

The Brief

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Romania - PPPs, Public Procurement

Important amendments to the Romanian legal framework regarding public procurement and concessions applicable as of 1 January 2013

The Romanian legal framework on public procurement and concessions of public works and services underwent important amendments as of 1 January 2013, further to the entry into force of new legislation amending Government Emergency Ordinance no. 34/2006 on the award of public procurement contracts, public works concession contracts and services concession contracts ("**GEO No. 34/2006**").

The provisions of Government Emergency Ordinance No. 77/2012, amending and completing GEO No. 34/2006 ("**GEO No. 77/2012**", published in the Official Gazette No. 827/10 of December 2012), aim to increase the efficiency and transparency of award procedures, and to render the Romanian legal framework compliant with the thresholds provided under the EU Regulation No. 1251/2011.

In addition to integrating the thresholds provided under EU Regulation No. 1251/2011¹, GEO no. 77/2012 includes provisions on the following main aspects:

- a new legal qualification of public procurement and concession contracts;
- rules governing the award procedures;
- right of bidders to indicate what information included in the offer is classified, confidential or protected by intellectual property rights;
- increased transparency of qualification criteria and evaluation factors;
- new rules for qualifying an offer as an offer with an abnormally low price;
- new grounds for contracting authorities to cancel an award procedure;
- a percentage of the bid bond to be retained in case of withdrawal of the complaint filed before CNSC;
- other rules aiming to increase transparency and avoid conflicts of interests.

¹ Concerning mainly: thresholds for publishing notices in the Official Journal of the European Union, thresholds for applying public procurement rules where a contract is financed by a contracting authority by more than 50%.



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1. A new legal qualification for public procurement and concession contracts

As of 1 January 2013, public procurement and concession contracts no longer qualify as commercial contracts under GEO no. 34/2006, but as contracts assimilated to administrative acts.

Such change in the legal qualification of public procurement and concession contracts is relevant *inter alia* in terms of (i) an enforced right of the contracting authority to terminate the contract for public interest subject to fair compensation, and (ii) the jurisdictions competent to hear a case involving a public procurement or concession contract, which are the administrative sections of ordinary courts of law.

2. Rules governing the award procedures

As of 1 January 2013, in order to award a public procurement contract for the acquisition of goods/works/services with a value in excess of EUR 15,000¹, contracting authorities are under an obligation to resort to open tenders or restricted tenders, except where the conditions for applying one of the specific award procedures (such as competitive dialogue, negotiation with or without publication of a prior notice) are met.

Where the value of such contract is below certain thresholds (i.e. EUR 130,000 for goods and services and EUR 5,000,000 for works), contracting authorities may resort to a simplified procedure consisting of a request for proposals.

3. Right of bidders to indicate what information included in the offer is classified, confidential or protected by intellectual property rights

GEO no. 77/2012 sets forth the principle that, when preparing their offers, bidders should indicate what information included therein is confidential, classified or protected by intellectual property rights.

Such information qualified by the bidders as confidential/classified/subject to intellectual property rights is to be subject to specific rules, as follows:

- access by the public to the part of the public procurement file that includes such information may be restricted;
- decisions rendered by the National Council for Settlement of Claims (CNSC) and by courts of law are to be published without including references to such information.

4. Increased transparency of qualification criteria and evaluation factors

New provisions of GEO no. 77/2012 state that qualification/selection requirements and criteria, as well as evaluation factors that are provided only in the award documentation and not in the data sheet (*fișa de date*)² or in the contract notice are deemed to be unwritten.

Furthermore, the Romanian public procurement regulatory authority (ANRMAP) is entitled to file a court action purporting to acknowledge the nullity of public procurement/concession contracts if the decision of the contracting authority in the process of evaluating the offers was based on qualification criteria or requirements that are not reflected in the data sheet/contract notice.

Any modification to the qualification and selection criteria, whether resulting from a decision of the CNSC or from a decision rendered by a court of law or as a remedial action, may only be made subject to publishing an erratum in the Public Procurement Electronic System (SEAP) and, if applicable, in the Official Journal of the European Union. Additionally, the timeframe for the preparation of offers must be extended.

5. New rules for qualifying an offer as an offer with an abnormally low price

As of 1 January 2013, an offer is deemed to be an offer with an abnormally low price when the price of the offer (VAT excluded) is lower than 70% of the estimated value of the contract (instead of the current 85% threshold).

This rule does not apply where there are at least 5 compliant and acceptable offers. In such case, the rule for determining whether the price of an offer is abnormally low remains the same: lower than 85% the arithmetical average of all offers, excluding the lowest and the highest offers.

¹ Equivalent in RON.

² GEO no. 77/2012 also expressly regulates, for the first time, the concept of data sheet (*fișa de date*) as part of the award documentation.



6. New grounds enabling contracting authorities to cancel an award procedure

Contracting authorities may cancel an award procedure based on the following new grounds:

- where a bidder did not submit a request for clarification in due time, thus making it impossible for the contracting authority to comply with the deadline for answering the request for clarification and the answer to the clarification request (i) modifies the information already published; (ii) impacts the preparation of offers, and (iii) renders necessary the publication of an erratum;
- where the contracting authority establishes ex officio that a clarification regarding the award documentation is necessary and such clarification (i) modifies the information already published; (ii) impacts on the preparation of offers and (iii) renders necessary the publication of an erratum;
- where the decision taken by the contracting authority in the process of evaluating the offers is based on qualification or selection requirements or criteria that are not mentioned in the data sheet or in the contract notice.

7. A percentage of the bid bond to be retained in case of withdrawal of the complaint filed before CNSC

According to GEO no. 77/2012, contracting authorities are to retain a percentage of the bid bond submitted by bidders that file complaints with the CNSC; not only when the complaint is rejected, but also when the complaint is withdrawn.

8. Other provisions that enhance the transparency of the award procedures and avoid conflicts of interest

- A new provision states that, within maximum 5 calendar days from the bid submission date, the contracting authority is to publish in the SEAP the names and contact details of the bidders/subcontractors/supporting third parties.
- As of 1 January 2013, contracting authorities are under an obligation to publish an erratum in the event of any change to information in the contract notice (including qualification and selection criteria). Amending such information only by means of an answer to a clarification request and without publication of an erratum is prohibited.



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