

GETTING THE DEAL THROUGH

Public Procurement

An overview of regulation in
35 jurisdictions worldwide

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Legislative framework

1 What is the relevant legislation and who enforces it?

In 2006, a new legal framework for public procurement entered into force, namely the Government Emergency Ordinance 34/2006 on the award of public contracts, public works concession contracts and services concession contracts (GEO 34/2006) and the Government Decisions 925/2006 and 71/2007, both approving norms for the implementation of GEO 34/2006. These regulations implement the relevant EC Directives on Public Procurement, including Directive 2004/18/EC and Directive 2004/17/EC.

The enforcement of these regulations is made by the National Council for Challenges and the administrative courts, which are both in charge of solving complaints against the deeds of contracting authorities (see question 33); by the National Authority for the Regulation and Monitoring of Public Procurements, which controls the observance of the public procurement legislation and applies sanctions for contraventions; and by the Ministry of Finance, through the Department for the Coordination and Control of Public Procurement, which controls the way public procurements financed by public funds are awarded.

2 In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

In addition to the EU Procurement Directives (including the GPA as integrated in these Directives), Romanian legislation also regulates the award of procurement contracts below the threshold value set out in the EU Directives and contains basic regulations for the award of services concessions.

3 Are there current proposals to change the legislation?

There are no proposals to change the public procurement legislation currently under debate.

4 What is the relevant legislation for the procurement of military equipment?

The provisions of GEO 34/2006 are also applicable to military supplies, save for cases where the essential security interests of the state require otherwise. The procedures to be followed and the conditions applicable to the award of military supplies which are not subject to GEO 34/1996 are established by Government Decision.

Applicability of procurement law

5 Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

According to the Romanian law, contracting authorities are the following:

- public authorities or institutions acting at the central, regional or local level;
- public bodies with a legal personality established to satisfy general interest needs without a commercial or industrial nature, which: are mostly financed by a public authority or institution or another public body; are operated by or are subject to the control of a public authority or institution or another public body; or have more than half of the members of the board of directors or management or surveillance body appointed by a public authority or institution or another public body;
- any association formed by the contracting authorities mentioned above;
- any public enterprise performing water or energy supply, transportation or postal services, when it awards public procurement contracts or enters into framework agreements related to these activities; and
- any legal entity, other than the ones mentioned above, performing water or energy supply, transportation or postal services based on a special or exclusive right granted by the competent authority, when such entity awards public procurement contracts or enters into framework agreements for the performance of the above activities.

GEO 34/2006 does not provide for any exclusion of any public entity from the above list of contracting authorities. We are not aware of any public entity being ruled not to constitute a contracting authority so far.

6 For which, or what kinds of, entities is the status as a contracting authority in dispute?

There have been debates with respect to various entities regarding their status as a contracting authority, notably when such entities were financed both by public and private funds.

At present, the status as a contracting authority of Fondul Proprietatea SA is in question. This is a state-owned company set up by law to secure the financial resources needed to reimburse persons entitled to the restitution for real estate unlawfully taken over by the Romanian state in the past. Its status is currently being reviewed by the National Authority for the Regulation and Monitoring of Public Procurements.

7 Are there specific domestic rules relating to the calculation of the threshold value of contracts?

The contracting authority is entitled to carry out direct procurements insofar as the value of the procurement does not exceed the equivalent in lei of €5,000. The rules for calculating the value of contracts reflects the relevant provisions of the Public Procurement Directives.

8 Does the extension of an existing contract require a new procurement procedure?

The contracting authority is entitled, without following a public procurement procedure, to extend the duration of a regular supply or services contracts concluded during the previous year and whose initial duration expires on 31 December of the current year, if the following conditions are cumulatively met: (i) the award documentation provided for the possibility of supplementing the products and services already acquired and for the maximum level of such supplementation; (ii) the award documentation and the contract provided the right of the contracting authority to opt for the supplementation; and (iii) the estimated value of the initial contract was established taking into account that the contracting authority might opt for supplementation at the maximum level. In any case, the extension may not exceed four months.

For any other cases, the extension of the contract cannot be made without a new procurement procedure.

9 Does the amendment of an existing contract require a new procurement procedure?

Public procurement contracts may be amended without a new procurement procedure only with respect to the price and only provided that certain circumstances have occurred which damage the legitimate commercial interests of the parties and which, objectively, could not have been foreseen upon the execution of the contract (ie, legislative amendments which determine the increase or decrease of the costs based on which the price of the contract was grounded; the increase or decrease of the prices of the constitutive elements of the tender which significantly influences the costs based on which the costs of the contract were grounded).

The amendment of any other elements of the contract requires a new procurement procedure.

10 May an existing contract be transferred to another supplier or provider without a new procurement procedure?

During the performance of the contract, the supplier or provider may replace only the subcontractors nominated in its bid and only with the express consent of the contracting authority. However, such replacement must not lead to the amendment of the initial technical or financial bid.

11 In which circumstances do privatisations require a procurement procedure?

Privatisations are not subject to the legislation applicable to public procurement. However, similar principles, such as transparency and fair treatment, also apply to privatisation.

12 In which circumstances do public-private partnerships (PPP) require a procurement procedure?

PPPs are no longer regulated as a separate institution but are regarded as works or services concessions. As a result thereof, PPPs are generally subject to the procurement procedures established by GEO 34/2006. Of course, in exceptional cases when public procurement procedures are not applicable to concessions, these exemptions also apply to PPPs (eg, projects which are deemed by the competent authorities as secret, partnerships between a contracting authority and a company affiliated to such authority in special sectors such as water or energy supply).

13 What are the rules and requirements for the award of services concessions?

For the award of services concessions, the contracting authority may apply qualification and selection criteria referring only to: the personal status of the tenderer and its capacity to carry out a professional activity, its economic and financial status, technical or professional capacity, quality insurance standards and environmental protection standards. The authority is obliged to mention the award criteria in the prior information notice. The detailed manner of applying these criteria is presented in the award documentation. The award criteria may refer, as applicable, to: the level of tariffs for use payable by the final beneficiaries, the level of royalties, the level of risk taken over by the concessionaire, financing and development plans, the qualitative, technical and functional level of the proposed technical solutions, the means of ensuring environmental protection, the manner of solving certain social issues, the terms for performing investments, and the duration of the concession.

The contracting authority is obliged to award the service concession contract by applying one of the following procedures: open tender, restricted tender or competitive dialogue.

The contracting authority may not use award criteria which are not directly connected with the object of the concession contract or which do not reflect a real and obvious advantage that the contracting authority may obtain by using such criteria. The contracting authority must establish a percentage of each criterion in the final decision which will correctly reflect the value of the financial benefits that the tenderers are offering or the technical or functional benefits of the proposed solutions.

14 What are the rules and requirements for the award of an in-house contract without a procurement procedure?

Services contracts granted by a contracting authority to another contracting authority or an association of contracting authorities which benefit(s) from an exclusive legal right to perform the respective services, are exempted from public procurement procedures. No legal exemptions are established in case private entities are also involved in the procedure as part of the contracting authority.

In case of special sector contracts (ie, contracts for public water and energy supply, transportation and postal services – defined by Romanian law as ‘relevant activities’), the contracts granted by an association of contracting authorities set up for the purpose of providing a relevant activity to one of its members or by a member to the association of contracting authorities to which it belongs are also exempted from public procurement procedures.

Moreover, in case of special sector contracts, also exempted are contracts which are granted by a contracting authority to an affiliated company, or by an association of contracting authori-

ties set up for the purpose of providing a relevant activity to a company affiliated to one of the authorities which is a member of the association. This exemption applies only in case 80 per cent of the turnover of the affiliated company for the last three years has resulted from the provision the performance of works, the provision of services or the supply of products for the contracting authority to which the entity is affiliated, depending on the type of the awarded contract.

An affiliated entity is defined as an entity which is included in the consolidation perimeter of the contracting authority or another entity: over which the contracting authority exercises, directly or indirectly, a dominant influence; which exercises, directly or indirectly, a dominant influence over the contracting authority; or which is, together with the contracting authority, under the dominant influence of another person.

The procurement procedures

15 Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency, competition?

The relevant Romanian legislation expressly refers to the principles of non-discrimination, equal treatment and transparency. With respect to competition, this is not provided as a principle for tender procedures but as one of the main scopes of GEO 34/2006. Also, there are several references to the competition principle in the text of GEO 34/2006.

16 Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

There are no specific provisions in the Romanian legislation expressly requiring the independence or impartiality of the contracting authority. However, the law ensures the observance of these requirements by stating clear rules for avoiding conflicts of interest (see question 17) when a contract is awarded.

17 How are conflicts of interest dealt with?

The contracting authority is obliged to take all necessary action to avoid situations which are likely to cause conflicts of interest or unfair competition. For this purpose, the following rules were settled:

- an individual or legal entity who took part in the drafting of the award documentation is entitled to be a bidder, associated bidder or subcontractor, provided that its involvement in the drafting of the award documentation is not likely to distort competition;
- individuals or legal entities directly participating in the process of verifying and assessing candidacies or offers are not entitled to be candidates, bidders, associated bidders or subcontractors;
- the following persons are not allowed to be involved in the process of verifying or assessing the offers:
 - persons holding shares or interests in the subscribed share capital of one of the candidates or bidders or subcontractors or persons who are members of the board of directors or management or surveillance body of one of the bidders or candidates or subcontractors;
 - spouses and relatives up to the fourth degree, inclusively, of persons who are part of the board of directors or management or surveillance board of one of the bidders or candidates;

- persons who have an interest which is likely to affect the objectivity of the process of verifying and assessing the offers of the candidates or bidders; and
- the contractor in a public procurement is not entitled to employ, for the performance of the public procurement contract, individuals or legal entities who were involved in the process of verifying and assessing candidacies or offers submitted within an award procedure, throughout a period of at least 12 months as of the conclusion of the contract, under the sanction of nullity of the respective contract for an immoral cause.

18 How is the involvement of a bidder in the preparation of a tender procedure dealt with?

Tenderers who have been involved in the drafting of the award documentation are allowed to participate in the procedure (see question 17), while individuals or legal entities directly taking part in the process of assessing the candidacies or offers may not be tenderers or subcontractors.

19 What is the prevailing type of procurement procedure used by contracting authorities in your country?

There are no official statistics available in this respect.

20 Are there special rules or requirements determining the conduct of a negotiated procedure?

The rules and requirements determining the conduct of a negotiated procedure, either with or without the publication of a prior contract notice, reflect the relevant provisions of Directive 2004/18/EC.

21 When and how may the competitive dialogue be used?

The Romanian legal provisions related to the competitive dialogue reflect the relevant provisions of Directive 2004/18/EC. The competitive dialogue can be used in case the following conditions are cumulatively met:

- the contract in question is deemed to be of special complexity, namely it is a public procurement contract for which the contracting authority is not, objectively, able to define the technical specifications capable of satisfying its necessities and requirements; or to establish the financial structure or the legal framework for implementing the project; and
- the application of the open or restricted tender procedure would not allow the awarding of the public procurement contract in question.

The competitive dialogue procedure is initiated by sending for publication a prior information notice whereby interested suppliers or service providers are requested to submit their candidacies.

The procedure takes place in three stages:

- preliminary selection of candidates;
- dialogue with the candidates admitted following the preliminary selection, aimed at identifying the solutions capable of meeting the needs of the contracting authority. Following this dialogue candidates draft and submit their final tender; and
- evaluation of the final submitted tenders.

22 What are the requirements for the conclusion of a framework agreement?

Framework agreements are defined as written conventions between one or several contracting authorities and one or several suppliers or service providers, the purpose of which is the settlement of the essential conditions governing public procurement contracts for a given period, in particular with respect to the price and, as the case may be, the considered entities. The framework agreement may be concluded with one, three or several suppliers or service providers. The framework agreement must provide at least the obligations of the suppliers or service providers undertaken by the technical proposals and the unitary price provided in the financial proposal based on which the price of each subsequently awarded contract shall be settled.

By concluding a framework agreement, the contracting authority undertakes, towards the supplier(s) or service provider(s) which is (are) part of the respective agreement, the following main obligations:

- not to initiate, during the framework agreement, a new award procedure, when it intends to purchase the products, services or works which were subject of the respective framework agreement, save for the case when the suppliers or service providers signing the agreement are no longer capable of meeting the requests of the contracting authority; and
- to award contracts to the signatory suppliers or service providers whenever it intends to purchase products, services or works which were subject of the respective framework agreement, complying with the essential conditions settled upon its conclusion.

23 May several framework agreements be concluded? If yes, does the award of a contract under the framework agreement require an additional competitive procedure?

Framework agreements may be concluded with several suppliers or service providers. The award of contracts under the framework agreement can be made without an additional competitive procedure, if all the terms and conditions of the contract were established in the framework agreement. Otherwise, an additional competitive procedure will be followed for the awarding of contracts.

24 Under which conditions can consortium members be changed in the course of a procurement procedure?

There are no specific legal provisions in this regard. However, in practice it has been ruled that the consortium members may not be changed in the course of a procurement procedure.

25 Are unduly burdensome or risky requirements in tender specifications prohibited?

There are no specific provisions in this regard.

26 What are the legal limitations on the discretion of contracting authorities in assessing the qualification of tenderers?

The contracting authority is obliged to protect the information that the supplier or service provider indicates as being confidential, insofar as the disclosure of such information would harm the legitimate interests of the supplier or service provider, especially with respect to commercial secrecy and intellectual property. The communication, transmission and storing of information must

ensure the confidentiality thereof. The content of the tenders must remain confidential until the date settled for their opening.

27 What are the requirements for the admissibility of alternative bids?

The contracting authority is entitled to allow alternative bids, provided that the award criterion is 'the most economically advantageous tender'. The prior information notice must explicitly specify whether it is allowed to submit alternative bids or whether such possibility is prohibited. In case such a specification is missing, the contracting authority is not entitled to take into consideration alternative bids.

28 Must a contracting authority take alternative bids into account?

If alternative bids have been allowed in the public procurement procedure, the contracting authority is obliged to examine these bids. (See also question 27.)

29 What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

The tender is binding all throughout the validity period settled by the contracting authority and may not be amended by the tenderer. Although not expressly provided by the law, the change of the tender specifications or the submission of its own standard terms of business may be interpreted as an amendment of the tender. In this case, the tender may be rejected. The tender may be completed at the request of the contracting authority without, however, changing the tender specifications.

30 What are the award criteria provided for in the relevant legislation?

There are two award criteria:

- the most economically advantageous tender; or
- the lowest price.

In case of a competitive dialogue procedure, the award criterion which must be applied is the most economically advantageous tender.

31 What constitutes an 'abnormally low' bid?

Romanian legislation establishes rules applicable in case of abnormally low tenders (see question 32), but it does not provide for any criteria to be used for assessing whether a tender is 'abnormally low'.

32 What is the required process for dealing with abnormally low tenders?

In case of abnormally low tenders, the contracting authority is obliged to request from the tenderer details regarding the tender and justifications for the offered price. The contracting authority is obliged to take into consideration justifications consisting of: the economic grounds for establishing the price, technical solutions or any extremely favourable conditions from which the tenderer benefits, the originality of the tender, the observance of labour protection legislation and the granting of state aid to the tenderer.

In case the contracting authority considers the abnormally low tender not to be justified, it will reject such tender. In the event that the abnormally low tender is justified based on the

tenderer benefiting from state aid, the contracting authority may reject the tender for this reason only if the tenderer fails to prove, in a reasonable time established by the authority, that such state aid was legally granted.

Review proceedings and judicial proceedings

33 Which authorities may rule on review applications?

Any person whose legitimate rights or interests are infringed by a deed of the contracting authority is entitled to challenge the respective deed either through the common judicial proceeding in the administrative courts, or through the special administrative review proceeding established by GEO 34/2006.

The special administrative review proceeding established by GEO 34/2006 is conducted before the National Council for Challenges. The National Council for Challenges is a special body created to review and take decisions on any challenge brought against any deed issued in an award procedure. The decisions of this body may be challenged before the Administrative Division of the Court of Appeal competent in the area where the contracting authority is located. The court decision is final and irrevocable.

The common judicial proceeding is followed before the administrative courts and is subject to a preliminary challenge filed by the applicant with the contracting authority. The decision of the administrative court ruling on the merits of the case may be appealed with the superior administrative court, the decision of the latter being final and irrevocable.

Damages may be requested only through the common judicial proceeding procedure.

The applicant may opt for only one of the two procedures mentioned above. In case several parties file complaints at the same time with the National Council for Challenges and with the administrative courts, the court will suspend the trial until the settlement of the review application by the National Council for Challenges.

34 How long does a review proceeding or judicial proceeding for review take?

Challenges filed before the National Council for Challenges are settled within 10 business days of receipt of the public procurement file from the contracting authority, or, in well-justified cases, within 30 business days of the same date. The contracting authority is obliged to send the public procurement file to the Council within five days of the latter's request. The appeal proceeding

against a decision issued by the National Council for Challenges generally takes from three to six months.

In the case of the common administrative procedure, a 30-day term is established for the settlement of the preliminary challenge filed with the contracting authority. An appeal against the contracting authority's decision filed with the administrative courts generally takes from three to six months for each procedural stage.

35 What are the admissibility requirements?

The applicant must have a legitimate interest in connection with the contract which is the subject of the award procedure. An application for review is admissible if the applicant has incurred, is incurring or faces the risk of incurring damages as a consequence of a deed of the contracting authority. The applicant may request the cancellation of the contracting authority's deed, the issuance of a certain deed or the taking by the contracting authority of any other steps necessary for the remedy of its deeds affecting the award procedure.

36 What are the deadlines for a review application and an appeal?

In case a review application is filed with the National Council for Challenges, the deadlines depend on the estimated value of the contract and are either five or 10 days following the date when the challenge deed was acknowledged by the applicant. In case the applicant has filed a preliminary review application with the contracting authority, the deadline is 30 days as of communication of the challenged deed.

37 Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure?

The review application filed with National Council for Challenges suspends de jure the award procedure until the challenge is settled. The suspension of the common judicial proceeding is made only based on a specific request by the applicant in well-grounded cases and to prevent imminent damages.

38 Must unsuccessful bidders be notified before the contract with the successful bidder is concluded?

The contracting authority is obliged to inform the tenderers of the awarding decision not later than three business days as of its issuance. The rejected candidates must be also informed of

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the grounds for the rejection decision. Also, tenderers who presented an acceptable tender which was not the winning tender, will be informed of the name of the winning tenderer and of the advantages of the winning tender in comparison with those of the notified tenderer.

39 Is access to the procurement file granted to an applicant?

Applicants are not allowed access to the procurement file during the award procedure but only after the contract is awarded. Access is granted according to the conditions and pursuant to the procedures established by the Romanian legislation applicable to free access to public information and may not be restricted, except for cases where such information is classified or protected by intellectual property rights. In practice, even if obliged by the law to grant the petition for access to the procurement file within a specific term, the Romanian authorities are unforthcoming and delay the granting of the petition.

40 Is it customary for disadvantaged bidders to file review applications?

There is no official data available to answer this question exactly, but from our experience and from the large number of award procedures advertised, it follows that few review applications are made.

41 May a contract be cancelled or terminated if the procurement procedure that led to its conclusion violated procurement law?

The contract may be cancelled in case the National Council for Challenges or the competent court decides that the legal award procedure was not observed.

42 Is legal protection available in cases of a de facto award of a contract, ie, an award without any procurement procedure?

Yes. A contract awarded in breach of the conditions set forth under public procurement legislation may be annulled. It is also sanctioned with a fine (amounting from approximately €1,500 to €6,000 in lei equivalent) for awarding public procurement contracts without complying with the legal procedures. The ascertaining of the contraventions and the application of sanctions is carried out by the National Authority for Regulating and Monitoring Public Procurements. Any person is entitled to notify this Authority with respect to an alleged infringement of the provisions regarding public procurement contracts and to any procedural aspect regarding the award procedure.