

## Chapter 16

### PPP & Concessions

#### 1. General

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 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;
- Government Emergency Ordinance No. 34/2006 on the award of public contracts, public works concession contracts and services concession contracts, as further amended and supplemented (“**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. 178/2010 on public-private partnerships (“**Law No. 178/2010**”);
- Law No. 215/2001 on the local public administration, as 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) *public works concession*, where in compensation for the works performed, the concessionaire is entitled to operate the asset resulted from respective works for a specific period and, potentially, to receive payment of a preset amount;
- (ii) *service concession*, where in compensation for the services provided, the concessionaire is entitled to exploit the respective services for a specific period and, potentially, to receive payment of a preset amount;
- (iii) *concession of public assets*, where the concessionaire receives from the concession grantor 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* - any interested bidder has the right to submit a tender offer;
- (ii) *restricted tender* which takes place in two distinct stages. Any interested bidder may apply to become a candidate, but only the selected candidates are invited to submit tenders;
- (iii) *competitive dialogue* - any interested bidder has the right to apply to become a candidate, and the contracting authority then conducts a dialogue with the selected candidates in order to identify the solutions that are suitable for its needs. Based on the solutions found, the successful candidates will submit their final tender;
- (iv) *negotiation* - the contracting authority engages in consultations and negotiates the contractual clauses, including the price, with the selected candidates; the negotiation may be with or without a prior publication of a contract notice.

When a contract is awarded for the public works concession, 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, leaving the option for candidates to increase the portion of the contract they intend to subcontract;
- (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 concession contracts awarding procedure

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

The publishing in the Official Journal of the European Union of the contract notice is compulsory in case the value of the contract of public works is at least equal to the RON equivalent of EUR 5,000,000. The rules for the contract value appraisal are provided by GEO no. 34/2006.

### 3.4. Appeals

Anyone who may justify an interest in a concession contract and incurs, risks to incur, or has incurred a damage as a direct consequence of an illegal act or of an illegal decision of a contracting authority during the awarding procedure, is entitled to use the following means of appeal:

- (i) administrative challenge in front of the National Council for Solving Complaints, before the conclusion of the concession contract. The decision of the National Council for Solving Complaints 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 of damages incurred within the awarding procedure, as well as claims related to the performance, annulment or termination of public contracts, in front of the Tribunal in the jurisdiction of which contracting authority has its seat. The Tribunal`s decision may be appealed in front of The Court of Appeal.

For disputes arising during the performance of the concession contract, Government Decision no. 71/ 2007 on approving the Norms for enforcing the provisions of GEO no. 34/3006 regarding the awarding of public works and services concession contracts provides that the parties are compelled to establish the methods for dispute resolution and the competent courts, being given the possibility to subject the dispute to arbitration.

### 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 has been classified as State secret;
- (ii) the performance of the contract implies special security measures for protection of national interests;
- (iii) the awarding procedures are set based on an international agreement concluded in compliance with the Treaty establishing the European Economic Community, concluded at March 25, 1957, as further amended (the “Treaty”), with one or more states which are not members of the European Union, aiming at supply of products, provision of services and execution of works for

- implementing/operating a project with signatory states and only if such agreement establishes a specific awarding procedure;
- (iv) the awarding procedures are set based on an international agreement relating to the stationing of troops and only if such agreement establishes a specific awarding procedure;
  - (v) enforcement of procedures specific to international bodies;
  - (vi) enforcement of specific procedures provided by the EU legislation, within programs and projects related to territorial cooperation;
  - (vii) 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;
  - (viii) 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 contract or as a concession contract, for which the awarding procedure is regulated by GEO no. 54/2006.

### 3.6. Concession contracts for public assets

**a) General** 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 an 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) tender, which shall be performed following the observance of the legal publicity requirements and only if at least 3 (three) valid offers have been submitted after the publishing of the bidding announcement, or
- (ii) direct negotiation, to be applied only when the requisite condition regarding the submission of 3 (three) 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 drafts 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 of 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 the contract (*i.e.*: the economic and financial standing, 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 (three) days passing their issuance. The concession contract may be concluded only after 20 calendar days as of such communication.

**4. PPP Contracts****4.1. Principles and general rules**

Law no. 178/2010 regulates the implementation of public-private partnership projects that regard the design, financing, construction, rehabilitation, modernization, operation, maintenance, development and transfer of a public asset or a public service.

The PPP contracts are awarded based on the same principles as the concession contracts regulated under GEO no. 34/2006, the main difference being that the accomplishment of the PPP project is always made via a project company, in which the public authority and the private investor are shareholders.

The stages that lead to the conclusion of a public-private partnership contract are:

- a) initiation of the PPP project by the public partner, made via publishing of the selection notice;
- b) the selection of the private partner using one of the procedures available for awarding PPP contracts, namely the open procedure or competitive dialogue;
- c) the conclusion of the project agreement with the selected private investors, in case of the competitive dialogue procedure;
- d) the negotiation with the selected private investors that signed the project agreement, in case of the competitive dialogue procedure.

After the PPP contract is signed, the parties start the set up formalities for the project company, which is organized as a joint-stock company according to the Romanian legislation.

The main rules that apply during the initiation, negotiation and completion of a PPP contract are:

- (i) the cooperation relationship between the project partners has a contractual nature;
- (ii) the sharing of responsibilities and risks, as well as the value of the financing are stipulated in the contract;
- (iii) parties' rights and obligations are not transferable;
- (iv) the PPP contract covers a single PPP project, with the performance of all its elements;
- (v) PPP contracts whereby the public authority takes risks that lead to the classification of the project as public spending are sanctioned with absolute nullity.

#### **4.2. Publicity for the award of PPP contracts**

The selection notice is to be published in the SEAP and in the Official Journal of the European Union.

The publishing in the Official Journal of the European Union is compulsory in case the estimated value of the PPP contract is at least equal to the RON equivalent of (i) EUR 125,000 for assets and services or (ii) EUR 4,845,000 for works.

#### **4.3. Appeals**

Anyone that considers itself harmed by an act or deed of the public partner made in breach of the legal provisions in the field of public-private partnership is entitled to lodge a complaint in front of the National Council for Solving Complaints.

The decision of the Council may be appealed in front of the Court of Appeal in the jurisdiction of which the public partner has its seat. Council's decisions concerning selection procedures that have as purpose the conclusion of PPP contracts regarding services and/or works related to the transport infrastructure of national interest may be challenged only in front of the Bucharest Court of Appeal.

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

The Romanian legislation regulates several types of concession in the 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.

## **5.1. 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 set up 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 from the State budget, subordinated to the Government and in technical coordination of the Minister 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 also applies 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 for approving the concession will also include the concession procedure, which may be:

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

- (iii) direct negotiation with short-listed investors, if the interested investor has conditioned the concession by the purchase of 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 the 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 and (ii) conditions under the concession terms of reference.

**5.2. 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) resettlement of dwellings affected by disasters;
- (v) expansion of existing constructions;
- (vi) protecting or enhancing the value of historical monuments.

Concession over the land belonging to public property may be granted only for construction purposes pertaining to objectives of public use/interest. Until clarification of legal status, concession may not be awarded for the plots of land free of constructions, under the administration of local authorities that are likely to be claimed by their former owners.

**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.

No later than 1 year from the date of obtaining the land concession deed, 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.

**5.3. 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 a duration of up to 49 years, in exchange for a royalty.

**c) Royalty**

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