner of implementation**. One of the **major observations we have identified since 2013** is **the absence of coherent and balanced template agreements between authorities/ contracting entities and contracting economic operators**, supporting the public procurement.

For example, in the field of construction, so far, FIDIC contractual conditions have not been adopted in the form intended by the Ministry of European Funds for many years and no viable alternative has been developed with regard to the current contractual issues raising disputes during the implementation phase of the project.

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Note should be taken that, in the meantime, the draft agreements/ unbalanced agreements, often even abusive, are subject to appeals in case of large infrastructure projects (highways), resulting in damage of the prerequisites of a real competition in the tender phase, as well as the proper execution of the subsequent projects. There are agreements in which usual responsibilities borne by authorities/ contracting entities are transferred to the economic operators. Also, the manner of implementing the agreements, from various reasons, is strongly altered subsequent to the will of the parties expressed in the tender phase.

We deem that **clear, consistent, balanced and especially predictable contractual relationships** are the basis for successful projects and collaborations. In this respect, we consider that the authorities/ contracting entities should show more flexibility in relation to the wording of the contractual terms/ acceptance of amendments to such contractual terms, suggested by the bidders/ candidates.

As example, one of the most important issues confronted by the bidders is represented by the deficiencies existent between the actual circumstances on the ground and the situation presented in the tender documentation, based on which the bids are drafted and based on which the public procurement agreements are concluded. The beneficiaries constrain the economic operators to quantify all technical elements, such as hidden utilities networks, even unknown to their owners. Transferring all financial obligations in connection with the relocation of the utilities not covered by the tender book, but discovered during the works, to the economic operators,, leads to an unequitable situation and to high damages for the entrepreneurs, since the provisions of Art. 221 of Law no. 98/2016 are not applicable for such entrepreneurs. We are of the opinion that it is necessary to regulate a distinct case of amending the agreement which allows such operation unequivocally.

5. In practice, we note a certain **reticence** of authorities/ contracting entities to **take remedial measures**, in particular following the announcement of the result of the award procedure. We deem that, in this context, replacing the right of economic operators to notify the contracting authority with requests for remedy according to the former GEO no. 34/ 2006, as amended, with the obligation to submit the preliminary notification referred to in Law no. 101 is not justified, especially considering that the authority/ contracting entity is provided with the possibility to take remedial measures after submitting the appeal. Therefore, in case the preliminary notification is not used by the authorities/ contracting entities to avoid appealing, in practice, **its main effect consists in the extension of the period for concluding the agreements**.

6. The **new law on public-private partnership**[2] is welcomed and represents **an improved**

[2] Law no. 233/2016 on public-private partnership

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form in comparison with the old legislation, by implementing many of the recommendations made over time by the representatives of the business environment and of project financers, offering more guarantees to the private participants, including the project financers. Moreover, the new law encourages the performance of PPP projects by briefly regulating a flexible structure, without over-regulating, and clearly dissociates the area of the projects included in the PPP field from the ones falling under the new concessions law. Also, the new law allows the implementation of PPP structures with which the investors from other jurisdictions are accustomed. Furthermore, clarifications were also regulated regarding the manner in which the public partner can participate with certain resources resulting from grants in financing projects which will fall under the provisions of the said law, and thus the PPP law can constitute a helpful solution, given the current budgetary context in Romania. Thus, we note that the new legislation is more flexible as regards both the manner of structuring of the public-private partnership and its financing, which may contribute to the actual implementation of such projects in practice. Also, referencing to the public procurement procedures for awarding projects is welcomed. Regulating the possibility of replacing the private partnership indicates, in our opinion, an enhanced interest for the following projects. We look forward to the methodological norms and effective application of the provisions of the PPP law, as practice will certainly bring to light the aspects which need clarifications, amendments.

b) <u>Issues with significant impact on the quality of the tendered projects and developed in the field of construction by means of public procurement procedures</u>

1. Indicators for estimate norms, Series 1981 – revised and amended:

This is a comprehensive material developed by the company A.O.C.C. S.A. (Consultancy, Organisation and Cybernetics in Construction) beginning with 1981, based on the agreements signed with the former M.P.W (Ministry of Public Works in the past), used for the assessment, tendering, clearing and tracking prices in the field of construction, in accordance with N.A.C.E.

This coding system of the lists of quantities/ estimates for construction works, the only of this kind in Romania, objectively flawed by time, **impedes the proper execution of many constructions projects, especially small and medium** ones (developed by the Mayoralties, County Councils etc.) for the following reasons:

a) indicators, consumptions, technologies, resources, as well as their definition and codification in these estimates are outdated, many of them defined **in the 80s**, despite of the updates performed;

b) due to various flaws in using this system, **there are projects incorrectly assessed** as of the first moment of initiating a public procurement project with all the consequences arising thereafter;

c) depending on how a designer, an authority/ contracting entity or project supervisor understands to work with these norms and indicators, public works tendering and clearing may lead to unconformities;

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d) at the sole discretion and despite the fact that these norms/indicators have repeatedly been declared references for the bidders (by Order no. 533 of May 31, 1999 amending and completing the Methodological Norms on the content – framework of the tenders, adjudication, contracting and clearing the execution of the works, approved by the Joint Order of the minister of finance and of the minister of public works and planning no. 784/34/N of April 13, 1998, Order no. 1014 of June 6, 2001 on the approval of the structure, content and use of the standard Documentation for preparation and presentation of the tender for public procurement of works), **many contracting authorities often easily abuse these provisions and excessively interpreting certain formal flaws** in filling-in the estimates within public tenders, **decide the exclusion or removal of bidders on grounds of non-compliance**. In this respect, proof are a number of conflicting resolutions from the National Council for Solving Appeals case-law.

Preserving and using this system is often justified by the contracting authorities in the absence of alternative references, by the need to perform unitary estimates to ensure comparability of tenders within a public tender etc. Sometimes, the manner of use of the documentation emanates right from consulting and design firms, which are accustomed with this system and do not know or do not want to adopt alternative solutions.
We deem that issues such as the above have a **significant impact** on the development of the public procurement in Romania in the field of construction.

Specifically, for the case referred therein, there are, in our opinion, two solutions:
a) a central authority should take over the responsibility for coordinating and handling the update, reformation of a national unified construction coding system, updated in terms of technologies, materials and modern resources, as well as of day to day reality experiences, including in terms of IT requirements and digitalization of the field of construction, giving in the same time a real freedom to each user in adapting the content of the articles, as well as in the manner of composition/calculation.
or
b) to discontinue the use of this system and to adopt practical solutions, especially since there are several beneficiaries carrying out major projects financed throughout BEI, BERD or even the European Union, using own estimates, including merged articles, as well as own norms. Especially since this system has been and is used on major projects for nearly 20 years.
2. Systematization, updating, merging synthesizing Romanian construction norms and standards.

The field of construction in Romania is regulated by a set of Romanian norms and standards, European directives, instructions and resolutions of different authorities, the situation being often unclear in terms of assumptions in which one simple question has multiple answers or the

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answers are missing: *E.g.* „Which are the best Romanian standards and examples of good practices in designing a district road?". In case of interviewing 10 different specialised people, there is a chance of receiving 10 different answers.

We do not want to develop this subject too much, but we deem that in the interest of this industry and of the proper conduct of the construction projects in public procurement and not only, an institution or **an inter-ministerial or maybe interdisciplinary commission** (in close cooperation with industry associations, with representatives of the academic environment and of the companies) must **aim at real targets and measures** for resolving issues which, at least for the business environment, seem to be abandoned.

With the risk of repeating ourselves, we emphasize again that, in our opinion, **in addition to the reform of the public procurement legislation, urgently comprehensive measures must be taken** for increasing the success of projects and for economic development, by update and professionalization of all aspects regarding the inherent content of the public procurements process in the field of infrastructure, but also in the medical field or other fields of national interest.

Same as in the past, AHK working group expresses the opinion of the economic operators involved in the day to day reality. Our intention is to provide feedback to those regulating the aforementioned fields and to make constructive suggestions, which we deem may have a positive impact on development of Romania. In this regard, we show, as in the past, our entire availability to discuss and detail the topics which we have referred to in this document in the discussion between authorities and business environment, organised in any possible legal form.

Sincerely,

Sebastian Metz

General Manager, Member of the Executive Committee
Romanian-German Chamber of Commerce and Industry

Lorand Fabian

Coordinator
Working group