

## ***PUBLIC PROCUREMENT SYSTEM***

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*Abstract: The concept of public procurement means the entire process of buying from third parties (including logistical aspects) and covers contracts for the supply of goods, services and work contracts. This process spans the whole life cycle, from the concept and initial definition of the procurement needs and necessities, until the end of the useful life of a product or work (and its decommissioning) or until the completion of service contract.*

*The definition is consistent with the concept of procurement cycle management. The process is not limited to the procurement function on compartments, but is multifunctional, especially in case of large contracts, complex and/or unusual.*

*Based on the commitments made by Romania in Chapter I "Free movement of goods" and the European Commission's recommendations, it was necessary for the Romanian legislature to adopt certain measures for drafting a new legislation on public procurement. Thus, the Government Ordinance no. 34/2006 was adopted, on the award of public procurement contracts, concession contracts for public works and concession of services.*

*The purpose of this ordinance is expressly provided for in art. 2, namely "to promote competition between operators, guaranteeing equal treatment and non-discrimination among operators, as well as transparency and integrity of the public procurement process".*

*Therefore, this new law regulated both the public procurement contract, which includes sector contract, as well as public works concession contract, contract for concession of services, including public procurement by electronic means.*

*The public procurement process can also be analyzed from a systemic perspective.*

**Key words:** *System, element, public procurement, regulation authority, contracting authority, economic operator, Council for Solving Complaints*

### **1. INTRODUCTION**

The systems theory is a concept from the field of philosophy, an interdisciplinary epistemological model in which systems are used to describe and explain phenomena with varying degrees of complexity. The analysis of structures and functions often leads to realistic prognoses on systemic behavior.<sup>1</sup>

The concept of systems theory, or systemic theory, is used in various scientific disciplines such as computer sciences, physics, electrical engineering, pedagogy, chemistry, geography, biology, logics, mathematics, physiology, sociology, psychology, ethnography, semiotics, literature and, of course, philosophy.

This theory is not yet an independent discipline, but a branched and heterogeneous framework for an interdisciplinary discourse that has the system as basic concept. So, there is no single "systems theory", but a lot of competing and partly contradictory definitions.

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<sup>1</sup>Wikipedia, Free Encyclopedia

The systems theory is the superior knowledge, at theoretical level, of the objects that possess the property of completeness, of the compact aggregates of entities that exists as one. The object of the systemic knowledge does not consist of randomly conglomerated components, but only objects composed of parts connected together by necessity. The circumlocution of the systems theory object is based on the following defining properties of the object considered: completeness, purpose, organization, relative autonomy.

The general systems theory is also a theory about systems taken from their concrete forms. The extraction is achieved by retaining the essential, defining components for each type of system. Aiming at the knowing of the general from the systems, the general systems theory considers the knowledge of organized complexities as its object.

The element<sup>2</sup> represents a part of a whole, part which contributes to the creation of a whole, a person who is part of a community, in relation to a certain discipline, basic principle, fundamental notion, from the French word *élément*, *lat. elementum*.

## 2. THE REVISION LITERATURE

**The general system theory (G.S.T.)** is a relatively new theory founded by Ludwig von Bertalanffy<sup>3</sup> covering systems of any kind and type. It is a theory of the organized complexities, following the formulation of principles, laws, concepts and models of systems. G.S.T. is a synthesis scientific discipline, general, based on a number of mathematical disciplines such as information theory, theory of strategic games, decision theory, operational research, theory of differential equations, probability theory, topology and abstract algebra. The fundamental concepts are: system, information, entropy, purpose, organization, centralization, interaction, isomorphism, integrality. Although a theoretical discipline, covering the integrality of systems and developing as a logical-mathematical discipline, general systems theory is applicable empirically and here we refer mainly to technical sciences. G.S.T. favours the completion of knowledge, transfers methods, principles and concepts across disciplines, introducing mathematical precision in research. Because of this gnoseological and epistemological potential, it has been taken over in contemporary science philosophy as research direction, aiming to integrate the fields of knowledge by a conceptualization and research methodology, unified at high level.

Niklas Luhmann<sup>4</sup> uses more concepts: system, environment, autopoiesis, respect, communication etc. He inspired from the autopoietic cybernetic model built by biologists Humberto Maturana and Francisco Varela. Thus, the society is comprised of systems that are autopoietic, i.e. they reproduce and organize according to intrinsic principles, without being controlled from outside (alopoietic). These systems are organizational, interactional and functional. The latter plays a very important role. Thus, according to Luhmann, the systems

<sup>2</sup>Explanatory Dictionary of Romanian Language, DEX, Second Edition, Univers Enciclopedic Publishing House, Bucharest, 1996, p. 336

<sup>3</sup> Ludwig von Bertalanffy, *General Theory of Systems. Application to Psychology* in volume „The Social Science: Problems and Orientations”, Paris, UNESCO, 1968.

<sup>4</sup> Niklas Luhmann, *Die Gesellschaft der Gesellschaft*, 1997, [ISBN 3518289608](https://www.isbn-international.org/view/title/3518289608)

are in contact with the surrounding environment, taking elements from this, to ensure the survival of the system, but they are not directed by the environment. Other systems exist in this environment, as well. These systems communicate with each other.

Systems can be differentiated, as it follows: psychological systems (human consciousness) and social systems. But, among other sociologists, such as Jürgen Habermas (with whom Luhmann had theoretical disputes), here people can not communicate, but only systems, and not any systems, but the social ones. That's because, the physical systems (the consciousness at individual level) are not available to the other, because what is expressed through signs and language is not a direct reflection of thoughts, nor can it be

A social system occurs when two people perceive each other. This is the simplest form of communication (hence the famous formula, "you can not avoid communication"). Even when two people who perceive each other, ignore themselves and do not utter a word out, make no sign, communication appears. Ignorance itself is communication.

### 3. CONTENT OF THE ARTICLES

As I said, given the commitments made by Romania to the European Union in chapter 1 - Free movement of goods, the Romanian legislature adopted Government Emergency Ordinance no. 34/2006<sup>5</sup>, herein after named the emergency ordinance, Government Decision no. 925/2006<sup>6</sup> and Government Decision no. 1660/2006<sup>7</sup>, the main internal laws transposing Community legislation, namely: Directive 2004/17/EC<sup>8</sup> of the European Parliament and of the Council of 31 March 2004 and Directive no. 18/2004/EC<sup>9</sup> of the European Parliament and of the Council of 31 March 2004.

Throughout the time, the two directives suffered amendments and completions<sup>10</sup>, which have been transposed into the national legislation on public procurement through

<sup>5</sup> Government Emergency Ordinance no. 34/2006 regarding the award of public procurement contracts, public works concession contracts and services concession contracts, approved by **Law 337/2006**, with further amendments and completions, published in the Official Journal of Romania, Part I, no. 418 as of 15 May 2006, approved with amendments.

<sup>6</sup> Government Decision no. 925/2006, for the approval of the rules of implementation of the provisions referring to the award of public procurement contracts of Government Emergency Ordinance no. 34/2006 on the award of public procurement contracts, public works concession contracts, and services concession contracts – published in the Official Journal of Romania, Part I, no. 625/20 July 2006.

<sup>7</sup> Government Decision no. 1660/2006 Government Decision no. 1660/2006 for approving the implementing rules of the provisions regarding the award of public procurement contracts by electronic means from GEO no. 34/2006 regarding the award of public procurement contracts, public works concession contracts and services concession contracts, published in Official Journal of Romania, Part I, no. 978/2 December 2006.

<sup>8</sup> Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

<sup>9</sup> Directive no. 18/2004/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, published in the Official Journal of European Communities no. L 134 of 30 April 2004.

<sup>10</sup> Directive no. 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contract and Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, modified by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending

amendments of the above-mentioned national normative laws or by creating of other norms (decisions, orders, orders of the President of the National Authority for Regulating and Monitoring Public Procurements).

The adoption of this legislation on public procurement, issued in line with European directives, has the primary responsibility to: *promote competition between suppliers; ensure equal and non-discriminatory treatment of operators; ensure transparency and integrity of the public procurement process; ensure efficient use of public funds by applying award procedures, including special award modalities*<sup>11</sup>.

In order to fulfill the purposes mentioned above, the legislature has established rules, policies and procedures on public spending, so that the application launched by public bodies to meet the demand of economic operators, all these rules and actions constituting **the public procurement system** which represents a part of the legal – economic – technical reality of the Romanian society.

The general purpose of this system is serving the public interest and therefore development and improvement of the life environment of the entire community.

### 3.1. Components of the public procurement system

The public procurement system is composed of the following: *regulatory authority, contracting authorities, economic operators, supervisors of the system*.

Among these elements of the system, the following types of relations can be met:

- **commercial**, in which the contracting authority wants to buy products, services or works, and the economic operators sell them;
- **counseling**, in which the contracting authority requires support for applying the rules of the game, and the regulating authority offers this support;
- **surveillance** in which the contracting authority applies the rules of the game, and the surveyors check their correct application;
- **remediation of the public procurements**, where the initially affected economic operators, make use of a right by the means of judicial administrative action, and subsequently, following the decision of the Council, the affected party (this may also be the contracting authority) will be able to use the right in court.

As it can be seen, in the procurement system, the components interact with each other, are interdependent, so that one of the components can be amplified or be annihilated / prevented from producing the effect.

### 3.2. Regulation authority

The regulation authority in public procurement system is the *National Authority for Public Procurements Regulation and Monitoring*, herein after named NAPPRM, independent

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the Directives 89/665/EEC and 92/13/EEC of the Council on the improvement of appeal ways in awarding of the public procurement contracts.

<sup>11</sup> Art. 2, paragraph (1) of G.E.O. no.34/2006

public institution with legal personality, subordinated to the Government and coordinated by the Secretary General of the Government

Its main role is to create rules of the game, by developing, promoting and implementing procurement policy and to supervise / control the correct application of the rules of procedures chosen by the contracting authorities in order to award a public contract or a frame agreement.

Specific relations take place among the components of the system, for the attainment of the general purpose.

Regarding the NAPPRM's role to provide a methodological advice to the contracting authority during the award of public procurement, and support in the correct application of legislation, we emphasize that NAPPRM's opinions, materialized in the views upon the problems at question are useful, but they do not link the litigants, nor the Council and Courts<sup>12</sup>.

### 3.3. Contracting authority

The society is organized into sovereign states whose interest and quality is that law should rule between individuals and / or legal persons, which is why, it tries by the legal systems adopted to remove disorder, to provide training of the population, the cash income needed to cover functioning expenses of its organs, management of the public field and other necessities required for the proper functioning of the state through the establishment of public order enforcement services, education, public finance, public field administration etc., which all together make up the public administration. The relations appeared among the bodies of the public administration and individuals and / or legal persons are regulated by the administrative law norms and become administrative legal relations<sup>13</sup>.

In G.E.O. no. 34/2006 article 8, the legislator, in conjunction with article 9, regulated the concept of **contracting authority**, which, in the field of public acquisitions plays the role of **buyer/purchaser**:

- *any state body* – namely, any public authority or institution acting at central or at regional or local level;
- *any body other than those mentioned above, that:*
  - *has legal personality;*
  - *was established to meet the general interest needs, without non-commercial and / or industrial features;*
  - *is at least in one of the following situations:*
    - *is funded mostly by a contracting authority as defined above, or by another public body;*

<sup>12</sup> D.D. Șerban – *Public procurements. Theory and Practice of the Administrative jurisdiction*, Hamangiu Publishing House, Bucharest, 2012 p. 49

<sup>13</sup> V. Prisacaru – *Treaty of Romanian Administrative Law – Basics*, Third Edition, revised, Lumina Lex Publishing House, Bucharest, 2002 p. 13

- *is subordinated to or supervised by a contracting authority as defined above, or by other public body;*
- *in the composition of the board of directors / management or supervisory body , more than 50% of its members are appointed by a contracting authority as defined above, or by another public body;*
- *any public undertaking which carries out one or more of the activities referred to chapter. VIII, Section 1, when it awards public procurement contracts, it concludes framework agreements for the performance of those activities;*
- *any legal entity, other than those mentioned above, performing one or more of the activities referred to Chapter VIII, Section 1, under a special or exclusive right, as defined in art. 3 letter k), awarded by a competent authority, when it awards public procurement contracts or concludes framework agreements for the performance of those activities;*
- *any association made up by one or more contracting authorities among those mentioned above<sup>14</sup>;*
- *legal entity without having the capacity of contracting authority awarding contracts subsidized / financed directly in a proportion of more than 50% by a contracting authority and the value of these contracts exceed the equivalent in lei of:*
  - ✓ EUR 200,000 euro for *provision of services*<sup>15</sup>;
  - ✓ EUR 5,000,000 euro for *execution of works*<sup>16</sup>.
- *centralized unit for procurements*<sup>17</sup> namely a contracting authority, as defined at art. 8 letter a), b) or c) of G.E.O. no. 34/2006, which:
  - *purchases on its own name products and / or services that are or may be intended for other contracting authority / authorities;*
  - *awards public procurement contracts or concludes framework agreements in the name other contracting authority / authorities.*

Currently, this type of contracting authority is not operational yet, because so far no government decision has been approved on the design and implementation of a national centralized system for the purchase of specialized certain products, services or works<sup>18</sup>.

In accordance with the principle of accountability, the determination of the classification circumstances under the Emergency Ordinance evoked, the application of each procedure or direct purchase is the sole responsibility of the contracting authority.

The Contracting Authority, which, based on legal powers at its disposal, grants to an entity, which is not defined as contracting authority, special or exclusive rights to provide a public service, is required to impose by the authorization issued for this purpose, the

<sup>14</sup> Art. 8 G.E.O. no. 34/2006

<sup>15</sup> Because the legislator regulates only these two types of contracts, namely services and works, taking into account the law principle „*ubi lex non distinguit, nec nos distinguere debemus*”, it results that in case of the supply contracts for goods directly funded more than 50%, irrespective of their value, there is no obligativity of applying G.E.O. no. 34/2006.

<sup>16</sup> Art. 9 letter c) and c<sup>1</sup>) G.E.O. no. 34/2006

<sup>17</sup> Art. 22 G.E.O. no. 34/2006

<sup>18</sup> As provided by art. 22, letter (1) G.E.O. no. 34/2006

observance of non-discrimination principle by those who benefits from the special or exclusive rights when it awards supply contracts to third parties.

In accordance to the legislation on public procurement, the contracting authority has the obligation that in its relations with economic operators interested to participate in a procedure for awarding public procurement contracts, to observe the following principles: *non-discrimination; equal treatment; mutual recognition; transparency; proportionality; efficient use of public funds.*

### 3.4. Economic operators

The capacity of economic operator, as part of the public procurement contract, can be had by any provider of products, service provider or contractor – natural person / legal person<sup>19</sup>, public or private, or group of such persons, therefore **professional**<sup>20</sup>, activating in the field in which it legally offers products, services on the market and / or works<sup>21</sup>.

Therefore, it is undoubtedly clear that, if the contracting authority has the capacity of buyer, *the economic operators* in the public procurement system will have the capacity of *vendor / supplier / contractor*.

The interest of the economic operators is to enter into contracts with public agencies, in order to achieve the purpose for which they were established, namely to perform activities in conditions of economic efficiency and profit-driven<sup>22</sup>, to this end submitting one, clear, comprehensive and serious bid.

### 3.5. Surveyors of the system

Those who supervise the way the public procurement system operates are:

- *National Authority for Public Procurements Regulation and Monitoring*

It is the regulator of public procurement, which by its departments perform the "ex ante" control of the tender documentation which will be published in the electronic procurement system, check the assessment reports, issues the permission for concluding the public procurement contract, provide the control performed revealed no violations or circumvention of the procurement legislation, impose remedies, applies the penalties and fines provided by law for the circumvention or violation of law on the award of public procurement contracts.

The efficiency of "ex ante" control can be noticed in the table below<sup>23</sup>.

<sup>19</sup> The private law entity is that entity established by Law no. 31/1990 on commercial companies, as amended and supplemented by Law no. 1/2005 on the organization and operation of cooperation

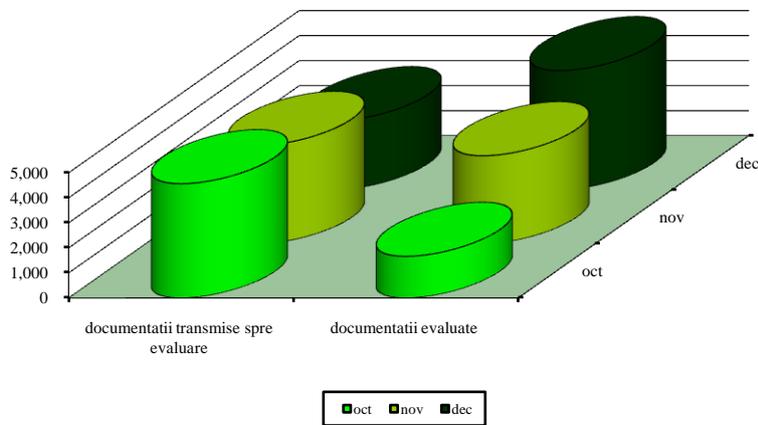
<sup>20</sup> Art. 3 of the Civil Code provides that all those who operate an undertaking can be considered professionals, this category including traders, entrepreneurs, companies, and any other person authorized to do business or profession, as those terms are prescribed by law, on the date the Civil Code entered into force. The public law legal person is that entity established by an administrative decision, issued by a public authority.

<sup>21</sup> Art. 3, letter r) G.E.O. no. 34/2006

<sup>22</sup> S. Cărpenaru – *Romanian Commercial Law*, All Beck Publishing House, Bucharest, 1998, p. 153

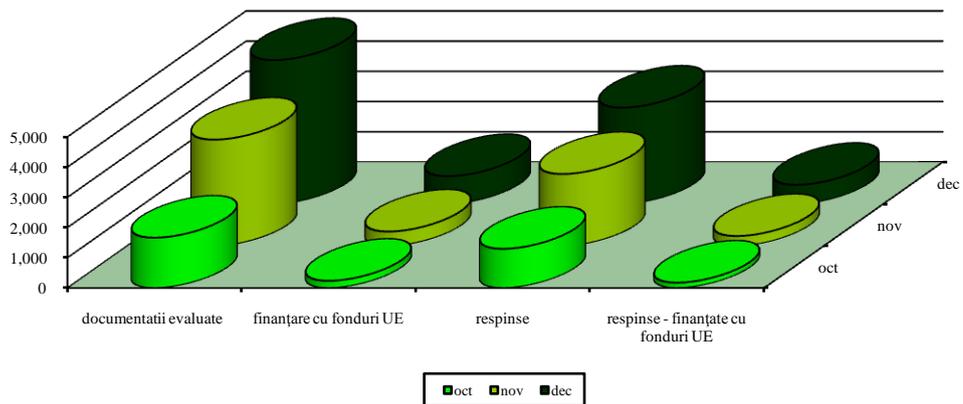
<sup>23</sup> *Evolution of the specific indicators of the public procurement between 2007 – 2011 - NAPPRM*

*Table 1 – Situation of ex ante control - 2011*



**Documentations sent for evaluation / documentations assessed**

*Table 2 – Situation of the documentations rejected following the ex ante control*

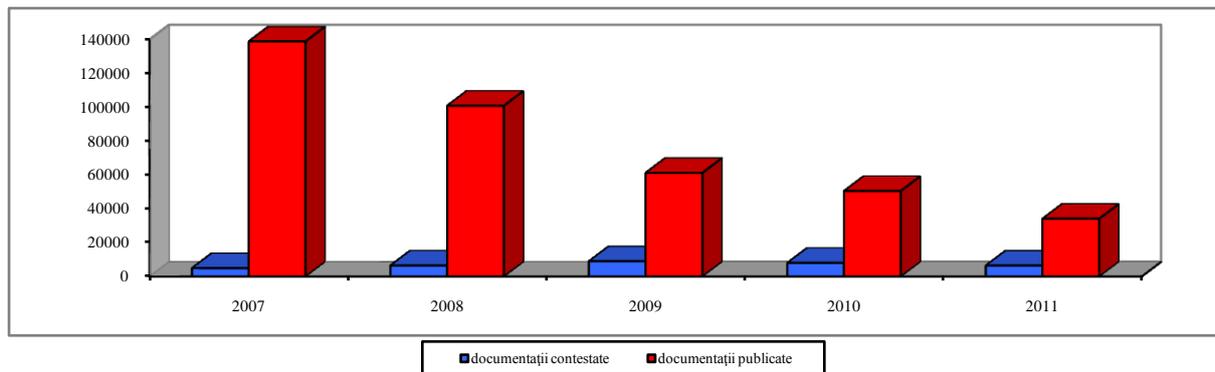


*Assessed documentations / funded with EU funds / rejected / rejected – funded with EU funds*

- *National Council for Solving Complaints(NCSC);*

It is an independent body with administrative-jurisdictional powers: solves the appeals in the award procedure, issues an opinion on the case before the court if so requested by the latter.

*Table 3 – Situation of the awarded documentations contested comparative with those published<sup>24</sup>*



*Contested documentation / published documentations*

- *Ministry of Public Finances;*

It is a specialized body of the central public administration, responsible for performing the verification function of the procedural aspects related to the award of public procurement contracts.

The Unit for Coordination and Verification of Public Procurements operates within this minister and its role is to effectively check the application of the procedures for the award of public procurement contracts.

This direction performs an *ex ante* control with advisory and prevention function and aims to check the public procurement process from the initiation of the procedure by publishing notice until the time the contract is signed<sup>25</sup>.

- *Court of Accounts.*

It is the public authority of the state which performs the external audit in the public sector as a supreme audit institution.

According to article 140, paragraph (1) of the Romanian Constitution, revised, “The Court of Accounts controls over the formation, management and use of financial resources of the state and public sector. In accordance with law, the disputes arising from the Court of Accounts shall be settled by specialized courts”.

Moreover, based upon article 1 – (1) of Law no. 92/1994, actualized and republished, the Court of Accounts exercise control over the formation, management and use of financial resources of the state and public sector, and paragraph (2) provides that: the control function of the Court is achieved by external public audit procedures specified in its standards audit, prepared in accordance with generally accepted international auditing standards.

- *Court*

Justice is the only authority that holds supremacy in the surveillance of the observance of the law.

<sup>24</sup> The evolution of the specific indicators of the public procurement national system for the period 2007-2011 – NAPPRM, associated with the Activity Report for 2011 – NCSC, Activity Report for 2010 – NCSC, Activity Report for 2009 – NCSC

<sup>25</sup> D.D. Șerban – op. cit. p. 56

According to article 126, of the Romanian Constitution “(1) the justice is provided by the High Court of Cassation and Justice and other courts established by law.”

Therefore considering that the decisions of the Council for Solving of the Complaints can be appealed in the Courts of Appeal, Administrative Division, it goes without saying that the courts are part of the public procurement system.

## CONCLUSIONS

Therefore the procurement process is an integrated system consisting of well defined elements that have an important role in the proceedings specified by law in force on the observance of the principles of competition between operators, guaranteeing equal treatment and non-discrimination of economic operators, ensuring transparency and integrity of the public procurement process, ensuring efficient use of public funds by applying procedures for the award procedures, including special award procedures.

These elements of the system represent a guarantee of the observance of the public procurement procedures and principles.

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