

Chapter 16

Concessions

1. General

A key feature of a 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 for at least part of the relevant projects, has to bear.

2. Main Regulations

- Romanian Constitution;
- Law No. 100/2016 on concessions of works and services concessions (“**Law No. 100/2016**”);
- Law No. 101/2016 on remedies and appeals concerning the awarding of public procurement contracts, sectoral contracts and concessions, and for the organization and functioning of the National Council for Solving Complaints (“**Law No. 101/2016**”);
- Government Emergency Ordinance No. 54/2006 on the regime of concession contracts for public assets (“**GEO No. 54/2006**”);
- Law No. 50/1991 on authorizing the execution of construction works, as amended to date (“**Law No. 50/1991**”);
- Law No. 268/2001 on privatization of companies managing the State’s publicly - and privately - owned land with agricultural destination, and for the creation of the Agency for the State’s Domain (“**Law No. 268/2001**”);
- Law No. 215/2001 on the local public administration, as republished (“**Law No. 215/2001**”).

3. Concession contracts

3.1. Principles and general rules

Concession contracts are awarded based on the following principles:

- (i) non-discrimination;
- (ii) equal treatment;
- (iii) mutual recognition;
- (iv) transparency;
- (v) proportionality;
- (vi) undertaking of responsibility.

The main types of concession contracts are:

- (i) **work concession contract**, where in compensation for the work performed, the concessionaire is entitled either to exclusively exploit the work performed or to receive an amount of money in addition to the right to exploit said work;
- (ii) **service concession contract**, where in compensation for the services provided, the concessionaire is entitled either to exploit the respective service performed under such a concession contract, or to receive an amount of money in addition to the right to exploit said service;
- (iii) **concession of public assets**, where the concessionaire receives from the concession grantor the right to operate a public asset in exchange for a royalty;
- (iv) **long-term concession contract**, where the concession period is of at least 5 years, including the execution period of works or buildings (if the contract has as an object the execution of works or buildings), as well as the period for providing services by the concessionaire, set up in such a manner for the latter to obtain a reasonable benefit.

3.2. Parties in concessions for works and services concessions contracts

As per Law No. 100/2016, the parties in concessions for works and services concessions contracts are:

- (i) contracting authorities, as follows:
 - (a) authorities and public institutions acting at a local or central level;
 - (b) public bodies;
 - (c) associations comprising at least one of the contracting authorities mentioned at point a) and b) above;
- (ii) contracting entities subject to performing one of the activities mentioned in Annex No. 2 to Law No. 100/2016 and attributing a concession contract for performing such an activity (e.g. gas and thermal energy; electricity; water; transport; oil and gas, etc.), as follows:
 - (a) contracting authorities;
 - (b) public enterprises;
 - (c) any subject of the law other than those referred to in letter a) or b) operating through exclusive or special rights given in order to perform one of the activities mentioned in Annex No. 2 to Law No. 100/2016.

3.3. The procedure for the award of of concession contracts for works and services concessions

On a case by case basis, concession contracts for works and services concessions may be awarded by means of a procedure, such as:

- (i) **open tender** – initiated by the publication of a concession notice by means of which the contracting authority requires any interested bidder to submit its tender offer; generally in a one stage procedure. Nevertheless, the contracting party may set, by means of the concession notice and awarding documentation, for the procedure to take place in two distinct stages;
- (ii) **competitive dialogue** - initiated by the publication of a concession notice by means of which the contracting authority requires any interested bidder to submit its request to participate in the the procedure for the award of; any interested bidder has the right to apply to become a candidate, following that only candidates who meet the qualifying and selection criteria set by the contracting party are entitled to participate in the next steps;
- (iii) **negotiation** – procedure performed without a prior publication of a concession notice.

When a contract is awarded for a works concession, the contracting authority has the obligation to request the bidder to mention in his tender offer which part/parts of the contract will be subcontracted and the identification data of the subcontractors. This provision applies only for cases in which the subcontracted parts represent more than 5 % of the entire work to be executed under the concession contract. The appointment of subcontractors for the execution of parts of the work does not diminish the responsibility of the concessionaire. Furthermore, the concessionaire is compelled to inform the contracting party about any modifications regarding the subcontractors and the subcontracted parts.

During the execution of a work concession contract the concessionaire is entitled to involve new subcontractors only with the prior approval of the contracting authority.

3.4. Publicity for the procedure for the award of concession contracts

The contracting authority is compelled to ensure the transparency of a concession contract by submitting by electronic means to publication, according to the provisions of the law, the concession notices, intent and concession award notices. In this respect the contracting authority must submit by electronic means to the Publications Office of the European Union of the relevant notices to be published with the Official Journal of the European Union.

The contracting authority is compelled to submit for publication a concession notice every time it intends to start one of the following award procedures, respectively open tender or competitive dialogue.

Except for certain situations, concession notices and concession award notices should not be published at a national level before publication by the Official Journal of the European Union. Notices published at a national level must not provide different information from notices published in the Official Journal of the European Union, and additionally must provide the submission date to the Publications Office of the European Union for publication purposes.

The contracting authorities must ensure, by electronic means, direct, complete, free and unrestricted access to economic operators to all the documents regarding the concession, as of the date the concession notice is published.

3.5. Appeals

Any person who considers themselves aggrieved in their rights or in a legitimate interest by an act of the contracting authority, or by failure to solve an application within the statutory period, may request the annulment of that act, the obligation of the contracting authority to issue an act, or to adopt measures for remedy, the recognition of the claimed right or of the legitimate interest, by administrative or judicial procedure.

Under penalty of rejection of the challenge/appeal as being inadmissible, that can be invoked *ex officio*, before addressing the National Council for Solving Complaints or to the competent court, the person who considers their rights aggrieved as mentioned above has the obligation to notify the contracting authority and to request for an integral or partial remedy of the alleged breach of the legislation regarding public procurement or concessions within 10 (ten) days or 5 (five) days, as applicable.

In case the aggrieved person is not satisfied by the response of the contracting party to the prior notification, or has not received any response to this notification, or in case the person considers himself to be aggrieved by the measures of remedy taken by the contracting authority, they are entitled to use the following means of appeal:

- (i) administrative challenge in front of the National Council for Solving Complaints. The contracting authority is entitled to conclude the contract only after communication of the National Council's decision, and by observing the term given for its conclusion. The decision rendered by the National Council for Solving Complaints may be challenged before the Court of Appeal for both illegal and factual grounds within 10 (ten) days from its communication;
- (ii) judicial challenge in front of the relevant Tribunal (administrative and fiscal section).

In addition to the above, according to Law No. 101/2016, the parties may agree that any disputes concerning the interpretation, conclusion, performance, amendment and termination of contracts may be settled through an arbitration procedure.

3.6. Cases when the contracting authority is not bound to apply Law No. 100/2016

Law No. 100/2016 provides for the following main situations:

- (i) service concessions awarded to one or more contracting authority, based on an exclusive right granted under legislative or administrative acts in accordance with the principles of the Treaty on the Functioning of the European Union ("TFEU");
- (ii) service concessions awarded to an economic operator, based on an exclusive right granted according to the principles of the TFEU, and to the legal act of the European Union which set common rules on market access;
- (iii) air transport service concessions granted under an operating licence as provided by the Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community;

- (iv) concessions of public passenger transport, as defined by the Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road;
- (v) the performance of the concession contract implies special security and defence measures, and the contracting entity assigns them to an international organization;
- (vi) concession contracts with the main goal of allowing contracting authorities to provide or exploit public electronic communications networks, or to provide to the public one or more electronic communications services;
- (vii) service concession contracts which have as an object, inter alia, the following: purchase or rental, by whatever financial means, of land, existing buildings or other immovable property, the acquisition, development, production or co-production of program material awarded by media service providers;
- (viii) concessions of works or concessions of services awarded by contracting authorities when it was established that the respective activity is directly exposed to competition;
- (ix) service concession contracts by means of which the contracting authority awards arbitration services, mediation and other forms of alternative dispute resolution services.

3.7. Concession contracts for public assets

a) General

The concession of assets belonging to 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 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 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 a term is established by the contracting authority on the basis of an opportunity study, and may be extended for a period of up to half of the initial term.

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

- (i) tender, 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 repeated publishing of the bidding announcement.

b) Concession initiative

A concession may be initiated by the contracting authority upon its sole initiative, or following a proposal submitted by any interested person. It is mandatory that a concession initiative is based

upon an opportunity study 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 main 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.*: economic and financial standing, 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 confirmation of receipt of any decisions regarding the award of a concession contract, no later than 3 (three) days after their issuance. The concession contract may be concluded only after 20 calendar days as of such a communication.

4. Special Rules – Specific Types of Concession

Romanian legislation regulates several types of concession in the private field: 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.

4.1. 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 a 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 by 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, or by research and agricultural production institutes or resorts, as well as over lands operated by agricultural and forestry education units.

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

In case an investor is interested in being awarded the concession/leasing over the agricultural land also applies to purchase corresponding shares in the State-owned company operating the land, the two contracts are 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 to purchase 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 a concession over plots of land referred to within this section, must submit a letter of intent to the conceding authority, respectively to ADS.

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

The ADS Board of Directors decision for approving a 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 a land concession simultaneously with a 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 tender book.

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

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

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

4.2. Concession of Construction Land

a) General issues

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, by public tender and with the observance of the urbanism and land planning documentation. By way of exception, a concession over private property land may be granted without public tender, by payment of a royalty if, *inter alia*, the following activities are envisaged:

- (i) building a 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 construction;
- (vi) protecting or enhancing the value of historical monuments.

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

b) Granting of a concession

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

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

A 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 deeds of the concession, the concessionaire should apply to obtain building authorization and must commence the construction for which the concession was granted. The concession right over the land, as well as the building authorization, is transferable in case of construction transfer.

4.3. 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 a land or construction concession award. Prior to a tender, the free zone authority must obtain an urbanism certificate, in compliance with Law No. 50/1991.

b) Concession contract

Concessions over land and construction located in free zones is granted following a public tender organized by the free zone authority with 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 royalties, established in the concession contract, is made in freely convertible currency accepted by the National Bank of Romania.