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The International Comparative Legal Guide to: Public Procurement 2012

A practical cross-border insight into
public procurement

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Romania



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1 Relevant Legislation

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

In the context of joining the European Union, the Romanian legal framework on public procurement underwent substantial changes, aimed to align its provisions to the EU standards, mainly by implementation of the relevant EU directives into the Romanian legislation. Currently, the Emergency Ordinance No. 34/2006 on the awarding 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 supplemented, on specific matters, such as procedural aspects and verification or contestation procedures, by two main sets of acts, issued by the Government, or by other competent authorities, as following:

- (i) Government acts, such as:
 - *Government Emergency Ordinance No. 30/2006* regarding the verification of the procedural aspects concerning the awarding of public procurement contracts, public works concession contracts and public services concession contracts, as amended;
 - *Government Decision No. 1660/2006* for approving the application guidelines regarding the awarding of procurement contracts by electronic means provided by the GEO No. 34/2006, as amended;
 - *Government Decision No. 921/2011* for approving the application guidelines of Government Emergency Ordinance No. 30/2006;
 - *Government Decision No. 71/2007* for approving the application guidelines of the provisions referring to the awarding of the public works concession contracts and of services concession contracts as provided under GEO No. 34/2006;
 - *Government Decision No. 925/2006* for approving of the application norms of the GEO No. 34/2006 regarding the awarding 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 Solving Complaints (hereinafter referred to as the “Council” or “NCSC”), meaning the Romanian authority competent to settle, as first instance, complaints related to public procurement awarding acts;

- *Government Emergency Ordinance No. 74/2005* regarding the setting up of National Authority for Regulating and Monitoring Public Procurement (hereinafter “NARMPP”), meaning the competent Romanian regulatory authority for public procurement, as amended; and
 - *Law No. 178/2010* regarding the Public Private Partnership (“Law No. 178/2010”).
- (ii) Acts of NARMPP, such as:
- *Order No. 107/2009* approving the Regulation regarding the supervision over the awarding procedure of public procurement contracts, public works concession contracts and services concession contracts.

1.2 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

The public procurement procedures are bound to respect the general principles of law, such as non-discrimination, equal treatments, transparency, assuming responsibility, etc., as provided in the basic normative acts such as the Romanian Constitution, the Law No. 52/2003 on decisional transparency in the public administration, etc.

Furthermore, every public procurement project must respect the specific legal provisions for that particular area of activity, like special regulations applicable to hospitals, sanitary recycling centres, wind farms, etc.

1.3 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

One of the main obligations undertaken by Romania with respect to the EU adhesion instruments was the alignment of its entire internal legal framework to the legal framework applicable in the EU.

Consequently, the Romanian legislation has been largely modified in order to become integrated and in accordance with the provisions of the EU directives.

We may mention in this regard the GEO No. 34/2006, which transposes the rules and principles established by the EU law provided under (i) Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004, on the coordination of procedures for the awarding of public works contracts, public supply contracts and public service contracts, under (ii) 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, and under (iii) 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.

As Romania joined the European Union in 2007, it became part of the GPA; since the date of adhesion to EU, Romania has been bound by the GPA.

1.4 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, together with Law No. 178/2010, explicitly provides that the fundamental principles of awarding public procurement contracts are: non-discrimination; equal treatment; mutual recognition; transparency; proportionality; and efficiency in using public funds and assuming of responsibility.

1.5 Are there special rules in relation to defence procurement or any other area?

The rules provided under GEO No. 34/2006 shall also apply to public procurement by contracting authorities responsible for the national defence or national security, insofar as the application of the procedure does not lead to disclosure of classified information related to national security, or may not prejudice national security or production of military equipment.

GEO No. 34/2006 does not apply to the situations when the public procurement contract is included in the category of classified information by the applicable legislation or when the fulfilment of the public procurement contract implies special security measures in order to protect certain national interests.

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

The provisions of GEO No. 34/2006 shall not apply to the awarding of public procurement contracts to structures of the contracting authorities operating on the territory of other states, when the value of such contract is equal or less than the limit value provided for the tender request procedure, as mentioned in question 3.1 item (v) hereunder. In such a situation, a special rule regarding advertising at local level shall apply.

2 Application of the Law to Entities and Contracts

2.1 Which public entities are covered by the law (as purchasers)?

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 entity governed by the public law, having legal personality, established in order to satisfy the general interest, not being of industrial or commercial type, which complies with at least one of the following conditions: (a) is 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; and
- (v) any legal entity, other than those provided under items (i) – (iv), conducting one or more of the activities provided above (i.e. water, energy, transportation and postal services), based on a particular or exclusive right, granted by a competent authority, upon awarding of public procurement contracts or upon entering into framework agreements for conducting such activities.

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 (as purchasers)?

The application of the awarding procedures established by GEO No. 34/2006 is also mandatory for private entities (which do not have the status of contracting authorities, 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 equal or in excess of EUR 4,845,000;
- (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 equal or in excess of EUR 193,000; or
- (iii) the situation of a private entity as mentioned under the answer to question 2.1 item (v) above.

In case of contract awarding as set out under (i) and (ii) above, the financing contracting authority shall include relevant provisions in the financing agreement to ensure the observance of GEO No. 34/2006 by the private entity.

2.3 Which types of contracts are covered?

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

- (i) public procurement (acquisition) contracts (including public procurement contracts in the fields of water, energy, transportation and postal services), the object of which being the performance of works, the delivery of goods or the providing 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 financial thresholds 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, insofar as:

- (i) the contract is awarded by a contracting authority provided under (i), (ii) or (iii) of question 2.1 above, and the total value of the contract is less than EUR 125,000; or
- (ii) the contract is awarded by a contracting authority provided under (iv) of question 2.1 above, and the total value of the contract is less than EUR 387,000.

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 when the total value of a contract/frame-agreement for the procurement of public works is less than EUR 4,845,000. In this case, 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 to divide the public procurement contract in order that it falls 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 supervising 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 case the contracting authority intends to purchase similar products divided into lots and 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 providing of services (as mentioned in the answer to question 2.4, paragraph 1 above), as well as of other types of services, the exemption described under question 2.4, paragraph 1 above shall apply only if the value of the services set out under question 2.4, paragraph 1 above is higher than the value of the other services in the contract.

2.6 Are there special rules for concession contracts and, if so, how are such contracts defined?

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 are also similar for concession contracts, e.g. the basic principles regarding public procurement awards are at the base of the awarding of concession contracts.

The concession contract of public works/services is defined by the applicable legislation as the contract having the same characteristics as the works/services contract, except for the fact that the contractor, having quality of concessionaire, receives from the contracting authority, having quality of conceder, in consideration of the works/services carried out/provided, the right to exploit the works/services for a certain period of time with or without payment.

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 decisions.

Similar to public procurement contracts, the contracting authority has the obligation to ensure the transparency of the awarding of concession contracts. The awarding procedure of a concession contract is initiated by publishing a contract notice. The contract notice is published in the ESPP, with the ROG, and, by case, with the OJEU. The publication with the latter is mandatory in all the situations where the estimated value of the concession contract is equal or exceeds the RON equivalent of EUR 4,845,000.

When awarding a concession contract, the contracting authority has the right to request: (a) the concessionaire awards contracts to third parties with 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) the candidates specify in the application the value/percentage of the works – which make the object of the concession contract to be awarded – that the candidate intends 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 involved in the process; the concessionaire will have the obligation to continually update the list, until the concession contract is finalised.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

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

- (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 the 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 under 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 identifying 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 met: (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*, which represents the simplified procedure whereby the contracting authority requests tenders from several economic operators. A tender request procedure is allowed only if the estimated value of the public procurement contract, without the VAT, is lower than the RON equivalent of: (a) EUR 125,000, for one supply contract, or (b) EUR 125,000 for one services contract; or (c) EUR 4,845,000 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 to public procurement of a plan or project in the field of territory planning, urban and landscape design, architecture or date 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 15,000. The value of products, services or works purchased has to be proven with justifying documents.

The contracting authority has the obligation of concluding public procurement contracts only within one of the procedures described under (i) or (v) 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 into 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 if it obstructs, restricts or distorts competition.

According to law, the contracting authority must award the public procurement by open or by restricted procedure. Notwithstanding the above, the contracting authority may apply the procedures provided under (iii) and (v) above, only by respecting the specific rules of each such procedure.

3.2 What are the minimum timescales?

As a general rule, the contracting authority must award a reasonable and adequate period of time for the publishing of the participation announcements or invitations for participation so that any interested economic operator is able to prepare the offers and obtain all documents attesting its qualifications, as requested by the awarding documentation.

The period of time awarded by the contracting authority cannot be less than the minimum legal period of time, established by the GEO No. 34/2006 for each type of award procedures, and in relation to the value of the public procurement contract.

The contracting authority must select the winner of award procedure within a general term of 20 days as of the date of opening the offers. Such general term may be extended once by the contracting authority, for reasonable reasons.

As a general rule, the public procurement contract may be legally concluded after a term of 11 days from communication of the result of the award procedure, if the value of the public procurement contract exceeds the equivalent in RON of EUR 125,000 and 6 days if the value of the public procurement contract is less than the equivalent in RON of EUR 125,000.

3.3 What are the rules on excluding/short-listing tenderers?

According to GEO No. 34/2006, the contracting authority has the obligation to exclude from the award of public procurement contract procedure, any tenderer about whom it has information pertaining that, in the last 5 years, the tenderer 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 from the award of the public procurement contract procedure any tenderer, if the tenderer:

- is under bankruptcy procedure;
- has not fulfilled his obligations related to the payment of taxes to the state as well as the obligations relating to the payment of social security contributions in Romania or abroad;
- in the past 2 years, he has not fulfilled or has not properly fulfilled his contractual obligations, due to reasons imputable to the tenderer, which has produced or is to produce serious prejudices to its beneficiaries;
- has been convicted in the last 3 years by definitive court judgment, for an act infringing the professional ethics or for a serious professional misconduct; or
- presents false information or doesn't present the information required by the contracting authority, in order to prove the fulfilment of the qualification and selection criteria.

In order to demonstrate the fact that the tenderer is not in one of the situations provided above, the contracting authority has an 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 where it is established, such as certificates, extracts from judicial records or any other equivalent document issued by competent authorities from that country.

In case the contracting authority has doubts concerning the personal situation of the tenderer, it has the right to request information directly from the competent authorities which issue the documents provided above. If such documents are not available, the contracting authority has the obligation to accept a declaration under oath, or in countries where there is no provision for declaration under 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.

Moreover, the contracting authority has the right to preselect the participants to the awarding procedure, by applying impartial and nondiscriminatory criteria explicitly specified in the contract notice for the awarding procedure.

In case of short-listing tenderers, the contract notice for the awarding procedure shall indicate the criteria on which the tenderers shall be short-listed, the rules applicable to the awarding procedure, the minimum number of short-listed tenderers and, if appropriate, the maximum number of short-listed tenderers.

3.4 What are the rules on evaluation of tenders?

The contracting authority must estimate the value of the public procurement contract based on the calculation and summing all

necessary amounts to be paid for the performance of the agreement, except VAT, to the extent that the amounts may be anticipated at the moment of estimation, together with any possible increasing or supplementing of such amounts.

The value of the public procurement contract must be estimated prior to the commencement of the award of public procurement contract procedure.

Specific calculation rules are provided by GEO No. 34/2006 for every type of public procurement contract, such as:

- (i) if the contracting authority intends to purchase goods that also require installation and operation activities, the value of the contract shall be calculated including the estimated value of such activities;
- (ii) if the contracting authority intends to conclude a service agreement for which only the monthly price of performing the services can be estimated, the total value of the contract shall be calculated considering the period of time for which the contract is concluded, respectively, the monthly amount multiplied by the number of months, if the contract is concluded for a period of no more than 48 months or the monthly amount multiplied with 48 if the contract is concluded for more than 48 months; or
- (iii) if the contracting authority intends to contract services for which it must provide tools, equipment, basic materials and utilities, the total amount of the contract is calculated by including the value of such equipments along the value of the provided services, etc.

3.5 What are the rules on awarding the contract?

The criteria for awarding the public procurement contract can be: (i) the most profitable tenderer from the economical 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 criteria used for awarding must be only the economically most profitable tenderer.

It is mandatory to provide the criteria used when awarding the public procurement contract in the participation notice and in the awarding documentation. Once the criterion of awarding is set forth, it cannot be changed throughout the entire period of application of the awarding procedure.

If the “economically most profitable tenderer” criteria of awarding is elected, then the tender established to be successful is the tender meeting the highest score resulting 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 values set forth for each of these or a specific calculation algorithm. The tender evaluation factors, as well as the relative value 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, the selected tender is the technically compliant tender presenting the lowest price.

3.6 What are the rules on debriefing unsuccessful bidders?

The contracting authority must inform the economic operators participating in the awarding process of the public procurement procedure of the result of the selection within 3 days of taking the decision and not later than 20 days from the date of opening the offers.

The information can be sent either by mail, fax or through other electronic means.

The contracting authority must inform the rejected economic operator, the operator who’s offer was rejected or the operator who’s offer was not selected of the following: (i) the detailed reasons of rejecting the economic operator; (ii) the detailed reasons for rejecting the offer, underlining the elements of the offer that did not tally with the performance requirements of the contracting authority; (iii) for the acceptable offers that were not selected, the detailed advantages of the selected offer and the name of the selected economic operator.

If providing the information mentioned above may harm public interests or legal commercial interests of the economic operators, the contracting authority is entitled to refuse to give such information to unsuccessful bidders.

3.7 What methods are available for joint procurements?

According to GEO No. 34/2006, several economic operators have the right to be associated and to form a group with the purpose of presenting their candidature together or submitting a common offer. They don’t have 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 requirement represents a necessary condition for performing the contract.

Affiliated undertakings have the right to participate within the same awarding procedure, but only in case when their participation does not distort competition. In this respect, the economic operator is required to include in the offer the list of its affiliates, if any.

3.8 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 criteria is the most advantageous tender from the economic point of view.

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

The contracting authority that allows for 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 such. In case the alternative bids do not accomplish the minimum requirements provided by the competent authority, they will not be taken into consideration.

When alternative bids are allowed, the change of the nature of the contract – if the offer is declared the winner (from supply agreement to services agreement or the other way around) – cannot be invoked as grounds for dismissal of such offer.

4 Exclusions and Exemptions (including in-house arrangements)

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

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 the protection of 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, as a result of the enforcement of procedures pertaining to the international or European Union institutions, or in case of public procurement contracts awarded to another contracting authority or an association of contracting authorities which benefit from a legally prescribed exclusive right to provide the relevant services, insofar 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 does not apply to “in-house” arrangements, insofar as the “in-house” entity may be considered a contracting authority, as set forth under question 2.1 above, and insofar as an “in-house” entity benefits from a legally prescribed exclusive right to provide the relevant services, to the extent 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 measures and if so what is the general outline of this?

According to the applicable legislative provisions, any act of the contracting authority which violates the legal provisions on public procurement can lead to a dispute. An act of the contracting authority is considered: (i) any administrative act; (ii) the 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 contracting authority’s deeds throughout the awarding procedure restricting the public procurement principles (such as transparency, equal treatment, proportionality) may also stand for administrative or judicial review.

The rights or legitimate interests of a persons are deemed injured if the following conditions are met in a cumulating manner: (i) the

person has or had a legitimate interest in a certain public procurement contract; and (ii) the person has suffered, suffers or risks to suffer a prejudice, as a consequence of an act of the contracting authority.

The remedies for the violation of legitimate interests and rights can be obtained by means of: (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 to take any measures considered necessary in order to remedy the prejudice suffered by the complainant, including but not limited to: (i) settle the oppositions filed within the awarding procedure, before entering into the contract; (ii) deliver judgment about the lawfulness of the procedures and operations conducted for the awarding of a public procurement contract; (iii) decide upon the annulment in whole or in part of the challenged public procurement administrative act, to oblige the contracting authority to issue a certain act or to decide upon the amendment of the deeds affecting the public procurement procedure; and (iv) decide for the stay, the continuance or the annulment of the public procurement procedure.

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

If an interested person addresses concomitantly to the Council and to the court, the court shall dispose the joining of the two cases.

The court competent to hear complaints submitted against the decision of the Council is the Court of Appeals – the administrative and fiscal disputes department – in the jurisdiction in which the contracting authority is headquartered. The court competent to hear legal actions submitted for remedies for damages emerged in the awarding procedure, as well as the execution, nullity, annulment and the termination of public procurement contracts in the first instance, is the Tribunal’s commercial division in the jurisdiction in which the contracting authority is headquartered.

If the court accepts the complaint it can change the decision of the Council, including, as follows: (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 on public procurement, and the contract was entered before the ordering of the stay 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 in general.

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

According to the provisions of 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 the completed control did not evidence violations or elusions of the laws applicable in the field of public procurements, imposes remedies, enforces sanctions provided by the law for eluding or

violating the legal provisions in the field of awarding public procurement contracts.

Further on, the Council conducts an administrative-jurisdictional activity.

5.4 What are the limitation periods for applying for remedies/enforcement?

The period for submitting the opposition is calculated from the date when the opponent becomes aware of an act of the contracting authority which it deems illegal. The Council shall first of all issue a decision about the exceptions of procedure and *exception in rem*.

The period for the submission of the opposition is mostly:

- (i) 10 days, in case the estimated value of the contract is higher than: EUR 125,000 for the supply contracts and service contracts awarded by the contracting authorities indicated under question 2.1 (i) - (iii); EUR 387,000 for the supply contracts and service contracts awarded by the contracting authorities indicated under question 2.1 (iv); and EUR 4,845,000 for the works' contract; and
- (ii) 5 days, in case the estimated value of the contract is equal to or lower than those indicated under question 5.4 (i) hereinabove.

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. The other participants in the awarding procedure must be notified by the contracting authority within 1 business day from the reception of the notification regarding the opposition.

5.5 What remedies are available after contract signature?

According to the relevant 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 order, as specified in question 5.1 above, 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.

Moreover, in duly justified cases, and to prevent potential damages, the court may order, at the request of the interested party, the stay of the public procurement contract.

Although the conditions for the court to order the annulment in full or in part of an act of the contracting authority are met, in case the court appreciates that public interest requests the preservation of the public procurement contract, the following sanctions may be ordered: (i) limitation of the effects of the contract, by reducing the execution period; and/or (ii) penalisation of the contracting authority with a fine of 2% -15% of the value of the public procurement contract.

In case 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 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 term of 1 business day after the reception of the notification regarding the complaint, the contracting authority has an 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 3-business day term from the reception of the complaint's copy, the contracting authority has an 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 file. The contracting authority has an obligation to answer any request of the Council and to send any other documents that are relevant for solving the complaint, in no more than 5 days from the receipt 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 20 days from receipt of the public procurement folder from the contracting authority. For grounded reasons the 20-day term may be extended by 10 additional days.

In case the injured person addresses to the competent court of justice, the judge shall communicate with celerity the motion of claim, together with related documents to the contracting authority.

Within a 3-day term from the receipt of the copy of the motion of claim, the contracting authority has an obligation to send its response to the court. The judge shall communicate with celerity the response of the contracting authority to the claimant.

Within a 3-day term of the reception of the copy of the contracting authority's response, the claimant has an obligation to send its own response to the court.

Within a 1-day term from the receipt of the subpoena for the first hearings in the litigation, the contracting authority has the obligation to inform the other participants in the awarding procedure about the litigation.

The first hearings shall be scheduled no later than 20 days after the registration of the motion of claim. The period of time that can elapse between two hearings is no more than 10 days.

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

Under the recent careful observation of the European Union, NARMPP and the Competition Council are very active and are paying special attention to the public procurement awarding procedures.

As in respect of the Council, in the first quarter of 2011, between January and June, the number of complaints (cases) submitted by undertakings to the Council was 3,312. In the same time frame, i.e. the first quarter of 2011, the total number of decisions issued by the Council was 3,030.

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

There are no leading examples of cases, for 2011, in which remedies or enforcement measures have been obtained.

5.9 What mitigation measures, if any, are available to contracting authorities?

The contracting authorities do not have an upper hand in case an individual / entity seeks administrative or judicial relief under GEO No. 34/2006. Notwithstanding the above, prior to a complaint before the Council, the complainant may choose to address the contracting authority in order to ask it to bring the potential infringement to an end. Should the contracting authority abide by such a request, the complainant may find itself without any grounds to continue its endeavours.

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) pre-contract 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 on the legitimate commercial interests thereof and which could not have been foreseen on the date the contract was entered into.

Moreover, in line with the European case law on the matter, a change in a public procurement contract must not amount to a new awarding.

6.2 To what extent are changes permitted post-contract signature?

As mentioned in the answer to the question 6.1 above, when awarding a public procurement contract based on the provisions of a framework agreement, the contracting authority shall not have the right to impose or accept substantial changes to the elements/conditions initially set by means of the framework agreement.

It is also worth mentioning that contracts under execution and award procedures pending when GEO No. 34/2006 entered into

force are governed by the legal provisions in force on their initiation. However, in practice, there are debates in respect of the applicable legislation for the amendments brought to the framework agreements (whether they are governed by the legislation in force at the moment the framework agreement was signed, or if the amendments should be considered as new awardings and therefore governed by the legislation in force at their acceptance).

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 because the provisions from the public procurement field do not apply to privatisations.

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

On 5 October 2010 the Romanian Parliament adopted a special law, the object of which was establishing special rules in relation to public-private partnership projects, i.e. Law No. 178/2010. The rule under Law No. 178/2010 is to award a PPP contract by open awarding procedure and by means of competitive dialogue.

The object of a PPP arrangement is awarded upon an award announcement. Such award announcement has to be published in ESPA and ROG. When the estimated value of the concession contract exceeds (i) EUR 125,000 (VAT excluded) for goods and services, and (ii) EUR 4,845,000 (VAT excluded) for works, the award announcement shall also be published in the OJEU.

The object of the PPP projects is the drafting, financing, construction, renovation, amelioration, exploitation, maintenance, development and transfer of an asset or of a public service.

8 The Future

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

On 1 October 2011, the New Civil Code entered into force, with a multitude of significant amendments brought to the civil legislation. Taking into consideration the fact that the Civil Code applies to all situations where the special legislation is silent, changes are likely to manifest in many business fields – public procurement included.



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