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Qualification, Selection, and Award Criteria in Romanian Public Procurement

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Abstract

This paper emphasizes the crucial role of understanding the rationale behind public procurement regulations in order to ensure their effectiveness. It highlights that the diligent establishment and consistent application of qualification, selection, and award criteria are fundamental not only from a formal perspective but especially in practice, where the true impact of the legislation is reflected. Moreover, it underlines the importance of Article 224(1) of Law no. 98/2016, which provides sanctions for contracting authorities that fail to comply with the rules governing these criteria, thereby reinforcing the need for responsibility and transparency in the procurement process.

Keywords: *Public Procurement in Romania, Qualification Criteria, Selection Criteria, Awarding Criteria, Transparency.*



1. Introduction

The domain of public procurement poses numerous difficulties for all actors involved—whether members of the contracting authority, economic operators participating in procedures, or legal advisors providing specialized assistance. Among the stages of the procurement process, the planning and assessment of tenders appear to generate the greatest challenges in practice, whether with respect to the drafting of the procurement documentation, the way economic operators interpret and respond to its requirements, or the manner in which contracting authorities apply those requirements during selection and evaluation.

At the same time, the reality of the Romanian procurement market has revealed that the most damaging scenarios are those in which criteria are designed or applied with the improper aim of advancing hidden interests and favoring “preferred contractors” or operators whose influence over decision-makers prevails over the legal framework of qualification and evaluation.

Practice has also shown that, on many occasions, participants in procurement procedures depart from the intended rationale of the legislation in an effort to expedite and simplify the process. Consequently, the immediate objective of awarding the contract as quickly as possible prevails for the parties involved, while fundamental principles such as transparency, non-discrimination, equal treatment, and proportionality risks to be ignored. This may give rise to irregular practices, inconsistent with the rules laid down in Directive 2014/24/EU as well as Romanian Law no. 98/2016 and Law no. 99/2016.

This paper therefore addresses these aspects of the selection and evaluation processes, offering a legal analysis of the rationale behind the regulation of qualification, selection, and award criteria under both Romanian legislation and European Union law.



2. Qualification, Selection, and Award Criteria

2.1. Definitions

The terminology of Law no. 98/2016 and Government Decision no. 395/2016 distinguishes between three types of criteria that contracting authorities may include in procurement documentation. It is essential to differentiate qualification, selection, and award criteria, since in practice these categories are sometimes confused.

According to Article 29(1) of GD no. 395/2016, qualification criteria are defined as follows:

“Qualification criteria concerning capacity are intended to demonstrate the technical, financial, and organizational potential of each economic operator taking part in the procedure, capacity which must reflect their actual ability to perform the contract/framework agreement and to overcome any difficulties related to its execution, should their tender be declared successful.”

Thus, qualification criteria represent the primary means by which the contracting authority frames the procurement process and provides the necessary technical, financial, and organizational details to allow interested operators to prepare their tenders. On this basis, the authority assesses whether bidders are capable of successfully carrying out the intended public contract.

Article 29 (2) of GD no. 395/2016 further defines selection criteria as follows:

“Selection criteria aim to identify candidates with the highest economic and financial, technical and/or professional capacity from among the operators who submitted a request to participate in multi-stage award procedures.”

Accordingly, selection criteria serve as a complement to qualification criteria. Once it has been determined which operators meet the qualification requirements, the selection stage differentiates those with superior economic, financial, technical, or professional capacity.

The legislation divides qualification and selection criteria into two subcategories: (i) grounds for exclusion of the candidate or tenderer and (ii) capacity-related criteria.

The first category - grounds for exclusion - is regulated under Articles 164-171 of Law no. 98/2016, but will not be examined in detail here. The second category - capacity-



related criteria - is governed by Articles 172–186 of the Law and constitutes the focus of this paper.

Article 172(1) of the Law states:

“In the award procedure, the contracting authority may apply only capacity-related criteria concerning:

- a) professional activity capacity;*
- b) economic and financial standing;*
- c) technical and professional capacity.”*

These three categories constitute the only capacity criteria the authority may invoke during the selection process. They may be used both as qualification and as selection requirements. The list is limited, as expressly provided by Article 172(2). This means that the contracting authority may not establish capacity requirements beyond these categories. While the authority has discretion to choose among them, it cannot create additional criteria outside the limits imposed by law.

Award criteria, by contrast, operate at the evaluation stage, i.e., after selection has taken place. At this point, the contracting authority identifies the best offer among those admitted, based on the award criteria.

Article 187 of Law no. 98/2016 provides:

“(1) Without prejudice to legal or administrative provisions on the price of certain products or the remuneration of certain services, the contracting authority shall award the public contract/framework agreement to the tenderer who has submitted the most economically advantageous tender.

(2) For the purposes of paragraph (1), the contracting authority determines the most economically advantageous tender on the basis of the award criterion and the evaluation factors specified in the procurement documentation.

(3) In determining the most economically advantageous tender as per paragraph (2), the contracting authority may apply one of the following award criteria:

- a) lowest price;*
- b) lowest cost;*
- c) best price-quality ratio;*



d) best cost-quality ratio.”

From these provisions, it follows that the purpose of the evaluation stage is to identify the most economically advantageous tender. For this, the contracting authority may only use the four award criteria expressly provided in Article 187(3).

It should be emphasized that the use of qualification and selection criteria is not mandatory. These requirements are to be applied only insofar as they are relevant to the specific procurement procedure. The contracting authority retains discretion to decide which categories to use and is not obliged to include them all or to cover every subcategory.

2.2. Distinctions

The differentiation between qualification and selection criteria often causes difficulties in practice. To clarify this distinction, Article 29(3) of GD no. 395/2016 is particularly relevant:

“Candidate selection is a separate process following qualification and is aimed exclusively at reducing the number of qualified candidates who will submit tenders in the second stage of the restricted procedure or, as applicable, who will participate in dialogue/negotiations. Selection is carried out by awarding each candidate a score reflecting their capacity to perform the contract to be awarded.”

Read together with Article 30(1)–(2) of GD no. 395/2016, it becomes clear that the legislator intended to establish that qualification may occur in any award procedure, whereas selection applies only when there is a need to limit the number of qualified candidates. Therefore, selection is required exclusively in multi-stage procedures such as restricted procedures, competitive negotiation, competitive dialogue, and innovation partnerships.

This interpretation is reinforced by the final part of Article 30(2) GD no. 395/2016, which expressly states that selection criteria *“must refer to the qualification criteria established in the tender documentation.”*

As a result, since qualification criteria may be used in any award procedure, selection criteria must necessarily be based upon them. This correlation, combined with the



practical difficulty of drawing a clear boundary between qualification and selection, often leads to confusion between the two.

In practice, qualification requirements represent the minimum standards that economic operators must meet in order to submit a tender, while selection criteria serve to identify, among the already qualified candidates, those most suitable to carry out the contract.

The confusion is further encouraged by the legislative drafting approach, as both Law no. 98/2016 and GD no. 395/2016 regulate qualification and selection criteria together, and both categories contain the same two subcategories: exclusion grounds and capacity-related criteria.

To properly distinguish between the two, one must look at their specific legal purposes: qualification criteria demonstrate whether a bidder possesses the actual ability to perform the contract, while selection criteria are meant to shortlist, from among those qualified, the candidates with the greatest economic, financial, technical, and/or professional capacity.

Another important point arises from Article 30(3) of GD no. 395/2016, which specifies that only qualification criteria may relate to professional activity capacity. This is logical since, during qualification, the authority must verify whether the operator possesses all necessary documents, licenses, or special authorizations required to legally conduct its professional activity. Once the qualification process is completed, it would be too late to examine such issues through selection criteria, as these no longer concern abstract legal capacity but rather aim at concretely identifying the most capable operators among those already deemed qualified.

Nonetheless, practice has shown instances in which qualification or selection has overlapped with evaluation, with selection criteria being reused as award criteria.

3. Correlation Between Procedure Stages and Qualification, Selection, and Award Criteria

According to Article 8(2) of GD no. 395/2016, every public procurement process consists of three distinct stages:

“Contracting authorities are required to document and complete, for each procurement procedure, three separate stages:



a) planning/preparation stage;

b) procedure organization and contract/framework agreement award stage;

c) post-award stage, namely the performance and monitoring of the contract/framework agreement.”

For the purposes of this discussion, the first two stages are the most relevant, as they involve the application of the criteria under review. To understand selection criteria, it is useful to consider a multi-stage procedure, such as the restricted procedure.

3.1. Planning/Preparation Stage

Among the many activities undertaken by a contracting authority at this stage, those particularly relevant here are: setting the award criterion and defining the qualification and selection criteria. These tasks are typically among the final steps of planning and are based on the needs assessment, market consultation, and other preliminary processes the authority must conduct when preparing the procurement procedure (including setting timelines, drafting specifications, dividing into lots, where applicable, etc.).

The award criterion, along with qualification and selection criteria, must be determined in line with the nature and complexity of the contract and must be consistent with the requirements of the technical specifications.

Once these criteria are defined, the planning stage concludes with the drafting of the award documentation which, under Article 20 (2) of GD no. 395/2016:

“includes any requirement, criterion, rule, and other information necessary to provide the tenderer/candidate with complete, correct, and explicit details regarding the application of the award procedure.”



3.2. Organizing the Procedure and Awarding the Contract/Framework Agreement Stage

Article 10 of GD no. 395/2016 states:

“The stage of organizing the procedure for awarding the contract/framework agreement begins with the submission of the award documentation in SEAP and ends with the signing of the public procurement contract/framework agreement.”

This stage also covers the processes of qualification and selection. Thus, while in the planning stage the authority establishes the criteria, in this phase it verifies compliance with those criteria for each participating operator.

In a restricted procedure, interested operators submit a request to participate, including the European Single Procurement Document (ESPD). According to Article 193(1) of Law no. 98/2016:

“At the time of submission of requests to participate or of tenders, the contracting authority accepts the ESPD, consisting of an updated self-declaration, as preliminary evidence in place of certificates issued by public authorities or third parties, confirming that the operator concerned meets the following conditions:

- a) it is not in any exclusion situation under Articles 164, 165, and 167;*
- b) it fulfills the capacity requirements set by the authority;*
- c) where applicable, it meets the selection criteria established in accordance with the law.”*

The ESPD thus serves to preliminarily demonstrate compliance with exclusion grounds, capacity-related qualification criteria, and, where applicable, selection criteria. This standardized declaration, introduced at EU level, was designed to simplify matters for both authorities and operators, reducing inconsistencies in national declarations and addressing linguistic challenges, as it is available in all official EU languages.

Where doubts arise regarding compliance with any criterion, the contracting authority may request supporting documents as evidence, pursuant to Article 196 of Law no. 98/2016.

At this stage of the restricted procedure, both qualification and selection take place: first, verifying that candidates are not excluded and that they meet the required capacities, and then, through selection, identifying which of them will advance to the second stage.



The selection process concludes with the preparation of an interim report, approved by the contracting authority's Director. Once approved and published in SEAP, the results are made public and candidates are invited to participate in the next stage.

In summary, the authority first eliminates candidates falling under exclusion grounds, then assesses qualification. Those who meet the qualification requirements are further differentiated using selection criteria. In the second part of this stage, the tenders are evaluated technically and financially, with the award criterion applied at the end.

In simplified terms: exclusion grounds answer "who must be excluded?", qualification criteria answer "who has the capacity to perform the contract?", selection criteria establish "among the qualified, who should proceed to the next stage?", and award criteria determine "whose tender best meets the objectives of the procurement?".

4. Frequent Situations of Improper Use of Qualification or Selection Criteria

4.1. Failure to Adapt Criteria to the Specifics of the Contract

Article 31(1) of GD no. 395/2016 sets out the proportionality requirements that any qualification criteria must satisfy:

"The contracting authority shall not restrict participation in the award procedure by introducing minimum qualification criteria which:

a) are irrelevant to the nature and complexity of the contract;

b) are disproportionate to the nature and complexity of the contract."

Through these negative conditions, the legislator sought to ensure that qualification and selection criteria are aligned with the specifics of the contract in question.

Case law under the previous procurement regime also addressed this matter. For example, in a 2013 decision, the Bucharest Court of Appeal examined whether the qualification and selection requirements imposed in a contract were proportionate. The contracting authority required the project manager and team experts to have at least three years of experience in public administration.

The court found that this requirement was unjustified and restrictive in light of the contract's object:



“To comply with the principle of proportionality, minimum qualification and selection requirements requested in the tender documentation, as well as the supporting documents proving compliance, must be limited to those strictly necessary to ensure optimal performance of the contract, considering its value, nature, and complexity. The contracting authority’s decision to impose such requirements must be supported by the justification note provided by GD no. 925/2006.”¹

The restrictive nature of the imposed requirements had a direct impact on competition, as out of three tenders submitted, two were rejected for failing to meet the qualification conditions related to staff experience.

This illustrates how poorly adapted qualification requirements can undermine competition, reduce the authority’s viable choices, and indirectly favor certain bidders who may remain the only candidate - often at the cost of the highest price being accepted.

To prevent such outcomes, authorities should act with caution when establishing qualification and selection criteria, imposing only those requirements that ensure effective contract performance without excessively narrowing competition. Specificity is welcome, provided it is justified by the contract’s objectives and the need for quality and efficiency. While it is understandable that authorities seek to ensure the contractor’s competence, this must not supersede principles of proportionality and equal treatment, nor should it serve to benefit previous collaborators.

4.2. Other Issues Regarding the Requirement of Similar Experience

Contracting authorities frequently rely on similar experience as a qualification or selection criterion, since it allows them to evaluate whether economic operators have successfully carried out comparable tasks in the past. However, the way in which similar experience is defined or measured in the award documentation can sometimes lead to breaches of the principles that govern public procurement.

For instance, in a case examined by the Bacău Court of Appeal, the contracting authority awarded a contract to a bidder who sought to prove similar experience through contracts involving works classified under CAEN codes different from those indicated in the procurement data sheet. While this did not automatically mean the bidder failed to meet

¹ Curtea de Apel București, Sentința civilă nr. 3346/2013 din 1 noiembrie 2013, citată în D.-D. Șerban, „Jurisprudență comentată în materia achizițiilor publice”, vol. VI, Ed. Hamangiu, București, 2017, p. 73.



the requirement, the court noted: *“CAEN codes in construction were developed and codified in legislation precisely because of the growing specialization of categories and subcategories of works. Given the technical complexity and diversification of construction activities, similar experience should not be confused with identical experience. At the same time, it cannot be considered fulfilled when a bidder invokes contracts from unrelated categories or subcategories, since there are clear differences, for example, between riverbed works and rehabilitation of residential or office spaces.”*²

The court thus correctly underlined that similar experience must not be mistaken for identical experience. Imposing such a restrictive interpretation would breach the principle of proportionality. Still, similar experience must reflect a real connection to the activities required under the contract. Accordingly, the court found: *“Between CAEN (CPV) code 45262640-9 – environmental improvement works, requested in the procurement data sheet, and the CAEN codes associated with the contracts presented by the winning bidder (45213 and 45233), there is a major difference. Therefore, in the court’s view, the award documentation’s requirement of similar experience was not satisfied.”*

The court also delivered a highly relevant assessment of how quality and price should be balanced when tenders are evaluated:

“When multiple bidders exist, and some of them demonstrably carry out the type of works required by the procurement, with experience identical or very close to the investment’s objective, a minimal price difference cannot justify awarding the contract solely on that basis. Other decisive elements, such as proven relevant experience in similar or identical works, must weigh more heavily. Thus, lowest price should prevail only where technical capacity, experience, and the team assigned are equivalent.”

This position is entirely appropriate. Contracting authorities should avoid applying the lowest price criterion mechanically. The purpose of procurement is not to secure the lowest figure, but to ensure the contract is successfully completed. While budgetary limits cannot be ignored, true economic advantage derives from high-quality execution.

Supporting the idea that “similar” does not mean “identical” is also a decision of the Pitești Court of Appeal. In that case, the procedure concerned a contract for technical assistance services (CPV 71345200-0) in supervising construction works. The awarding

² Curtea de Apel Bacău, Decizia nr. 739/2015 din 21 aprilie 2015, citată în D.-D. Șerban, *idem*, p. 28.



documentation required similar experience in technical assistance contracts. A bidder challenged its exclusion on the grounds that it had not supervised the precise type of construction works in question, but had other technical assistance experience. The court ruled:

“The procedure concerns awarding technical assistance services contract CPV 71345200-0 for the project ‘specific infrastructure for tourism activities’. The Court ruled that: *“Contrary to the authority’s claims, the bidder’s experience in school rehabilitation and correction works is irrelevant, since the contract at issue is for technical assistance. Thus, the Council correctly held that the required similar experience need not cover technical assistance for specific types of works, but simply contracts for technical assistance services, regardless of the sector or complexity of the works supervised.”*³

This interpretation is sound and again confirms that qualification and selection criteria must always be analyzed in light of the specific contract in question.

4.3. Addition to the Qualification or Selection Criteria through Clarification Requests

Qualification and selection criteria must be clearly set out in the award documentation so bidders understand from the outset the project’s level of complexity and the technical, professional, and financial requirements needed to participate. Consequently, the practice of some contracting authorities using clarification requests to introduce new requirements amounts to an unlawful amendment of the award documentation.

A CNSC decision illustrates this point. The case involved a works contract for the modernization of a power plant. The complainant argued that the contracting authority had abused the clarification mechanism by requesting technical documents not specified in the award documentation. The Council upheld this argument, stating: *“As concerns the alleged shortcoming – failure to provide ‘equipment offers for automation specifying type and model of each item (specifications and technical sheets)’ – the Council notes that the bidder complied with the request to provide a list of equipment including specifications and technical sheets. However, the type and model requirement had not been set in the award*

³ Curtea de Apel Pitești, Decizia nr. 1540/2015 din 22 septembrie 2015, citată în D.-D. Șerban, *idem*, p. 417-418.



documentation. Therefore, the complainant cannot be faulted for not providing it. According to Art. 140(1) of GD no. 394/2016, clarification requests must address formal aspects or confirm what is already required by the award documentation, not introduce new obligations.”⁴

The Council rightly held that introducing modifications through clarification requests undermines both transparency and equal treatment, two fundamental principles of procurement law.

5. Disproportionate Use of Evaluation Factors – Distortion of Purpose

Evaluation factors operationalize the award criteria, typically by assigning relative weights to aspects such as price, technical quality, or deadlines. While they should adapt award criteria to the contract’s specifics, they must not distort the procedure or breach proportionality.

For example, in an infrastructure project, suppose the factors are: price, technical compliance, and completion deadline. If delays by the contracting authority itself drastically shorten the time available for performance, the deadline factor could unfairly disadvantage bidders, forcing them into higher costs or impractical commitments. In such cases, operators might justly seek price adjustments, deadline extensions, or even annulment of the procedure under Art. 212(1)(c) of Law no. 98/2016.

This demonstrates the need to balance the authority’s interests with operators’ rights and the principle of predictability. Award criteria must ensure proportionality both in securing public value and in enabling bidders to deliver under fair and feasible conditions.

Too often, authorities justify disproportionate burdens on contractors by invoking the “public interest.” While public interest is indeed central, procurement contracts must also embody balanced cooperation, ensuring risks and benefits are fairly distributed. Excessive rigidity often leads to failure, explaining the high number of unsuccessful contracts in Romania.

⁴ CNSC, Decizia nr. 804/C2/758 din 23 mai 2019, nepublicată.



Ultimately, EU and national procurement law aim not to eliminate risks for authorities but to safeguard competition, equal treatment, and value-for-money. Efficiency today is no longer viewed solely in economic terms but also in terms of sustainability and long-term benefits, reflecting the shift introduced by Directive 2014/24/EU.

6. Conclusions

Understanding the underlying scope of the law is essential for the regulation to truly achieve its purpose. The establishment and diligent application of qualification, selection, and award criteria are crucial not only from a formal standpoint, but above all in the way these rules are effectively implemented in practice.

Naturally, compliance with the principles laid down in Article 2 of Law no. 98/2016 represents the fundamental premise for ensuring the proper conduct of award procedures. Yet, from a more pragmatic perspective, it is equally important to highlight that Article 224(1) of the same Law provides sanctions for contracting authorities that breach the rules concerning qualification and selection criteria, as well as award criteria.