

The International Comparative Legal Guide to:

Public Procurement 2009

A practical insight to cross-border Public Procurement



Published by Global Legal Group with contributions from:

Advokatfirmaet Haavind Vislie AS
Alerion
Aluko & Oyebode
Arnold & Porter LLP
Ashurst LLP
Beiten Burkhardt
Blake, Cassels & Graydon LLP
Boga & Associates
Borislav Boyanov & Co.
Cervantes, Aguilar-Alvarez & Sainz
Dorda Brugger Jordis
Eversheds Ots & Co
Gómez-Acebo & Pombo

Hammarström Puhakka Partners
Houthoff Buruma
J. Sagar Associates
Klavins & Slaidins LAWIN
Law firm Foresta
Lee & Ko
Legance Studio Legale Associato
M. & M. Bomchil
MacRoberts LLP
Mamo TCV Advocates
Mannheimer Swartling Advokatbyrå AB
Matheson Ormsby Prentice

Meitar Liguornik Geva & Leshem Brandwein
Middletons
Molitor, Fisch & Associés
Pachiu & Associates
Peterka & Partners
PI Partners
Plesner
Rui Pena, Arnaut & Associados
Schoenherr
Tassos Papadopoulos & Associates
TozziniFreire Advogados
Walder Wyss & Partners Ltd.
WKB Wierciński, Kwieciński, Baehr

Romania



Delia Vasiliu



Andrei Dumitrache

Pachiu & Associates

1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

In the context of Romania becoming a member of the European Union at the beginning of 2007, the legal framework on public procurement underwent substantial changes, aimed to bring it up to the EU standards.

Currently Emergency Ordinance No. 34/2006 on the allotment of public procurement contracts, works concession contracts and services concession contracts, as amended (hereinafter “**GEO No. 34/2006**”), sets out the general legal framework of public procurement in Romania.

The general provisions of GEO No. 34/2006 are completed, on specific matters, by two main sets of acts:

- (i) Government acts, such as:
 - Government Emergency Ordinance No. 30/2006 regarding the verification function of the procedural aspects concerning allotment of public procurement contracts;
 - Government Decision No. 1660/2006 for approving the application norms regarding the allotment of procurement contracts by electronic means from the GEO No. 34/2006;
 - Government Decision No. 942/2006 for approving the application norms of Government Emergency Ordinance No. 30/2006;
 - Government Decision no. 71/2007 for approving the application norms of the provisions referring to the allotment of the public works concession contracts and of services concession contracts from the GEO No. 34/2006;
 - Government Decision No. 925/2006 for approving of the application norms of the GEO No. 34/2006 regarding the allotment of public procurement contracts, works concession contracts and services concession contracts;
 - Government Decision No. 782/2006 approving the Regulation of organisation and functioning of the National Council for the Settlement of Contestations, hereinafter referred to as the Council or NCSC (the authority competent to settle, as first instance, claims related to public procurement acts); or
 - Government Emergency Ordinance No. 74/2005 regarding the setting up of National Authority for Regulation and Monitoring Public Procurement or “**NARMPP**” (competent Romanian regulatory authority for public procurement).
- (ii) Acts of NARMPP, such as:
 - Order No. 113/11.04.2008 approving the Regulation regarding the supervision over the allotment procedure of public procurement contracts, public works concession

contracts and services concession contracts;

- Order No. 175/2007 regarding the approval of the Operational Manual for observing and verifying the allotment of public procurement contracts, public works concession contracts and services concession contracts; or
- Order no. 155/2006 of the President of the NARMPP on the approval of the Guide for allotmenting public procurement contracts.

1.2 How does the regime relate to supra-national regimes including the GPA and/or EC rules?

One of the major obligations undertaken by Romania under the EU adhesion instruments was that of coordinating its internal legal framework with the legal framework applicable in the EU.

Consequently the Romanian legislation has been largely modified so that it would become integrated and in accordance with the provisions of the EU directives.

We may mention in this regard the fact that GEO No. 34/2006 transposes the provision of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the allotment of public works contracts, public supply contracts and public service contracts, of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

1.3 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

GEO No. 34/2006 explicitly provides that the fundamental principals at the base of any allotment of public procurement contracts are: non-discrimination; equal treatment; transparency; proportionality; efficiency in using public funds; and assuming of responsibility.

1.4 Are there special rules in relation to military equipment?

The rules provided under GEO NO. 34/2006 shall apply also to public procurement by contracting authorities responsible for the

national defence or national security, in so far as the application of the procedure does not lead to disclosure of classified information related to national security, or may prejudice national security or production of military equipment.

Special rules of procedure for public procurement in such cases are established by order of the Government.

2 Application of the Law to Entities and Contracts

2.1 Which public entities are covered by the law and is it possible to obtain a ruling on this issue?

For the purpose of GEO No. 34/2006, the following public entities are considered **contracting authorities**:

- (i) any central, regional or local state body - public authority or public institution;
- (ii) any public law entity which is (a) financed by one of the entities under (i) above, (b) is subordinated or controlled by one of the entities under (i) above, or (c) the majority of the members of its management or supervisory bodies are nominated by one of the entities under (i) above;
- (iii) any association or joint venture of entities under (i) or (ii) above; and
- (iv) any public company active in the public services (water, energy, transportation and postal services) or another entity performing such services based on an exclusive right granted by a contracting authority, when it concludes contracts of public procurement or it concludes frame-agreements with regard to the provision of such public services.

In case of reasonable doubt, a ruling on the incidence of the public procurement laws on the operations of a public authority may be obtained from the regulatory authorities or from the competent court of law.

2.2 Which private entities are covered by the law and is it possible to obtain a ruling on this issue?

The application of the awarding procedures established by GEO No. 34/2006 is mandatory also for private entities (which do not have the status of contracting authority, as per the answer to question 2.1 above), under the following circumstances:

- (i) more than 50% of the financing for a contract regarding performance of works, which is awarded by the private entity, is directly ensured by a contracting authority, and the estimated value of such contract is in excess of EUR 2,500,000; or
- (ii) more than 50% of the financing for a contract regarding provision of services, which is awarded by the private entity, is directly ensured by a contracting authority, and the estimated value of such contract is in excess of EUR 125,000.

In case of contract awarding as set out under (i) and (ii) above, the financing contracting authority shall have the obligation of imposing on the private entity the observance of GEO No. 34/2006, through the financing agreement.

2.3 Which types of contracts are covered?

GEO No. 34/2006 covers the following types of contracts:

- (i) public procurement (acquisition) contract (including contracts public procurement in the fields of water, energy, transportation and postal services), having as an object the

performance of works, the delivery of goods or the provision of services;

- (ii) contracts regarding the concession of services by a contracting authority to a private entity; and
- (iii) contracts regarding the concession of public works by a contracting authority to a private entity.

2.4 Are there threshold values for determining individual contract coverage?

Contracts for the procurement of public services such as research and development services, transportation services, telecommunication services, management and consultancy services, financial services, maintenance and repair services, advertisement services etc., are exempted from the general regime set out by GEO No. 34/2006, in so far as:

- (i) the contract is awarded by a contracting authority provided under (i), (ii) or (iii) at question 2.1 above, and the total value of the contract does not exceed EUR 125,000; or
- (ii) the contract is awarded by a contracting authority provided under (iv) at question 2.1 above, and the total value of the contract does not exceed EUR 420,000.

In the cases mentioned above, the contracting authority shall only have to observe the rules under GEO No. 34/2006 regarding the content of the tender book.

Other thresholds available under GEO No. 34/2006 relate to partial exemptions, such as that, providing that in case of the total value of a contract/frame-agreement for the procurement of public works does exceed EUR 5,000,000, the contracting authority is exempted from the obligation of publishing the tender announcement with the Romanian Official Gazette (ROG), with the Official Journal of the European Union (OJEU) or with the Electronic System for Public Acquisitions (ESPA).

2.5 Are there aggregation and/or anti-avoidance rules?

The legislation provides that the contracting authority does not have the right of dividing the public procurement contract with the scope of falling under the exemptions provided by the GEO No. 34/2006. The observance of this rule by the contracting authority is ensured by the public authorities who supervise the public procurement system, such as NARMPP and the Ministry of Finance, through its special control body.

Furthermore, GEO No. 34/2006 provides for several anti-avoidance rules, such as:

- (i) in the case the contracting authority intends to purchase similar products divided on lots whose purchase is accomplished by awarding several distinct supply contracts, then the estimated value is considered to be the cumulated value of all lots; or
- (ii) in case of contracts which refer to the provision of services (as provided at question 2.4, para. 1 above,) as well as of other types of services, the exemption described under question 2.4, para. 1 above shall apply only if the value of the services set out under question 2.4, para. 1 above is higher than the value of the other services in the contract.

2.6 Are there special rules for concession contracts?

Services and public works concession contracts are regulated under a separate chapter of GEO No. 34/2006. Most of the requirements regarding the awarding procedure of public procurement contracts is similar also for concession contracts, e.g. the basic principals

regarding public procurement awards are at the base of the awarding of concession contracts.

The founding principle of the decision regarding the necessity of the concession project, the way of transferring and recuperating the object of the concession, the modalities for preparing the tender documentation and the specific ways for applying the procedures provided by this law for awarding the concession contract are set-up by Government Decision.

Similar to public procurement contracts, the contracting authority has the obligation to ensure the transparency of concession contracts awarding.

The awarding procedure of a concession contract is initiated by publishing a contract notice. The contract notice is published in the ESPP, in the Official Gazette of Romania, and, by case, in the Official Journal of the European Union. The publication in the Official Journal of the European Union is mandatory in all the situations where the estimated value of the concession contract exceeds the RON equivalent of EUR 5,000,000.

The contracting authority awarding a concession contract has the right to request: (a) from the concessionaire, to award contracts to third parties, a percentage of a minimum of 30% of the total value of works that are the subject of the concession, giving the candidates the possibility to increase the share/shares of the contract that will be subcontracted; or (b) from candidates, to specify in the application the value/percentage of the work for which the concession contract is to be awarded with the intent to assign to third parties.

Any candidate that participates in the awarding procedure of a concession contract has the obligation to include in the application a list containing the legal persons that have the quality of related undertakings; the concessionaire will have the obligation to permanently update the list, till the concession contract is finalised.

3 Procedures

3.1 What procedures can be followed, how do they operate and is there a free choice amongst them?

The public procurement procedures provided under GEO No. 34/2006 are:

- (i) Open procedure, which represents the procedure for awarding the public procurement contract to which any interested economic operator is entitled to submit a tender.
- (ii) Restricted procedure, which represents the procedure whereby any economic operator is entitled to submit its candidacy, and only selected candidates, will be entitled to submit a tender. The restricted procedure is used when the supply is exceeding the demand.
- (iii) Competitive dialogue, which represents the procedure to which any economic operator is entitled to submit candidacy and whereby the contracting authority carries on a dialogue with the accepted candidates, for the purpose of identification of one or several solutions fit to meet its requirements, and, based on the identified solution/solutions, the selected candidate to elaborate the final tender. The competitive dialogue is applied only when the following conditions are cumulatively fulfilled: (a) the relevant contract is deemed to be highly complex; and (b) the application of the open procedure or restricted procedure would not allow the awarding of the relevant public procurement contract.
- (iv) Direct negotiations, which is the procedure whereby the contracting authority carries on consulting with the selected candidates and negotiates the terms of the public procurement with one or several of such candidates. Direct

negotiation can be (a) negotiation with the prior publication of a participation notice, or (b) negotiation without the prior publication of a participation notice. The Direct negotiations may apply only in certain situations, such as emergency situations.

- (v) Tender request represents the simplified procedure whereby the contracting authority requests tenders from several economic operators. The main condition for a tender request to be allowed are applied only if the estimated value of the public procurement contract, without the VAT, is lower than the RON equivalent of: (a) EUR 75,000, for one supply contract or for one services contract; or EUR 500,000 for one works contract. The tender request procedure is initiated by publication, in the ESPA, of an invitation for participation in the awarding procedure. Derogation from such rule is available only with the prior consent of NARMPP.

There are two supplementary procedures: (i) competition of solutions, which represents the procedure which applies especially for public procurement of a plan or project in the field of territory planning, urban and landscape design, architecture or data processing, by selecting such plan or project based on a competition between bidders, supervised by a council of the contracting authority; and (ii) direct purchase, which is applied whenever the cumulated yearly value (without VAT) of products, services or works purchased does not exceed the RON equivalent of EUR 10,000. The value of products, services or works purchased has to be proven with justifying documents.

The contracting authority has the obligation of awarding public procurement contracts only by one of the procedures under (i) or (ii) above. All other means of awarding procedure are exemptions and they may be used only under specific circumstances provided under the law.

In addition to the above, a contract authority is entitled to conclude framework agreements. Framework agreements represent the written understanding entered between one or several contracting authorities and one or several economic operators, the purpose of which is to set forth the essential elements/conditions which will govern the public procurement contract which are to be awarded for a given period, especially with respect to the price and, as applicable, to the amounts taken into consideration. The framework agreement does not represent the legal basis for undertaking public funds. Subsequent contracts are awarded based on the framework agreement, which represent the legal grounds for payment. The contracting authority is obligated to enter a framework agreement, regularly by application of the open procedure or restricted procedure. The framework agreement may not be used so that it would obstruct, restrict or distort competition.

The general requirement of the law regarding publicity of public procurement awarding procedures is that the documents related to such procedure which are subject to third party publicity (e.g. tender announcement, participation announcement, awarding decision etc.) have to be published with the Official Gazette of Romania, with the Official Journal of the European Union and with ESPA. Some limitations in this regard are provided for each particular procedure.

3.2 What are the rules on specifications?

The contracting authority has the obligation to state accurately within the tender documentation any request, rule, criteria, and other necessary information, in order to ensure that the tenderer is completely, justly and explicitly informed regarding the way of conducting the awarding procedure.

The specifications shall contain, but not be limited by it, at least the

following:

- a) general information regarding the contracting authority;
- b) instructions regarding the mandatory deadlines and necessary formalities for participating to the awarding procedure;
- c) if requested, the minimum qualifications requirements and documents that shall be submitted by the tenderers in order to fulfil the selection and qualification criteria;
- d) the terms of references or, in the case of applying the competitive dialogue or negotiation procedure, the descriptive documentation;
- e) instructions regarding the elaboration and submission of the technical and financial proposal;
- f) detailed and complete information regarding the awarding criteria applicable for establishing the winning tender;
- g) instructions regarding the use of the means of legal dispute; and
- h) information regarding the compulsory clauses of the contract.

The contracting authority has the right to point out within the tender documentation the competent institutions from which the economic operators can obtain information regarding the provisions on tax payment and/or environment protection. It has also the obligation to point out the compulsory rules related to the specific employment protection and working conditions that are in force at national level and that have to be respected during the performance of the contract or to indicate the competent bodies from which the economic operators may obtain appropriate information regarding the respective regulations.

It is compulsory for the terms of references to contain the technical specifications, meaning technical requirements, prescriptions, technical characteristics needed to describe, in an objective manner, any product, service or work in order to meet the requirements of the contracting authority.

The performances and functional characteristics through which the technical specifications are defined may also include environmental characteristics. When the contracting authority lays down environmental characteristics in terms of performance or functional requirements, then it may use the detailed specifications, or, if necessary, parts thereof, as defined by European or (multi-) national “eco-labels”, or by and any other eco-label, provided that the following conditions are cumulatively met:

- a) those specifications are appropriate to define the characteristics of the supplies or services that represent the object of the public procurement contract;
- b) the requirements for the “eco-label” are drawn up on scientific basis;
- c) the “eco-labels” are adopted using a specific procedure that allowed the involvement of all interested parties - such as government bodies, consumers, producers, distributors and environmental organisations; and
- d) “eco-labels” are available to all interested parties.

It is forbidden to define in the terms of reference the technical specifications that indicate a specific source, production, make, a particular process, or trade marks, patents, types or a specific origin with the effect of favouring or eliminating certain economic operators or certain products.

3.3 What are the rules on excluding tenderers?

According to GEO No. 34/2006, the contracting authority has **the obligation** to exclude, from the procedure applied for the award of the public procurement contract, any tenderer whereof it has information that, in the last 5 years, it was convicted by definitive

court judgment, for participation in a criminal organisation, for corruption, for fraud and/or for money laundering.

The contracting authority has **the right** to exclude within the award of the public procurement contract procedure any tenderer, if the tenderer:

- a) is bankrupt or is under liquidation procedure, his affairs are being lead by a judiciary administrator, or his business activities are suspended or he has entered into an arrangement with creditors, or is in a similar situation regulated by law;
- b) is the subject of a legal procedure for his declaration on one of the situations provided for by letter a);
- c) has not fulfilled his obligations relating to the payment of taxes to the state as well as the obligations relating to the payment of social security contributions in accordance with the legal provisions of Romania or of the country in which he is established;
- d) in the past 2 years it has not fulfilled or has not properly fulfilled its contractual obligations, due to reasons imputable to the tenderer in the matter, which has produced or by its nature shall produce serious prejudices to its beneficiaries;
- e) has been convicted in the last 3 years by definitive court judgment, for an act that doesn't correspond with the professional ethics or for a grave professional misconduct; or
- f) presents false information or doesn't present the information required by the contracting authority, regarding the situation provided for by letters a)-e).

In order to demonstrate the fact that the tenderer is not in one of the situations provided above, the contracting authority has the obligation to accept as sufficient and relevant any document considered edifying from this point of view, in the country of origin of the tenderer or whence it is established, such as certificates, extracts from judicial records or any other equivalent document issued by competent authorities from that country.

In the case when the contracting authorities have doubts concerning the personal situation of the tenderers, it has the right to request information directly to the competent authorities which issue such documents as those provided above. If such documents are not available, the contracting authority has the obligation to accept a declaration on oath, or in countries where there is no provision for declaration on oath, a solemn declaration made by the person concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body.

3.4 What are the rules on short-listing tenderers?

The contracting authority has the right to impose that participation to the awarding procedure shall be reserved only for sheltered workshops or for those tenderers that agree to perform the contract in the context of sheltered employment programmes for protected employment, where the major part of the employees are persons with disabilities who cannot carry on a professional activity in normal conditions because of the nature and gravity of their disabilities.

Anyway, when the contracting authority decides to limit the participation to the awarding procedure, as mentioned above, this decision must be explicitly specified in the contract notice for the awarding procedure.

3.5 What are the rules on awarding the contract?

The criteria for awarding the public procurement contract can be: (i) the best profitable tender from the economic point of view; or (ii) exclusively, the lowest price.

In case the awarding of the public procurement contract is made by application of the procedure of competitive dialogue, the used criteria of awarding must be only the economically best profitable tender.

The criteria of awarding the public procurement contract are specified as a must in the participation notice and in the awarding documentation. Once the criterion of awarding is set forth, it cannot be changed throughout the whole period of application of the awarding procedure.

If the “economically best profitable tender” criterion of awarding was elected, then the tender established to be successful is the tender meeting the highest score resulted from the application of a system of evaluation factors. The system of evaluation factors contains various objective factors, regarding only the tender, as well as the relative weights set forth for each of these or a specific calculation algorithm. Anyway, the tender evaluation factors, as well as the relative weight thereof or the calculation algorithm must be clearly defined in the awarding documentation. The evaluation factors must have a substantial relation to the specificity of the contract and cannot be altered throughout the entire period of application of the awarding procedure.

In case the criterion of awarding “exclusively, the lowest price” is applied, then the tender set forth as being successful is that admissible tender the technical proposal of which meets all the requested mandatory minimum requirements and the financial proposal of which contains the lowest price.

3.6 What methods are available for joint procurements?

According to GEO No. 34/2006, more economic operators have the right to be associated and to form a group with the purpose to present together the candidature or to submit a common tender, not having the obligation to assume a specific legal form of their association.

The contracting authority has the right to ask the group to assume a specific legal form of their association only if the common tender is declared the winner and only if such a requirement represents a necessary condition for performing the contract.

Affiliated undertakings have the right to participate within the same awarding procedure, but only in the case when their participation does not distort competition.

3.7 What are the rules on alternative bids?

The contracting authority has the right to allow the tenderers to submit alternative bids only when the awarding criterion is the most advantageous tender from the economic point of view.

The contract notice has to explicitly specify if the submission of the alternative bids is authorised, or if this possibility is forbidden. When this specification is missing, the alternative bids cannot be taken into account.

The contracting authority that permits the submission of alternative bids has the obligation to specify in the terms of reference the minimum compulsory requirements that must be accomplished and any other specific requirements for the submission of these. In case the alternative bids do not accomplish the minimum requirements provided by the competent authority, the contracting authority is not allowed take these into consideration.

In case when the contracting authority announced the possibility to submit alternative bids, the contracting authority doesn't have the right to reject a bid having as the only reason the fact that, if this is declared the winner: (a) the supply contract for the awarding of which the procedure was organised is transformed into a services

contract; or (b) the services contract for the awarding of which the procedure was organised is transformed into supply contract.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions and who determines their application?

Following the answer provided under question 2.3 above, GEO No. 34/2006 shall not apply for:

- (i) public procurement contracts which have the status of classified information or the performance of which requires special security measures with regard to national interests;
- (ii) services contracts referring to the purchase or lease of real estate or other immovable assets;
- (iii) services contracts referring to the purchase, production, development or joint production of radio or television programmes;
- (iv) services contracts referring to arbitration or conciliation;
- (v) services contracts referring to the provision of financial services related to issuing, purchasing, selling or transferring securities or other financial instruments performed by public authorities for attracting financial resources and/or capital, or by the National Bank of Romania;
- (vi) contracts regarding hiring of personnel; or
- (vii) contracts regarding research and development services, in case such are entirely financed by the contracting authority which is also the beneficiary of such services.

Furthermore, GEO No. 34/2006 shall not apply in case of public procurement contracts concluded as a result of international treaties or in case of public procurement contracts awarded to another contracting authority or an association of contracting authorities which benefit of a legally prescribed exclusive right to provide the relevant services, in so far as such legal provisions are compatible with the EU legislation.

The exemptions apply in virtue of the law. Further exemptions in fields regarding the national interest or national security may be enacted by decision of the Government.

4.2 How does the law apply to “in-house” arrangements, including contracts awarded within a single entity, within groups and between public bodies?

GEO No. 34/2006 shall not apply to “in-house” arrangements, in so far as the ‘in-house’ entity may be considered a contracting authority, as set forth under question 2.1 above, and in so far as “in-house” entity benefits of a legally prescribed exclusive right to provide the relevant services, in so far as such legal provisions are compatible with the EU legislation.

The same rule applies also for awards between contracting authorities or to groups of contracting authorities.

5 Remedies and Enforcement

5.1 Does the legislation provide for remedies/enforcement and if so what is the general outline of this, including as to *locus standi*?

According to the applicable legislative provisions, any act of the contracting authority which violates the legal provisions on public

procurements can lead to dispute emergence. An act of the contracting authority is considered: (i) any administrative act; (ii) absence of issuing an administrative act or any other act, denial to issue it; or (iii) any other act besides those mentioned above, which causes or may cause legal effects.

The person which considers it has been injured in its right or legitimate interest, can be any person that fulfils the following terms, in a cumulating manner: (i) the person has a legitimate interest about a certain public procurement contract for the awarding of which the provisions of the ordinance are applied; and (ii) the person has suffered, suffers or risks to suffer a prejudice, as a consequence of an act of the contracting authority.

Options of turning into good account the impaired legitimate right or interest are: (i) the administrative-jurisdictional way by deferring to the Council; or (ii) in court, in terms of the administrative dispute law.

The Council is competent: (i) to settle the oppositions filed within the awarding procedure, before entering the contract; (ii) to deliver judgment about the lawfulness of the procedures and operations conducted for the awarding of a public procurement contract; and (iii) to issue an opinion on the dispute deferred to the court, if the court requests this.

The Court has the exclusive power to settle: (i) disputes regarding the granting of indemnities; and (ii) disputes emerged after the entering of the public procurement contract.

Disputes regarding the granting of indemnities are settled according to the provisions of the Administrative Disputes Law No. 554/2004, as amended. The parties cannot address concomitantly to the Council and to the court. In such a situation, the court shall suspend the trial until the settlement of the case by the administrative-jurisdictional way.

The second appeal is the way of opposition against the decision of the Council. The court competent to settle the complaint is the Appeal Court, the administrative and fiscal disputes compartment, in the jurisdiction of which the contracting authority is headquartered.

The court can order the suspension of the awarding procedure until the settlement of the complaint filed against the decision of the Council. The court, accepting the complaint, changes the decision of the Council, and orders, in view of remedy of the illegality or groundlessness aspects impairing the acts issued within the awarding procedure, as applicable: (i) the annulment in total or in part of the act of the contracting authority; (ii) the obligation to issue the act by the contracting authority; (iii) the fulfilment of an obligation by the contracting authority; or (iv) any other necessary steps.

If the court, accepting the complaint, alters the decision of the Council and establishes that the act of the contracting authority violated the provisions of the laws about public procurement, and the contract was entered before the ordering of the suspension of the awarding procedure, the injured party is entitled to indemnities. In any case, the ruling delivered by the court is final and irrevocable.

5.2 Can remedies/enforcement be sought in other types of proceedings or applications outside the legislation?

No remedies/enforcement may be sought in other types of proceedings or applications outside the legislation.

5.3 Before which body or bodies can remedies/enforcement be sought?

According to GEO No. 34/2006, NARMPP by the General Division of control, verifies and approves the intention, participation and

awarding notices, verifies the evaluation reports, issues the approval for entering the public procurement contract in case where the completed control did not evidence violations or elusions of the laws applicable in the field of public procurements, imposes repairing steps, enforces sanctions and fines provide by the law for eluding or violation of the legal provisions in the field of awarding public procurement contracts.

Further on, the Council conducts an administrative-jurisdictional activity. The Council has the following powers: (i) to settle the oppositions filed within the awarding procedure before entering the contract; (ii) to deliver a judgment on the legality of the procedures and operations conducted by the contracting authority in awarding a public procurement contract; and (iii) to issue an opinion on the dispute deferred to court if the court requests this.

5.4 What are the legal and practical timing issues raised if a party wishes to make an application for remedies/enforcement?

The period for submitting the opposition is calculated as from the date when the opponent becomes aware of an act of the contracting authority which this deems illegal. Submission of the opposition before the Council suspends de jure the awarding procedure until the date when the opposition is settled by the Council. The Council shall first of all issue a decision about the exceptions of procedure and exception in rem.

The decision regarding the temporary steps can be challenged by filing a complaint to an appeal court competent to settle the complaint against the opposition, within 5 days as from the communication of the decision.

The period for the submission of the opposition is mostly:

- (i) 10 days, in case where the estimated value of the contract is higher than: EUR 40,000 for the supply contract and service contract; and EUR 250,000 for the works' contract; and
- (ii) 5 days, in case where the estimated value of the contract is equal or lower than: EUR 40,000 for the supply contract and service contract; and EUR 250,000 for the works' contract.

The opposition can be submitted in all stages of the awarding procedure and against any act of the contracting authority, within the period of submission provided above. Participants in the awarding procedure must be notified by the contracting authority, within 5 days as from the reception of the notification regarding the opposition.

5.5 What remedies are available after contract signature?

According to the incident legislation, only the court is competent for solving the disputes regarding the awarding procedure submitted after the conclusion of the public procurement contract.

For the situation when a person submits a complaint, by admitting the complaint, the court will be able to modify the Council's decision ordering, by case, for the correction of the aspects of unlawfulness and groundlessness that affect the acts issued:

- a) the annulment in full or in part of the act of the contracting authority;
- b) the obligation of issuing the act by the contracting authority;
- c) the fulfilment of an obligation by the contracting authority; or
- d) any other necessary measures.

In the case when the court admits the complaint, modifies the decision of the Council and finds that the act of the contracting authority has infringed the provisions of the public procurement

legislation and the contract has been concluded before disposing the suspension of the awarding procedure according to the incident legislation, the harmed party is entitled only to compensation.

5.6 What is the likely timescale if an application for remedies/enforcement is made?

The opposition and also the copy of the challenged act, as well as copies of other relevant documents, shall be submitted to the Council. On the same or on the next day, the application shall be submitted with the contracting authority, together with the same documents attached.

Within a 5-day term since the reception of the notification regarding the complaint, the contracting authority has the obligation to inform the other participants in the awarding procedure about this issue and the notification must also include a copy of that certain complaint.

Within a 5-day term from the reception of the complaint's copy, the contracting authority has the obligation to send its point of view regarding the complaint to the Council, together with any relevant documents as well as, under the sanction of a fine, a copy of the public procurement folder. The contracting authority has the obligation to answer to any request of the Council and to send it any other documents that are relevant for solving the complaint, in no more than 5 days as from the reception of the request, under the sanction of a fine, applied to the leader of the contracting authority. The Council has the obligation to solve the complaint in no more than 30 days as from the reception of the public procurement folder from the contracting authority.

5.7 Is there a culture of enforcement either by public or private bodies?

There is no culture of enforcement either by public or private bodies in Romania.

5.8 What are the leading examples of cases in which remedies/enforcement measures have been obtained?

No leading examples of cases in which remedies or enforcement measures have been obtained are well known.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) or changes to contract terms post-signature? If not, what are the underlying principles governing these issues?

The applicable legislation does not expressly govern changes to contract specifications. When the contracting authority awards a public procurement contract on the basis of framework-agreement provisions, it shall not impose or accept substantial modifications of the initially established elements or conditions in the respective framework-agreement.

The contracting parties are entitled, throughout the fulfilment of the public procurement contract, to convene upon the amendment of the contract terms, under an additional document, only in case of the emergence of some circumstances which encroach the legitimate commercial interests thereof and which could not have been foreseen on contract entering date.

6.2 In practice, how do purchasers and providers deal with these issues?

As mentioned under question 6.2 herein, in such cases, additional documents to the contract are concluded.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

According to the provided legislation, no special rules in relation to privatisations are applicable.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

The rule under GEO No. 34/2006 is to award a concession object of a PPP arrangement by either an open procedure or a restricted procedure.

The object of a PPP arrangement is awarded upon an award announcement. Such award announcement has to be published in SEAP, and the Official Gazette of Romania, Part VI. When the estimated value of the concession contract exceeds EUR 5,000,000, the award announcement shall also be published in the Official Journal of the European Union.

The Romanian government has the right to set out different awarding procedures for PPP procurements performed by State authorities in various sectors such as national defence or national security. Such case applies when PPP arrangements are deemed as secret, or special safety measures are to be undertaken.

8 Other Relevant Rules of Law

8.1 Are there any related bodies of law of relevance to procurement by public and other bodies?

Among the bodies who supervise the operation of the public procurement system, as mentioned in question 5.3 above, are further: (i) The Ministry of Public Finances, a special body of the central public administration, in charge with the fulfilment of the position of verification of the procedural aspects related to the processes of awarding the public procurement contracts; and (ii) The Court of Audit, the public authority of the State exercising the external audit in the public sector in capacity of supreme institution of audit.

9 The Future

9.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

Taking into consideration that the latest changes to the relevant legislation were made about one year ago, no supplementary changes, with significant impact in the provided legislative area, are expected in the near future.

**Delia Vasiliu**

Pachiu & Associates
4-10 Muntii Tatra Street
Bucharest, Sector 1
Romania

Tel: +40 21 3121 008
Fax: +40 21 3121 009
Email: Delia.Vasiliu@lp-legal.com
URL: www.lp-legal.com

Delia graduated the Law School of West University in Timisoara in 2004. She is also a Master of Business Law postgraduate and a Ph.D. candidate in international commercial law at the Law School of Bucharest University.

She is a senior member of the Bucharest Bar Association and a member of the National Romanian Bars Association.

Delia has an extensive experience in assisting Austrian and German investors in Romania and is also a regular contributor to several reviews and law publications specialised in intellectual property law. Her expertise covers corporate law, commercial contracts, civil law, litigation, and regulatory matters. Delia is fluent in Romanian, German and English and conversant in Italian.

**Andrei Dumitrache**

Pachiu & Associates
4-10 Muntii Tatra Street
Bucharest, Sector 1
Romania

Tel: +40 21 3121 008
Fax: +40 21 3121 009
Email: Andrei.Dumitrache@lp-legal.com
URL: www.lp-legal.com

Andrei graduated the Law School of "Nicolae Titulescu" University, Bucharest in 2004. Andrei is a senior member of the Bucharest Bar Association and a member of the National Romanian Bars Association.

Andrei's area of expertise includes tax, corporate and real estate law, commercial and capital market's law. He is also a regular contributor to several reviews and legal publications, both in Romania and abroad, covering tax, public-private partnership, and securitisation.

Andrei is fluent in Romanian and English and conversant in French and German.



Pachiu & Associates
Attorneys at Law

Pachiu & Associates is a Bucharest based business law firm established by Romanian attorneys. The firm currently consists of 20 lawyers plus additional staff comprising paralegals, authorised translators and supportive staff. The lawyers of the firm are all graduates of leading universities in Romania or abroad. More than half of the lawyers are senior members of the Bucharest Bar Association. All lawyers are fluent in Romanian and English, and some are fluent in German, French and Spanish. The Firm provides for a full range of commercial and corporate legal advice from its main office in Bucharest and its secondary office in Cluj-Napoca (west of Romania).

The Firm has extensive expertise in matters related to corporate governance, corporate disputes, securities, mergers and acquisitions, insolvency, commercial contracts, offshore and tax structures, labour law, real estate, anti-trust law, intellectual property, banking and project financing, secured transactions, cross-border transactions, public acquisitions, procurement, and litigation. Apart from its consistent mergers & acquisitions and cross-border transactions practice, the firm has developed a strong practice in tax, securitisation and real estate, construction, labour and intellectual property. Any type of transaction is always duly considered from a tax point of view.

The firm maintains a close relationship with some leading multinational law firms and other small and medium-sized law firms from abroad, so as to ensure efficient liaison with important foreign business centres and jurisdictions.