

Public Procurement Procedures

1. Legal Framework

Government Emergency Ordinance no. 34 of 2006 on the Award of Public Contracts, Public Works Concession Contracts and Services Concession Contracts (“GEO 34”) implements the main provisions of the relevant EU Directives with regard to the public procurement.

GEO 34 provides for the following procedures to be followed for the award of a procurement contract:

- a. Open public tender - takes place in a single stage and any interested party may submit a bid.
- b. 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 at the second stage.
- c. Competitive dialogue - any interested party may submit a bid. The contracting authority may have a competitive dialogue only with the accepted candidates. Only the candidates selected by the contracting authority are invited to submit a final offer.
- d. Negotiation – the contracting authority discusses and negotiates the contractual clauses, including the price, with the selected candidates from amongst suppliers, contractors and providers. The contracting authority may, or may not publish a notice for invitation to negotiations.
- e. Offer request – a simplified procedure according to which the contracting authority requests offers from several suppliers, contractors, and providers.
- f. Competition for the award of a project – it allows the contracting authority to retain a project that was selected by a jury on a competitive basis, especially in the territorial planning, urban and zoning areas.

2. Award of procurement contracts

There are no specific procedures for the award of public procurement contract function of different classes of goods, services, or works.

The public procurement procedures differ function of the area of activity of the contracting authority, or the value of the public procurement contract.

As a rule, a public procurement contract is awarded pursuant to an open or limited public tender.

In case of contracts in sectors of water, energy, transport, postal services or other relevant activities as defined by GEO 34, as a rule, a public procurement contract is awarded pursuant to an open or limited public tender or negotiation with a prior publication of a tender notice. In these sectors, the procedure of the competitive dialogue cannot be used by the contracting authorities when awarding a public procurement contract.

According to the provisions of Art. 19 of GEO 34, the contracting authority is entitled to directly procure products, services or works, if the value of the procurement does not exceed the RON equivalent of EUR 15,000 for each procurement contract for products, services, or works. Consequently, the contracting authority must use the public procurement procedures for the awarding of a public procurement contract above this threshold.

The procedures to be used for the awarding of a public procurement contract also depend on the estimated value of the public procurement contract, i.e. the Offers Request may be used by the contracting party only in cases when the estimated value of the public procurement contract, exclusive of VAT, is less than the RON equivalent of EUR 100,000 for services or supply contracts, or EUR 750,000 for the construction works contracts.

3. Publication of information about the intended public procurement

The contracting authority is obliged to ensure the transparency of the public procurement process by publishing the notices of intent, the participation notices and the award notices as required by GEO 34.

Notice of Intent

The contracting authority has the obligation to submit for publication a notice of intent when it intends to invoke the application of the provisions of Art. 75 (2) or of Art. 89 (2) of GEO 34 which provide for shorter terms, than the general term of 52 days mentioned under paragraph 7 below, within which bids have to be submitted to the contracting authority, and if:

- a. the total estimated value of the contracts/framework agreements which are to be awarded/concluded within the following 12 (twelve) months with regard to the procurement of **products** of the same CPV group (class), is equal or higher than the RON equivalent of EUR 750,000;
- b. the total estimated value of the contracts/framework agreements which are to be awarded/concluded within the following 12 (twelve) months with regard to the procurement of **services** of the same CPV group is equal or higher than the RON equivalent of EUR 750,000;
- c. the total estimated value of the contracts/framework agreements which are to be awarded/concluded within the following 12 (twelve) months for the

procurement of **works**, is equal or higher than the RON equivalent of EUR 5,000,000.

The Notice of Intent is published:

- a. in the Official Journal of the European Union, in the Electronic System of Public Procurement ("SEAP") and in the Official Monitor of Romania, Part VI, Public Procurement; or
- b. only in SEAP, provided that, before publication, a prior simplified information notice was sent to the European Commission.

Participation Notice

The contracting authority must publish a participation notice in the SEAP, and optionally in the Official Monitor of Romania, Part VI, in the following cases:

- a. open or limited public tender, competitive dialogue or negotiation with the prior publication of a participation notice procedures are launched in order to conclude a public procurement contract or frame-agreement;
- b. a dynamic purchasing system is initiated;
- c. a competition regarding the award of a project is organized.

The participation notice shall be published in the Official Journal of the European Union in case the value of the contract exceeds the RON equivalent of:

- a. EUR 125,000 for supply or services contracts granted by authorities and public institutions;
- b. EUR 400,000 for supply or services contracts granted by public companies or instrumentalities performing relevant activities in one of the sectors of public utility – water, energy, transports and postal services;
- c. EUR 5,000,000 for contracts for works.

As of January 1, 2008, the publication of the Participation Notice in the Official Monitor of Romania, Part VI is optional.

4. Joint offers

Any economic operator is entitled to participate, individually or as part of a group of operators, to the tender procedure.

Several economic operators are entitled to associate for the purpose of submitting their participation or common offer, without having the obligation to officially register their association.

The contracting authority is entitled to request that the association/joint venture shall be registered only in case the common offer is declared the winner and only if such

measure represents a condition necessary for the appropriate performance of the contract.

Without any derogation from its liability with regard to the manner of performance of the future public procurement contract, the bidder is entitled to include in the Technical Proposal the possibility to subcontract a part of the mentioned contract.

In case that the contracting authority requests such, the bidder has the obligation to specify the part/parts of the contract to be subcontracted and the contact details of the proposed subcontractors.

5. Foreign bidders

The bidders do not need to have any presence in Romania and they can submit their tenders directly from abroad.

The domestic and the foreign bidders are equally treated. In addition to the documentation required to the Romanian bidders the foreign bidders will also have to submit Romanian certified translation of the documents. In case the documents to be submitted in a bid are issued by the authorities or are notarized in countries which did not conclude with Romania treaties for waiving of the apostille formalities, such documents will also have to be apostilled.

A multinational bidding consortium is allowed to submit a bid.

6. Language of the tender documents

The Participation Notice mentions the languages and the format in which the tenders can be submitted, e.g. written form, fax, e-mail or digital.

The bids can be submitted in English.

7. Time Frames for submitting bids

GEO 34 provides for the calculation methods of the deadlines for the submitting of the tenders for each procedure for the awarding of the public procurement contracts.

- A. Thus, in the case of open tender when the estimated value of the contract exceeds the following thresholds:
 - a. EUR 125,000 for services/products (the contracting authority complies the provisions of Art. 8 (a) – (c) of GEO 34);
 - b. EUR 400,000 for services/products (the contracting authority complies the provisions of Art. 8 (d), (e) of GEO 34);
 - c. EUR 5,000,000 for works,

as a rule, there is a term of at least 52 days between the date of transmission of the participation notice for publication in Official Journal of the European Union and the deadline for submitting the tenders.

GEO 34 provides for the following exceptions:

- a. if a Notice of Intent was published, the general term of 52 days is reduced to 36 days;
 - b. if the Participation Notice was sent for publication in the Official Journal of the European Union, in electronic format, the general term of 52 days is reduced by 7 days, as follows:

52 - 7 = 45 days (without a notice of intent),

36 - 7 = 29 days (with a notice of intent),
 - c. if the award documentation is published in SEAP, the general term of 52 days is reduced as follows:
 - i. to 47 days;
 - ii. to 40 days if a Participation Notice was published;
 - iii. to 24 days if a Notice of Intent and a Participation Notice were published.
- B. In case of an open tender when the estimated value of the contract is under the thresholds mentioned above, i.e. (EUR 125,000, EUR 400,000, and respectively EUR 5,000,000):
- a. Rule: at least 20 days must lapse between the date of transmission of the Participation Notice for publication in Official Journal of the European Union and the deadline for submitting the tenders.
 - b. If the award documentation is published by SEAP, the general term of 20 days is reduced to 15 days.

The bids can be filed by authorized representatives, or by mail, or by e-mail.

8. Costs

The bidders cannot claim their costs for preparing their bid

9. Award criteria

The contracting authority has the obligation to specify the qualification and award criteria in the Participation Notice. If the main criterion regarding the granting of the contract is the most economically advantageous offer, the tender documentation must include the calculation algorithm of the score. The Participation Notice must be submitted together with an opportunity report providing reasons for the procurement of products, services, or works, at the same time mentioning the intended impact and the criteria for the measuring of the obtained result.

The contracting authority is entitled to apply qualification and selection criteria only with regard to:

- a. status of the candidate;
- b. capacity to carry out its business activity;
- c. economic and financial status;
- d. technical and/or professional capacity;
- e. quality assurance standards;
- f. standards regarding the environment protection, in certain cases mentioned by GEO 34.

10. Challenge of the award decision

Any competing bidder, including the foreign bidders, without any restriction, whose rights or interests were infringed by an award of a contracting authority is entitled to challenge the respective award either through the special procedure provided by GEO 34, or by filing a legal action with the competent administrative court.

GEO 34 procedure

The special procedure provided by GEO 34 is conducted before the National Council for Settlement of Contestations ("CNSC").

CNSC is a special body created to review and take decisions on any challenge brought against any deed issued in regard to an award procedure. The decisions of this body may be challenged before the Administrative Litigation Section of the Court of Appeals competent in the jurisdiction of which the contracting authority is located. The court decision is final and irrevocable.

Court procedure

First, the bidder must file a Preliminary Complaint with the contracting authority. If the bidder is not satisfied by the response of the contracting party to its letter, it may file a legal action with the administrative court of competent jurisdiction. The decision of the administrative court ruling on the merits of the case may be appealed before the superior administrative court.

The applicant may use only one of the two procedures mentioned above.

A contract awarded in breach of the conditions set forth under public procurement legislation may be annulled. The investigation of the violations and the application of sanctions is carried out by the National Regulatory and Monitoring Authority for Public Procurement ("ANRMAP"). Any person is entitled to notify ANRMAP with respect to an alleged infringement of the provisions regarding public procurement contracts, and to any procedural aspect regarding the award procedure.

In case the public procurement contract had legal effects or if the annulment of the public procurement contract would have more negative than positive effects, and only if there are imperative reasons of public interest, the court may order:

- a. limitation of the effects of the contract by shortening the period for the performance of the contract;
- b. application of a fine to the contracting authority up to 2% of the value of the object of the contract.

11. Damages

The claim for damages caused in relation to the tender procedure may be filed according to the conditions set out in GEO 34, or by filling a separate legal action, according to the common procedure.

The damages caused by a deed of the contractive authority or by not resolving in due term an application regarding the awarding procedure, by non-complying with public procurement legal provisions, may be granted only after the annulment of such deed or other remedies carried out by the contracting authority.

If the damages are claimed in relation to the costs/expenses for preparing the bid and attending the awarding procedure, the party which is claiming damages must prove the non-compliance of the contracting authority with the provisions of GEO 34, and the fact that the plaintiff would have had a realistic chance to be awarded the contract, which was compromised due to non-compliance with the provisions of the law.

The claims for damages caused within the awarding procedure are subject to a stamp fee of 2% of the value of the claim.

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