

ABOUT PUBLIC ACQUISITION MONITORING ROLE AND NECESSITY DURING FRAMEWORK AGREEMENT POST-IMPLEMENTATION

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Abstract: *This article aims to highlight the importance of a good contract administration to the success of the public contracting process. The necessity for monitoring is also crucial, because during the implementation and post-implementation stage a significant amount of waste and abuse of public funds and corruption in public contracting happens. Our research considers that, most of the focus monitoring and control time is placed on the procurement process, which is a comparatively shorter period than contract implementation. In our opinion, the real benefits, however, are obtained after the contract is awarded, so more attention needs to be placed on ensuring the contract is implemented consistently with its terms and conditions. This is not to lessen the importance of the procurement process in getting the contract awarded, but it is only after the contract is awarded that the real value of the entire procurement process is achieved. Therefore, our article presents a risks analysis of the post-implementation process and aims to spotlight an issue for Romanian present stage of public acquisition proces.*

Keywords: *public aquisition, risk analysis, procurement process, monitoring necessity, public funds, corruption in public contracts*

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1. Introduction

The main goal of public procurement is to ensure timely and cost-effective contracts to qualified contractors in accordance with the principles and procedures established in the public procurement laws.

The main goal of contract administration is to ensure that proper procedures are in place to monitor and evaluate suppliers and service providers' performance in the fulfillment of their contractual obligations, and to ensure that appropriate actions are taken to avoid or remedy any deficiencies noticed in contract execution. Namely, the suppliers and service providers of goods, works and services to support national and local government, and public services operations, are involved in such a way as to accomplish the public procurement laws.

Based on their specific goals, we distinguish a clear delimitation between public procurement and contract administration. That distinction, far from lessening the importance of one as opposed to the other, actually reinforces each of them by identifying and focusing on their specific purpose.

Our article highlights the idea that all the procurement and contract administration processes always deal with risks. There are risks in determining need and planning procurements, selecting the appropriate procurement methods, developing the specifications, preparing solicitation documents and calling for offers, evaluation and selection of companies, negotiating the contract, and contract administration.

As any ordinary process, customers need supplies and services to cover immediate and future needs, therefore procurement management is about solving problems and managing risks. Procurement planning and strategy development are important with a view to reducing risk in the procurement process. A comprehensive understanding of the procurement process, principles and guidelines is also vital to finding appropriate solutions and minimizing risks during the entire process, including post-implementation stage.

2. Dealing with contract administration risks

Regarding the state of knowledge, the concept of risk has seen a remarkable evolution, but all definitions make references to mitigating hazards to a comprehensive approach of our realities, including financial aspects and the non-financial aspects which relate, mainly, to the elements of social responsibility.

The Health and Safety Executive (HSE) says: “A risk assessment is nothing more than a careful examination of what, in your work, could cause harm to people.”

According to HSE, the employers have a duty under the Management of Health and Safety at Work Regulations 1999, to carry out risk assessments to identify what hazards exist in a workplace, and how likely these hazards are to cause harm. They must then decide what prevention or control measures are needed. Control measures include actions that can be taken to reduce the potential of exposure to the hazard, or the control measure could be to remove the hazard or to reduce the likelihood of the risk of exposure to that hazard being realised.

A simple administrative control measure would be the secure guarding *by adopting standard operating procedures or safe work practices or providing appropriate training, instruction or information* to reduce the potential for harm and/or adverse health effects to person(s). Isolation and permit to work procedures are examples of administrative controls.

In terms of public procurement, mitigating risk is a necessary action laying also during the framework agreement post-implementation period but directly linked with the prior process time, including negotiations and evaluating the implementation process itself. The final goal of risk assessment is to ensure that the residual risk following implementation of control measures is “as low as is reasonably possible (ALARP)”.

Theoretically speaking, for a risk to be ALARP it must be possible to demonstrate that the cost involved in reducing the risk further would be grossly disproportionate to the benefit gained.

We identified some risk situations during the negotiations process with direct influences into the contract administration process and the following analysis would trigger the main consequences and the appropriate measure set as recommendations items, limited with our research.

1. Risks for Negotiations process

Some Risk situations	Kind of consequences	Risk assessments
1.1. The expectations of buyer and tenderer are not reconciled	<ul style="list-style-type: none"> ✓ Contract disputes ✓ Cost variations ✓ Purchase of non-suitable product and inefficient use of resources ✓ Delivery delays 	<ul style="list-style-type: none"> • Define the contract terms clearly and carefully • Provide staff with strong skills in contract planning and management and very good communication attitude • Clarify all ambiguities before signing the contract • Record writing for any negotiating each party's obligations
1.2. Terms and conditions of agreement without definitions or clearly details	<ul style="list-style-type: none"> ✓ Contract disputes ✓ Cost variations ✓ Delivery delays ✓ Need to restart procurement ✓ Possible cost of legal action 	<ul style="list-style-type: none"> • Distinguish between essential and non-essential goals and requirements • Terms and conditions defined to share risks between buyer and tenderer
1.3. The contract terms do not include all the requirements on the tenderer	<ul style="list-style-type: none"> ✓ Contract disputes ✓ Need to restart procurement for a possible contract invalidity ✓ Possible cost of legal action ✓ An inadequate relationship with supplier/customer ✓ Cost variations ✓ Purchase of non-suitable product and inefficient use of resources ✓ Delivery delays 	<ul style="list-style-type: none"> • Provide negotiators with adequate training and support • Negotiate commercial terms • Terms should be fair and reasonable
1.4. Failure to reflect the terms offered and agreed in the contract	<ul style="list-style-type: none"> ✓ Contract disputes ✓ Possible cost of legal action ✓ An inadequate relationship with supplier/customer ✓ Cost variations ✓ Purchase of non-suitable product and inefficient use of resources ✓ Delivery delays 	<ul style="list-style-type: none"> • Provide negotiators with adequate training • A must: Checking final draft of contract with successful tenderer • Keep writing records of all negotiations and agreements

2. Risks for Contract management

Some Risk situations	Kind of consequences	Risk assessments
1	2	3
2.1. The supplier DO NOT accept the contract	<ul style="list-style-type: none"> ✓ An inadequate relationship with supplier/customer ✓ Contract disputes ✓ Possible cost of legal action ✓ Cost variations ✓ Purchase of non-suitable product and inefficient use of resources ✓ Delivery delays ✓ Need to restart procurement 	<ul style="list-style-type: none"> • Provide negotiators with adequate training • Negotiate but retain integrity of the contract • Adopte legal action if non-acceptance causes loss • Ensure all staff know responsibilities and conditions • Ensure good record keeping and documentation
2.2. Failure to fulfil the conditions of the contract	<ul style="list-style-type: none"> ✓ An inadequate relationship with supplier/customer ✓ Contract disputes ✓ Possible cost of legal action ✓ Cost variations ✓ Inefficient use of resources ✓ Delivery delays ✓ Need to restart procurement 	<ul style="list-style-type: none"> • Negotiate but retain integrity of the contract • Provide negotiators with adequate training • Adopte legal action if non-acceptance causes loss • Ensure all staff know responsibilities and conditions • Ensure good record keeping and documentation
2.3. Contract Price variation	<ul style="list-style-type: none"> ✓ Cost overruns influences by foreign rate exchange ✓ Contract disputes ✓ Cost variations ✓ Inefficient use of resources ✓ Purchase of non-suitable product and inefficient use of resources ✓ Delivery delays ✓ Need to restart procurement ✓ Possible cost of legal action 	<ul style="list-style-type: none"> • Agree on a formula for calculating variations in case of foreign rates • Agree on prices and the basis of prices • Ensure good record keeping and documentation
2.4. The supplier is starting to work before contract is signed	<ul style="list-style-type: none"> ✓ Contract disputes ✓ Possible cost of legal action for perceived breach of contract ✓ Potential liability to pay for unauthorised work ✓ Unanticipated cost increases 	<ul style="list-style-type: none"> • Ensure all staff know responsibilities and conditions • Accept all contracts in writing • Ensure approvals are received before allowing work to start • Confirm verbal acceptance of contract with written advice • Ensure good record keeping and documentation

Some Risk situations	Kind of consequences	Risk assessments
2.5. Unauthorised increase in scope of work	<ul style="list-style-type: none"> ✓ Contract disputes ✓ Possible cost of legal action for perceived breach of contract ✓ Potential liability to pay for unauthorised work ✓ Unanticipated cost increases 	<ul style="list-style-type: none"> • Ensure all staff know responsibilities and conditions • Ensure all contract amendments are issued in writing • Record all discussions and negotiations • Confirm instructions in writing • Ensure good record keeping and documentation
2.6. Poor administering the contract	<ul style="list-style-type: none"> ✓ Cost variations ✓ Inefficient use of resources ✓ Purchase of non-suitable product and inefficient use of resources ✓ Delivery delays ✓ Need to restart procurement ✓ Failure of contract ✓ Full benefits not achieved ✓ Contract/supply disputes ✓ Possible cost of legal action 	<ul style="list-style-type: none"> • Ensure all staff know responsibilities and conditions • Ensure all staff are suitably trained and experienced in contract planning and management • Maintain up-to-date procedures and practices • Check that all obligations are covered in the contract • Agree on responsibilities • Implement appropriate safety standards and programs • Ensure good record keeping and documentation
2.7. Key personnel not all time available	<ul style="list-style-type: none"> ✓ Full benefits not achieved ✓ Contract/supply disputes ✓ Progress on project disrupted ✓ Less expertise without key personnel 	<ul style="list-style-type: none"> • Ensure all staff know responsibilities and conditions • Ensure all staff are suitably trained and experienced in contract planning and management • Maintain up-to-date procedures and practices and include requirement in specification and ensure compliance in post-tender negotiation • Assuring personnel with strong knowledge of the market • Accept risk and manage possible delay

Some Risk situations	Kind of consequences	Risk assessments
2.8. Loss of intellectual property	<ul style="list-style-type: none"> ✓ Cost variations ✓ Inefficient use of resources ✓ Loss of commercial opportunity ✓ Unwarranted reliance on supplier for product support 	<ul style="list-style-type: none"> • Check that all obligations are covered in the contract • Agree on responsibilities • Implement appropriate safety standards and programs • Ensure good record keeping and documentation • Ensure suitable clauses are included in the contract • Ensure all staff know responsibilities and conditions • Ensure all staff are suitably trained and experienced in contract planning and management • Maintain up-to-date procedures and practices
2.9. Loss or damage to goods in transit	<ul style="list-style-type: none"> ✓ Delays in delivery ✓ Inefficient use of resources ✓ Loss of commercial opportunity ✓ Liability disputes ✓ Failure of contract ✓ Full benefits not achieved ✓ Contract/supply disputes ✓ Possible cost of legal action 	<ul style="list-style-type: none"> • Include appropriate packaging instructions in specification • Agree on insurance cover for supplier to provide • Accept delivery only after inspection • Know when title of goods is transferred to buyer • Ensure all staff know responsibilities and conditions • Ensure all staff are suitably trained and experienced in contract planning and management • Maintain up-to-date procedures and practices
2.10. Fraud	<ul style="list-style-type: none"> ✓ Delays in delivery ✓ Inefficient use of resources ✓ Disruption to procurement activities ✓ Full benefits not achieved ✓ Contract/supply disputes ✓ Failure of contract ✓ Failure of contract ✓ Possible cost of legal action 	<ul style="list-style-type: none"> • Follow and maintain fraud procedures and practices control procedures • Maintain an ethical environment • Ensure all staff are suitably trained and experienced in avoiding or detecting fraud

3. Evaluating the procurement process

Some Risk situations	Kind of consequences	Risk assessments
3.1. Failure to identify and address problems during the procurement process	<ul style="list-style-type: none"> ✓ Scope of the public procurement is not achieved ✓ Procurement objectives are not achieved ✓ Potential future failure in the procurement process 	<ul style="list-style-type: none"> • Promote a good relationship with suppliers • Agree on performance criteria (with supplier and customer) • Include evaluation clause in the contract • Implement performance management strategies
3.2. Failure to evaluate procurement and management processes	<ul style="list-style-type: none"> ✓ Failure to improve procurement and management processes 	<ul style="list-style-type: none"> • Include evaluation clause in the contract • Develop systematic evaluation methods, techniques and evaluation criteria • Implement performance management strategies
3.3. Failure to administer the contract	<ul style="list-style-type: none"> ✓ Scope of the public procurement is not achieved ✓ Procurement objectives are not achieved ✓ Potential future failure in the procurement process 	<ul style="list-style-type: none"> • Promote a good relationship with suppliers • Agree on performance criteria (with supplier and customer) • Include evaluation clause in the contract • Ensure all staff know responsibilities and conditions • Ensure all staff are suitably trained and experienced in contract planning and management • Maintain up-to-date procedures and practices
3.4. Failure to monitor the post-implementation process	<ul style="list-style-type: none"> ✓ Potential future failure in the procurement process 	<ul style="list-style-type: none"> • Ensure all staff are suitably trained and experienced in contract planning and management • Maintain up-to-date procedures and practices • Include evaluation clause in the contract • Develop systematic evaluation methods, techniques and evaluation criteria

As above is presented, we conclude that the Contract administration involves all activities related to the monitoring of suppliers, contractors and service providers' performance in the fulfillment of their contractual obligations, and to ensure that appropriate actions are taken to promptly remedy any deficiencies noticed in contract implementation, scope or terms and conditions.

The overall performance of the entity involves the aggregation of economic performance of the contracts, with the social and environmental performance. All economic entities claim performance so that performance management has become a tool not only useful but also indispensable, unable to speak of performance without proper management, performance evaluation and in this context, is a key to management.

In this article the research vision is limited to some risks situations which could have consequences to a general economic and financial analysis of the contract administration, especially in term of costs, as the following:

1. ability **to negotiate** the contract
2. ability **to administrate** the contract
3. ability **to monitor** the post-implementation stage
4. ability **to evaluate** the procurement process,

with indicators such as: *the contract quality of terms and conditions, reconciliation with the bid, staff performance on negotiating process and the implementation process, market knowledge, ability to solve administrative problems, cost variables, ability to share risks between buyer and tenderer, adequate formula for calculating variations of costs/prices, the level of evaluation methods, techniques and evaluation criteria progress*, and so on.

As the results of these abilities aim to assess **the health of the public procurement process**, the same applies to the interpretation of indicators obtained for the assessment of the "risks health of the contract". Economic and financial results obtained are assessed by

- *comparison with the values obtained at the end of the contract implementation with the values established in the planning period*, in order to appreciate the time evolution of the "state of contract health" or,

- *comparing with the averages registered or recommended for different areas and industries for the same types of acquisitions*, in order to take future measures with a view to increasing quality of work.

Depending on the objectives pursued by the contract diagnosis and depending on the assessment of the results, we can jump to different conclusions, such as:

- the financial evolution of the contract **has accomplished** the objectives compared to the prior planning period, but compared to the average values of branch activity can be seen as a company is much below these performances;

- the financial evolution of the contract **does not achieve** its own performance determined in the prior planning period but, compared to the average values of branch activity can be seen that the contract achieved more than these performances.

Our research intends to mirror **the importance of the monitoring action during all the procurement process**, therefore as above is mentioned, the evaluation for any contract must include a good understanding of the objectives aimed to be performed by. Contract Administration generally concludes with a final inspection and acceptance of the goods, works or services prior to the completion date or termination of the contract.

The inspection and verification, prior to acceptance, should ensure as a minimum that:

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| <ol style="list-style-type: none">1. <i>The goods, works or services meet the technical specifications and quantities defined in the contract,</i>2. <i>Any variations to the contract are well documented and accounted for,</i>3. <i>Any delay has been noted and appropriate actions has been taken as indicated in the contract, and</i>4. <i>All required documentation had been received and good record keeping, and documentation is ensured.</i> |
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Depending on the conclusions of the financial diagnosis which occurs we can identify the strengths and weaknesses of the contract, as the first step to prepare a corrective action plan in the short, medium or long term, in order to recover, maintain or optimize a future **“state of financial health” of the public procurement contract.**

3. Conclusions

How important the contract implementation phase is in reality is a question with a prompt response: *very important*, because it is where the results of the procurement process are obtained, and the requesting entity is in a position to finally receive the expected benefits of their procurement

request. Without contract award and effective contract implementation, the objectives for initiating the procurement process cannot be attained. The supplier, contractor or service provider has the obligation to observe the contract in accordance with its terms and conditions, to meet all the technical and quality standards. Also, the procuring entity has the obligation to comply with the terms and conditions of the contract; especially the obligation of ensuring that payments are made on time. The success of the public contracting process depends on a good contract administration because during this stage a significant amount of waste and abuse of public funds and corruption in public contracting happens. Most of the focus is placed on the procurement process, which is a comparatively shorter period than contract implementation. The real benefits, however, are obtained after the contract is awarded, **so more attention needs to be placed on ensuring that the contract is implemented consistently with its terms and conditions**, when the real value of the entire procurement process is achieved.

Therefore, our article presents a form of how to manage to analyze the risks for a public procurement contract not only in the planning period but also after the implementation stage, so that future difficulties are to be mitigated and good practices to be developed by all the public or private entities.

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