

Chapter 30

Public Procurement

1. General

Each year, more than 250,000 public authorities in the European Union spend around 18% of GDP on purchasing services, works and supplies. To create a level playing field for all businesses across Europe, the European Union has set minimum harmonised rules in the public procurement field (in particular, Directive 2004/18/EC and Directive 2004/17/EC), which also which have been transposed into national legislation. On 15 January 2014, the European Parliament adopted a package of three new public procurement directives to replace Directive 2004/18/EC and Directive 2004/17/EC, namely the Directive of the European Parliament and of the Council on the award of concession contracts, the Directive of the European Parliament and of the Council on procurement by entities operating the water, energy, transport and postal services sectors and the Directive of the European Parliament and of the Council on public procurement. Member States (Romania included) are required to transpose these Directives within two years from the date of EU adoption.

Given the economic crisis, public contracts have become more and more alluring for companies, especially in fields such as IT, design and construction. Currently, public procurement is one of the most dynamic sectors of the Romanian economy, being seen as one of the engines for the economic growth, with more than 12,500 contracting authorities and over 34,000 business operators registered with the Electronic System for Public Procurement (“SEAP”). Transparency in the public procurement field has been continuously improving over recent years and the number of contract award notices has grown faster, demonstrating increased compliance with post-award publication requirements. While the level of EU funds absorption has been a problem within the past years, key regulatory measures to accelerate public spending have been introduced in the legislation with the aim of simplifying and rationalising the public procurement rules and procedures. As a result, Romania’s absorption rate is currently 34%, four times higher than it was in May 2013, according to recent information released by the Ministry of European Funds.

2. Main Regulations

- 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 Decision No. 925/2006 approving the application norms of the provisions regarding the award of public contracts of 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.

- Commission Regulation (EU) No. 1336/2013 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of the application thresholds for the procedures for the awards of contract.

3. Parties in a public contract

Public procurement is the method under which public sector bodies and certain utilities (called “contracting authorities”), obtain goods, works and services from private or public persons, based on public contracts. Public contracts are qualified as administrative acts by Romanian law; accordingly, disputes arising in connection thereto are settled by the administrative and fiscal divisions of the courts of law. The following are qualified as *contracting authorities* for the purposes of public procurement:

- (i) any State body - public authority and public institution – acting at central, regional or local level;
- (ii) any legal entity established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, that has one of the following features: (i) is financed, for the most part, by a State body or other bodies governed by public law; (ii) is subordinated/under the control of such bodies; (iii) having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State bodies, or by other bodies governed by public law.
- (iii) any public undertaking performing relevant activities in one of the sectors of public utility – water, energy, transports and postal services;
- (iv) any subject of law performing relevant activities in one of the sectors of public utility – water, energy, transports and postal services and benefiting from special or exclusive rights to perform such activities.
- (v) any partnership made up of one or several contracting authorities mentioned under items (i) or (ii);

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:

- (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) for service contract awarded to a contracting authority or to a partnership of contracting authorities, when such provide such services based on exclusive rights, in compliance with the provisions of the Treaty;
- (viii) the object of the contract is:
- the acquisition or rental, by whatever financial means, of land/existing buildings/other immovable property or concerning rights thereon; nevertheless, financial service contracts concluded at the same time as, before or after the contract of acquisition or rental remains subject to procurement legislation;
 - the acquisition, development, production or co-production of programme material intended for broadcasting;
 - arbitration and conciliation services;
 - financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, in particular transactions by the contracting authorities to raise money or capital, and central bank services;
 - employment contracts;
 - research and development services other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority.
- (ix) 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 service contract is less than or equal to the RON equivalent of EUR 134,000 in case of authorities and public institutions and EUR 414,000 in case of public companies or other entities performing relevant activities in one of the sectors of public utility – water, energy, transports and postal services.

The contracting authority has the right to directly purchase any products, works and services the value of which, exclusive of VAT, does not exceed the RON equivalent of EUR 30,000 per each purchase of products of services and EUR 100,000 per each purchase of works.

4.2. Procurement in the utilities sector

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*:

- (i) for the awarding of the contract to an affiliated undertaking, provided that at least 80% of the average turnover of the affiliated undertaking for the preceding 3 (three) years derives from the provision of similar products, works or services to undertakings with which it is affiliated. When, because of the date on which an affiliated undertaking was created or commenced activities, the turnover is not available for the preceding three years, it will be sufficient for that undertaking to show that the turnover is credible, particularly by means of business projections; contracts awarded for purposes of resale or lease to third parties, provided that the contracting entity enjoys no special or exclusive right to sell or lease the subject of such contracts, and other entities are free to sell or lease it under the same conditions as the contracting entity;
- (ii) the contracting authority purchases products for purposes of resale or lease to third parties, and enjoys no special or exclusive right, so other entities are free to sell or lease similar products under the same conditions as the contracting authority;
- (iii) the contracting authority intends to purchase products, services or works for the pursuit of its activities in a third country (i.e., not an EU member state), provided that a network or a geographical area within the European Community is not physically used;
- (iv) contracts for the supply of energy or of fuels for the production of energy if awarded by contracting entities engaged in the energy sector;
- (v) contracts for the purchase of water if awarded by contracting entities engaged in the water sector;
- (vi) in case the relevant activity 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.

In case the tender submitted in a procedure for awarding a public supply contract contains products originating from third party states which did not conclude bilateral or multilateral agreements with the European Union to ensure effective access of the European Union entities to the markets of such third party states, such tender may be rejected if the ratio of the products originating from the third party states exceeds 50% of total value of the products.

5. Types of contracts

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

- (i) *The public supply contract* focuses on the supply of products, based on purchase, lease, rental or hire purchase, for full consideration or in instalments, or without option to buy;
- (ii) *The public service contract* focuses on the provision of any services comprised in the annexes 2A and 2B of GEO no. 34/2006;
- (iii) *The public works contract* focuses on execution and, if necessary, on design and execution of works related to one of the activities listed in annex 1 of GEO no. 34/2006.

6. Procedures for awarding public contracts

6.1. Types of procedures

The law regulates the following types of procedures:

- a) Open tender** - any interested supplier, contractor or provider has the right to submit a tender;
 - b) Restricted tender** - takes place in two distinct stages. Any interested supplier, contractor or provider may apply to become a candidate, but only the selected candidates are invited to submit tenders;
 - c) Competitive dialogue** – any interested supplier, contractor or provider 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 draw up and submit their final tenders;
- 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 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.
 - e) Call for tenders** - a simplified procedure according to which the contracting authority requests tenders from several suppliers, contractors and providers;
 - f) Contest of solutions** – is a special procedure used for the procurement of a plan or project, where the selection process is allocated to a panel of judges.

As a rule, a public contract is awarded pursuant to an open or restricted 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 contract is awarded pursuant to an open or restricted tender or negotiation with a prior publication of a contract notice.

In case the contracting authority employs a different procedure, it should prepare a *explanatory note*.

The call for tenders may be used by the contracting authority only if the estimated value of the public contract, exclusive of VAT, is less than the RON equivalent of EUR 134,000 for service or supply contracts, or EUR 5,186,000 for works contracts.

6.2. Negotiated procedure

6.2.1. Negotiated procedure with prior publication of a contract notice

The *negotiated procedure with prior publication of a contract notice* may be applied only:

- (i) in case the open or restrictive tender, the competitive dialogue or call for tenders resulted in no tender or only unacceptable or incompliant tenders being submitted, and only if the contracting authority does not substantially alter the initial requirements provided in the awarding documentation;
- (ii) in exceptional cases when the nature of the supplies/services/works or the risks attaching thereto do not permit prior overall pricing;
- (iii) in the case of services, *inter alia* financial services within category 6 of Annex 2A of GEO No. 34/2006, and intellectual services such as services involving the design of works, insofar as the nature of the services to be provided is such that contract specifications cannot be established with sufficient precision to permit the award of the contract by selection of the best tender according to the rules governing open or restricted tender;
- (iv) in respect of public works contracts, for works which are performed solely for purposes of scientific research, experimental testing or technological development and not with the aim of ensuring profitability or recovering research and development costs.

6.2.2. Negotiated procedure without prior publication of a contract notice

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

- (i) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator;
- (ii) insofar as is strictly necessary when, for reasons of extreme urgency brought about by unforeseeable events, the time limit for the open tender, restricted tender or negotiated procedure with publication of a contract notice cannot be complied with. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority;

- (iii) when the products involved are manufactured purely for the purpose of scientific research, experimentation, study or technological development, and provided no profit or recovery of research and development costs are sought;
- (iv) for additional deliveries by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance; the length of such contracts as well as that of recurrent contracts may not, as a general rule, exceed three years. 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 three years is not applicable;
- (v) for supplies quoted and purchased on a commodity market;
- (vi) for the purchase of supplies on particularly advantageous terms, from either a supplier which is definitively winding up its business activities, or the receivers or liquidators of a bankruptcy, an arrangement with creditors, or a similar procedure under national laws or regulations;
- (vii) for public service contracts, when the contract concerned follows a design contest and must, under the applicable rules, be awarded to the successful candidate or to one of the successful candidates, in the latter case, all successful candidates must be invited to participate in the negotiations;
- (viii) for additional works or services not included in the original contract but which have, through unforeseen circumstances, become necessary for the performance of the works or services described therein, on condition that the award is made to the economic operator performing such works or services when such additional works or services cannot be technically or economically separated from the original contract without major inconvenience to the contracting authorities, or when such works or services, although separable from the performance of the original contract, are strictly necessary for its completion. The aggregate value of contracts awarded for additional works or services may not exceed 20 % of the amount of the original contract; such treshol is not applicable for works or service contracts awarded by entities operating in the water, energy, transport and postal services sector.
- (ix) for new works or services consisting in the repetition of similar works or services entrusted to the economic operator to whom the same contracting authorities awarded an original contract, provided that such works or services are in conformity with the tender book based on which the original contract was awarded according to the open or restricted procedure. As soon as the first contract is put up for tender, the possible use of this procedure shall be disclosed and the total estimated cost of subsequent works or services shall be taken into consideration by the contracting authorities; this procedure may be used only during the three years following the conclusion of the original contract.

6.3. Special methods for awarding public contracts

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

- (i) framework agreement for a maximum period of 4 (four) years awarded, usually, based on open or restricted tender procedure;
- (ii) dynamic purchasing system for a maximum period of 4 (four) years, in order to purchase products for ordinary use. The rules for open tender procedure should be met in all stages. This procedure may be used only via SEAP;
- (iii) electronic public tender.

This last method is used in the following cases: (i) as a final stage of an open or restricted tender, of a negotiated procedure with prior publication of a contract notice or call for tenders, before awarding the public contract and only if the technical specifications were precisely defined in the tender book; (ii) resuming of competition in case of a framework agreement and (iii) at the submission of the binding offers in order to award a public contract using the dynamic purchasing system.

7. Publicity for the public contracts awarding procedure

The contracting authority must publish a contract notice in the following cases:

- (i) the open or restricted tender, competitive dialogue or negotiated procedure with prior publication of a contract notice are launched in order to conclude a public contract or framework agreement;
- (ii) a dynamic purchasing system is initiated;
- (iii) a solution contest is organized.

As of 1 January 2007, the intention notice, the contract notice and the awarding notice are published in 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 contract, exclusive of VAT, exceeds the RON equivalent of EUR 134,000 for services or supply contracts or EUR 5,186,000 for the works contracts, in order to publish the notice in SEAP, the operator of SEAP shall obtain the prior publication approval from the National Authority for Regulating and Monitoring the Public Procurement (“ANRMAP”).

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

- (i) EUR 134,000 for supply or service contracts awarded by public authorities and public institutions;
- (ii) EUR 414,000 for supply or service contracts awarded by public undertakings or other entities performing relevant activities in one of the sectors of public utility – water, energy, transports and postal services;

- (iii) EUR 5,186,000 for works contracts..

Any direct purchase exceeding the RON equivalent of EUR 5,000 must be recorded in SEAP.

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

The contracting authority *is obliged to exclude* from the awarding procedure of a public contract any bidder/candidate who has been the subject of a conviction by a final judgment to, within the preceding five years, for participation in a criminal organization, corruption, fraud and/or money laundering.

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

- a) it has been declared bankrupt by a judgment awarded by the bankruptcy judge;
- b) in the preceding two years, it failed to fulfil or it faulty fulfilled its contractual duties, for reasons attributable to such bidder/candidate, and such circumstance led or is able to lead to serious damages for the beneficiaries;
- 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 preceding three years, for a professional misconduct or acts infringing the professional ethics;
- e) it provides false information or fails to provide the information requested by contracting authority, with respect to the qualification and selection criteria.

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.

In order to check the economic and financial standing of the candidates/bidders, the contracting authority is entitled to request the balance sheet as well as other evidences, 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 designated as confidential by candidate/bidder and the disclosing of such information affects the legitimate interests of the candidate/bidder, especially the commercial secret and intellectual property.

9. Awarding documentation

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

The contracting authority prepares 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 or negotiated procedure); instructions regarding the deadline that must be observed and the formalities that must be met; the minimal qualification criteria, if requested, and the justifying documents; instructions regarding the preparation and presentation of the financial and technical proposals; detailed and complete information regarding the criteria used for awarding the public contract; instructions for appeals; mandatory contractual clauses.

Any selection and evaluation criteria which are included in the data sheet for the awarding procedure but are missing from the invitation or the contract notice will be deemed non-applicable. Also, in case of works or service contracts, the contracting authority has the obligation to provide either the mandatory rules for work protection, or the relevant institutions entitled to provide such information.

The awarding criterion may be either: the most economically advantageous tender, or the lowest price.

The contents of the tender must be firm and binding, for the whole period set by the contracting authority.

Suppliers, contractors and providers have the right to associate and submit a joint tender, without the obligation to assume a specific legal form.

Alternative tenders are allowed only when the awarding criterion is the most economically advantageous tender, and only if specifically provided in the contract notice.

10. Cancelling the awarding procedure for a public contract

The contracting authority is entitled to cancel the awarding procedure for a public contract before the date it informs on the result of the awarding 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 tenderers, within maximum 3 business days as of the cancellation date, both the cessation of their obligations undertaken within the tender and the reason for cancellation.

11. Conclusion of the public contract

The contracting authority must conclude the public contract with the bidder whose tender was selected as the winning tender, based on technical and financial proposals.

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

- (i) 11 (eleven) calendar days in case the value of the public contract is less than or equal the RON equivalent of EUR 134,000 in case of authorities and public institutions and EUR 414,000 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 service contracts and EUR 5,186,000 for works contracts;

- (ii) 6 (six) calendar days in case the value of the public contract is less than the RON equivalent of EUR 134,000 in case of authorities and public institutions and EUR 414,000 in case of public companies or those acting in public utility sectors – water, energy, transports and postal services and for supply and service contracts and EUR 5,186,000 for works contracts.

Public contracts concluded 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 negotiated procedure without prior publication of a contract 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 contract individuals or legal entities that participated in the candidature/tender 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 contract and incurs, risks to incur, or incurred a damage as a direct consequence of an illegal act or of an illegal decision of a contracting authority, is entitled to use the following means of appeal, set forth by the public procurement law:

- (i) administrative challenge in front of the National Council for Solving Complaints before the conclusion of the public contract; the decision of the National Council for Solving Complaints may be challenged in front of the Court of Appeal;
- (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

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