

## INVESTING IN ROMANIA



## CONTENT

|  |   |
|--|---|
| LEGAL FRAMEWORK  | 1 |
| PUBLIC PROCUREMENT<br>SYSTEM - FUNDAMENTAL<br>PRINCIPLES | 1 |
| PUBLIC PROCUREMENT<br>CONTRACT                           | 2 |
| PUBLIC PROCUREMENT<br>PROCESS                            | 2 |
| CONCESSION OF PUBLIC WORKS<br>AND SERVICES               | 3 |

## LEGAL FRAMEWORK

## Domestic legislation

The *sedes materiae* of public procurement is substantially represented by Government Emergency Ordinance no. 34/2006 on the award of public procurement contracts, of public works concession contracts and of services concession contracts (GEO 34/2006), as well as by the provisions under Government Decision no. 925/2006 approving the rules for the application of the provisions on the award of public procurement contracts under GEO 34/2006.

The two main legal deeds are supplemented at a general level by the provisions under Order of the National Authority for the Regulation and Monitoring of Public Procurement (ANRMAP) no. 107/2009 approving the Regulation on the supervision of the manner in which public procurement contracts, public works concession contracts and services concession contracts are awarded, under Government Emergency Ordinance no. 30/2006 regarding the control of the procedural aspects related to the award of public procurements contracts, as subsequently supplemented and amended, and as for the field of public concessions under ANRMAP Order no. 1517/2009 approving the Guide for the implementation of public works and services concession projects in Romania and under Government Decision no. 71/2007 approving the rules for the implementation of the provisions

concerning the award of public works concession contracts and of services concession contracts of GEO 34/2006. Also aimed at the supplementation of GEO 34/2006 and of the methodological approval rules was the adoption of the provisions under ANRMAP Order no. 51/2009 for the acceleration of the restricted tender procedures and negotiation with the prior publication of a tender notice and of the provisions under ANRMAP Order no. 183/2006 on the application of the provisions regarding the media advertising agreement.

## European Complementary Legislation

At the level of the European legislation, the following legislation shall be directly applied in Romania: the provisions of Commission Regulation (EC) no. 1564/2005 of September 7, 2005 establishing the standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives 2004/17/EC and 2004/18/EC of the European Parliament and Council, the provisions of Regulation (EEC, EURATOM) no. 1182/71 of the Council of June 3, 1971 determining the rules applicable to periods, dates and time limits and the provisions of Regulation no. 2195/2002 of the European Parliament and Council and, respectively, of Commission Regulation no. 213/2008 on the Common Procurement Vocabulary (CPV).



## PUBLIC PROCUREMENT

PUBLIC PROCUREMENT SYSTEM –  
FUNDAMENTAL PRINCIPLES

Public procurement plays a major role in the economy of all EU Member States, as the value of public procurement at European level reaches around 16% of the GDP.

The public procurement system refers to the rules, principles, institutions and actions, taken as whole, with respect to the manner in which public money is spent to the best interest of the Community, within which the demand initiated by a contracting authority meets the supply of a public or private business entity.

**Contracting authorities** can be the bodies of the state acting at a central, regional or local level, as well as the bodies established to meet general needs, lacking any trading or industrial nature, controlled by a state body, and the public undertakings carrying out relevant business activities.

In Romania, the public procurement system is under the supervision of ANRMAP, the Ministry of Economy and Finance, through the Public Procurement Coordination and Monitoring Unit (PPCMU), the Agency for Information Society Services – Operator of the Public Procurement Electronic System (SEAP), the National Council for Claim Settlement (NCCS), the Court of Account and Audit Authority therein.

The laws in the field of public procurement also apply in the case of contracts awarded by a business entity that does not hold the capacity of contracting authority, provided that such contract is directly subsidised in a proportion of over 50% by a contracting authority and the estimated value thereof is higher than the equivalent in lei of EUR 5,000,000 for works contracts and, respectively, of EUR 200,000 for services contracts.

**The fundamental principles** underlying the approval of each and any decision during the public procurement process aimed at ensuring unity, homogeneity, balance and coherence are: (i) non-discrimination – any business entity must be able to participate in a tender procedure and stand a chance to become a contracting party; (ii) equal treatment – the rules, requirements and criteria applicable within a tender procedure must be the same for all business entities; (iii) mutual recognition – the acceptance of goods, services and works

## INVESTING IN ROMANIA



## PUBLIC PROCUREMENT

lawfully supplied in the EU market, of degrees, certificates and other documents, as well as of technical specifications, equivalent to those required at a national level; **(iv)** transparency – to acquaint the public with any information concerning the implementation of a tender procedure; **(v)** proportionality – to ensure a correlation between the needs of the contracting authority, the scope of the public procurement contract and the requirements to be met; **(vi)** efficient use of public funds – the use of the competitive system and of the economic criteria for the award of such contract so as to achieve value for the spent money; and **(vii)** accountability – the clear determination of the duties and responsibilities held by the parties involved in the public procurement process, to ensure the professionalism, impartiality and independence of the decisions made throughout the conduct of such process.

PUBLIC PROCUREMENT  
CONTRACT**General Features**

By entering into a public procurement contract, the contracting authorities commence developing trading relationships with business entities with a view to purchase goods, services or works. Public procurement contracts are made for valuable consideration and are compulsorily concluded in writing.

**Utility Procurement Contract**

The utility procurement contract is awarded for the conduct of a relevant activity in any of the following public utility sectors: water, energy, transport and postal services.

**Media Advertising Contract**

The scope of such contract is the creation, production, and/or broadcast of advertisements or of any other forms of publicity by means of written, audio-visual or electronic mass-media.

A media advertising contract must compulsorily include specific provisions with respect to the parties' obligation to ensure, throughout the performance of this contract inclusively, access of the public to the following information: (i) end addressees of advertising funds; (ii) criteria for the distribution of these funds; (iii) the amounts allotted to each end beneficiary; and (iv) the terms set for the

fulfilment of contractual provisions.

**Transparency of public procurement procedures**PUBLIC PROCUREMENT  
PROCESS

The contracting authority is liable to publish a tender notice whenever it initiates a public procurement procedure, in any of the regulated forms thereof.

It is mandatory that the tender notice be published in both the Official Journal of the European Union and the Electronic Public Procurement System (EPPS), should the estimated value of goods/services contracts be higher than EUR 125,000, the value of works contracts be higher than EUR 5,000,000, and the value of utility procurement contracts be higher than EUR 400,000 as for the procurement of goods/services and, respectively, of EUR 5,000,000 as for the procurement of works, or only in the EPPS should the value of public procurement contracts not exceed the aforementioned thresholds.

Further to the completion of a public procurement procedure and to the execution of the related contract, the contracting authority is bound to publish an award notice within not more than 48 days as of the execution thereof. The award notice will either be published only in the EPPS, or in both the EPPS and the European Union Official Journal under the same

conditions as the tender notice.

**Planning the organization of a bidding procedure**

A material stage to be carried out by the contracting authority under the organization of a tender procedure is represented by the preparation of the public procurement plan, where account will be taken of the objective need for goods, services and works, of the estimates with respect to the funds that are to be allotted from the annual budget and of the ongoing public procurement contracts.

Under such a plan, the contracting authority will estimate as well, inter alia, the value of the public procurement contract, the date for the commencement of the procedure and the date for the completion of the same.

Selection of the award procedure will be made based on the complexity of the public procurement contract which is to be awarded, on the costs triggered by such award, on the level of development and competition on the relevant market and on certain constraints, such as the emergency or compatibility with other existing goods or services.

The preparation of the tender documentation related to the public procurement process is mandatory. The tender documentation includes requirements, rules, criteria and other public procurement-related information, including, inter alia, time limits, minimum eligibility criteria, the terms of reference comprising technical specifications, instructions for the preparation of the bid and information on the remedies at law, as well the criterion for the award of the successful bid.

The contracting authority selects the successful bid from among the bids declared admissible based on the award criterion specified in the tender notice, either the economically most advantageous bid, or the lowest price exclusively.

Non – compliant or unacceptable bids cannot be declared admissible. A bid is non-compliant if it does not properly meet the requirements under the terms of reference, if it contains proposals for the amendment of contractual provisions that are blatantly detrimental to the contracting authority or if the financial proposal comprises costs that are either unreasonable or





## INVESTING IN ROMANIA



## PUBLIC PROCUREMENT

not resulting from free competition.

A bid is unacceptable if it fails to comply with the rules of submission set out by the contracting authority, if it stands as an alternative to the terms of reference, which are not allowed by the contracting authority, if the bidder fails to meet the eligibility criteria or if the VAT-exclusive price of the financial proposal exceeds the estimated value of the public procurement contract and if, despite the possibility of releasing additional funds, the price is high above 10% of the estimated value or if the execution of the contract at the bid price would result into the avoidance of certain legal provisions.

### Manners of awarding a public procurement contract

#### (1) Open Tender

It stands as the most common award procedure, particularly when there is no oversupply in the market, any interested business entity being entitled to submit a bid. The open tender is launched upon the publication of a tender notice whereby business entities are called to submit bids. The procedure is usually carried out in one stage, but it can also be completed by a further stage of electronic bidding. The tender may also be entirely electronically conducted.

The evaluation of the submitted bids is carried out in the following stages: (i) the check on whether all minimum eligibility requirements are met, on whether they have been required under the tender documentation, including the request for clarifications, if applicable; (ii) the selection of eligible business entities and of the bids deemed as non-acceptable, as the case might be; (iii) the check on the technical proposals of the eligible bidders and the request for clarifications, if applicable; (iv) the selection of non-compliant technical proposals and of admissible proposals; (v) the check on the bidders' financial proposals; and (vi) the selection of admissible bids.

The open tender is completed upon the selection of the successful bid from among the admissible ones, upon the publication of the award notice and the conclusion of the public procurement contract.

#### (2) Restricted Tender

It is used in the case of an oversupply in the market. Any business entity is entitled to submit

an application, yet only the selected applicants are entitled to submit a bid.

The restricted tender is similar to the open tender in terms of the selection/award criteria it relies on, but it is different though from the perspective of the two distinct stages in which it is organized (selection of applications and the evaluation of the bids submitted by the selected applicants) and of the minimum terms set out for the conduct of the various stages of the procedure.

#### (3) Competitive Dialogue

It is only used in the award of utterly complex contracts, where the organization of an open or restricted tender would not allow the award of the respective contract.

Any business entity may participate in such a procedure, but only the selected applicants submit a final bid, prepared based on the dialogue conducted by the contracting authority with the same for the purpose of identifying appropriate solutions that might meet the needs of the former. The successful bidder will only be declared based on the criteria of the economically most advantageous bid.

#### (4) Negotiation with/without prior publication of a tender notice

It can be used exclusively under conditions strictly stipulated by law and it implies the direct negotiation between the contracting authority and the pre-selected/selected applicants of the provisions of the public procurement contract.

#### (5) Call for Bids

It stands as the smoothest public procurement procedure, under which the contracting authorities call for bids to be submitted by various business entities; it can only be used if the estimated value of the public procurement contract is lower or equal to the equivalent in lei of EUR 100,000 for supply/services contracts and of EUR 750,000 for works contracts, respectively.

### Challenge of the tender procedure

Any person considering that any of its rights or legitimate interests have been impaired in any way through a deed of the contracting authority, through the breach of legal provisions in the field of public procurement, may ask that the respective deed be rescinded, that the contracting authority be held liable to

issue another deed, that the claimed right or legitimate interest be acknowledged, either by an administrative-jurisdictional way through the submission of a challenge with CNSC, or by action in court. The time limit for the challenge of a deed issued by the contracting authority is of 5 or 10 business days, according to the estimated value of the public procurement contract, and it is calculated as of the date on which the injured party takes knowledge of such deed. The procedure conducted before CNSC is gratuitous, but the claims filed with legal courts having as object public procurement contracts are charged with a special stamp duty, in a relatively low amount, provided for by Government Emergency Ordinance 34/2006. The duty stamps varying according to the value of the contract apply only to the disputes arising out of the performance or termination of the public procurement contract that has already been concluded, so that, in the case of claims having as object non-pecuniary legal deeds, including the challenge

### CONCESSION OF PUBLIC WORKS AND SERVICES

of the contract award, a fix fee of Lei 4 will apply. The public works or services concession contract has substantially the same features as the public works and, respectively, services contract, with the difference that in consideration for the performed services the contractor, acting as concession grantee, receives from the contracting authority, acting as concession grantor, the right to exploit the services on a limited period of time or such right accompanied by a pre-established amount of money.

With a view to estimate the value of the concession contract, the contracting authority applies the same rules as in the case of public procurement contracts. The tender procedure of a concession contract is initiated through the publication of a tender notice.

Each and every project of public works or services concession relies upon a feasibility study, which the contracting authority is bound to prepare. The feasibility study must contain the main particularities of the project, based on a technical, economic and financial analysis carried out with respect to the planned investment. Further to the feasibility study of the project, the contracting authority prepares

# INVESTING IN ROMANIA



## PUBLIC PROCUREMENT

as well the substantiation note thereof, should it deem necessary to properly assess the benefits entailed by the concession.

The public works concession contract or the services concession contract may be awarded through open call for bids, restricted call for bids, competitive dialogue or negotiation without the prior publication of a tender notice,

this last situation in the event that the tender is organized in one of the first three forms and none of the submitted bids has been deemed admissible.

The criteria for the award of the concession contract may only be the most economically advantageous bid, and the factors used in the evaluation of such bids may even include the

length of the concession, the amount of the royalty or the manner of settlement of certain social or environmental issues.

