

Legal issues applicable to public tenders in Romania

Authors: Mihai Mares

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MAREȘ / DANILESCU / ASOCIAȚII

attorneys at law

Public Procurement Law in Romania

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General legal framework

- Main legal instrument governing public procurement, public works concessions and services concession contracts is Government Emergency Ordinance no. 34/2006 (GEO no. 34/2006)
- For certain projects, such as the ones financed by EBRD or EIB, the Government may decide to that the procedure which has to be observed in order to award the contracts shall be provided by the respective financial institution.
- The concession of public assets, through which the contracting authority awards the right and the obligation to exploit a public asset in exchange of a fee, is regulated separately by GEO no. 54/2006

Distinction between Public Procurement and Concession projects

- Under a public procurement contract, the private partner receives a fee from the contracting authority for the performance of its activity, without undertaking the majority of the exploitation risk of the project.
- In case of concession agreements, the concessionaire is granted with the right to exploit the results of the works or services which make the object of the agreement, undertaking the majority of the performance and the exploitation risk.
- Thus, in case that the majority of the operating risk does not stay with the partner, the contract will be qualified as a public procurement contract.

Public Procurement Contracts

- WORKS CONTRACT is the public procurement contract having as object: (i) either undertaking works related to certain specified activities or undertaking a construction; or (ii) both designing and undertaking works related to certain specified activities or both designing and undertaking a construction; or (iii) undertaking, by any means, of a construction complying with the contracting authority's requirements and objectives.
- SERVICES CONTRACT is the public procurement contract having as object supply of one or several certain specified services, provided in the annexes to GEO no. 34/2006
- SUPPLY CONTRACT is the public procurement contract having as object supply of one or several goods, by means of purchase, including payment by installments, renting or leasing.

The contract having as main object supply of goods and, accessorially, operations/works of installing and setting up for working conditions falls under the scope of the supply contract.

- **SECTORIAL CONTRACT** is the public procurement contract granted for the purpose of undertaking a relevant activity in the public utility sectors of water, energy, transport and post.

Other relevant activities: activities which imply exploring a geographic area with the view of prospecting or extracting crude oil, natural gas, coals or other solid combustibles or making available to transporters operating air, maritime or fluvial lines airports, maritime/fluvial ports.

The Parties of the Public Procurement and Concessions Contract

- **CONTRACTING AUTHORITIES** – any state body or public institution (acting at central, regional or local level); any legal entity, having legal personality, set up for satisfying general – interest needs, without commercial or industrial character, mainly financed or subordinated, controlled or managed or supervised by a contracting authority; any association made up of one or more contracting authorities; any public enterprise performing one or several activities relevant in the public utility sector etc.

Legal entities that are not deemed to be contracting authorities now have an obligation to comply with public procurement laws if accumulatively they award services or works contracts that are financed 50% or more by a contracting authority and are worth at least EUR 5,000,000 (service contract) or EUR 200,000 (works contract).

- **ECONOMIC OPERATOR** – any individual or legal entity, State or privately owned, or a group of such entities, lawfully, supplying goods, services or undertaking works and complying with specific criteria.

Publishing of the initiation of a procurement process in the EU Official Journal

- Supply and service contracts with a minimum value of EUR 130,000, awarded by (i) a public body; (ii) an entity that was established to provide services of public interest and which is financed, controlled or managed by public bodies; (iii) any association among the entities mentioned at (ii) above; or (iv) an autonomous administration or a stated-controlled company;
- Supply service contracts with a minimum value of EUR 400,000, awarded by: (i) a public undertaking that carries out “relevant” activities in the water, energy, transportation or postal services; or (ii) other persons who carry out activities in the water, energy, transportation or postal sector
- Works contracts with a minimum value of EUR 5,000,000.

Economic/financial/technical capacity

- An economic operator could participate in a public tender demonstrating the required economic/financial/technical capacity required by the tender book, through the sustainability of a third party
- The third party should signed an irrevocable support declaration that will put at the disposal of the participant in the tender, the resources required – either economic, financial or technical.
- The offer of a group of economic operators will be considered as a whole, by taking into consideration the resources of all the members of the group.

Subcontracting

- A participant in the public tender - without being solve of the legal obligations undertaken in front of the public authority – has the right to include in his technical proposal the possibility to subcontract a part of the contract.

- The public authority has the right to request the participant to precise which part/parts of the public contract is going to subcontract and to identify the subcontractor.

Public Private Partnership (PPP)

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Department for Infrastructure Projects and Foreign Investments

- On January 15, 2013 the Government established the Department for Infrastructure Projects and Foreign Investment managed by the Minister for Infrastructure Projects of national interest and Foreign Investment.
- Its core responsibilities in the PPP sector are the following:
 - (i) supervising the public procurement, infrastructure projects and PPP involving the contracting authorities under the department's coordination;
 - (ii) providing the operator of the Electronic System for the Public Procurement with its approval to upload the PPP announcements;
 - (iii) drafting the national strategy for stimulating and enactment of the PPP projects and submitting it, for approval, to the Government;
 - (iv) providing assistance to public partners and interested investors throughout all phases of a PPP project.

Thank you

MAREȘ / DANILESCU / ASOCIAȚII

55 - 55 bis Carol I Blvd.
2nd District, Bucharest 020915, Romania

T: (+4) 031 43 78 324
F: (+4) 031 43 78 327

www.mares.ro