

Tax & Legal Guide Romania Public Private Partnerships – Public Procurement



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General legal framework

Romanian law provides for several types of instruments through which State or local authorities entrust undertaking of works, supplying of goods or services to private investors, namely by means of public procurement, public works concessions and services concessions contracts.

The relevant legal framework was dramatically modified during last years, following European Commission's recommendations and with a view to comply with Romania's engagements in the field of ensuring free movement of goods in the context of Romania's accession to the EU.

The main legal instrument governing public procurement, public works concession and services concession contracts is Government Emergency Ordinance no. 34/2006 (GEO no. 34/2006), entered into force on June 30, 2006. GEO no. 34/2006 has as purpose the harmonization of the relevant Romanian legislation with the provisions of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, of Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, of Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts and of Council Directive 92/13/EEC 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.

With respect to public works and services concessions, GEO no. 34/2006 establishes the general framework for granting such contracts, while the specific stipulations regarding the substantiation of the decision to undertake the project, the method of transfer and recovery of the object of the concession, the method of preparation of the granting documentation and application of procedures are regulated through Government Decision no. 71/2007.

The norms for applying the provisions regarding the awarding of public procurement contracts and set by Government Decision no. 925/2006.

However, the procedures provided by GEO no. 34/2006 shall not be applicable in case where a specific European procedure applies, in the context of the territorial cooperation programs. Also, 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 the provided by the respective financial institution.

The technical documentations of public procurement and concession projects, which have to be performed by the contracting authorities, such as the pre-feasibility or feasibility studies, are provided by Government Decision no. 28/2008.

Contracts falling under the scope of GEO no. 34/2006 are:

- public procurement contracts;
- public works concession contracts;
- services concession contracts.

The above mentioned legislative framework only applies to concession of public works and concession of services. The concession of public assets, through which the contracting authority awards the right and obligation to exploit a public asset in exchange of a fee, is regulated separately by GEO no. 54/2006. In case where the exploitation of the asset which makes the object of the concession implies the performance of works and/or the performance of services, the contracting authority has the obligation to qualify the nature of the agreement according to the provisions of GEO no. 34/2006.

As regards the concession of assets belonging to the private domain of the state or local authorities, currently the legal framework is set by Law no. 50/1991 on the authorization of construction works and Law no. 215/2001 on the local public administration.

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 exploitation risk. Thus, in case that the majority of the operating risk does not stay with the private partner, the contract will be qualified as a public procurement contract.

Types of Public Procurement and Concession Contracts

Public Procurement Contracts

Works contract is the public procurement contract having as object:

- either undertaking works related to certain specified activities or undertaking a construction; or
- both designing and undertaking works related to certain specified activities or both designing and undertaking a construction; or
- 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 appendixes 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, with or without the option to purchase. 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. Relevant activities in the above mentioned sectors are considered to be the following:

- Water: making available or exploiting fixed networks destined to ensure, to the public's benefit, services of production, transport or distribution of drinking water, or supplying drinking water to networks such as the above; also, projects of hydraulic technology, irrigations or soil amelioration as well as evacuation and treatment of used water are also subject to similar procedures.
- Energy: making available or exploiting fixed networks destined to ensure, to the public's benefit, services of production, transport or distribution of gaseous combustibles, thermo energy or electricity, or supplying gaseous combustibles, thermo energy or electricity through networks such as the above.
- Transport: making available or exploiting networks destined to ensure, to the public's benefit, railway transportation services and passengers' terrestrial transportation services, based on timetables, such as public transportation by buses, tramways, subway, trolleybuses or cable transportation.
- Post: postal services, management of courier services, electronic mail, financial postal services, philately services and logistics services related to postal services.
- 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 or other transportation network terminals.

Concession contracts

As opposed to public procurement contracts, GEO no. 34/2006 provides two types of concession contracts, respectively concession of public works and concession of services.

Comments

Due to the fact that most of the complex projects imply both the performance of public works and services, sometimes it is difficult to qualify a contract as a contract for public works or a contract for services. Thus, a contract will be qualified as public works contract in case where its object especially aims at performing works as defined in the law, even if the contract includes ancillary services which may be necessary for the performance of the respective activities. The opposite reasoning applies for qualifying a contract as concession of services.

Also, the same issue appears in case where the contract envisages both the performance of services and the supply of certain assets. In this respect, in case where the contract implies both the performance of services and the supply of assets, the contract shall be qualified as a services contract or a supply contract based on the estimated value of the public works and the assets which will be supplied. Thus, in case where the estimated value of the services is higher than the value of the supplied assets, the contract shall be construed as a contract for services. The opposite reasoning applies for qualifying a contract as a supply contract.

The Parties of the Public Procurement and Concessions Contract

Contracting authorities

- any State body – public authority 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 as defined above or other body governed by public law;
- any association made up of one or more contracting authorities, mentioned above;
- any public enterprise performing one or several activities relevant in the public utility sectors: water, energy, transport and post, when it grants public procurement contracts or concludes framework - agreements destined to the performance of the respective activities;
- any entity, other than those mentioned above, performing one or several activities relevant in the public utility sectors: water, energy, transport and post, based on a special or exclusive right granted by a competent authority, when it grants public procurement contracts or concludes framework - agreements destined to the performance of the respective activities.

As regards concession contracts, the contracting authorities which have to comply with the legal provisions regulating concessions, contained in GEO no. 34/2006 and GD no. 71/2007 are the ones provided under the first three paragraphs above. The contracting authorities mentioned under the last two paragraphs will have to comply with the mentioned legal provisions only when awarding public procurement contracts.

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 related to personal status, economic and financial status, capacity to exercise its professional activity, technical and/or professional capacity, compliance with quality insurance standards and with environment protection standards.

Procedures for Granting Public Procurement Contract

Open tender: any interested economic operator has the right to submit an/the offer;

Restricted tender: any economic operator has the right to candidate and, only selected candidates will have the right to submit the offer;

Competitive dialogue: any economic operator has the right to candidate and the contracting authority conducts a dialogue with the admitted candidates for the purpose of identifying one or several solutions that would satisfy its needs and, on the basis of the respective solution/s the selected candidates would elaborate the final offer;

Negotiation: procedure through which the contracting authority consults with one or several of the selected candidates and negotiates contractual clauses, including the price, with one or more of them, with or without prior publishing of a participation announcement;

Request of offers: simplified procedure through which the contracting authority requests offers from several economic operators;

Design contest: a special procedure through which the contracting authority acquires, specifically in the field of urban planning, architecture or data processing, a plan or a project by having it selected, on competition bases, by a jury, with or without prize awarding.

Special Methods of Granting the Public Procurement Contract

Framework agreement: written agreement concluded between one or several contracting authorities and one or several economic operators with a view of establishing the essential elements/conditions that will govern the public procurement contracts to be granted within a given period of time, specifically as regards the price thereof and, as the case may be, the quantities considered. As a rule, framework agreements are mandatory concluded by applying open or restricted tender procedures.

Dynamic purchasing system: the entirely electronic process, limited in time and open throughout its duration to any economic operator fulfilling qualification and selection criteria and who has presented an initial offer compliant with the requirements of the tender book; such a system can be used only for acquiring current use goods, having characteristics generally available on the market that satisfy the contracting authority's needs.

Electronic auction: repetitive process, undertaken after a first complete appraisal of offers, whereby the economic operators have the possibility, exclusively by electronic means, to reduce the offered prices and/or improve other elements of the offer; the final appraisal must be necessarily undertaken by the electronic means used. The contracting authority is entitled to use electronic auction as a final stage of the open tender or restricted tender, of the negotiation with prior publishing of a participation announcement, when resuming the competition between the economic operators that have signed a framework agreement or when submitting the firm offers with the view of granting a public procurement contracts by a dynamic acquisition system. However, electronic tender may not be used when acquiring services and works contracts, implying provisions of intellectual services, such as consultancy, design or others similar.

Criteria for awarding the contracts

The public procurement contract is granted either based on the criterion of the most advantageous offer from an economic point of view or exclusively based on the lowest price criterion. The criterion for awarding concession contracts is the most economic advantageous offer from an economic point of view, exclusively.

How we can help:

We provide legal assistance on various aspects related to public procurement and concession law. Benefiting from Deloitte's multidisciplinary team, including Financial Advisory, Management Consulting, Tax and Grants and Incentives departments, we offer assistance in all stages of public procurement and concession projects. We believe that one of our key strengths is the combined expertise, which in our view represents added value for our clients and allows us to undertake a project in all its aspects.

In this respect, our services consist of:

- Providing legal analysis on various aspects of Romanian legislation regarding public procurement and concession projects, including concession of public assets;
- Providing assistance to contracting authorities in all stages of public procurement and concession projects, starting with drafting the feasibility and substantiation study, drafting the awarding documentation;

- Assisting the contracting authorities and private clients during the awarding procedures for a public contract, drafting and negotiating the public procurement or concession contracts; and
- Providing assistance during the contestation procedure in front of the National Council for Solving Contestations and courts of law

The professionals working with Reff & Associates have relevant expertise in public procurement and concession projects, being involved in the drafting of a toolkit and a manual for contracting authorities with respect to applying the concession legislation, delivering trainings and conferences to central and local public authorities regarding the implementation the concessions legislation, drafting substantiation studies of concession decision for contracting authorities, representing and assisting private investors during the negotiations with the public authorities and providing assistance in various public procurement and concession projects.

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Reff & Associates is the correspondent law firm of Deloitte Romania, integrated with the Deloitte multi-disciplinary advisory practice and affiliated to a network of law firms and legal departments working with Deloitte all over the world. The professionals working with Reff & Associates have significant experience in high level transactions, in which complex matters are addressed from cross-border and multi-disciplinary perspective. The multidisciplinary experience of legal professionals allows them to provide, together with other Deloitte professionals, a complete answer to the needs of their clients. They propose state of the art services relying not only on legal and regulatory expertise but also on the use of innovative processes. Their global and systematic approach allows the clients to integrate early in their strategy potential legal issues, thus anticipating and preventing legal risks and minimizing the disruption of business operations.

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