



POLICY ANALYSIS

Constraints on the use of MTender public procurement electronic system

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Chisinau 2019



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Introduction

The public procurement system in the Republic of Moldova suffers from a number of problems such as the lack of transparency and open access to data at all stages of the procurement process, limited competition and anti-competitive practices, limited capacities and insufficient human resources, but also from the inefficiency in the use of public money. International practice shows that electronic public procurement systems can contribute significantly to the increase in the level of transparency, reducing the risks of frauds affecting public budgets, but also to the increase in the value (in relation to purchased goods, works and services) of funds used in the public procurement system and whose number amounts to more than 10 billion lei annually (the total value of the public acquisitions made in 2018 was 10.5 billion lei).

An electronic public procurement system is one of the most efficient tools for increasing the transparency and efficiency of the public procurement process. Electronic procurement is a powerful tool due to bringing about useful information for procurement planning, but also for the purpose of encouraging healthy competition, ensuring transparency, as well as increasing citizens' confidence in the procurement system and in the governance.

The introduction and development of electronic procurement is an essential component of the reform of the public procurement sector, which started with the Republic of Moldova entering into the Association Agreement with the European Union and with the entry into force of a new Law on public procurement on May 1, 2016. (Law no. 131 of July 3, 2015). The development of electronic procurement was also provided for in the first Strategy for the development of the procurement system for the years 2016-2020, adopted by Government Decision no. 1332 of December 14, 2016.

The introduction of electronic procurement in the Republic of Moldova with the support of the European Bank for Reconstruction and Development (hereinafter EBRD) was announced in November 2016, together with the signing of a Memorandum for the development of electronic procurement between the Ministry of Finance, the Public Procurement Agency, several business associations, NGOs (including IDIS „Viitorul”), as well as IT companies, and it was declared to be an indispensable tool for a transparent and efficient national procurement system.

The use of electronic systems in public procurement implies a number of advantages and benefits for both public authorities and citizens. These include:

- Making budgetary expenses more efficient by reducing trading costs, those related to paper-based procedures and by obtaining more competitive prices.
- Reducing the administrative burden by carrying out the entire procurement process in electronic format and by gradually excluding paper purchases that consume officials' time and administrative and budgetary resources.
- Increasing the confidence of the economic agents in the procurement system, which determines their more active participation in the procurement procedures and the increase of the competition level.
- A high degree of transparency that increases the confidence of citizens in public authorities and in the correct management, in the public interest, of public resources.

What is the current electronic procurement system MTender?

In January 2017, the Ministry of Finance in collaboration with the EBRD launched the pilot mode of the new electronic public procurement system - SIA RSAP MTender (hereinafter MTender). While the system operated in this pilot mode, the authorities had the possibility to test its functionality on low-value procurement procedures, this being a stage which preceded the implementation of the electronic instrument for the high-value purchases. The decision to use the system for small purchases belonged, with some exceptions, to the contracting authorities.

The main purpose of implementing the new electronic procurement system „MTender” was to increase transparency in the public procurement process, to ensure adequate value for public money, to improve the access of small and medium-sized enterprises to the public procurement market and implicitly the level of competition, but also to reduce the trading costs for all parties involved, thus contributing towards ensuring a competitive and sustainable national public procurement system.

The basic objectives underlying the implementation of the „MTender” system were:

- **increasing transparency and preventing corruption** and corruptible acts during all stages of the public procurement process, beginning with its planning and to the final execution of the public procurement contract, including all related payments;
- **increasing the efficiency and the value of the quality/price ratio** in public procurement processes;
- **reducing transaction costs** for all stakeholders, especially for small and medium-sized enterprises;
- **implementing a competitive and sustainable model of an electronic procurement system**, with low maintenance costs and scalable, to meet the needs of citizens and of the state.

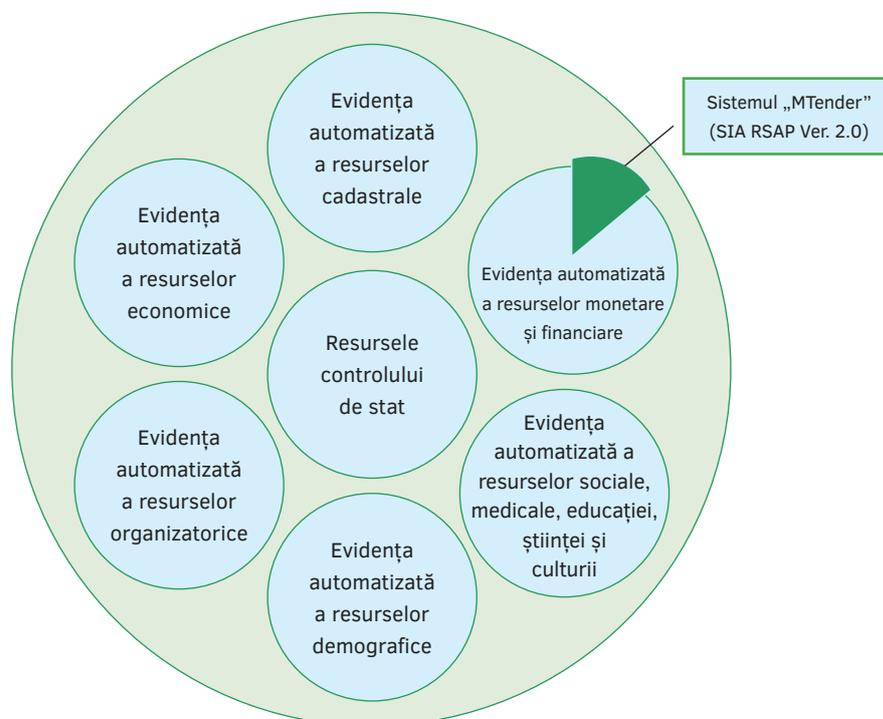
Following the pilot implementation of the MTender system, its results showed that the use of electronic platforms contributed to the increase in the number of participants in the public procurement procedures, to the increase of the level of trust of the business community in the public procurement system, and to the reduction of the time necessary for the preparation of the documents for the submission of offers, etc. According to the 2nd edition of the Index fo trust in the public procurement system developed by IDIS „Viitorul” in April this year, one of the positive changes listed by the economic operators active in the public procurement market was that: „conducting public procurement through the SIA RSAP MTender electronic system determined the reduction of the transportation costs incurred by the economic operators in order to receive the materials and the information relevant to the procurement, as well as the saving of the necessary time.” Also, with regard to the confidence in the public procurement system and in comparison to 1 or 2 years ago, the economic

operators participating in the survey and in the in-depth interviews observed some positive trends, with their confidence level slightly increasing. This is due in particular to the implementation of electronic procurement, which has contributed to increasing the level of transparency and reducing the possibilities of faking public procurement procedures¹.

Subsequently, the technical concept of the automated information system "The State Register of Public Procurement" (MTender) was approved by Government Decision no. 705 of July 11, 2018. According to the aforementioned GD, the Ministry of Finance was to be the owner of the central data unit of the MTender system and to ensure the implementation, operation, and development of the system in accordance with the international legislation and agreements to which the Republic of Moldova is a party.

The concept mentioned earlier provides that the „MTender” system represents a component of state information resources and is part of the monetary and financial resources segment (Figure 1). The „MTender” system creates a unitary information space and an official source of data on public procurement procedures and on the resulting public procurement contracts. The „MTender” system has been revised in order to automate the processes making up the public procurement procedures, but also the pre-procedure (planning) and post-procedure (monitoring) processes. At the same time, the „MTender” system was to provide advanced data analysis tools.

Figure 1. The place of the MTender system within the state information resources, according to the Technical Concept of the system (GD no. 705 of July 11, 2018)



1 <http://viitorul.org/ro/library-books/1629>

The public institution „Center for Information Technology in Finance” (hereinafter CTIF), was to be the owner and the technical operator of the central unit of data of the MTender system, being responsible for the maintenance of the mentioned unit, for the maintenance and development of the single governmental portal of online access. (<https://mtender.gov.md/>), for ensuring the interoperability of the system with the common government technological platform „MCloud”², as well as for the integration with the state information resources and the relevant government electronic services available in the Republic of Moldova.

It is important to underline the principles of the MTender system as set out in the Technical Concept:

1. a model of interconnected multi-platforms.

The „MTender” system consists of a Central Data Unit that communicates in real time with several electronic procurement platforms and different electronic governance services, ensuring the complete conduct of public procurement by electronic means.

2. full coverage of procurement processes.

The functionalities of the „MTender” system cover the entire process of public procurement - from procurement planning to billing and payments under public procurement contracts.

3. interoperability with electronic governmental services.

The „MTender” will ensure interoperability with government electronic services, information systems and state registers relevant to public procurement processes.

4. open-source, open data, and open contracting standards and principles

The Central Data Unit will be developed mainly on the basis of the open-source model and will promote transparency and accountability by incorporating the Open Data Concept and the Open Contracting Data Standards (OCDS).

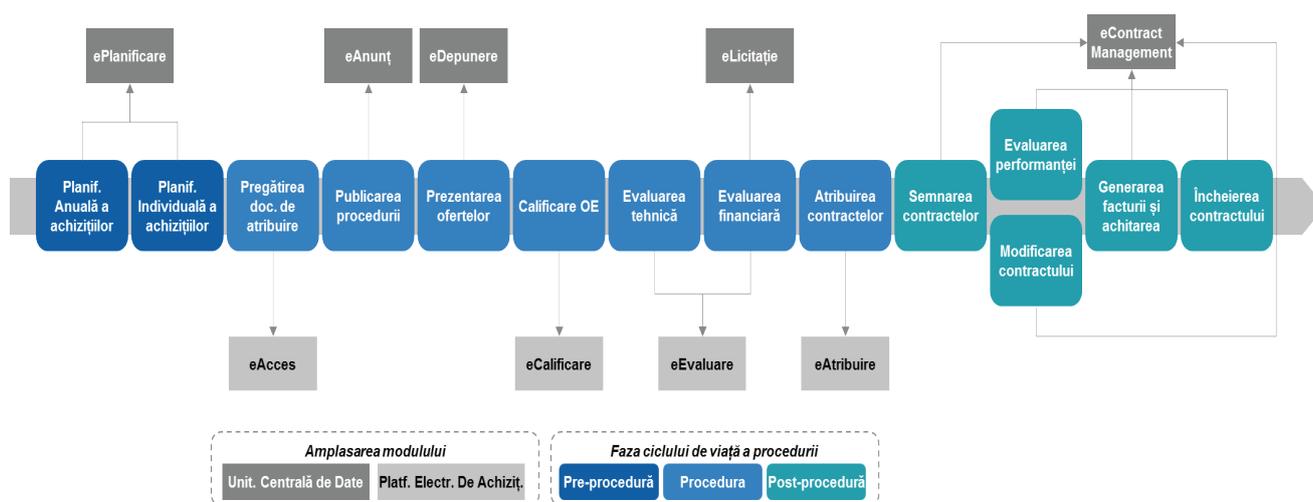
5. cost efficiency in implementation.

The multi-platform approach in developing the MTender system will ensure high value for money ratio through:

- a. use of open-source applications;
- b. integration of government electronic tools and services;
- c. adopting a sustainable development model, based on the tax per transaction.

² The common technological platform implemented by the Government in order to make more efficient the expenses for the IT services consumption. The MCloud platform aims to make government spending more profitable and to consolidate data centers in a form of shared management - <http://egov.md/en/projects/mcloud>.

Figure 2. Stages of the procurement process in MTender system according to the technical concept

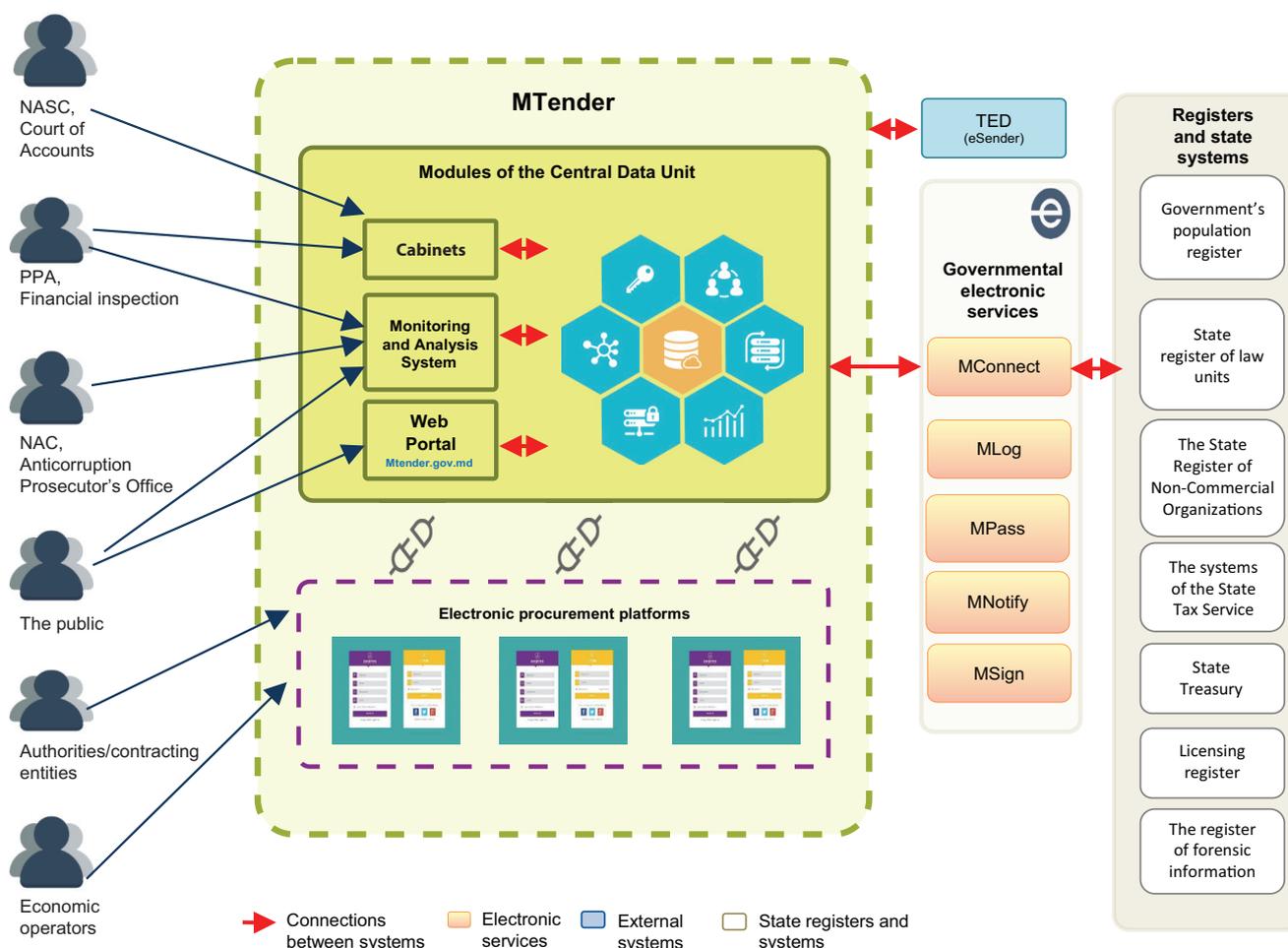


For the purpose of implementing the above mentioned GD no. 705/2018, the Ministry of Finance approved, in September 2018, the Program for the experimental use of the MTender system (Order of the MF 157 of September 14, 2018 with further modifications). According to this program, the contracting authorities were going to use the MTender system from 17 October 2018 to conduct requests for price quotation (RPQ) and open tender types of procedures. In other words, all public authorities with the contracting authority status according to Law 131/2015 were going to have to carry out the RPQ and open tender procedures through the MTender system. Regarding the technical functionalities, according to the same order, the system would offer the following functionalities to the authorities and economic operators:

Contracting authorities and economic operators

- editing and publishing the notice for participation and other information related to the process of organizing a procedure for awarding the public procurement contract;
- establishing deadlines for submitting clarifications to published information;
- submission of electronic offers;
- submitting clarifications and providing answers to received clarification questions;
- establishing, for tenderers, deadlines for submission of offers;
- filing and receiving the ESPD;
- applying the electronic auction procedure with the goal of evaluating the submitted bids;
- the designation of the winners in the procurement procedure;
- the publication of the results of the public procurement contract award;
- publishing information on the concluded contracts;
- publication of the information related to the public procurement procedure (participants, offers, contracts);
- generating and signing public procurement contracts;
- registration of public procurement contracts;
- publication of annual procurement plans.

Figure 3. The structure of the MTender system



Also in October 2018, the Regulation on the way of keeping the State Register of public procurement formed by the automated information system „State Register of Public Procurement” (MTender) was approved and it entered into force on October 12, 2018 (Government Decision No. 986 of October 10, 2018). The respective regulation contained provisions in relation to the following aspects: the rights and obligations of the subjects of legal relationships in the field of register creation and operation; managing and ensuring the operation of the registry; the users of the registry, as well as their registration, authentication and authorization within the system; MTender interaction with other information systems (State Register of Population, State Register of Law Units, Treasury Information System, State Tax Service Information Services, etc.) and governmental electronic services (MPass, MSign, MNotify, MConnect, MCloud, MLog, MPay, eFactura); requirements regarding the information placed in the register; minimum security and operating requirements and other specific requirements.

Constraints on the use of the MTender system

In 2018 and 2019, a series of modifications and adjustments were made in the MTender system in order to enable contracting authorities to conduct procedures in the most efficient manner, but also to stimulate more active participation of economic operators. However, there are still a number of deficiencies and inconsistencies with the primary and normative-secondary legal framework and some of the technical functionalities stipulated in the Technical Concept of the system and of the Regulation regarding the keeping of the State Register of MTender public procurement are missing.

The current deficiencies and inconsistencies in the system as well as the lack of technical functionalities that ensure the electronic execution of the entire process of public procurement generates a series of constraints for economic operators, who are thus discouraged from participating in public procurement procedures. Due to these malfunctions, the positive effects of implementing electronic procurement cannot be fully enjoyed.

Currently (August 2019), the following deficiencies and dysfunctions that generate constraints on carrying out the public procurement procedures can be highlighted:

I. THE STAGE OF LAUNCHING THE PUBLIC PROCUREMENT PROCEDURE

1. Publishing the notice for participation

- ✓ The content of the announcement for participation in the system does not correspond to the provisions of Law 131/2015;
- ✓ the system does not contain the feature necessary for generating the participation announcement;
- ✓ the contracting authority does not control all the data appearing in the notice for participation. Some information appears in the notice for participation without being indicated by the CA or in a different way than the one in which it was indicated by the CA (eg: type of procurement procedure, validity of offers - default value of 90 days);

2. Generating awarding documentation files

- ✓ The system does not generate any documents that are part of the awarding documentation and the contracting authority has the task of preparing them manually and then uploading them into the system;

3. Generarea DUAE electronic

- ✓ The system does not generate the ESPD and, accordingly, the contracting authority must pre-fill it manually and upload it into the system, while the economic operators face the same constraint: downloading the ESPD pre-filled by the authority, manually completing it, signing it electronically and uploading it to the system. Moreover, the economic operator is obliged to submit precisely that ESPD blank pre-filled and published by the authority, and which is often in a non-editable format (pdf). However, the submission of an ESPD for any other than the one requested by the contracting authority represents grounds for disqualification from the public procurement procedure. Therefore, completing the electronically generated ESPD form excludes the risk of submitting a form different from the one requested by the contracting authority and, consequently, the disqualification of the bidders. We mention that one of the electronic platforms has developed an electronic ESPD, but the use of this tool is not mandatory for authorities and economic operators.

4. Specifying the deadlines for clarification and submission of the offer

- ✓ The minimum deadlines set in the system do not correspond to those provided for in Law 131/2015, which stipulates in the case of RPQ a minimum of 7 days for goods, and a minimum of 12 days for works and services. In the case of the open auction, the law provides for at least 20 days for purchases exceeding 2.3 million. lei (goods and services) and 90 mln. lei (works).

5. Proper display of the lot list in the case of multilot procedures

- ✓ The system does not number the lots and does not display them in the order established by the contracting authority in the award documentation, which generates confusion and errors.

6. Selecting CPV codes from different categories of goods, services or works

- ✓ The system does not permit the selection of CPV codes from different categories in order to be able to carry out mixed procurement procedures that have the purpose of different types of procurement (goods, services, works) in accordance with the Law 131/2015.

7. Checking the availability of the financial resources of the authority at the stage of launching the procurement procedure

- ✓ The integration of MTender with the State Treasury system allows verifying the availability of financial resources when launching the procurement procedure. However, this functionality is not offered by all electronic platforms in accordance to the provisions of the Law 131/2015 which states that a procurement contract is concluded according to the procurement procedures and within the limit of the budgetary allocations. Also, one of the conditions for planning a procurement contract, according to the Regulation on the planning of procurement contracts, is the existence of financing sources or the proof of their allocation.

8. The modification of the procurement plan

- ✓ In case of cancellation of a procurement procedure (eg, due to the lack of participants), the system does not allow the initiation of a new procedure from the existing procurement plan. The authority is obliged to introduce in the plan a new procedure, without maintaining the connection with the canceled procedure, which creates confusion with regard to the correctness of the plan and to the use of the budgeted resources.

II. THE STAGE OF CONDUCTING THE PROCUREMENT PROCEDURE

1. Modification of the procurement procedure data

- The system does not allow to make changes in the data of the procurement procedure after publication (eg: unit of measure, quantity, value). In the case of NASC decision stipulating the revision of the requirements, the procedure will be canceled and another one will be initiated by creating a new plan line.
- The system does not allow for the modification of the structure, value, and order of the lots.

2. Ensuring the notification of the economic operators who have submitted a request for participation

- The system does not ensure the notification of the economic operators who have submitted an offer so that it can be informed whether the offer has been submitted successfully, or not.

3. Ensuring the submission / modification / withdrawal of offers in a legible electronic format

- The system does not offer the possibility of uploading the electronic offers in a format predetermined by the system, so as to ensure their uniformity and to prevent the errors in the offers.

4. Ensuring the delivery of the receipt for the submission of the offer

- The system does not ensure the generation and saving of the receipt for the submission of the offer.

5. Ensure the secure (encrypted) submission of the offer

- The system does not ensure the submission of encrypted offers, in order to secure the offers.

6. Ensuring the electronic submission of the offer guarantee

- The system does not have a technical instrument for submitting the offer guarantee in an electronic format.

7. Marking some information in the offer documentation as personal data and/or trade secret

- As the MTender system works according to the „everyone sees everything“ principle and the documents of the offer are public, it is necessary to protect personal data and trade secrets, in accordance with the legislation in force.

III. THE STAGE OF AWARDING AND SIGNING THE CONTRACT

1. Confirmation of the completion of the process of awarding the public procurement contract

- The system does not offer the possibility of confirming the completion of the process of awarding the public procurement contract.

2. Generation of the awarding decision

- The system does not generate automatically the awarding decision, the contracting authority having to elaborate it on paper, upload it to the system and send it to the Public Procurement Agency.

3. Generating the report on the public procurement procedure

- The system does not generate automatically the report.

4. Generating the award notice with all the mandatory information according to Law 131/2015

- The system does not automatically generate the announcement of the award of the public procurement contract.

5. Generation of public procurement contract between 2 and more parties (several contracting authorities in case of centralized procurement or association agreements).

- The system has no functionalities for generating the public procurement contract.

6. Cancellation of the award of the procurement contract and the award of the contract to another participant in the procurement procedure.

- The system does not have functionalities that allow the cancellation of the award of the procurement contract (in case of a NASC decision, or in case of identification of corruption acts, anti-competitive practices, etc.).

7. Registration of procurement contracts with the Treasury

- The system has no functionalities for electronic registration of the contract with the Treasury through the Treasury's information system. Currently, the registration of contracts on paper creates major constraints and delays the procurement process.

8. Modification of a procurement contract whose registration was refused by the Treasury

- The system does not have functionalities for modifying/correcting errors in the contract in case the Treasury refuses to register it for this reason.

9. Modification of a procurement contract at the execution stage (additional agreements for the increase, or decrease of value, the extension of the execution deadline)

- The system does not have functionalities for initiating, generating and registering additional agreements to public procurement contracts.

Another problem concerns the terminology used in the system, including on the governmental portal - www.mtender.gov.md, as well by electronic platforms, a terminology which is often unclear, different from one platform to another and which does not correspond to legal terms. To illustrate, the system and the electronic platforms use terms such as: „*procedural report*“, „*illustration*“, „*updating period*“, „*review of offers*“, „*submission documents*“, „*minimum step of lowering the rate of auction*“, „*minimum goal for price reduction*“, „*decline rate*“ etc., and this creates confusion for economic operators, but also for the general public. It is necessary that both the governmental portal and the electronic platforms use a single terminology that corresponds to the legislation in the field.

Also, an extremely important aspect for the economic operators are the filters and the search engines in the system, which are meant to facilitate the search for a certain procurement procedure, the acquisitions of a contracting authority or the procurement contracts awarded to a certain economic operator. Respectively, the 3 basic filters are: information about the buyer (name, registration number, region, type, type of activity), the procurement procedure (unique identification number, type, status, estimated value, CPV, etc.) and periods (period of publication, delivery, clarification, electronic auction, submission of tenders, award of the contract). However, there is no filter for „economic operators“ to make it possible to search for contracts awarded by an authority to a particular economic operator.

The latest solutions and developments in the MTender system

The most recent updates and functionalities introduced (July 2019) in the MTender system, which facilitate the participation of economic operators in public procurement, eliminating some of the constraints listed above, are the following:

1. The low-value procurement procedures are executed in the same way as the RPQ and open tender procedures, with a shorter deadline for clarifications (minimum 1 day) and for the submission of the offer (minimum 2 days) and with the optional „electronic auction“ (Before these changes, the „electronic auction“ was obligatory. This meant that the authority decided whether to carry out small purchases with or without electronic auction, and the economic operator had to follow the requirements set by the authority).
2. In addition to the only awarding criterion available in the previous system - the „lowest price“ - the other 3 awarding criteria were introduced in accordance with Law 131/2015 (the lowest cost, the best quality-price ratio, the best value for money). Moreover, when selecting other awarding criteria than the „lowest price“, all bids submitted during the procurement procedure become visible.
3. The possibility of uploading additional documents (clarifications, confirmatory documents related to ESPD) was introduced to the tender that was selected as the winner following the award of the contract.
4. The contracting authority may return to the decision to award the procurement contract, a functionality required in case of a submission by a participant of an appeal which is followed by a decision in which, for example, the NASC orders as a remedial measure the re-evaluation of the offers.
5. The „appeals“ section was integrated into the MTender system. Thus, the system displays the information regarding the formulated appeals, and the details - in the „the appeal procedure“ section. So in cases where a complaint has been formulated regarding a procurement procedure, the information that until now could only be found on the NASC web page (and there were cases in which not even the contracting authority knew of such information), will be displayed.

Conclusions and recommendations

In conclusion, we see that, after about 10 months of implementation of the MTender system, users face a number of challenges in the process of awarding public procurement contracts. The challenges are based on the mismatches between the technical functionalities of the system and the legal provisions and those of the secondary-normative framework that was not approved after the latest amendments to Law 131/2015, but also due to the fact that the system does not ensure the electronic conduct for the entire procurement process, thus doubling the efforts of the participants and discouraging the economic operators from entering the public procurement market.

Taking into account the findings mentioned in the previous chapters and in order to eliminate the current constraints faced by economic operators in the process of participating in the public procurement procedures, the following actions are required:

I. THE GENERAL:

- Elimination of inconsistencies between the functionalities of the MTender system and the legal framework, either by adjusting the system to the legal provisions, or, where appropriate, by amending the legal framework in accordance with the technical aspects of the system that were not provided for in the last amendments of Law 131/2015. The lack of clear game rules and the mismatches between the system and the legal framework are a major constraint in the way of the proper functioning of the procurement system and for the active participation of economic operators in the procurement procedures.
- Speeding up the approval of the secondary regulatory framework which, after the amendment of the Law 131/2015 in 2018, requires modifications and adjustments. Under the current conditions and in the absence of law enforcement regulations, there arise interpretations of this law as well as an increasing number of filed appeals and, as a result, delays in the procurement process with negative effects for both the authorities and the economic operators involved in the public procurement procedures.
- Speeding up the implementation of the technical functionalities of the MTender system stipulated in the Technical Concept and in the Regulation regarding the way of keeping the State Register of public procurements formed by the automated information system „The State Register of Public Procurement” (MTender).
- Ensuring the integral conduct of the public procurement process by electronic means (from the planning and until the management of the procurement contract) through the MTender system and eliminating the current burden on the contracting authorities and economic operators who are required to elaborate manually a series of documents, in order to be able to upload them later on into the system.
- Ensuring the integration of the system with the state information resources and with the relevant and available government electronic services in the Republic of Moldova in order to facilitate the

access of the economic agents to the market of public procurement, especially of SMEs, which would generate more competition and efficiency as a result of the significant savings.

- Development of the Business Intelligence (BI) analysis mode as an integral part of the MTender system that will allow both economic operators, the civil society and the general public to analyze the opportunities in the procurement market and to monitor public procurement, thus contributing to the efficiency of the procurement system and to the reduction of the fraud and corruption in the system.

II. TECHNICAL:

- Electronic generation of the announcements (notice of intent, notice for participation, notice of award), of the awarding documentation, tender documentation, of the ESPD, of the awarding decision, of the report, of the procurement contract, of the additional agreements to the contract, in accordance with the concept technical.
- Modification, in accordance with the legislation in force, of the minimum terms for clarifications and submission of the offers pre-set by the system so as to prevent abuses by the contracting authorities.
- Ensuring the proper display in the system of the list of lots according to the order set by the authority in the awarding documentation;
- Introducing the possibility of selecting CPV codes from different categories to make it possible to carry out mixed procurements in the system according to the provisions of Law 131/2015;
- Introducing the verification of the availability of the financial resources in the accounts of the authority at the beginning of the procurement procedures, something that would eliminate the issue of procurements that do not have financial coverage as well as all its consequences.
- Ensuring the notification of the economic operators who have submitted an offer whether or not their offer has been successfully submitted.
- Ensuring the secure (encrypted) submission of offers by defining the way to implement the secure submission of the offer (architecture, technologies, participants, developer, etc.);
- Organizing discussions with commercial banks in order to define a mechanism for issuing electronic bank guarantees and their implementation terms.
- Ensuring the delivery of the confirmation regarding the completion of the process of awarding the public procurement contract so as to exclude certain confusion of the economic operator but also of the general public.
- Ensuring the electronic registration of the contract with the Treasury through the Treasury's information system. Currently, the registration of contracts on paper creates major constraints and delays the procurement process;
- Ensuring the possibility of editing / adjusting a contract in which errors have been identified and which the Treasury does not accept for registration.
- Introducing the possibility of modifying the procurement contract at its execution stage (additional agreements for the increase or the decrease of value, as well as for the extension of the execution term) according to the provisions of the Law 131/2015.

