

## Chapter 29

# Public procurement

## 1. General issues

Currently, public procurement is one of the most dynamic sectors which is often of big interest and both challenge for investors. This is, inter alia, due to the foreign loans granted to the Romanian State by international financial institutions such as EBRD, IBRD or the World Bank as well as to the structural funds accessed by Romania as of January 1<sup>st</sup>, 2007.

It is estimated that the number of such projects will grow in the following years, taking into account the huge need to modernize the Romanian public infrastructure and the increasing financing granted to Romania after the accession to the EU on January 1<sup>st</sup>, 2007.

In order to fulfill the undertakings assumed by Romania towards the EU, the National Authority for Regulation and Monitoring of the Public Procurements (Autoritatea Nationala pentru Reglementarea si Monitorizarea Achizitiilor Publice - “ANRMAP”) was established based on Government Emergency Ordinance no. 74/2005, as further amended and supplemented.

## 2. Main regulations

- Government Emergency Ordinance no. 34/2006 on the award of public procurement contracts, public works and services concession contracts (“**GEO no. 34/2006**”)<sup>1</sup>;
- ANRMAP Order no. 155/2006 approving the Guide for the award of public procurement contracts;
- Government Decision no. 925/2006 approving the application norms of the provisions regarding the award of public procurement contracts of Government Emergency Ordinance no. 34/2006.

## 3. Parties in a public procurement contract

Public procurement represents the method via which the public authorities or the entities controlled by these authorities (called “contracting authorities”), obtain products, and engage works and services from private or public persons, based on public procurement contracts.

The following are qualified as *contracting authorities* for the purposes of public procurement:

- a) any authority and public institution;
- b) any legal entity performing non-commercial or non-industrial activities of public interest, that has one of the following characteristics: (i) is financed by an authority or

<sup>1</sup> The current contracts and the award procedures as of the date of entry into force of GEO no. 34/2006 (June 30, 2006) are finalized based on the legal provisions existing at the starting date.

a public institution or other public body; (ii) is subordinated/under the control of a public authority or institution or other public body; (iii) more than half of its board, management or supervising members are appointed by a public authority or institution or other public body;

- c) any partnership made up of one or several contracting authorities mentioned under items a) or b);
- d) any public company performing relevant activities in one of the sectors of public utility-water, energy, transports and postal services;

Mention should be made that the entity developing economic activities and that is directly or indirectly under the dominant influence of the entities mentioned under item a), b) or c) above is considered as *public company*.

- e) any subject of law performing relevant activities in one of the sectors of public utility-water, energy, transports and postal services and benefits from special or exclusive rights to perform such activities.

Mention should be made that GEO no. 34/2006 does not provide for limitations in case of suppliers, contractors or providers in respect of nationality. Without prejudice to the agreements or treaties concluded by Romania, in case two or more offers are equivalent, the contracting authority has the right to declare as winning offer the offer which contains more than 50 % products originating from the European Union member states or third party states which concluded with the European Community states bilateral or multilateral agreements, based on reciprocity.

## 4. Cases when the contracting authority is not bound to apply GEO no. 34/2006

### 4.1. General cases

The law provides for the following main situations:

- a) The award procedure to be applied by a contracting authority from the national defence and national security sector, may conduct to a disclosure of an information against an essential interest of the state or implies protection of certain essential interest of the state related to the production and trade of weapons, munitions and war gear;
- b) The contract has been classified as secret, its execution implies special security measures according to the enforced laws or involves the protection of certain essential interests of the state;
- c) The award procedures are set based on an international agreement concluded in compliance with the Treaty for the establishment of the European Community, concluded at March 25, 1957, as further amended (the "**Treaty**"), with one or more states which are not members of EU aiming at implementing/operating a project with signatory states, envisaging the supply of products and execution of works; This case is applicable only if such agreement establishes a specific awarding procedure;
- d) The award procedures are set based on an international agreement referring to stationary troops; This case is applicable only if such agreement establishes a specific award procedure;
- e) Enforcement of procedures specific to international bodies;

- f) Services contract awarded to a legal entity that acts as contracting authority itself and provides such services based on exclusive rights, in compliance with the provisions of the Treaty;
- g) The object of the contract is, inter alia:
  - the purchase or lease, by any financial means, of lands/buildings/other existing real estate or rights over such assets;
  - providing financial brokerage services regarding the issuance, purchase, sale and transfer of securities or other financial instruments, as well as providing specific services of a central bank by the National Bank of Romania;
  - labour force employment etc.
- h) The contracting authority envisages purchasing: hotel and restaurant services, railway transport services, water transportation services, ancillary transport services, legal services, labour force selection and placement services, investigation and protection of goods and persons, education, health or social assistance services and leisure, cultural and sporting services. In such case the contracting authority is not bound to apply GEO no. 34/2006 provided that the value of the services contract is less than or equal to the RON equivalent of EUR 125,000 in case of authorities and public institutions and EUR 420,000 in case of public companies or subject of law performing relevant activities in one of the sectors of public utility – water, energy, transports and postal services.

The contracting authority has the right to buy directly, without following any of the procedures provided by law, any products, works and services the value of which, exclusive of VAT, is less than the RON equivalent of EUR 10,000 per each product, work and service.

## 4.2. Specific cases

In case of the contracts in sectors of water, energy, transport, postal services or other relevant activities as defined by GEO no. 34/2006, the contracting authority is not bound to apply GEO no. 34/2006 in following cases, inter alia:

- a) for the award of the contract to an affiliate company provided that at least 80% of the medium turnover of the affiliated company for the last 3 (three) years comes from the supply of similar products, the execution of similar works and provision of similar services for the contracting authority. In case the affiliated company was incorporated less than 3 (three) years ago, the annual turnover is computed based on the annual business plan of the relevant entity;
- b) the contracting authority purchases products with the purpose of reselling or renting the same, and does not benefit from any special or exclusive right, and any other entities having the right to sell or rent similar products under the same conditions;
- c) the contracting authority intends to acquire products, services or works purposed for the performance of the relevant activities in a UE third party state, provided that a network or a geographical area of European Community is not used;
- d) the entities performing relevant activities in prospect or the extraction of raw oil, natural gas, coal or other solid fuels or in energy sector may purchase energy and energetic products pertaining to the extractive industry or other fuels without being bound to apply GEO no. 34/2006;

- e) the entities operating in the water sector are not bound to apply GEO no. 34/2006 in case such entities purchase water;
- f) in case the relevant activity for which the contracts are purposed is directly exposed to competition; The European Commission, further to a notification/request provided in this respect, establishes if the relevant activity is or not directly exposed to competition.

## 5. Types of contracts

GEO no. 34/2006 provides for the following types of public procurement contracts:

- a) *The supply contract* focuses on the supply of products, based on purchases, for full consideration or in instalments, or rental or leasing with or without a purchase option;
- b) *The services contract* focuses on the provision of any services comprised in the annexes 2A and 2B of GEO no. 34/2006;

In case of advertising services supplementary rules for transparency should be observed, including specific clauses in the public procurements contracts for this purpose.

- c) *The works contract* focuses on performance and, if necessary, on planning and performance of works related to one of the activities listed in annex 1 of GEO no. 34/2006.

## 6. Procedures for awarding public procurement contracts

### 6.1. Types of procedures

The law regulates the following types of procedures:

- a) *Open public tender* - any interested supplier, contractor or provider is free to submit an offer;
- b) *Limited public tender* - takes place in two distinct stages. Only candidates selected by the contracting authority in the first stage will be invited to make an offer in the second stage;
- c) *Competitive dialogue* – any interested supplier, contractor or provider is free to submit an offer; the contracting authority may perform the dialogue only with the *accepted candidates*. Only *candidates selected* by the contracting authority (from the accepted candidates) are invited to make the final offer;

Mention should be made that the competitive dialogue cannot be used by entities operating in the water, energy, transport and postal services sector.

- d) *Negotiation* - the contracting authority discusses and negotiates the contractual clauses, including the price, with the selected candidates from suppliers, contractors and providers; the negotiation may be with or without a prior publication of a participation notice.
- e) *Offer request* - a simplified procedure according to which the contracting authority requests offers from several suppliers, contractors and providers;

- f) *Solutions contest* - permits the contracting authority to obtain, especially in the territorial planning, urban and zoning field, a plan or a project that was selected by a jury on a competitive basis.

As a rule, a public procurement contract is awarded pursuant to an open or limited public tender. In case of contracts in sectors of water, energy, transport, postal services or other relevant activities as defined by GEO no. 34/2006, as a rule, a public procurement contract is awarded pursuant to an open or limited public tender or negotiation with a prior publication of a participation notice.

In case the contracting authority uses another procedure, it should prepare a *justification note* in this respect.

*The offers request* may be used by the contracting party only in cases when the estimated value of the public procurement contract, exclusive of VAT, is less than the RON equivalent of EUR 75,000 for services or supply contracts, or EUR 500,000 for the construction works contracts.

## 6.2. Negotiation procedure

### 6.2.1. Negotiation procedure with a prior publication of a participation notice

The *negotiation procedure with a prior publication of a participation notice* may only be applied only in any of the cases below:

- (i) as a result of an open or limited public tender, a competitive dialogue or an offer request, no offer or only unacceptable or incompliant offers have been submitted, and only if the contracting authority does not substantially change the initial requirements, in the awarding documentation;
- (ii) in exceptional cases when the products/services/works do not allow an initial global estimation of the contract price;
- (iii) when the service types do not allow for an accurate preparation of the terms of reference;
- (iv) the contracting authority contract works that are to be exclusively performed for scientific research, experimental purposes or technological development.

### 6.2.2. Negotiation procedure without a prior publication of a participation notice

The procedure of *negotiation procedure without a prior publication of a participation notice* may be conducted in the following cases:

- (i) when the products, works and services can be supplied, performed or provided by a single contracting party out of technical or artistic reasons, or of reasons related to the protection of an exclusive right on the same;
- (ii) due to exceptional reasons, when the time periods established for open or limited public tender, negotiation with a prior publication of a participation notice or offer request cannot be fulfilled;
- (iii) the contracting authority purchases products (awarding of a contract, in case of entities operating in the water, energy, transport and postal services sector) that are

- (is) to be exclusively performed for scientific research, experimental purposes or technological development;
- (iv) when the authority decides to additionally purchase products for partial replacement or extending the previously purchased equipment, installations or other devices. The contracting party is entitled to enforce this procedure in a period not exceeding 3 (three) years from the initial contract award. In case of contracts in sectors of water, energy, transport, postal services or other relevant activities as defined by GEO no. 34/2006 such limit of 3 (three) years is not applicable;
- (v) when the products are purchased in very advantageous conditions from an economic operator who closes his business or from a syndic judge managing the business of a bankrupt entity;
- (vi) when the purchase of supplementary/additional services or works is contemplated that, although not included in the services/works contract previously awarded to a contractor, become necessary for the contract performance;
- (vii) when, after a services or works contract is awarded, the contracting authority intends to purchase new services or works, similar to the services or works purchased based on the initial contract; Mention should be made that such case is not applicable for services contract awarded by entities operating in the water, energy, transport and postal services sector;
- (viii) when, as a result of a solutions contest, the contract must be awarded to a competitor;
- (ix) when a contracting authority purchases raw materials traded on the commodity exchanges on the spot market;
- (x) when a contracting authority acting in the public utilities sector (water, energy, transportation and postal services) has the opportunity to purchase the contemplated products for a lower price than the market price.

### 6.3. Special methods for awarding public procurement contracts

Besides these procedures, GEO no. 34/2006 provides *special methods* for awarding public procurement contracts:

- a) frame-agreement for a maximum period of 4 (four) years concluded, customary, based on open or limited public tender procedure;
- b) dynamic purchasing system for a maximum period of 4 (four) years, in order to purchase products for ordinary use. In this case should be fulfilled the rules of open public tender procedure. This procedure may be used only by Electronic System of Public Procurement (Sistemul Electronic de Achizitii Publice – “SEAP”);
- c) electronic public tender.

This last method is used in the following cases: (i) as a final stage of an open or limited tender procedure, negotiation with a prior publication of a participation notice or offer request; (ii) resuming of competition in case of frame-agreement and (iii) at the submission of the final offers in order to award a public procurement contract using the dynamic acquisition system.

## 7. Publicity for the public procurement contracts awarding procedure

The contracting authority must publish in the SEAP (and optionally in the Official Gazette, Part IV) a participation notice in the following cases:

- (i) the open or limited public tender, competitive dialogue or negotiation with a prior publication of a participation notice procedures are launched in order to conclude a public procurement contract or frame-agreement;
- (ii) a dynamic purchasing system is initiated;
- (iii) a solution contest is organized.

As of January 1<sup>st</sup>, 2007, the intention notice, the participation notice and the awarding notice are published in the SEAP and, as the case may be, in the Official Journal of the European Union.

Mention should be made that in case when the estimated value of the public procurement contract, exclusive of VAT, is over the RON equivalent of EUR 75,000 for services or supply contracts or EUR 500,000 for the works contracts, in order to publish the notice in SEAP, the operator of SEAP shall obtain the prior publication approval from ANRMAP.

The participation notice and the awarding notice shall be published in the Official Journal of the European Union in case the value of the contract is over the RON equivalent of:

- (i) EUR 125,000 for supply or services contracts granted by authorities and public institutions;
- (ii) EUR 420,000 for supply or services contracts granted by public companies or subject of law performing relevant activities in one of the sectors of public utility – water, energy, transports and postal services;
- (iii) EUR 5,000,000 for works contracts.

As of January 1<sup>st</sup> 2008, the publication of the participation notice and the awarding notice in the Official Gazette, Part IV, is optional.

## 8. Criteria that the bidder/candidate must meet in order to participate in public procurement contracts

The contracting authority *is obliged to exclude* from the award procedure of a public procurement contract any bidder/candidate which has been convicted, during the last five years, for taking part in organized crime, corruption, fraud and/or money laundering activities.

A bidder/candidate *may be excluded* from the award procedure of a public procurement contract, if:

- a) it undergoes a bankruptcy or liquidation procedure, its business being managed by a director appointed by the court and its commercial activities being suspended;
- b) it is involved in a legal procedure that may lead to any of the situations stipulated under item a);
- c) it has outstanding budgetary debts, pursuant to the current legal provisions in Romania or in the state where the bidder/candidate is established;

- d) it has been convicted, in the last three years, for a professional error or acts infringing professional ethic;
- e) it provides false information or does not submit the information requested by contracting authority as regards the items a)-d).

The bidder/candidate is bound to present the documents required by the contracting party in order to prove its technical and/or professional capabilities as well as to allow the inspection of its production capacities and system performance of its quality control, and of performing research-development studies. Mention should be made that another person, irrespective of the existing relationships between the candidate/bidder and that person, may support the technical and/or professional capabilities of the candidate/bidder.

In order to check the economical and financial capabilities of the candidates/bidders, the contracting authority is entitled to request the balance sheet as well as other proving documents, for example creditworthiness letters submitted by banks, reports on global turnover, insurances for various professional risks. Mention should be made that another person, irrespective of the existing relationships between the candidate/bidder and that person, may support the economical and financial capabilities of the candidate/bidder. The contracting authority is bound to keep confidential the information submitted by bidders/candidates, provided that such information is claimed as confidential by candidate/bidder and the disclosing of such information affect the legitimate interest of the candidate/bidder, especially the commercial secrecy and intellectual property.

## 9. Award documentation

Pursuant to GEO no. 34/2006 the *awarding documentation* includes all information related to the object of the public procurement contract and the awarding procedure of this object, including the terms of reference or, if case, the descriptive documentation.

The contracting authority draws up the awarding documentation. The documentation must contain at least: general information regarding the contracting authority; minimal qualification requirements and the documents that the bidder/candidate must submit; terms of reference or descriptive documentation (used for competitive dialogue procedure or negotiation procedure); instructions regarding the deadline that must be observed and the formalities that must be met; the minimal qualification criteria, if requested, and the proving documents; instructions regarding the preparation and presentation of the financial and technical offer; detailed and complete information regarding the criteria used for awarding the public procurement contract; instructions for appeals; mandatory contractual clauses.

Also, in case of works or services contracts, the contracting authority has the obligation to provide either the mandatory rules for work protection, either the relevant institutions entitled to provide such information.

The final criterion may be either the most attractive technical-economical offer, or the lowest offered price.

The offer contents must be firm and mandatory, for the whole period set by the contracting authority.

Suppliers, contractors and providers have the right to associate and submit a common offer, without the obligation to present their association in a legal form.

*The basic offer* is the only offer the bidder or the associated bidders may submit, excepting the case when the criterion is the most attractive technical-economical offer, when *alternative offers* are allowed. In order to verify the candidatures and to assess the offers, individuals or

legal entities may be involved. For offers' appraisal, a jury made up of individuals must be appointed by the contracting authority.

## 10. Cancelling the award procedure for a public procurement contract

The contracting authority is entitled to cancel the award procedure for a public procurement contract before the date it sends out the result of the award procedure and before the contract conclusion. GEO no. 34/2006 lists the situations that allow the contracting authority to do so.

The authority has the obligation to communicate in writing to all participants, undertaken in maximum 3 business days time as of the cancellation date, both the cessation of their obligations undertaken on the offer and the reason for cancellation.

## 11. Conclusion of the public procurement contract

The contracting authority must conclude the public procurement contract with the bidder whose offer was declared winning offer based on technical and financial proposals.

The conclusion of the public procurement contract may be performed after the lapse of specific terms after transmission of the decision for awarding the public procurement contract:

- (i) 10 (ten) calendar days in case the value of the public procurement contract exceeds the RON equivalent of EUR 125,000 in case of authorities and public institutions and EUR 420,000 in case of public companies or those acting in one of the sectors of public utility – water, energy, transports and postal services for supply and services contracts and EUR 5,000,000 for works contracts;
- (ii) 5 (five) calendar days in case the value of the public procurement contract is less than or equal to the RON equivalent of EUR 125,000 in case of authorities and public institutions and EUR 420,000 in case of public companies or those acting in public utility sectors – water, energy, transports and postal services and for supply and services contracts and EUR 5,000,000 for works contracts.

Public procurement contracts executed before the lapse of the above-mentioned terms are null and void.

The contracting authority is not obliged to comply with these terms in case of negotiation procedure without a prior publication of a participation notice applied due to reasons of extreme urgency. For the avoidance of unfair competition, the law prohibits the contractor to hire for the purposes of the public procurement contract individuals or legal entities that participated in the candidature/offer verification/assessment.

Such restriction applies for a period of at least 12 months as of the contract conclusion, under the sanction of the contract annulment by the contracting authority.

## 12. Appeals

Anyone who may justify an interest in a public procurement contract and that incurs, risks to incur, or was incurred a damage as a direct consequence of an illegal act or an illegal decision of a conceding authority, is entitled to use the following appeal means, set forth by the public procurement law:

- (i) administrative contestation in front of the National Council for Settlement of Contestations before the conclusion of the public procurement contract; The

decision of the National Council for Settlement of Contestations may be challenged in front of the Appeal Court;

- (ii) legal action for compensation in front of the court or the Appeal Court, depending on the contracting authority being a local or a central public authority, in the jurisdiction of which the plaintiff or the contracting authority has its seat. The Court's decision may be subject to a second degree appeal with the Appeal Court or the High Court of Cassation and Justice. The Court is only entitled to grant compensations.

The Court is the only one entitled to solve the disputes appeared after the execution of the public procurement contract.

The Court may only be intimated after finalizing the administrative contestation. In case more parties intimate both the National Council for Settlement of Contestations and the Court, the Court shall suspend the trial until the finalization of the administrative contestation.