

9. ROMANIAN PUBLIC PROCUREMENT LAWS

Updated January 2018

The relevant **Romanian public procurement laws and regulations** are:

- ✓ Law no. 98 of 2016 on Public Procurement ("**Public Procurement Law**"), as amended by Government Emergency Ordinance no. 107 of 2017 on the Amendment and Supplementation of Several Legal Norms having Impact on the Public Procurement Sector („**GEO no. 107**")
- ✓ Law no. 99 of 2016 on Sectorial Procurement ("**Sectorial Law**")
- ✓ Law no. 100 of 2016 on Works and Services Concessions ("**Concessions Law**")
- ✓ Law no. 101 of 2016 on Remedies and Appeals Concerning the award of public procurement contracts, sectorial contracts and of works concession contracts and service concession contracts, and for the organization and functioning of the National Council for Solving Complaints ("**Remedies Law**")

Public Procurement Law

The provisions of the Public Procurement Law entered into effect as of May 26, 2016 and they will replace the provisions of the Government Emergency Ordinance no. 34 of 2006 regarding the Award of Public Contracts, Public Works Concession Contracts and Services Concession Contracts ("**GEO no. 34**") and any other contrary provisions stipulated by other legal norms.

The Public Procurement Laws implemented the European Directives 2014/23/EU regarding the Award of Concession Contracts, 2014/24/EU regarding Public Procurement and 2014/25/EU regarding Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sectors.

Types of procedures for the award of the public procurement contracts

The Public Procurement Law implements the relevant EU Directives in the public procurement area, and regulates the specific procedures to be followed for the award of the public procurement contracts. The Public Procurement Law provides two new awarding procedures, i.e.:

- (i) Innovation partnership – enables the contracting authority to enter into a structured partnership with a bidder with the objective of developing an innovative product, service or works;
- (ii) Simplified procedure – may be applied by the contracting authority for the contracts with a reduced value.

The above procedures are in addition to the procedures below which were already provided for by the prior legislation, i.e.:

- (i) Open Public Tender – takes place in a single stage and any interested provider can submit a tender;
- (ii) Limited Public Tender – consists of two stages, and only the bidders selected by the contracting authority at the first stage will be invited to submit bids in the second stage;
- (iii) Competitive Negotiation – consists of two stages:

(1) the stage of filing the applications for participation to the tender, and of the selection of the short listed bidders by applying the qualification and selection criteria; and

(2) the stage of filing the official offers by the shortlisted bidders, the evaluation of the compliance of their bids with the minimal requirements established by the contracting authority, the negotiations for the purpose of improvement of the initial offers, the filing of the final offers, and the evaluation of the final offers by applying the award criteria and the evaluation factors.

(vi) Competitive Dialogue – any interested provider can submit a bid; the contracting authority may perform the dialogue only with the accepted candidates and only the candidates selected by the contracting authority from amongst the accepted candidates are invited to make the final offer;

(v) Tender for a Solution Project – allows the contracting authority to obtain a plan or a project which was selected by a jury on a competitive basis, especially in the territorial planning, urban, and zoning sectors.

The Concession Law regulates two awarding procedures: (i) open tender with a possibility to organize a negotiation phase and (ii) competitive dialogue.

As a rule, the contracting authority shall award a public procurement contract pursuant to an open or a limited public tender, in case the estimated value of the contract is equal or above the following thresholds:

- a. Lei 24,977,096 (approximately EUR 5,548,000), for public procurement/framework agreements concerning works;
- b. Lei 648,288 (approximately EUR 144,000), for public procurement/framework agreements concerning products and services;
- c. Lei 3,376,500 (approximately EUR 750,000), for public procurement/framework agreements concerning social services or other specific services.

The other types of public procurement procedures, i.e. the Competitive Dialogue, and the Negotiation, may be used by the contracting authority only in the special cases provided for by the Public Procurement Law.

The contracting authority shall base the award of a public procurement contract which is awarded pursuant to an open or a limited public tender on the most economically advantageous offer.

In case of contracts in the sectors of water, energy, transport, postal services or other relevant activities, as defined by the Sectorial Law, a public procurement contract is usually awarded pursuant to an open, or limited public tender, or competitive negotiation, or competitive dialogue. In these sectors, the other above-mentioned procedures can be used by the contracting authorities when awarding a public procurement contract only under the specific circumstances provided by the Sectorial Law.

According to the provisions of Public Procurement Law, the contracting authority may procure products or services, without using an awarding procedure, if the value of the acquisition does not exceed the Lei 132,519, i.e. the equivalent of EUR 29,350, exclusive of VAT, for each acquisition. Also, the contracting authority may procure works without an awarding procedure, if the value of the acquisition does not exceed the Lei 441,730, i.e. the equivalent of EUR 97,832, exclusive of VAT, for each acquisition. In both the above-mentioned cases, the public procurement should be based on a Grounding Note.

The contracting authority is obliged to ensure the transparency of the public procurement process by publication of the Notices of Intent, the Participation Notices and the Award Notices according to the Public Procurement Law.

Notice of Intent

The contracting authority may notify its intentions with regard to the scheduled procurements by publishing a Notice of Intent.

The Notice of Intent is published in the Official Journal of the European Union and at the national level in the Electronic System of Public Procurement (“**SEAP**”).

Participation Notice

The contracting authority must publish a Participation Notice in the following cases:

- (i) it launches procedures of Open, or Limited Public Tender, Competitive Dialogue, Competitive Negotiation, or Innovation Partnership in order to conclude a public procurement contract, or framework agreement; or
- (ii) it initiates an electronic purchasing system; or
- (iii) it organizes a Tender for a Solution Project; or
- (iv) it initiates the procedure regarding the award of public procurement contracts/framework agreements for social services and other specific services, except if a continuously valid Notice of Intent was published.

The Public Procurement Law provides that the Participation Notice shall be mandatorily published in the Official Journal of the European Union in case the value of the public procurement contract, or of the framework agreement is equal or above the following thresholds:

- a. Lei 24,977,096 (approximately EUR 5,548,000), for public procurement/framework agreements concerning works;
- b. Lei 648,288 (approximately EUR 144,000), for public procurement/framework agreements concerning products and services;
- c. Lei 3,376,500 (approximately EUR 750,000), for public procurement/framework agreements concerning social services or other specific services.

Note:

The above value thresholds are amended from time to time by the European Commission according to the appropriate rules and procedures provided by Art. 6 of EU Directive 2014/24/EU regarding Public Procurement.

*The National Agency for Public Procurement (“**ANAP**”), publishes on its website the value thresholds established by the European Commission, at the date of the entry into force thereof according to the appropriate rules and procedures provided by Art. 6 of EU Directive 2014/24.*

Joint Offers

The contracting authority has the right to require the economic operators who jointly participate in the tender procedure, whose offer was declared winner to adopt or to establish a certain legal vehicle, provided that this aspect was provided in the Participation Notice and the award documentation and to extent to which this is necessary for the appropriate performance of the public procurement contract.

Without any derogation from its liability with regard to the manner of performance of the future public procurement contract, the bidder may include in the technical proposal the possibility to subcontract part of the works or services covered by the tendered contract.

At the request of the contracting authority, the bidder has the obligation to specify the works or services which will be subcontracted, and the contact details of the proposed subcontractors.

The contracting authority does not have the right to require the economic operators who jointly participate in the award procedure to adopt or to establish a certain legal vehicle for the filing of an offer or of an application for participation.

The contracting authority has the right to establish by the tender documentation, when necessary and justified for objective reasons, the manner in which the economic operators will fulfill the requirements regarding the economic and financial capacity and the technical and professional capacity in case they jointly participate in the award procedure, in compliance with the proportionality principle.

Foreign bidders

The domestic and the foreign bidders are equally treated. The foreign bidders must submit the Romanian certified translation of the bidding documents.

In case that the documents to be submitted in a bid are issued or notarized in countries which did not conclude treaties with Romania for the waiving of the apostille formalities, such documents will also have to be apostilled.

Submission Deadlines

The period between the date of the transmission of the participation note for publication in the Official Journal of the European Union, and the deadline for the filing of the offers is of at least 30/35 days, subject to the type of the tender procedure.

If the contracting authority published a note of intent within the procedures regarding open bid, limited bid and competition negotiation, with regard to the public procurement contract to be awarded, it has the right to reduce the period between the transmission of the participation note for publication in the Official Journal of the European Union and the deadline for the filing of the offers to at least 10/15 days if the following conditions are cumulatively met:

- (i) the Notice of Intent included all the information necessary for the Participation Notice, to the extent to which the respective information was available at the time of the publication of the Notice of Intent;
- (ii) the Notice of Intent was sent for publication with a period between 35 days and 12 months prior to the date of the transmission of the Participation Note.

Selection Criteria

The contracting authority has the right to apply within the award procedure only qualification and selection criteria relating to:

- a. reasons for the exclusion of the bidder;
- b. capacity of the bidder, i.e.:
 - (i) capacity of exercising the professional activity;

- (ii) economic and financial status;
- (iii) technical and professional capacity.

Award Notice

The contracting authority shall issue an Award Notice to be published within 30 days, further to:

- (i) the award of the public procurement agreement, or the conclusion of the framework agreement following the completion of the award procedure;
- (ii) the completion of a tender for a solution by establishing the winning competitor;
- (iii) the completion of the tender procedure by the award of a public procurement agreement in case of a dynamic procurement procedure;
- (iv) the closing of a dynamic procurement system.

The Award Notice must be published in SEAP and in the Official Journal of the European Union.

Conclusion of the Public Procurement Agreement

The contracting authority awards the public procurement contract/framework agreement to the bidder who submitted the most financially advantageous offer.

The contracting authority establishes the most financially advantageous offer based on the tender procedure and on the evaluation factors provided in the procurement documents.

In order to determine the most financially advantageous offer, the contracting authority has the right to apply one of the following award criteria:

- (i) lowest price;
- (ii) lowest cost;
- (iii) the best quality-price relation;
- (iv) the best quality-cost relation.

Public Procurement Law introduced the standard European Single Procurement Document (“**ESDP**”). ESDP is drafted based on a standard form approved by the European Commission and is provided exclusively in electronic format.

The contracting authority may request the bidders to submit justifying documents as proof of the information included in ESDP, at any time during the course of the tender procedure, if this is deemed necessary in order to ensure compliance with the procedure.

If the economic operator proves that it fulfilled all the criteria regarding the economic and financial status or regarding the technical and professional capacity invoking the support of a third party, the relevant information ESDP must be also filled with by the supporting third party.

If the economic operator intends to subcontract parts the contract, the relevant information must be also filled in ESDP by the subcontractors.

An economic operator may reuse an ESDP already used in a previous award procedure, provided that it confirms that the information included in it is still correct and valid at the date of the filing thereof.

ANAP updates the full list of the databases that includes relevant information regarding the economic operators established in Romania in the Electronic System Implemented and Managed by the European Commission (“**E-Certis**”). E-Certis includes information regarding certificates and other supporting documents regularly requested by the contracting authorities in relation to the E-Certis tender procedure.

In order to facilitate the cross-border award procedures, ANAP makes sure that the information regarding the certificates and other forms of supporting documents uploaded in E-Certis are updated on a permanent basis.

The contracting authorities use E-Certis and mainly require those types of certificates or forms of supporting documents that are available in E-Certis.

Challenging of the award procedure

Any competing bidder, including the foreign bidders, whose rights or interests were infringed by an action of a contracting authority, is entitled to challenge the respective action by filing a Complaint with the contracting authority. The procedure regarding this legal remedy is provided by Remedies Law. The Complaint must be filed with the contracting authority within:

a. 10 days, starting with the day following the day when the act of the contracting authority considered unlawful was taken note of in case the estimated value of the contract is equal or above the following thresholds:

(i) Lei 24,977,096 (approximately EUR 5,548,000), for public procurement/framework agreements concerning works;

(ii) Lei 648,288 (approximately EUR 144,000), for public procurement/framework agreements concerning products and services;

(iii) Lei 3,376,500 (approximately EUR 750,000), for public procurement/framework agreements concerning social services or other specific services.

b. 5 days, starting with the day following the day when the act of the contracting authority considered unlawful was taken note of in case the estimated value of the public procurement or concession procedure is below the thresholds mentioned above.

The party who is not satisfied with the reply received to the Complaint filed with the contracting authority, or who did not receive any reply by the expiry of the legal 3-day deadline from the contracting authority, or who considers that it was harmed by the remedy measures taken by the contracting authority may notify the National Council for Solving Complaints (“**NCSC**”) in order:

(i) for the act of the contracting authority to be annulled;

(ii) to oblige the contracting authority to issue an act or to take remedy measures;

(iii) for the claimed right or the legitimate interest to be acknowledged.

The Notification will be filed with NCSC within the 10-day or 5-day deadlines depending on the value of the procurement agreement.

NCSC examines the legality of the challenged act and can:

a. issue a decision by which it fully or partly annuls it;

b. orders the contracting authority to issue such an act;

c. orders any other measure, in addition to the ones mentioned above, necessary in order to remedy the consequences of the act that affected the award procedure.

According to the Remedies Law, the Decisions of NCSC must be published in SEAP and on the website of NCSC. The decisions of NCSC may be challenged before the Administrative Litigation Section of the Court of Appeals of the jurisdiction where the contracting authority is located within 10 days as of the communication thereof. The court decision is final.

According to the provisions of the Remedies Law, the parties may agree on arbitration for the settlement of the disputes related to public procurement agreements.

The court, granting the complaint, will amend the NCSC decision, ordering according to the case:

- (i) the annulment in whole or in part of the act of the contracting authority;
- (ii) the issuance of the act by the contracting authority;
- (iii) the fulfillment of an obligation by the contracting authority, including the removal of any discriminatory technical, economic or financial specification in the Participation Notice, from the award documentation or from other documents issued in relation to the award procedure;
- (iv) any other measures necessary to remedy the violation of the legal provisions in the field of public procurement, sectorial procurement, or concessions.

The court may order the suspension of the award procedure and/or of the performance of the agreement until the settlement of the case under certain conditions and subject to the payment of a bond of 2% of the estimated value of the agreement, but no more than the values established by the Remedies Law.