

Chapter 29

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 harmonized rules in the public procurement field (in particular, Directive 2004/18/EC and Directive 2004/17/EC) which have been transposed into national legislation. On the 15th of 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. The new directives were (i) the Directive 2014/23/EU of the European Parliament and of the Council on the award of concession contracts, (ii) the Directive 2014/25/EU of the European Parliament and of the Council on procurement by entities operating the water, energy, transport and postal service sectors and (iii) the Directive 2014/24/EU of the European Parliament and of the Council on public procurement.

Member States were required to transpose these Directives within two years of the date of EU adoption. Thus, given this obligation imposed on Romania as an EU Member State, these three new Directives were transposed through new normative acts recently adopted by the competent Romanian authorities, mentioned at point 2 below and detailed throughout this chapter.

Due to the effects of the economic crisis, public contracts have become more and more alluring to companies especially in fields such as IT, design and construction. Currently, public procurement is one of the most dynamic sectors of the Romanian economy, it is seen as one of the engines of 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 quickly. This demonstrates increased compliance with post-award publication requirements. While the level of EU funds absorption has been a problem over the past years, key regulatory measures to accelerate public spending have been introduced in the legislation with the aim of simplifying and rationalizing public procurement rules and procedures. As a result, Romania’s absorption rate is 74%, significantly higher than it was in 2014, according to data released by the Ministry of European Funds and published on its official website at the beginning of 2015.

For concessions of works and services concessions’ general framework, currently regulated by Law No. 100/2016 on concessions for works and services concessions, please refer to Chapter 16 – *Concessions*.

2. Main Regulations

- Law No. 98/2016 on public procurement (“**Law No. 98/2016**”);

- Government Decision No. 395/2016 approving the application norms of Law No. 98/2016;
- Law No. 99/2016 on sectoral procurement (“**Law No. 99/2016**”);
- Government Decision No. 394/2016 approving the application norms of Law No. 99/2016;
- Law No. 101/2016 regarding remedies and appeals concerning the award of public procurement contracts, sectoral contracts and concessions contracts for works and services concessions, and for the organization and functioning of the National Council for Solving Complaints (“**Law No. 101/2016**”).

3. Parties in a public contract

3.1. General

Public procurement is the method under which public sector bodies and certain utilities (called “contracting authorities”) obtain products, 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.

As per Law No. 98/2016, the following are qualified as *contracting authorities* for the purposes of public procurement contracts:

- (i) authorities and public institutions acting at central or local level, as well as their structures which are entitled to the position of credits officer and have competences in public procurement;
- (ii) public bodies ;
- (iii) associations comprising at least one of the contracting authority referred to in point (i) or (ii) above.

3.2. Parties in sectoral procurement contracts

As per Law No. 99/2016, the parties in sectoral procurement contracts are:

- (i) contracting entities, as follows:
 - a) entities and public institutions acting at central and local level, as well as their structures which are entitled to the position of credits officer and have competences in public procurement;
 - b) public bodies;
 - c) associations comprising at least one of the contracting entities mentioned in letter a) and b) above;
- (ii) public enterprises, in certain conditions;

- (iii) any subject of law, other than those referred to in point (i) or (ii) above, which operates based on exclusive or special rights granted by a competent entity;
- (iv) any association, including a temporary one, comprising one or more of the entities referred to in point (i) – (iii) above.

4. Cases when the contracting authority/entity is not bound to apply public procurement legislation

4.1. Special cases when the contracting authority/entity is not bound to apply Law No. 98/2016

Law No. 98/2016 provides for certain situations when the contracting authority/entity is not bound to apply this law, *inter alia*:

- (i) in case of sectoral procurement contracts, sectoral framework agreements and sectoral solutions contests awarded or organized by sectoral contracting authorities that are obliged to apply the law on sectoral procurement;
- (ii) in case of sectoral procurement contracts, sectoral framework agreements and sectoral solutions contests excluded from the application of law on sectoral procurement;
- (iii) in case of sectoral procurement contracts, sectoral framework agreements and sectoral solutions contests awarded or organized by a sectoral contracting authority which provides postal services as stipulated within the law on sectoral procurement, for performing certain activities as follows:
 - a) value-added services in connection with electronic mail, entirely provided by electronic means, including the secured transmission of coded documents by electronic means, services for management of addresses and transmission of registered electronic mail messages;
 - b) financial services subject to CPV codes from 66100000-1 to 66720000-3 and to legal provisions of law on sectoral procurement, mainly including postal orders and transfers based on current postal accounts;
 - c) philatelic services;
 - d) logistics services consisting of services that combine physical delivery and/or storage with other functions than postal services;
- (iv) in case of public procurement contracts, framework agreements and solutions contests that have as their main purpose to allow the contracting authorities to provide or operate public networks of electronic communication or to provide to the public one or more electronic communication services;
- (v) in case of public procurement contracts/framework agreements and solutions contests attributed or organized pursuant to international rules (e.g. in case of public procurement

contracts, framework agreements, solution contests attributed or organized by a contracting authority according to public procurement rules established by an international organization or an international financial institution, where such public procurement contracts/framework agreements or solution contests are entirely financed by the respective organization or institution);

- (vi) in case of public procurement contracts/framework agreements for services having as object, inter alia:
 - a) purchase or rental, by any financial means, of lands, existing buildings or other immovable property or the rights thereof;
 - b) purchase, development, production or co-production of equipment for programs intended to be used for audiovisual media services, attributed to media services providers, or for contracts of broadcasting or supply of programs which are assigned to media services providers;
 - c) services of arbitration, mediation and other forms of alternative dispute resolution;
 - d) financial services in connection with the issuance, sale, purchase or transfer of securities or other financial instruments, within the meaning of art. 4 para. (1) of Regulation (EU) no. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) no. 648/2012; services of central banks and operations conducted with the European Financial Stability Facility and the European Stability Mechanism;
 - e) loans, irrespective of being in connection with the issuance, sale, purchase or transfer of securities or other financial instruments;
 - f) employment contracts;
 - g) services of civil defense, civil protection and prevention of hazards, provided by persons without a patrimonial purpose, subject to CPV codes 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3, except for ambulance services of patient transport;
 - h) services of public passenger transport by railway or subway;
- (i) in certain cases within the security and defense field, for public procurement contracts/framework agreements or solution contests related to which is accomplished at least one or the following conditions:
 - a) the award and execution of public procurement contract/framework agreements or solution contests represents state secret information, in accordance with the legal provisions on protection of classified information;

- b) the award and execution of public procurement contract/framework agreements or solution contests requires the imposition of special security measures for protection of essential security interests of the Romanian State, provided that they cannot be guaranteed by less intrusive measures.

4.2. Special cases when the contracting authority/entity is not bound to apply Law No. 99/2016

Law No. 99/2016 provides certain situations when the contracting authority/entity is not bound to apply this law, *inter alia*:

- (i) in case of sectoral contracts which are awarded for purchasing products in order to be resold or rented to third parties, provided that the contracting entity does not benefit from a special or exclusive right in this respect, and other persons are also entitled to sell or lease similar products under the same conditions as the contracting entity;
- (ii) in case of contracts awarded by the contracting entities for performing other activities than those performed within their relevant activities;
- (iii) in case of sectoral contracts awarded in order to purchase products, services or works for performing certain activities relevant in a third country provided that performing such activities will not interfere with the physical use of a network or a geographical area within the European Union;
- (iv) in case of contracts that have as its object the purchase of water, if such contracts are awarded by a contracting entity performing one or both of the activities related to drinking water (e.g. making available or operation of fixed networks intended to be used for the supply of public services within the production, transport or distribution of drinking water);
- (v) in case of contracts awarded by contracting entities that have as its object activities performed for the exploration of oil and natural gas.

5. Types of contracts

5.1. Types of public procurement contracts

Law No. 98/2016 provides for the following types of public procurement contracts:

- (i) **public procurement contract** – the contract having an onerous title, assimilated by law with an administrative act, concluded in writing by and between one or more economic operators and one or more contracting authorities, having as its object the execution of works, supply of products or services;
- (ii) **public procurement contract of works** – the public procurement contract that has as its object: (i) exclusively the execution, or the design and execution of works related to one of the activities listed in Annex. 1 of Law No. 98/2016; (ii) exclusively the execution, or the design and execution of a construction; or (iii) the execution, by any means, of a construction

fulfilling the requirements settled by the contracting authority that has a decisive influence on the type or design of that construction;

- (iii) **public procurement contract of products** – the public procurement contract that has as its object the acquisition of products by purchase, including payment by installments, rental, leasing with or without a purchasing option, or by any other contractual modalities under which the contracting authority benefits from such products. This is irrespective of the fact that the latter acquires or not the ownership over such products; the public procurement contract of products may include, as an accessory, works or operations of establishment and installation;
- (iv) **public procurement contract of services** – the public procurement contract that has as its object the supply of services other than those subject to a public procurement contract of works according to letter (ii) above;
- (v) **long-term contract** – the public procurement contract concluded for a period of at least 5 (five) years, including the term for the execution of the works or the construction. Provided that such contract has a component related to the execution of works or a construction and the term for the supply of services is established in order for the contractor to obtain a reasonable profit.

5.2. Types of sectoral contracts

Law No. 99/2016 provides for the following types of sectoral contracts:

- (i) **sectoral contract** – the contract has an onerous title assimilated by law with an administrative act, concluded in writing by and between one or more economic operators and one or more contracting entities, has as its object the execution of works, supply of products or services, in order to perform their main activity within one of the areas defined as relevant by Law No. 99/2016;
- (ii) **sectoral contract of works** – the sectoral procurement contract has as its object:
 - exclusively the execution or the design and execution of works, related to one of the activities provided by Annex no. 1 to Law No. 99/2016;
 - exclusively the execution, or the design and execution of a construction; or
 - execution by any means, of a construction fulfilling the requirements settled by the contracting authority that has a decisive influence on the type or design of that construction.
- (iii) **sectoral contract of products** – the sectoral procurement contract that has as its object the acquisition of products by purchase, including payment by installments, rental, leasing with or without a purchasing option, or by any other contractual modalities under which the contracting entity benefits from such products, irrespective of the fact that the latter acquires

or not the ownership over such products; the procurement contract of products may include, as an accessory, works or operations of establishment and installation;

- (iv) **sectoral contract of services** – the sectoral procurement contract that has as its object the supply of services other than those subject to a sectoral contract of works according to point (ii) above;
- (v) **long-term contract** – the sectoral contract concluded for a period of at least 5 (five) years, including the term for the execution of the works or the construction, provided that such contracts have a component related to the execution of works or a construction and the term for the supply of services is established in order for the contractor to obtain a reasonable profit.

6. Procedures for awarding public procurement contracts

6.1. Types of procedures

Law No. 98/2016 regulates the following types of procedures for awarding public procurement contracts:

- (i) **Open tender** – any economic operator is entitled to submit a tender following the publication of a contract notice.
- (ii) **Restricted tender** – any economic operator is entitled to submit a request for participation in the tender procedure following the publication of a contract notice, and subsequent to this, only the candidates fulfilling the qualification and selection criteria, as established by the contracting authority, should be entitled to submit the bid in the next stage of the procedure.

The restricted tender is carried out in 2 (two) mandatory stages: (i) the stage of submission of requests for participation and selection of candidates by applying the qualification and selection criteria; (ii) the stage of submission of the bids by the candidates selected during the first stage and their evaluation by applying the awarding criteria and evaluation factors. During the first stage, mentioned above, the contracting authority is entitled to limit the number of candidates which fulfill the qualification and selection criteria and which will be invited to submit their bids during the second stage, provided that a minimum number of candidates is assured.;

- (iii) **Competitive negotiation** – any economic operator is entitled to submit a request for participation in the tender procedure following the publication of a contract notice, and subsequent to this, only the candidates fulfilling the qualification and selection criteria, as established by the contracting authority, are entitled to submit initial bids in the next stage. The contracting authority will carry out negotiations in order to improve these bids

For more details related to the competitive negotiation procedure, please refer to sub-section 6.2.1 below.

- (iv) **Competitive dialogue** – any economic operator is entitled to submit a request for participation in the tender procedure following the publication of a contract notice, and

subsequent to this, only the candidates fulfilling the qualification and selection criteria, as established by the contracting authority, are entitled to participate in the dialogue stage, and the remaining candidates at the end of the dialogue stage are entitled to submit final bids.

The competitive dialogue procedure is carried out during 3 (three) stages: (i) the stage of submission of requests for participation and selection of candidates by applying the qualification and selection criteria; (ii) the stage of dialogue with the remaining candidates, in order to identify the solution/solutions corresponding to the contracting authority's needs and based on which the final bids will be submitted; (iii) the stage of submission of final bids by the remaining candidates following the second stage and their evaluation by applying the awarding criteria and evaluation factors.

- (v) **Innovation partnership** – any economic operator is entitled to submit a request for participation in the tender procedure following the publication of a contract notice, and subsequent to this, only the candidates fulfilling the qualification and selection criteria, as established by the contracting authority, are entitled to submit initial bids in the next stage, based on which the contracting authority will carry out negotiations in order to improve them.

The innovation partnership is carried out within 3 (three) stages: (i) the stage of submission of requests for participation and selection of candidates by applying the qualification and selection criteria; (ii) the stage of submission of initial bids by the candidates selected during the first stage and the evaluation of their conformity as per the requirements of the contracting authority; (iii) the stage of negotiations for improvement of initial bids, submission of final bids and their evaluation by applying the awarding criteria and evaluation factors.

- (vi) **Negotiation without prior publication** – the contracting authority is entitled to use the negotiated procedure without prior publication of a contract notice for awarding public procurement contracts/framework agreements of works, products or services in specific cases provided by Law No. 98/2016 and detailed in sub-section 6.2.2. below.

- (vii) **Solutions contest** – solutions contest shall be initiated through the publication, by the contracting authority, of a contest notice requesting interested economic operators to submit their projects. The solutions contest may be organized as follows: (i) during the procedure of awarding a public procurement contract of services; (ii) as a separate procedure, with premiums or payments granted to the participants.

Awarding procedure applicable in case of social services and other specific services – this procedure is applicable in case of public procurement contracts/framework agreements that have as their object social services or other specific services as provided in Annex no. 2 to Law No. 98/2009 and an estimated value equal to or higher than RON 3,334,050. In such cases, the contracting authority has the following obligations: (i) to make available its intention to purchase the respective services by publication of a contract notice or by means

of a notice for intention continuously valid; and (ii) to publish a notice for the award of the contract.

- (viii) **Simplified procedure** – this procedure may be initiated through publication, by the contracting authority, of a simplified notice of participation with the relevant awarding documentation in SEAP. The contracting authority may decide to perform such a procedure during one stage or during multiple stages corresponding to the selection of candidates and negotiation and the evaluation of bids.

6.2. Negotiation procedure according to Law No. 98/2016

6.2.1. Competitive negotiation procedure

Under *the competitive negotiation procedure*, any economic operator is entitled to submit a request for participation in the tender procedure following the publication of a contract notice, and subsequent to this, only candidates fulfilling the qualification and selection criteria, as established by the contracting authority, are entitled to submit initial bids in the next stage, based on which the contracting authority will carry out negotiations in order to improve them. Competitive negotiation is initiated by transmission for publication of a contract notice, through which the contracting authority requires economic operators to submit requests in order to provide information and documents for qualification and selection criteria as established by the contracting authority.

The competitive negotiation procedure is generally carried out during two mandatory stages:

- (i) the stage of submission of requests for participation and selection of the candidates, by applying the qualification and selection criteria;
- (ii) the stage of submission of initial bids by the candidates selected in the first stage and evaluation of their compliance with the minimum requirements established by the contracting authority and negotiations for the improvement of the initial bids, submission of final bids and their evaluation by applying the awarding criteria and evaluation factors.

During the first stage, mentioned above, the contracting authority is entitled to limit the number of candidates which fulfill the qualification and selection criteria and thus which will be invited to submit their initial bids, provided that a minimum of 3 (three) candidates is assured.

6.2.2. Negotiation procedure without prior publication of a contract notice

The *negotiation procedure without prior publication of a contract notice* may be conducted in the following cases, *inter alia*:

- (i) where within an open tender procedure or a restricted tender organized for the acquisition of products, services or works, was not submitted any bid/request for participation or in cases where only inconsistent bids/requests for participation were submitted. This is done provided that the initial conditions of the acquisition will not be substantially amended and, at the request of the European Commission, a report is to be submitted to the latter;

- (ii) where the works, products or services may be delivered only by a particular economic operator for one of the reasons mentioned at Article 104 para. (2) of Law No. 98/2016 (e.g. object of the acquisition is creation or acquisition of an artwork or an unique artistic performance; competition is missing by technical reasons; performance of certain exclusive rights including intellectual property rights);
- (iii) as a strictly necessary measure, in case the application terms for an open tender, a restricted tender or a competitive negotiation may not be carried out due to extreme urgency reasons, determined by unforeseeable events and which are not caused, in any way, by an action or inaction of the contracting authority;
- (iv) where the products subject to acquisition are manufactured solely for scientific, experimental, study or developmental research, and the public procurement contract does not provide production in sufficient quantities of the product in order to establish its commercial viability or the recovery of costs for research and development;
- (v) where it is necessary to purchase from the initial contractor additional quantities of products to be used for partial replacement or extension of products or existing facilities, and only when the replacement of the initial contractor will provide the contracting authority in the position of purchasing products with technical characteristics different to the existing ones, that would lead to incompatibility or disproportionate technical difficulties in operation and maintenance of such products;
- (vi) for products quoted and purchased on a commodity market, such as agricultural products, raw materials and energy exchanges, in cases where the regulated and supervised multilateral trading structure guarantees for the prices on the market;
- (vii) for acquisition of products or services, under special advantageous conditions, from an economic operator that definitively ceases its commercial activities or is in bankruptcy or a similar procedure.

6.3. Special methods for awarding public procurement contracts

Besides the procedures mentioned above, Law No. 98/2016 provides *specific methods* for awarding public contracts:

- (i) conclusion of a framework agreement, with one or more economic operators, for a maximum period of 4 (four) years., except for exceptional cases duly justified by the contracting authority, particularly by the object of that framework agreement;
- (ii) dynamic purchasing system that is organized and entirely operates as an electronic process and that is open during its entire validity period to any economic operator fulfilling the qualification and selection criteria. The contracting authority is entitled to use a dynamic purchasing system, through SEAP, for acquisitions of current use, whose general features, available on the market, fulfill the needs of the contracting authority;

- (iii) electronic public tender. This last method mentioned at point (iii) above is used in the following cases: (i) as a final stage of an open tender, a restricted tender, or a competitive negotiation procedure; (ii) at the resumption of competition between the economic operators being parts of a framework agreement and (iii) at the submission of the bids in order to award a public procurement contract using the dynamic purchasing system.

7. Publicity for the public contracts awarding procedure

The contracting authority has the obligation to ensure transparency of the procedure of awarding public contracts/framework agreements by publishing notices of intention, contract notices and awarding notices.

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

- (i) at the initiation of an open tender, a restricted tender, a competitive dialogue, a competitive negotiation procedure or an innovation partnership, for awarding public contracts/framework agreements;
- (ii) at the initiation of a dynamic purchasing system;
- (iii) in case of an organization of a solution contest;
- (iv) in case of the initiation of the procedure for awarding public procurement contracts/framework agreements for social services and other specific services provided in Annex no. 2 at Law No. 98/2016, except for cases of a notice of intention continuously valid being published.

The publication of contract notices in the Official Journal of the European Union is mandatory in all cases where the estimated value of the public procurement contract/framework agreement is higher than or equal to the following thresholds:

- (i) RON 23,227,215 (approx. EUR 5,160,000) for public contracts/framework agreements of works;
- (ii) RON 600,129 (approx. EUR 133,000) for public contracts/framework agreements of products and services;
- (iii) RON 3,334,050 (approx. EUR 3,334,000) for public contracts/framework agreements that have as their object social services and other specific services, as provided in Annex No. 2 to Law No. 98/2016.
- (iv) The contracting authority ensures, by electronic means (through SEAP), the direct, complete, unrestricted and free of charge access to all economic operators to the public procurement documentation commencing with the publication date of the contract notice. The contracting authority may extend the term established in the contract notice or the awarding documentation for submission of the bids or requests for participation where: for any reason, the additional information or the response of the contracting authority to the request for clarifications are not transmitted in term, although such clarifications or additional information were requested in due term;

- (v) where the awarding documentation is significantly amended.

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

The contracting authority *must exclude* from the awarding procedure of a public procurement contract any operator which has been the subject of a conviction by a final judgment of a court, for committing one of the following criminal offenses:

- (i) establishment of an organized criminal group as provided by Article 367 of Law No. 286/2009 adopting the Romanian Criminal Code (“**Criminal Code**”);
- (ii) corruption offenses provided by Articles 289-294 of Criminal Code and assimilated criminal offenses provided by Articles 10-13 of Law No. 78/2000 on preventing, detecting and sanctioning acts of corruption (“**Law No. 78/2000**”);
- (iii) offenses against the financial interests of the European Union provided by Articles 181 - 185 of Law No. 78/2000;
- (iv) acts of terrorism provided by Articles 32-35 and 37-38 of Law No. 535/2004 on preventing and combating terrorism;
- (v) money laundering provided by Article 29 of Law No. 656/2002 on preventing and sanctioning money laundering, as well as on instituting measures for preventing and combating terrorism acts ;
- (vi) trafficking and exploitation of vulnerable persons provided by Articles 209-217 of Criminal Code;
- (vii) fraud within the meaning of Article 1 of the Convention on protection of the financial interests of European Communities dated 27 November 1995.

The obligation to exclude an economic operator from the awarding procedure shall also apply in cases where the person sentenced by a final judgment of the court is a member of the administrative, management or supervisory body of that economic operator or has power of representation, decision or control within it.

The contracting authority is entitled to request any economic operator to submit relevant documents in order to prove the registration form and, where applicable, documents of certification or professional membership, in accordance with legal requirements of the country in which the economic operator is established. Moreover, the contracting authority is entitled to request the bidder/candidate to submit relevant information and documents related to technical and professional capacity of the proposed subcontractors, regarding the part/parts of the contract they will effectively perform.

In order to prove the economic and financial situation, as a general rule, the economic operator will provide one or more of the following information and documents:

- (i) appropriate statements or bank excerpts or, where applicable, proof of professional risk insurance;
- (ii) financial statements or excerpts from the financial statements, in cases where the publication of financial statements is required under the law of the country the economic operator is established;
- (iii) a statement of the aggregate turnover of the economic operator and, where applicable, the turnover in the area of activity covered by the contract for the last three financial years available, depending on the date of incorporation or the date of commencement of activity by the economic operator, as far as the information about such turnover are available.

It should be mentioned that the economic operator shall invoke, where applicable and in relation to a public contract/framework agreement, the support provided for a third/third parties on the fulfillment of criteria on economic and financial status and/or criteria on technical and professional capacity, regardless of the nature of relationships existing between the economic operator and the respective third party/third parties. However, the contracting authority shall not disclose information submitted by the economic operators and indicated by them as being confidential, including technical or commercial secrets and confidential elements of the bids.

9. Awarding documentation

Pursuant to Law No. 98/2016 the contracting authority is obliged to draw up the awarding documentation which contains all information necessary for providing to operators a complete, fair and accurate overview on the requirements of the procurement, the object of the contract and also the modality of performing the awarding procedure. Technical specifications are established in the awarding documentation and define the required characteristics related to the work, service or products which represent the scope of the procurement. It will be determined whether a transfer of intellectual property rights is required by such technical specifications.. Technical specifications should allow all economic operators equal access to the awarding procedure and should create unjustified obstacles to ensure effective competition between the economic operators.

Notwithstanding the compulsory technical rules at national level, to the extent that they are compatible with the normative acts adopted at European Union level, the technical specifications are established in one of the following modalities:

- (i) by reference to performance requirements or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise in order to allow the bidders to determine the scope of the contract and the contracting authorities competent to award the contract;
- (ii) by reference to technical specifications and, as order of priority, to national standards transposing European standards, European technical assessments, common technical specifications, international standards, other technical systems of reference established by the European standardization bodies or, in the absence of any of these, to national standards, national technical approvals or national technical specifications related to the design,

computation and execution of works and use of products; each consignment will be accompanied by the words "or equivalent";

- (iii) by reference to performance requirements or functional requirements according to point (i) above, and by reference to technical specifications referred to in point (ii) above, as a modality to presume the compliance with such requirements of performance or functional requirements;
- (iv) by reference to technical specifications referred to in point (ii) above, for certain characteristics, and by reference to requirements of performance or functional requirements referred to in point (i) above, for other characteristics.

In case the contracting authority intends to procure works, products or services with certain environmental, social or of other natural characteristics, the contracting authority may request, through the technical specifications, the evaluation factors or execution conditions of the contract, a specific label as evidence that the works, services or products fulfill the requested requirements, in case the following conditions are fulfilled cumulatively:

- (i) the labeling requirements relate only to criteria that are related to the scope of the contract and are appropriate to define the characteristics of the works, products or services constituting the scope of the contract;
- (ii) the labeling requirements are based on non-discriminatory and objectively verifiable criteria;
- (iii) the labels are established through an open and transparent procedure, which may be attended by all interested relevant entities, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organizations;
- (iv) the labels are accessible to all interested entities;
- (v) the labeling requirements are set up by a third party entity over which the economic operator (that requested the issuance of the label) cannot exercise a determinative influence.

It should be mentioned that the contracting authority is entitled to request the economic operators to provide a testing report or a certificate issued by a conformity evaluation body, as evidence attesting the conformity of products, services or works (which are the object of the procurement) with the requirements or criteria established through the technical specifications, evaluation factors or execution conditions of that contract.

In case an economic operator does not have certificates or testing reports or there is no possibility to obtain them within the established deadlines (for reasons beyond its control), the contracting authority is obliged to accept other means of evidence, such as a technical file of the manufacturer, as long as such means of evidence attest that the works, products or services rendered/provided/performed fulfill the requirements or criteria established through the technical specifications, evaluation factors or execution conditions of that contract.

Moreover, any interested economic operator is entitled to request clarifications or additional information in connection with the awarding documentation. The contracting authority has the obligation to respond as

soon as possible, clearly and completely, to any request for clarifications or additional information in a term not usually exceeding 3 (three) business days from the date of receiving such a request from an economic operator.

The contracting authority is entitled to allow or to request the bidders to submit alternative bids only in the cases where it has explicitly stated in the contract notice that it allows or requires the submission of alternative bids. In case the contracting authority did not explicitly state that it allows or requests the submission of alternative bids, it is not entitled to consider such alternative bids. Furthermore, the alternative bids must be connected with the scope of the public procurement contract/framework agreement.

At the same time, for the awarding procedure, the contracting authority is entitled to apply only the following criteria of capacity:

- (i) capacity to exercise the professional activity;
- (ii) economic and financial status;
- (iii) technical and professional capacity.

The contracting authority will award the public procurement contract/framework agreement to the bidder which has submitted the most economically advantageous bid. Thus, in order to determine the most economically advantageous bid, the contracting authority is entitled to apply one of the following award criteria:

- (i) the lowest price;
- (ii) the lowest cost;
- (iii) the best value for money;
- (iv) the best value for cost.

10. Cancelling the awarding procedure for a public contract

- (i) The contracting authority has the obligation to cancel the awarding procedure for a public contract in the following cases: where no bid/request for participation was submitted or no admissible bid was submitted. Where submitted admissible bids cannot be compared due to an uneven modality in the approach to the technical and/or financial solutions;
- (ii) where violations of the law are affecting the awarding procedure or the conclusion of the contract becomes impossible;
- (iii) the National Council for Solving Complaints or the court orders the amendment/removal of any technical specifications from the tender book or from other documents issued in connection with the awarding procedure, and the contracting authority is unable to take corrective measures without affecting the principles of public procurement;

- (iv) in case the contract cannot be concluded with the bidder whose bid was established as being successful, because such bidder is in a force majeure situation or cannot perform the contract and there is no admissible bid ranked on 2nd place.

The contracting authority is obliged to publish in SEAP the decision to cancel the procedure for awarding the public procurement contract/framework agreement, accompanied by justification of such annulment of the awarding procedure.

11. Conclusion of the public contract

The contracting authority has the obligation to submit a notification accepting its bid to the successful bidder expressing the consent to conclude the public procurement contract/framework agreement. During the evaluation process, the contracting authority is entitled to submit partial results to the candidates/bidders, for each intermediate stage of the procedure.

The contracting authority establishes the winning bid within a maximum 25 days-term from the deadline provided for the submission of bids. Exceptionally, in duly justified cases, the contracting authority may extend this period. The extended evaluation period shall be communicated to the economic operators involved in the procedure within a maximum term of 2 (two) days.

In cases where the contracting authority may not conclude the public procurement contract/the framework agreement with the bidder whose bid was determined as being successful, as a result of the fact that the bidder is in a force majeure situation or in impossibility to perform the contract/framework agreement, the contracting authority has the obligation to declare the bid ranked in 2nd place as the winning bid, but only if such bid exists and is inadmissible. If the bid ranked in 2nd place is not an admissible bid, the contracting authority is obliged to cancel the awarding procedure of the public procurement contract/framework agreement.

12. Appeals

Any person that considers themselves aggrieved in its right 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 appeal as being inadmissible, it can be invoked *ex officio*, before addressing the National Council for Solving Complaints or the competent court, the person that considers to be aggrieved, as mentioned above, has the obligation to notify the contracting authority related to the request for integrally 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. Therefore, if the aggrieved person is not satisfied by the response of the contracting party to the prior notification or in case it has not received any response to this notification or in case the person considers themselves to be aggrieved by the measures of remedy taken by the contracting authority, it is 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 by its conclusion;
- (ii) judicial challenge in front of the competent court. The decisions of the National Council related to solving the appeal may be appealed by any of the involved parties, before the competent court, both on illegal or factual grounds, in a 10 (ten) days-term of their communication. The court competent to hear the complaint against the decision of the National Council is the Court of Appeal, administrative and fiscal department in whose jurisdiction is situated the contracting authority, and the complaints are settled by panels of judges specialized in public procurement matters.

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