

## Chapter 16

# PPP & Concessions

## 1. General

The public - private partnership (“PPP”) refers to forms of cooperation between public authorities and the world of business which aim to ensure the design, funding, construction, renovation, management, maintenance, development and/or transfer of a public asset or service. Public authorities at all levels are increasingly interested in co-operating with the private investors, in order to benefit from the know-how of the private sector and to overcome public budget constraints.

A key feature of concession is the right of the concessionaire to exploit the construction or service, granted as a consideration for having erected the construction or delivered the service. The main difference to public procurement is the risk inherent in such exploitation which the concessionaire, usually providing the funding of at least parts of the relevant projects, has to bear.

## 2. Main Regulations

- Romanian Constitution;
- Law no. 178/2010 on PPP (“Law no. 178/2010”);
- Government Emergency Ordinance no. 34/2006 on the award of public procurement contracts, public works and services concession contracts, as further amended (“GEO no. 34/2006”);
- Government Emergency Ordinance no. 54/2006 on the regime of the concession contracts for public assets (“GEO no. 54/2006”);
- Law no. 215/2001 on the local public administration, republished (“Law no. 215/2001”).

## 3. Concession contracts

### 3.1. Principles and general rules

The concession contracts are awarded based on the following principles:

- (i) non-discrimination;
- (ii) equal treatment;
- (iii) mutual recognition;
- (iv) transparency;

- (v) proportionality;
- (vi) efficient use of public funds;
- (vii) undertaking of responsibility.

The main types of concession contracts are:

- (i) *concession of public works* where, in compensation for the works performed, the concessionaire is entitled to operate for a specific period the asset resulted from respective works and, eventually, to receive payment of a preset amount;
- (ii) *concession of services*, where, in compensation for the services provided, the concessionaire is entitled to exploit respective services for a specific period and, eventually, to receive payment of a preset amount;
- (iii) *concession of public assets*, where the concessionaire receives from the conceding authority the right to operate a public asset in exchange of a royalty.

### 3.2. Concession contracts for public works and services

On a case by case basis, the concession contract may be awarded by means of a procedure, such as:

- (i) *open tender*, where any interested economic operator may submit a tender;
- (ii) *restricted tender*, where any economic operator may submit its candidature, but only candidates selected by the contracting authority are invited to submit tender;
- (iii) *competitive dialogue*, where any economic operator may submit its candidature; the procedure consists in a dialogue unrolled between the contracting authority and the admitted candidates, aiming at identifying one or more suitable solutions satisfying the purposes of the former and based whereon the selected candidates will elaborate the final tender;
- (iv) *negotiation*, where the contracting authority consults with the selected candidates and negotiates the contractual clauses, including the price, with one or more of those.

When a contract is awarded for the concession of public works, the contracting authority has the right to request:

- (i) the concessionaire to subcontract with third parties at least 30% of the overall value of the works subject to the concession;
- (ii) the candidates to specify, within the application submitted, the value of the works within the concession contract which they intend to award to third parties.

### 3.3. Publicity for the award of concession contracts

The participation notice is to be published in the Electronic System of Public Procurement (Sistemul Electronic de Achizitii Publice – “SEAP”), in the Official Gazette, Part VI and in the Official Journal of the European Union.

The publishing in the Official Journal of the European Union of the participation notice is compulsory in case the value of the contract is over the RON equivalent of EUR 5,000,000. The rules for the contract value estimation are provided by GEO no. 34/2006.

### 3.4. Appeals

Anyone who may justify an interest in a concession contract and that incurs, risks to incur, or has 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 GEO no. 34/2006:

- (i) administrative complaint in front of the National Council for Settlement of Contestations, before the conclusion of the concession contract. The decision of the National Council for Settlement of Contestations may be challenged in front of the Court of Appeal. As an exception, the administrative complaint which refer to the provisions of the awarding documentation may be filed only until the date established for submitting the offers;
- (ii) legal action for compensation in front of the court in the jurisdiction of which the contracting authority has its seat. The Court’s decision may be subject to a second degree appeal with the Appeal Court. The Court is entitled only to grant compensations.

The Court is the only entitled to solve the disputes appeared after the execution of the concession contract.

The Court may only be intimated after finalizing the administrative complaint. 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 complaint.

The person that files the administrative complaints under GEO no. 34/2006 must immediately notify the contracting authorities in connection with such administrative complaints.

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

The law provides for the following main situations:

- (i) the contract is classified as a state secret, its awarding may lead to disclosure of information which would be detrimental to essential security interests of the state or involves protection of security interests of the state related to manufacture and sale of guns, ammunition or military equipment;
- (ii) the object of contract is, inter alia:

- a) purchase or lease of lands, buildings, other real estate or real estate rights;
  - b) development, purchase, production and coproduction of radio and television programmes purposed for broadcasting by institutions of radio and television distribution;
  - c) arbitration and conciliation services;
  - d) 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;
  - e) labour force employment, etc.
- (iii) the award procedures are set based on an international agreement concluded in compliance with the Treaty for the establishment of the European Community, 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 execution of public works; This case is applicable only if such agreement establishes a specific awarding procedure;
  - (iv) 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;
  - (v) enforcement of procedures specific to international bodies;
  - (vi) the concession contract is awarded by a contracting authority performing one or more relevant activities as defined by GEO no. 34/2006, in case the object of the concession contract is the operation of that relevant activities;
  - (vii) the concession contract has as purpose the concession of public assets, provided that the conceding authority *does not intend to obtain the performance of a work or service*; in case when the contracting authority intends to obtain a work or service, this contract may be deemed as a public procurement contract or as a concession contract, for which the awarding procedure is regulated by GEO no. 54/2006;
  - (viii) the concession contract has as object the acquisition of supplementary/additional works or services, which have not been included in the initial concession contract, but which, due to unforeseen circumstances, have become necessary to fulfill the relevant agreement. This case is applicable only if the conditions provided by GEO no. 34/2006 are fulfilled.

### 3.6. Concession contracts for public assets

#### a) General issues

The concession of assets belonging to the public property may be granted in the name of the State by (i) the ministries or any other specific bodies of the public central administration, for the assets belonging to the

State public property or by (ii) the county, local councils, the Bucharest General Council or public institutions of local interest, for the assets belonging to the public property of the county, city or commune.

The term of the concession may not exceed 49 years, starting with the date of its conclusion. Such term is to be established by the contracting authority on the basis of the opportunity study and may be extended for a period of time of up to half of the initial term.

The granting procedures provided by the GEO no. 54/2006 are:

- (i) the bid, which shall be performed following the observance of the legal publicity requirements and only if at least 3 valid offers have been submitted after the publishing of the bidding announcement, or
- (ii) the direct negotiation, to be applied only when the requisite condition regarding the submission of 3 valid offers was not met after repeating the publishing of the bidding announcement.

#### **b) Concession initiative**

The concession may be initiated by the contracting authority upon its sole intention or following a proposal submitted by any interested person. The concession initiative shall be mandatorily based upon an opportunity study to be performed by the contracting authority. Further to the opportunity study, the authority shall draft the tender book.

#### **c) Concession contract**

The concession shall be approved by (i) Government Decision, (ii) by decision of the local or county councils or by (iii) the Bucharest General Council, as the case may be.

The criterion for awarding the contract is the level of the royalty (the winning offer being the one with the highest royalty) but there are also other criteria that the conceding authority may consider when granting such contract (*i.e.*: the economic and financial capacity, the environmental protection, the specific conditions related to the nature of the asset granted into concession).

The contracting authority is obliged to inform the bidders in writing and with receipt confirmation with respect to the decisions regarding the awarding of the concession contract, no later than 3 days passing their issuance. The concession contract may be concluded only after 20 calendar days of the date such informing has been accomplished.

### **3.7. Special Rules – Specific Types of Concession**

The Romanian legislation regulates several types of concession in private fields: concession of land managed by former state-owned agricultural enterprises, concession of construction land, as well as concession of land located in free zones. Each of these concession types is presented below.

### 3.7.1. Concession of land managed by former state-owned agricultural enterprises

#### a) General

Agricultural lands, held by the State under public or private ownership and operated by commercial companies may fall under the scope of concession under Law no. 268/2001 on the privatization of commercial companies managing State-owned agricultural land and on the creation of the State Property Agency (“ADS”), as further amended and supplemented.

An essential role within the entire procedure is played by ADS. ADS is an institution of public interest with legal status, financed out of extra-budgetary sources, subordinated to the Ministry of Agriculture and Rural Development. ADS awards concessions over agricultural land held in the public or private property of the State, land that is operated by State-owned companies.

Upon receiving a letter of intent from the interested investor, concerning the concession over a land belonging to the State private property, included or contemplated to be included in the ADS scope, the latter must draw up the opportunity study and must evaluate the shares held by the State-owned company, managing the land.

In case the investor interested in being awarded the concession/leasing over the agricultural land applies also for purchasing of corresponding shares in the State-owned company operating the land, the two contracts will be negotiated as per the privatization methods specified under the law. If the investor is only interested in being granted a concession/leasing over the agricultural land and does not apply for purchasing shares, the concession may be granted only over those plots of land that, under the opportunity study, are not core to the State-owned companies activities, as per their statutory object of activity.

#### b) Land concession procedure

Romanian or foreign individuals or entities, including employee’s associations, as well as agricultural companies, agricultural associations and other agricultural associative forms, with legal status, aiming to be awarded the concession over the plots of land referred to within this section, must submit a letter of intent to the conceding authority, or to the ADS, as the case may be.

After receiving the letter of intent, ADS will draw up, within 30 days, the opportunity study, including a technical and economic evaluation and the concession tender book, which shall be submitted for approval to the ADS Board of Directors.

The ADS Board of Directors decision approving the concession will also comprise the concession procedure, which may be:

- (i) tender by sealed envelope, if the interested investor has not requested to purchase shares in the State-owned company operating the relevant land;
- (ii) public auction;

- (iii) direct negotiation with short-listed investors, if the interested investor has requested to purchase shares in the State-owned company operating the relevant land;
- (iv) direct negotiation.

### c) Procedure of granting land concession simultaneously with share sale

In case the investor is interested in purchasing shares in a State-owned company, as well as being awarded a concession or lease over the land belonging to the State public or private property and operated by such a State-owned company, ADS, based on an experts' evaluation report, will draw up for approval: (i) the State-owned company presentation file; (ii) the price assessment regarding the shares; (iii) the terms of reference.

ADS draws up the opportunity study and submits it for approval to its Board of Directors. The Board of Directors decides on the terms of reference content including on the concession duration, the royalty computation and the payment methods, investments to be made by the concessionaire, operations conditions, environmental obligations, assets status at the termination of concession.

The negotiation commission appointed by decision of ADS Board of Directors negotiates the terms of the two contracts, based on the approved terms of reference.

The offers are selected based on common grid, which includes: (i) price per share and payment means, (ii) conditions under the concession terms of reference.

### 3.7.2. Concession of Construction Land

#### a) General issues

The plots of land that belong to the State's or local authorities' private property and which are destined for construction purposes, may be granted under concession, as per Law no. 50/1991 regarding the authorization of construction works, as further amended and supplemented ("Law no. 50/1991"), by public tender and with the observance of the urbanism and land planning documentation. By way of exception, the concession over the private property land may be granted without public tender, by payment of a royalty, if, *inter alia*, the following activities are envisaged:

- (i) building public utility or social objectives, with no lucrative purpose;
- (ii) building of dwellings by the National Housing Agency;
- (iii) building of dwellings for beneficiaries aged under 35 years;
- (iv) expansion of existing constructions.

Concession over the land belonging to public property may be granted only for construction purposes pertaining to objectives of public use/interest. Over the plots of land free of constructions, under the

administration of local authorities that are likely to be claimed by their former owners, concession may not be awarded until clarification of their legal status.

#### **b) Granting of concession**

Provided that the publicity conditions regarding the tender are observed, the concession will be granted based on the offers presented by the bidders, accompanied by a pre-feasibility study or by a feasibility study. Only the offers that are in compliance with the urbanism documentation, approved as per the law, will be accepted.

The concession price shall be established so that its minimum limit should ensure the recovery of the land sale price in 25 years, plus the related costs for infrastructure works. The concession duration is established by the local authorities, as per the urbanism documentation or according to the nature of the construction.

The concession contract is concluded based on the tender award minutes, or in accordance with the local authority's decision, if a public tender has not been carried out, as per the above-mentioned exceptions.

Within 1 year at the latest after the land concession contract being executed, the concessionaire should apply in order to obtain the building authorization and must commence the construction for which the concession has been granted. The concession right over the land, as well as the building authorization is transferable in case of construction transfer.

### **3.7.3. Land concession and construction in free zones**

#### **a) Concession initiative**

The concession initiative belongs to the free zone authority or to any Romanian or foreign individual or entity, who can justify an interest for the land or construction concession award. Prior to the tender, the initiator must obtain the urbanism certificate, in compliance with Law no. 50/1991.

#### **b) Concession contract**

Concession over land and constructions located in free zones is granted following a public tender organized by the free zone authority, with the support of the county council having jurisdiction over the free zone. Through the concession contract, concluded within 10 working days after the investor selection date, the conceding authority transfers a plot of land or a construction from the free zone to the concessionaire for lucrative management, for duration of up to 49 years, in exchange for a royalty.

#### **c) Royalty**

The payment of royalty, established by the concession contract, is made in freely convertible currency accepted by the National Bank of Romania.