

PUBLIC PROCUREMENT

The presentation hereby has in view the legal provisions in force on the 31st of March 2004

Applicable legislation in this field

- Government Emergency Ordinance no. 60/2001 on public procurements, published in the Official Gazette no. 241/11th of May 2001, as further amended and completed:
 - Law no. 212/2002 for the approval of the G.E.O. no. 60/2001 on public procurements, published in the O.G. 331/17th of May 2002;
 - Law no. 386/2003 for the amendment and completion of Art. 41 from the Government Emergency Ordinance no. 60/2001 on public procurements, published in the O.G. no. 692/3rd of October 2003
 - Government Emergency Ordinance no. 106/2003 for the completion of Art. 41 from the Government Emergency Ordinance no. 60/2001 on public procurements, published in the O.G. no. 747/26th of October 2003
- Government Decision no. 1587/2003 on enforcement of the conciliation procedure for settlement of the disputes regarding the awarding of public procurement contracts, published in the O.G. 20/12th of January 2004
- Government Decision no. 461/2001 for the approval of the norms for the enforcement of the Government Emergency Ordinance no. 60/2001 on public procurements, published in the Official Gazette 268/24th of May 2001;
- Government Decision no. 20/2002 on public procurements by electronic auctions, published in the Official Gazette 86/1st of February 2001;
- Government Decision no. 182/2002 on list of contracting authorities entitled to enforce the provisions of Government Ordinance no. 20/2002 on public procurements by electronic auctions and products that are to be procured by the electronic auction procedure, published in the Official Gazette no. 158/5th of March 2002;

- Government Decision no. 478/2002 for the completion of annexes no. 1 and no. 2 of the Government Decision no. 182/2002 on list of contracting authorities entitled to enforce the provisions of Government Ordinance no. 20/2002 on public procurements by electronic auctions and products that are to be procured by the electronic auction procedure, published in the Official Gazette no. 355/28th of May 2002;
- Government Decision no. 179/2002 on establishment of Electronic system of public procurement operation supervisory committee, published in the Official Gazette 165/7th of March 2002;
- Government Decision no. 1186/2001 for the approval of the Procedures on public procurement of products and services that involve national security, public order, national safety and security and of their related list, published in the Official Gazette 815/18th of December 2001.

I. Concept

Public procurement represents the final or temporary acquisition, by a legal person defined as contracting authority, of certain products, works or services, by the awarding of a public procurement contract. Public procurement contract is concluded in written form, between the contracting authority and contractor. Public procurement contract may take the form of a supply contract, of a services contract, of a construction contract or of a contract for concession of works.

II. Contracting authority

Any of the following may act as contracting authority:

- any public authority, including judicial authority;
- any public institution, of general or local interest, autonomous or under the control and subordination of a public authority;
- any other legal person, established in order to perform non-commercial or non-industrial activities of public interest that is financed by public funds, or is under the subordination and control of a public institution or authority, or more than half of its board of management body are appointed by a public authority or institution;
- any legal person performing relevant activities in one of the public utilities sectors – water, energy, transports and

telecommunications- and that is, directly or indirectly, under the dominant influence of one of the legal persons above, or benefits from special or exclusive rights to perform such activities. Relevant activities are stipulated in Art. 6, paragraph 1 from the Government Emergency Ordinance no. 60/2001, as further amended and completed.

III. Situations in which the contracting authority is not bound to apply one of the procedures stipulated by the Government Emergency Ordinance no. 60/2001, as further amended and completed, for the awarding of a public procurement contract

Contracting authority is not bound to use one of the awarding procedures stipulated by the Government Emergency Ordinance no 60/2001, as further amended and completed, when awarding public procurement contracts, if:

- procures products, services and works exclusively destined for telecommunication services, in case other legal persons are entitled to perform similar telecommunication services, in the same geographic area and under the same terms;
- acts in the field of national defence, public order, national safety and security and purchases products and services related to the production or trade of weapons, munitions and war gear or the awarding of the services or provision contract may lead to the distribution of information contrary to the country's defence and security interests;
- the contract has a confidential nature or its execution involves special security measures, according to legal provisions on national defence, public order, national safety and security;
- the public procurement contracts awarding procedures are set based on a treaty or international agreement aiming at implementing or exploitation of a project, jointly with one or many foreign partners, of a treaty, international agreement or of other such documents on stationing of troops or as a result of enforcing a procedure specific to certain international financial bodies or to other donors/creditors;
- the contract is a services contract awarded to a legal person that acts as contracting authority itself and provides such services based on exclusive rights established according to law;

- the object of the contract is purchasing surface or underground water for the purpose of developing activities in the field of drinking water production, transport or distribution;
- the object of the contract is purchasing energy or energetic products pertaining to the extractive industry or raw oil, natural gas, coal or other solid fuels;
- the object of the contract is: a) purchase or lease, by any financial means, of lands/buildings/other existing real estates or of rights over them; award of contracts for purchasing of financial mediation services that are concluded, regardless of the form, in connection to the purchasing or lease contract, is subject of the provisions of the emergency ordinance hereby; b) purchasing, development, production or co-production or programmes by radio-broadcasting and television institution, as well as purchasing of broadcasting times; c) provision of telephonic, telegraphic, telex services and network maintenance, of broadcasting and satellite communications; d) provision of arbitration and conciliation services; e) provision of financial mediation services connected to issuance, purchase, sale or transfer of movable securities or of other financial instruments, as well as provision of services by National Bank of Romania; f) labour force employment, respectively conclusion of labour contracts; g) provision of research-development services, entirely remunerated by the contracting authority and whose results are not necessary to the contracting authority for its own benefit;
- purchases hotel and restaurant services, railway transport services, water transportation services, services related and auxiliary to transportation, legal services, labour force selection and placement services, investigation and protection services for goods and persons, education services, health and social assistance services, entertainment, cultural and sportive services;
- purchases products for the purpose of reselling or leasing them and does not benefit from any special or exclusive right on the products that are going to be sold or leased, any other legal persons also having the right to sell or lease similar products, under the same terms as the contracting authority;
- purchases products, works or services destined to other purposes than the developing of relevant activities or products, works or services destined for the developing relevant activities in another country than Romania, if the fulfilling of this purpose does not

imply the physical use of a network or geographic area from Romania;

- purchases products, works or services whose value, V.A.T. excluded, cumulative during one year, does not exceed the equivalent in lei of Euro 2,000.

IV. Procedures for the awarding of public procurement contract

In principle, the awarding of any public procurement contract has to be performed by enforcing the procedures stipulated by the Government Emergency Ordinance no. 60/2000, as further amended and completed:

- Open auction, namely the procedure through which any interested supplier, contractor or provider is free to submit an offer;
- Limited auction, namely the procedure taking place in two distinct stages and in which only candidates selected by the contracting authority in the first stage are invited to make an offers;
- Negotiation that can be: a) competitive negotiation; b) negotiation with a single source;
- Inquiry, namely the simplified procedure according to which the contracting authority requests offers from several suppliers, contractors and providers;
- Contracting authority is entitled to organize a solutions contest, respectively a procedure that allows it to procure, especially in the field of territory arrangement, of town-planning and landscape designing, of architecture or in that of data processing, a plan or a project, by its selection on competitive basis by a jury, with or without awarding prizes to wining competitor/competitors. Solutions contest may be an independent procedure or part of a procedure that leads to the awarding of a services contract.

Participation in the procedure for services contract awarding

Any Romanian or foreign supplier, contractor or provider, natural or legal person may participate in a procedure for public procurement contract awarding; the foreign supplier, contractor or provider benefit in Romania from the same regime on participating as the Romanian supplier, contractor or provider in the country of residence of the foreign supplier, contractor or provider.

Documentation for the drawing up and presentation of the offer has to comprise at least the documents stipulated in Art. 34 paragraph 1 from the Government Emergency Ordinance, as further amended and completed.

The bidder is bound to draw up the offer according to the provisions of the documentation for the preparation and presentation of the offer. The offer is firm and mandatory, from the content point of view, during the entire validity period established by the contracting authority and has to be signed, on his own responsibility, by the bidder or by a person duly authorized by him.

Technical proposal is drawn up according to the requirements comprised in the specifications, so as to ensure the provision of all information necessary for the technical assessment.

Financial proposal is drawn up so as to ensure the provision of all information necessary for the financial assessment. The price of the offer shall be expressed both in ROL and in Euro.

Exclusion from the procedure

A bidder/candidate that is in one of the following situations may be excluded from the award procedure of a public procurement contract:

- it undergoes a bankruptcy or liquidation procedure, wherein its business is managed by a syndic-judge or its commercial activities are suspended or is in a similar situation to the above, regulated by law;
- it is involved in a legal procedure that may lead to one of the situations stipulated above;
- it has failed to fulfil its exigible payment obligations of taxes and duties to the state, as well as of the contribution for state social securities;
- it provides false information in the submitted documents;
- it perpetrated a serious professional mistake or has not met its obligations undertaken under another public procurement contract, to the extent in which the contracting authority may bring as proof conclusive evidence in this respect.

Criteria for the public procurement contract awarding

The basic criterion on the basis of which the public procurement contract is awarded may be either:

- the most attractive technical-economical offer;
- the lowest price, exclusively.

In the case of the criterion “the most attractive technical-economical offer”, the winning offer is the one meeting the highest score resulting from the enforcement of a calculation algorithm.

V. Conclusion of the public procurement contract

The contracting authority must conclude the public procurement contract with the bidder whose offer was established as being the winning offer by the evaluation commission. Public procurement contract is concluded within the validity period of the offers.

The bidder invited by the contracting authority to conclude the public procurement contract must submit the performance bond, according to the provisions stipulated in the documentation for the offer preparation and presentation.

VI. Appeals

Any natural or legal person having a legitimate interest in relation to a certain public procurement contract and that incurs, risks to incur or was incurred a damage as a direct consequence of an illegal decision, is entitled to appeal against the act or illegal decision administratively or in court. The administrative appeal of acts and illegal decision is **written contestation**.

Competence of settling the contestations submitted administratively belongs to contracting authority.

Participants involved in the procedure of public procurement contract awarding are entitled to associate to the contestation submitted to contracting authority, by written notification filed with the contracting authority headquarters, within 5 days from the acknowledgement of the notification on reception of a contestation. Participants that do not associate to the contestation, lose the right to challenge, both administratively and in court, the act or decision invoked as being illegal by the contestation submitted originally.

The contracting authority is obliged to lodge, for each contestation, a motivated resolution that shall be communicated to the person contesting the act or decision. Within two working days from the reception of the resolution communication, the persons contesting the act or decision are bound to notify the contracting authority if they accept or not the contracting authority resolution and the corrective measures, possibly decided, by it; those notifying the contracting authority on the acceptance of the resolution and the decided corrective measures lose their right to challenge in court,

including that of filing application for intervention in the interest of the party that would challenge that resolution and/or the respective corrective measures.

Legal action in front of the court is only brought only after the administrative contestation and only by those persons that have submitted contestations, as well as for those requests that have been the object of administrative challenging. Legal action in front of the court is only brought if the contracting authority has not answered a contestation within due time or when the person contesting the act or decision is not satisfied with the answer received in due time. Art 81 paragraph 3 from the Government Emergency Ordinance comprises the cases in which a legal action in front of the court may be brought, without the prior administrative contestation. Legal action is brought at the administrative contentious department of the tribunal in the territorial area of competence the contracting authority headquarters is, within maximum 30 days from the date of the reception of the motivated resolution regarding the contestation or, if no answer is received, from the date of the expiration of the period of settling the contestations. The tribunal's decision may be subject to a second degree appeal with the administrative contentious department of the Appeal Court.

VII. Sanctioning regime

Sanctioning regime in the field of public procurement is stipulated by the Chapter X from the Government Ordinance no. 60/2001, as further amended and completed.

For example:

It shall be a contravention, except when, according to criminal law, the act constitutes an offence, the holding by a participant with the procedure of public procurement contract awarding of information on content of other participants' offers, as well as its agreement with other participants or with the contracting authority for the purpose of distorting the result of the procedure.

Applicable sanction is a fine from ROL 20,000,000 to ROL 50,000,000.

VIII. Public procurements on the Internet

The system of public procurements through Internet functions according to the Government Ordinance no. 20/2002 on public procurements by electronic auctions, as further amended and completed.

Contracting authorities bound to use this system and products, services and works that are to be procured by electronic auction, as well as the value limits up to the provisions of the ordinance on public procurement by electronic auctions apply, are established by Government Decision. Original list of public institutions bound to procure products through this system is stipulated in the appendix 1 of the Government Decision no. 182/2002, as further amended and completed, and the list of products that are to be the object of public procurement contracts concluded by using this system is stipulated in appendix 2 of the same decision. These lists have already been extended through the occurrence of Government Decision no. 478/2002, Government Decision no. 608/2002, Government Decision no. 843/2002, Government Decision no. 1110/2002 and Government Decision no. 1285/2002, new contracting authorities and products for which the compulsoriness of using this system exists, being stipulated.

The list of products for which the expressly nominated contracting authorities are bound to organize electronic auctions, includes so far products of general use and having a high degree of necessity among which of agriculture, products of food industry, of textile industry, of oil processing industry, medicines, etc.

In principle, the stages of the electronic auction procedure are the same with the stages of general procedures of an auction, established by the Government Emergency Ordinance no. 60/2001 on public procurements.

The decisions of the contracting authority on the selection of the electronic auction procedure for the purpose of awarding a public procurement contract cannot be contested or challenged in court.