



**COUNTRY
COMPARATIVE
GUIDES 2023**

The Legal 500 Country Comparative Guides

Romania

PUBLIC PROCUREMENT

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This country-specific Q&A provides an overview of public procurement laws and regulations applicable in Romania.

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ROMANIA

PUBLIC PROCUREMENT



**“Complex contracts” refers to contracts including: where the needs of the contracting authority cannot be met without adaptation of readily available solutions; contracts involving design or innovative solutions; where prior negotiation is required before a contract can be awarded due to particular circumstances related to the nature, the complexity or the legal or financial make-up of a contract or because of risks attaching to these circumstances; and where technical specifications cannot be determined with sufficient precision with reference to established technical standards, references or specifications.*

1. Please summarise briefly any relationship between the public procurement / government contracting laws in your jurisdiction and those of any supra-national body (such as WTO GPA, EU, UNCITRAL).

The Romanian “common” Public Procurement legislation is consisting mainly of the following normative acts: A) Law no. 98/2016 on public procurement (“Law no. 98/2016”) and B) Government Decision no. 395/2016 approving the Norms for the application of the provisions on the award of public procurement contracts/framework agreements set forth under Public Procurement Law no. 98/2016 (“GD no. 395/2016”).

Romania has also decreed Law no. 99/2016 on sectorial procurement (“Law no. 99/2016”) which regulates the way contracting entities carry out sectorial procurements, the procedures for awarding sectorial contracts and organizing solution contests, the specific tools and techniques that can be used for awarding sectorial contracts, as well as certain specific aspects related to the execution of sectorial contracts.

As part of the EU’s jurisdiction, Romania transposed Directive 2014/24/EU on Public Procurement and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors in its own national legislation, thus aligning with the European requirements on public procurement related matters.

European Treaties (i.e., Treaty on European Union and

Treaty on the Functioning of the European Union) and also EU Commission Regulations directly effect and are also directly applicable (subject to being precise, clear and unconditional) in Romanian.

Romanian laws on public procurement also comply with the World Trade Organization’s Government Procurements Agreement (“WTO GPA”), given that Romania is an EU Member State. Nonetheless, UNCITRAL Model Law on Public Procurement are considered *soft law* in Romania.

During 2022 several normative acts have been promulgated, normative acts which brought some significant changes regarding the primary legislation applicable to public procurement in Romania.

The main promulgated normative acts of 2022 are as follows:

- i. Government Emergency Ordinance no. 26/2022 for the amendment and completion of some normative acts in the field of public investments (promulgated on the 18th of March) (“GEO no. 26/2022”);
- ii. Law no. 86/2022 to supplement Law no. 98/2016 on public procurement and for the amendment and supplement of Law no. 99/2016 on sectorial procurement (promulgated on the 13th of April) (“Law no. 86/2022”);
- iii. Law no. 208/2022 for the amendment and completion of Law no. 98/2016 regarding public procurement, Law no. 99/2016 regarding sectorial acquisitions, Law no.

- 100/2016 regarding works concessions and service concessions, as well as Law no. 101/2016 regarding the remedies and appeals in the matter of awarding public procurement contracts, sectorial contracts and works concession and service concession contracts, as well as for the organization and functioning of the National Council for the Resolution of Appeals (12th of July) ("Law no. 208/2022");
- iv. Law no. 256/2022 for the amendment and completion of Law no. 98/2016 regarding public procurement, to amend Law no. 99/2016 regarding sectorial procurement, for the amendment of Law no. 100/2016 regarding work concessions and service concessions, as well as for the amendment of art. 25 para. (1) from GEO no. 66/2011 on the prevention, detection and sanctioning of irregularities arising in obtaining and using European funds and/or national public funds related to them (promulgated on the 25th of July) ("Law no. 256/2022");
- v. Government Emergency Ordinance no. 136/2022 for the amendment of some normative acts (5th of October) ("GEO no. 136/2022").

GEO no. 26/2022 has been promulgated as to aid the implementation of the infrastructure projects of national interest and the investment projects proposed to be financed from the National Recovery and Resilience Plan ("NRRP"), as well as considering the need to approve some measures regarding the legislation in the field of public procurement, so as to avoid delays in implementation and loss of funding.

GEO no. 26/2022 also provides new rules regarding payments made directly to other entities under the public procurement contract.

The contracting authority will have the opportunity to make direct payments corresponding to the part/parts of the contract fulfilled, for services, products or works provided, not only to subcontractors, but also to suppliers and/or subcontractors of subcontractors and/or any other economic operators, provided that this possibility was foreseen in the procurement documents. Of course, it is necessary for the respective entities to express their option in this regard.

GEO no. 26/2022 completes the provisions on lawsuits and claims related to public procurement procedures in order to complete their scope of application also with disputes and claims arising from the termination, resolution, unilateral termination or early termination of public procurement contracts for reasons independent of

the contracting authority. Such disputes shall be settled in first instance, as a matter of urgency by the civil litigation section of the court in the circumscription of which the contracting authority has its registered seat or in the circumscription in which the plaintiff has its registered office/domicile.

It also provides that the procedure of the presidential ordinance in the matter of suspension of the termination, resolution, unilateral termination or early termination of public procurement contracts is inadmissible, since in the case of the presidential ordinance, the action will be judged in chambers, and the contracting authority, as a defendant, is not summoned, thus not having the opportunity to submit its defence.

Law no. 86/2022 provides a series of changes in re. to the provisions of Law no. 98/2016 and Law no. 99/2016, mainly focused at green public procurement agreements and also at procurements that have as object products that have an impact on the environment. In addition to the above, Law no. 86/2022 provided also new changes in regards to the fact that the contracting entity will not use the lowest price or the lowest cost as an award criterion in the case of a) certain categories of sectorial contracts/framework agreements for works or services that have as their object intellectual services and that involve activities with a high level of complexity; and b) certain categories of sectorial contracts/framework agreements for products that have an impact on the environment, during their entire life cycle."

Law no. 208/2022 introduces a series of changes that mainly target the primary normative acts in the field of public and sectorial procurements, as well as in the concessions field.

The novelty criteria brought to Law no. 98/2016 basically covers the following aspects: direct awards; negotiation without prior publication; social services and other specific services; guarantee of participation and guarantee of good execution; supporting a third party; award criteria; ESPP; requests for clarifications sent during the evaluation of offers; modification of the public procurement contract/framework agreement; the contraventions and sanctions that can be applied.

The main new elements brought to Law no. 101/2016 concern aspects such as: a) the resolution of court disputes; b) disputing the ascertaining documents; c) ascertaining the absolute nullity of the contract/additional act to it.

In what concerns the resolution of court disputes, the new law establishes a term of 45 days for the resolution of lawsuits and claims regarding the granting of compensation for damages caused during the award

procedure, as well as those regarding the execution, cancellation, nullity, resolution, termination or unilateral denunciation of contracts.

At the same time, the new law includes in the category of disputes within the jurisdiction of the administrative and fiscal litigation section of the court (specialized public procurement sections) the processes and requests regarding the execution, resolution, termination or unilateral denunciation of contracts. The previous legal provision has not been amended/repealed according to which disputes and claims arising from the execution of administrative contracts and those arising from the termination, resolution, unilateral denunciation or early termination of public procurement contracts for reasons independent of the contracting authority are resolved by the civil section of the court.

Regarding the challenging the ascertaining documents, another amendment concerns the appeal of the ascertaining documents issued by the contracting authorities/entities that contain information regarding the fulfilment or the non-fulfilment of contractual obligations by the contractor and, if applicable, any arising damages.

The new law expressly provides that the ascertaining documents can be appealed at the administrative and fiscal litigation section of the court, within 30 days from the date of their communication to the contractor. The appeal procedure will follow the provisions of the section resolution of disputes in the court of law provided by Law no. 101/2016.

In addition to the above, Law no. 208/2022 provides the National Agency for Public Procurement with the right to request the court to declare the absolute nullity of the contract/additional acts, concluded with the violation of the conditions required by the legislation on public procurement, the legislation on sectorial procurement or the legislation on works concessions and service concessions.

The purpose of the new Law no. 256/2022, according to its statement of reasons, is to create a clearer and more favourable regulatory framework for the adoption of practical measures that will lead to an increase in the performance of local public authorities in the administration and organization of investments and objectives of local interest, with a view to transposing community provisions in national legislation.

According to Law no. 256/2022, regarding the provisions of Law no. 98/2016 on public procurement, the main aspect concerned is the method of choosing the procedure for awarding public procurement contracts. Thus, for the public procurement contracts for works or

services whose object is the achievement of new public investment objectives or intervention works on existing ones, the contracting authority chooses the award procedure according to the following considerations:

- a. the estimated value of the contract with the object of rendering the feasibility study development services for each individual investment objective, if the contract provides for a clause regarding the assignment of the author's patrimonial rights;
- b. the estimated value of the contract having as its object the provision of technical design services and assistance from the designer for each investment objective in part cumulated with that of the works related to the investment objective, if they are the object of the same public works procurement contract;
- c. the estimated value of the contract having as its object the provision of technical design services and assistance from the designer for each individual investment objective, separated from the estimated value of the contract having as its object the execution of works related to the investment objective, if separate service contracts are awarded technical design and assistance from the designer, respectively works;
- d. for the specific services related to a work such as project verification, expertise, energy audit, environmental impact study, fire scenario, consultancy, technical assistance and others, which require certified/attested specialists for their implementation, it will be established the estimated value of each service for each individual investment objective and depending on the value obtained, for each service, the appropriate acquisition method will be established.

Also, the limitation of the right of the contracting authority to request only in the case of the simplified procedure the submission of supporting documents proving the information contained in the ESPP within the period of 5 working days is waived. For equal treatment, in the case of all public procurement procedures, it is necessary that the contracting authorities have the right to request the candidates/bidders to submit the supporting documents that prove the information contained in the ESPP within the respective term.

Last but not least, throughout the entire law, the definition provided for the term "construction" has been replaced with the definition of the term "works" and, implicitly, the term "construction" with the term "works". This replacement takes into account the fact that both

the Directive and the national rules refer in reality to the notion of works, without there being a legal definition of them.

GEO no. 136/2022 amends several normative acts. Among the most important changes, the normative act creates the legal framework for the use of buses purchased from European funds by administrative-territorial units and sent free of charge to school units, for school transport. In this sense, Government Ordinance no. 27/2011 has been duly amended as to depict the above change.

GEO no. 136/2022 amends several paragraphs of Law no. 98/2016, Law no. 99/2016 and Law no. 100/2016 as to consider the need to limit the possibility of setting up the participation guarantee, as the case may be, the guarantee of good execution through letters of guarantee issued by non-banking financial institutions from Romania or from another member state for the procurement of works/concessions of works whose estimated value is less than or equal to 40,000,000 RON exclusive of VAT and respectively for purchases of products or services/service concessions whose estimated value is less than or equal to 7,000,000 RON exclusive of VAT.

The above change is justified by the fact that in the case of procurement whose object is of high complexity and whose value reflects these needs of the buyer, it is necessary, for the appropriate guarantee of the contracts during their development and at the same time for the pursuit and fulfilment of the public interest in order to assign and complete the investment objectives assumed by the Government of Romania, the establishment of a value threshold for bidders to present Participation Guarantees/Good Performance Guarantees issued by non-bank financial institutions. The thresholds of 40,000,000 RON exclusive of VAT for works and respectively 7,000,000 RON exclusive of VAT for services or products.

2. What types of public procurement / government contracts are regulated in your jurisdiction and what procurement regimes apply to these types of procurements? In addition to any central government procurement regime please address the following: regulated utilities procurement regime (e.g. water, gas, electricity, coal, oil, postal services, telecoms, ports, airports), military procurements, non-central government

(local, state or prefectures) and any other relevant regime. Please provide the titles of the statutes/regulations that regulate such procurements.

In addition to any central government procurement regime please address the following: regulated utilities suppliers (e.g., water, gas, electricity, coal, oil, postal services, telecoms, ports, airports) military procurements non-central government (local, state or prefectures) and any other relevant regime. Please provide the titles of the statutes/regulations that regulate such procurements.

Romanian Public Procurement legislation covers the following contracts:

- **works, services and supplies public procurement contracts** – regulated by Law no. 98/2016 and GD no. 395/2016.

Law no. 98/2016 provides a general framework for public procurement contracts and applies to both public and private entities, under the conditions expressly stipulated within the law's provisions.

- **works, services and supplies sectorial (utilities) contracts** – regulated by Law no. 99/2016 on sectorial procurements, transposing Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and Government Decision no. 394/2016 approving the Norms for the application of the provisions on the award of utilities contracts/framework agreements set forth under Law no. 99/2016 on sectorial procurements ("GD no. 394/2016").

Law no. 99/2016 regulates utilities contracts/framework agreements involving gas and thermal energy, electricity, water, transportation services, relevant activities in the ports and airports fields, postal services, relevant activities in the oil, natural gas, coal fields.

- **services and works concession contracts** – regulated by Law no. 100/2016 on work concession contracts and services concession contract ("Law no. 100/2016"), transposing Directive 2014/23/EU on the award of concession contracts and Government Decision no. 867/2016 on the approval of the Application Norms of Law no. 100/2016 ("GD no. 867/2016").
- **military procurements** – regulated by Government Emergency Ordinance no.

114/2011 on the awarding on certain public procurement contract in the defence and security fields ("GEO no. 114/2011").

- **RON 3,636,150 (EUR 750,000)** – for social services and other specific services contracts/framework agreements.

As regards to the procurements done in the field of public goods and services, provisions of some additional special laws may be applicable, such as: Government Emergency Ordinance no. 39/2018 regarding the public-private partnership ("GEO no. 39/2018"), Law no. 51/2006 on Community Utilities ("Law no. 51/2006") and various other provisions of Government Emergency Ordinance no. 57/2019 on the Administrative Code ("GEO no. 57/2019") mainly regarding the concession of public property.

Please note that the above thresholds are applicable as of January 1, 2022 and until the next update made by decision of the European Commission, once every two years, which review the thresholds with effect from the 1st of January. Therefore, the above thresholds for 2022-2023 apply from the 1st of January 2022.

Contracting entities must publish a contract notice/award notice in the OJEU if the estimated value of the sectorial/utilities procurement is equal or above the following thresholds:

3. Are there specified financial thresholds at which public procurement regulation applies in your jurisdiction? Does the financial threshold differ depending on the nature of procurement (i.e. for goods, works or services) and/or the sector (public, utilities, military)? Please provide all relevant current thresholds in your jurisdiction. Please also explain briefly any rules on the valuation of a contract opportunity.

- **RON 2,089,574 (EUR 431,000)** – for supplies and services contracts, as well as for design contests.
- **RON 26,093,012 (EUR 5,382,000)** – for works contracts.
- **RON 4,848,200 (EUR 1,000,000)** – for social services and other specific services contracts.

Pursuant to Romanian legislation on public procurement, the thresholds set forth by the European Commission shall also apply in Romania.

Law no. 100/2016 shall apply to works concession contracts and services concession contracts whose value is equal to or above **RON 26,093,012 (EUR 5,382,000)**. If the value of the contract is below the aforementioned threshold, the works concession contracts and services concession contracts are awarded under the GD no. 867/2016 provisions.

In this regard, all of the Romanian public procurement primary laws (i.e., Law no. 98/2016, Law no. 99/2016 and Law no. 100/2016) state that the National Agency for Public Procurement ("ANAP" or "Agenția Națională pentru Achiziții Publice (ANAP)" shall publish on its website the thresholds settled and updated by the European Commission under the EU relevant provisions on public procurement matters.

As for public procurement contracts in the defence and security fields, contracting authorities are forced to obtain prior approval from the Romanian Parliament if the estimated value of the contract is equal to or above RON equivalent of **EUR 100,000,000**.

Contracting authorities must publish a contract notice/award notice in the Official Journal of the European Union ("OJEU") if the estimated value of the procurement is equal or above the following thresholds:

4. Are procurement procedures below the value of the financial thresholds specified above subject to any regulation in your jurisdiction? If so, please summarise the position.

- **RON 26,093,012 (EUR 5,382,000)** – for works contracts or framework agreements.
- **RON 678,748 (EUR 140,000)** – for supplies or services contracts/frameworks agreements.
- **RON 1,042,363 (EUR 215,000)** – for supplies or services contracts/framework agreements awarded by the local/county council, Bucharest General Council as well as public institution in their subordination.

Public procurement contracts and sectorial/utilities procurement contracts below the value of the financial thresholds as specified above are awarded based on a simplified procedure, which is significantly more flexible and implies shorter deadlines and simpler procedural formalities.

Furthermore, if the estimated value of the procurement contracts and sectorial/utilities procurement contracts is below **RON 270,120** (for the supply or the services

contracts) or **RON 900,400** (for the works contracts), the contracting authorities/entities are entitled to use a direct award, as per the provisions re. the new threshold values brought forward by Law no. 208/2022.

The new Law no. 208/2022 also brings a series of clarifications on the manner in which the contracting authorities will directly award products, services and works:

Regarding the form of the legal commitment by which the expenses related to the direct award are committed – public purchase contract, order or other type of document concluded under the terms of the law, including in the case of purchases initiated by means of payment instruments that allow the holder to use them in the relationship with merchants to make payments, without cash, for the purchase of products, services and/or works through a terminal, such as, but not limited to, payment cards and/or electronic wallets.

The obligation to use the electronic catalogue provided by SEAP or to publish an announcement on its own website – for purchases whose estimated value is greater than 200,000 RON exclusive of VAT (for products and services), respectively 560,000 RON exclusive of VAT (for works).

The obligation to consult at least 3 (three) economic operators – in the case of purchases whose estimated value is between 140,000 RON exclusive of VAT and 200,000 RON exclusive of VAT (for products and services), respectively between 300,000 RON exclusive of VAT and 560,000 RON exclusive of VAT (for works); the purchase can also be made if, following the consultation, only one valid offer is received from the point of view of the requested requirements.

The right to purchase based on a single offer – if the estimated value of the purchase is less than or equal to 140,000 RON exclusive of VAT (for products and services), respectively 300,000 RON exclusive of VAT (for works).

The right to pay directly based on the legal commitment, without prior acceptance of an offer – if the estimated value of the purchase is less than 9,000 RON exclusive of VAT.

However, these procedures must comply with public procurement principles, expressly stated by the relevant legislation, namely:

- Non-discrimination;
- Equal treatment;
- Mutual recognition;
- Transparency;

- Proportionality;
- Assumption of responsibility.

Public procurement contracts in the defence and security fields can be directly awarded if the estimated value of the contract is below RON equivalent of EUR 100,000, irrespective of the type of contract that is awarded by direct public procurement.

5. For the procurement of complex contracts*, how are contracts publicised? What publication, journal or other method of publicity is used for these purposes? What is the typical period from the publication of the advert that bidders have to respond to the advert for a complex contract?

Complex contracts are not expressly legally defined under the Romanian legislation.

However, it may be considered that some contracts arisen from special `procurement procedures` could be considered complex contracts given their select scope, timeframe or relevant social impact.

Thus, in practice, at the level of the contracting authority, we can find the following sorting of complex contracts:

- a. Complex public procurement awards, involving the alignment of the interests of a large number of interested parties; and
- b. Public procurement contracts that are complex in terms of size, such as:
 - Degree of innovation;
 - Duration;
 - Arrangements required for implementation;
 - Market analysis and research (including engaging the market in market consultation);
 - Align a large number of interested parties (including public consultation).

In case of complex projects involving an allocation of risks between the contracting authority and the economic operator the project may be awarded as a concession of works and/or services. The award of a works or services concession always involves the transfer to the concessionaire of a significant part of the operating risk of economic nature, in connection with the operation of the works and/or services in question. A significant part of the operating risk is considered to

have been transferred when the estimated potential loss incurred by the concessionaire is not negligible.

Also, it may be considered that some public-private partnership contracts ("PPPs") which are assigned by a procedure regulated by the above-mentioned procurement laws (especially the one regarding the concession of public property) could be classified as complex contracts given that their scope is represented by the implementation or, as the case may be, the rehabilitation and/or extension of a good or of some goods belonging to the *public partner* and/or the operation of a *public service*.

The public-private partnership contracts are awarded according to the provisions of Law no. 98/2016, of Law no. 99/2016 or of Law no. 100/2016, with their subsequent amendments and completions, but they are prepared and governed by the special rules in GEO no. 39/2018. PPPs are designed according to the conclusions of the substantiation study elaborated depending on the object of the contract and the manner in which the transfer of a significant part of the economic operating risk is performed.

The standard public procurement contract concluded for a period of at least 5 years which includes the duration of execution of works or construction, if it has a component consisting of execution of works or construction, as well as the duration of the provision of services, could be considered a complex contract, given the lengthy timeframe for its implementation or execution.

However, as previously mentioned, contracting authorities/entities must publish a contract notice/award notice in the OJEU if the estimated value of the procurement is equal or above the specified thresholds.

Generally, in Romania, public procurement procedures are also published in the Electronic System for Public Procurement ["ESPP" or *Sistemul Electronic de Achiziții Publice (SEAP)*], available at <https://www.e-licitatie.ro>.

The timescale between the publication of the advert in OJEU/ESPP and the bidders' response depends on the procurement procedure used by contracting authorities, as follows:

- for an open procedure – 35 days.
- for a restricted procedure, competitive procedure with negotiation, competitive dialogue and innovation partnership – 30 days.
- for a simplified procedure – 10 days for the awarding of supplies and services contracts; 6 days for low complexity supplies contracts; 15

days for works contracts.

6. For the procurement of complex contracts, where there is an initial selection stage before invitation to tender documents are issued, what are typical grounds for the selection of bidders? If there are differences in methodology between different regulated sectors (for example between how a utility might undertake a regulated procurement procedure and how a government department might do so), please summarise those differences.

In order to conclude and start the execution of the obligations from a public-private partnership contract, the following steps must be completed beforehand:

- a. the realization by the public partner of a substantiation study;
- b. the approval of the substantiation study by the Government for the projects of the central public administration or, as the case may be, by the deliberative authorities for projects of the local public administration;
- c. completing the procedure for awarding the public-private partnership contract;
- d. the approval of the public-private partnership contract resulting from the completion of the negotiations and initiated by the parties by the Government for the projects of the central public administration or, as the case may be, by the deliberative authorities for projects of the local public administration;
- e. signing the public-private partnership contract;
- f. fulfilment of all the suspensive conditions provided in the public-private partnership contract, including the financial closure.

The initiative to carry out a project in public-private partnership belongs to the public partner and for the preparation of the substantiation study, the public partner may contract the necessary consulting services depending on the specifics of the project, including technical, financial and legal services. The costs generated by the realization of the study of substantiation and development of the award procedure shall be borne by the public partner.

The substantiation study includes an identification of the categories of risks related to the implementation of the project, their quantification and a presentation of

alternatives for allocating risks between the contracting parties, depending on the capacity of each party to manage the risk assumed.

The procedure for selecting the private partner also includes the award procedure necessary for concluding the public-private partnership contract with the project company.

If the public-private partnership contract cannot be signed during the selection procedure, in accordance with the law, with any of the private investors who have submitted bids, the public partner has the right to launch a new procedure.

7. Does your jurisdiction mandate that certain bidders are excluded from tendering procedures (e.g. those with convictions for bribery)? If so, what are those grounds of mandatory exclusion? Are there any notable features of how this operates in your jurisdiction e.g. central registers of excluded suppliers? Does your jurisdiction specify discretionary grounds of exclusion? If so, what are those grounds of discretionary exclusion?

Romanian laws on public procurement contain both mandatory and discretionary grounds for exclusion of bidders from tendering procedures.

Contracting authorities/entities **exclude** the bidder from the procedure when it can be determined based on a final judgment of a court of law that the bidder/a member of its management, executive or supervisory body or a person with power of representation, decision or control of the bidder, was convicted for one of the following crimes:

- establishment of an organized criminal group;
- corruption;
- crimes against the financial interests of the European Union;
- acts of terrorism;
- money laundering;
- trafficking and exploitation of vulnerable persons;
- fraud, within the meaning of Article 1 of the Convention on the Protection of the Financial Interests.

On the same note, bidders that breached their obligations relating to payment of taxes, duties or social security contributions are excluded from public

procurement procedures.

Nevertheless, **bidders are also excluded** from public procurement procedures in the following cases:

- have breached the mandatory provisions re. environment, social and work relationship fields as set out by the EU or national legislation, and the breach can be proved by any appropriate means and/or evidence.
- are undergoing insolvency proceedings/liquidation/judicial supervision/cessation of commercial activity.
- have committed a serious professional misconduct that questions their integrity and such a thing can be proved by any means of evidence.
- the contracting authority has sufficient reasonable indicators/concrete information to consider that the bidder has concluded agreements with other bidders aimed at distorting competition within or in connection with the ongoing award procedure.
- are in a situation of conflict of interest in or in connection with the ongoing award procedure and such situation cannot be effectively remedied by other less severe measures.
- the previous participation of the bidder in the preparation of the award procedure has led to a distortion of competition and such a situation cannot be remedied by other less severe measures.
- the bidders seriously or repeatedly breached their main obligations under a public procurement/sectorial/concession contract concluded before and such breach led to an early termination of the contract, payment of damages or any other comparable sanction.
- are guilty of false statements in respect of the information submitted at the request of the contracting authority, did not present such information or are not able to present the required supporting documents.
- attempted to unlawfully influence the decision-making process of the contracting authority, obtained confidential information which could confer unjustified advantages in the award procedure or neglectfully provided erroneous information which may have a significant influence on the decision of the contracting authority/entity.

However, some of the mandatory grounds for exclusion are considered *discretionary* under GEO no. 114/2011, referring to public procurement contracts in the defence and security fields, such as:

- insolvency of the bidder.
- conviction of the bidder in the last 3 years by a final judgment decision of a court of law for an act that has infringed professional ethics or for committing a mistake in professional matters.
- bidder's failure to fulfil its obligations relating to payment of taxes, duties or social security contributions.
- bidder's failure to fulfil its previous contractual obligations.
- bidder's lack of capacity to avoid risks and threats to national security, established based on any relevant means of evidence.
- bidder's failure to present the information requested by the contracting authority to prove the fulfilment of the qualification and selection criteria or bidder's bad faith in presenting false information.

3. Post-awarding stage - performance and implementation of the contract/framework agreement.
4. Analysis and evaluation of the performance of the bidder in regard to executing the contract.

Given the specific provisions of GEO no. 39/2018, the procedure for selecting the private partner also includes the award procedure necessary for concluding the public-private partnership contract with the project company.

In addition, it is to be noted that all public-private partnership contracts are awarded according to the provisions of Law no. 98/2016, Law no. 99/2016 or Law no. 100/2016, with the subsequent amendments and completions, as the case may be and according to the conclusions of the substantiation study elaborated depending on the object of the contract and the manner in which the transfer of a significant part of the economic operating risk is performed, or of the services in question.

The above provision establishes that even in the case of PPPs, as a general rule, the award procedure must cover, as a minimum, the same 4 steps mentioned above i.e., 1. Planification/Preparation of the award procedure, 2. Organization of the award procedure and awarding of the contract/framework agreement, 3. Post-awarding stage and 4. Analysis and evaluation of the performance of the bidder. Please note that some special derogatory provisions could be applicable given each of the specific provisions of the following normative acts: Law no. 98/2016, Law no. 99/2016 or Law no. 100/2016.

We have described the typical procurement procedure for the award of a PPP in our previous answer to the earlier question. From our practical experience, an estimation for the total length of the procedure is reasonable to be between 1 year - 2 years depending on the extent and significance of the award procedure.

8. Please describe a typical procurement procedure for a complex contract. Please summarise the rules that are applicable in such procedures. Please include a timeline that includes the key stages of the process, including an estimation for the total length of the procedure.

As previously mentioned, Romanian legislation on public procurement does not expressly define complex contracts. Irrespective of the complexity of the contract, any award procedure must cover the following 4 steps:

1. Planification/preparation of the award procedure.

It is initiated by identifying the needs and preparing the reports of necessity and ends with the approval of the contracting authority of the award documentation, including supporting documents, as well as the contracting strategy for the award procedure in question.

2. Organization of the award procedure and awarding of the contract/framework agreement.

Contracting authorities may use one of the following procedures: open procedure; restricted procedure; competitive procedure with negotiation; competitive dialogue; innovation partnership; negotiation procedure without prior publication; design contest; award procedure applicable for social and other specific services; simplified procedure; direct award.

9. If different from the approach for a complex contract, please describe how a relatively low value contract would be procured. (For these purposes, please assume the contract in question exceeds the relevant threshold for application of the procurement regime by less than 50%)

Contracts below the value of the financial thresholds are awarded through a simplified procedure and, in some particular cases, through a direct award of the tender. Law no. 208/2022 introduced the obligation to submit a quarterly notification in SEAP regarding direct awards -

the notification will cover direct awards, grouped by necessity and will include at least the object, the awarded quantity, the value and the CPV code (with the exception of awards made using the SEAP electronic catalogue).

Simplified procedures are significantly more flexible, require simpler procedural formalities and shorter deadlines. Generally, when using simplified procedures, contracting authorities/entities publish a simplified contract notice on ESPP's website, together with the awarding documentation.

Tenders and any other relevant documents (including request for clarifications) are updated on ESPP's website. Under such circumstances, it is undoubtedly that only bidders registered with ESPP can participate in the simplified procedures.

However, if the simplified procedure involves many stages, such as both candidates' selection and tenders' negotiation and evaluation, the awarding procedure is not carried out through electronic means.

Nevertheless, if the estimated value of the procurement agreement/utilities agreement is below RON 270.120 – for supply or services contracts or RON 900,400 – for works contracts, contracting authorities/entities are entitled to use the direct award approach.

10. What is seen as current best practice in terms of the processes to be adopted over and above ensuring compliance with the relevant regime, taking into account the nature of the procurement concerned?

All contracting authorities have the obligation to elaborate the annual public procurement program, as a managerial tool used for planning and monitoring the portfolio of procurement processes at the level of contracting authority, for planning the resources necessary to carry out the processes and for verifying the fulfilment of local/regional/national strategy objectives development, where applicable.

The annual public procurement program shall be drawn up, in its initial form, in the fourth quarter of the previous year, on the basis of reports of necessity submitted by the departments of the contracting authorities and shall include all public procurement contracts/framework agreements which the contracting authority intends to award during the following year.

When establishing the initial form of the annual public procurement program, the contracting authority has the

obligation to take into account: a) the objective needs for the products, services and works; b) the degree of priority of the necessities provided at let. a); c) anticipations regarding the sources of financing to be identified.

After the approval of its own budget, the contracting authority has the obligation to update its annual public procurement program according to the approved funds.

The contracting authority has the obligation to publish every six months in ESPP extracts from the annual program of public procurement, as well as any modification on them, within 5 working days, extracts that refer to:

- a. contracts/framework agreements for products and/or services whose estimated value is greater than or equal to the thresholds provided in art. 7 para. (1) of Law no. 98/2016;
- b. works contracts/framework agreements whose estimated value is greater than or equal to the thresholds provided in art. 7 para. (5) of Law no. 98/2016.

In addition, the contracting authority, through the internal department specialized in the field of procurement, has the obligation to keep records of the direct award procurements of products, services and works, as an annex to the annual program of public procurement. The contracting authority has the right to make subsequent amendments or completions within the annual public procurement program, provided that the sources of financing are identified.

Irrespective of the procedure adopted by the contracting authorities/entities, they must firstly draw up the award documentation in a manner that contains all the necessary details to provide economic operators (bidders) with complete, correct and accurate information on the procurement requirements, the subject-matter of the contract and the methodology of the award procedure.

Award documentation, as well as every stage of the award procedure must comply with public procurement principles of non-discrimination, equal treatment, mutual recognition, transparency, proportionality and assumption on responsibility.

Contracting authorities/entities must ensure that the above-mentioned principles are strictly observed and that economic operators (bidders) are not treated differently.

Prior to the initiation of the award procedure, contracting

authorities are also entitled to conduct market consultation through ESPP, as well as through any other available means.

11. Please explain any rules which are specifically applicable to the evaluation of bids.

The contracting authority has the obligation to designate, for any award of public procurement contracts /framework agreements, the persons responsible for the evaluation of tenders and, as the case may be, of requests to participate. The persons designated for this task form an "evaluation commission".

If the evaluation of requests to participate/tenders requires in-depth expertise in the field of public procurement or of a technical, financial, legal and/or specific contractual nature, the contracting authority may appoint, in addition to the evaluation committee, external specialists, appointed co-opted experts.

During the evaluation process, the members of the evaluation commission and the co-opted experts have the obligation to maintain the confidentiality of the contents of the offers/requests to participate, as well as of any other information presented by the candidates/tenderers in the award procedure.

Except for the opening meeting of the tenders in which other persons have the right to participate, only its members and, as the case may be, the co-opted experts, as well as the persons empowered by ANAP, *have the right to participate in the meetings of the evaluation commission.*

All the members of the evaluation commission and the co-opted external experts have the obligation to respect the rules for avoiding the conflict of interests provided by law.

The decisions of the evaluation commission shall be made with the vote of at least 2/3 of its members with the right to vote.

In the case of the selection process of the candidates or the establishment of the winning bid based on score, the vote of the members of the evaluation commission is reflected by the score given to each request for participation/bids separately.

If there are differences of opinion between the members of the evaluation committee or when there is considerable difference between the scores given by them, the chairman of the evaluation committee will

request the re-analysis of the divergence points, in order to complete the bidding and determine the winning bid. The process of reanalysing the points of divergence shall be recorded in a report, justifying the contrary opinions.

In this case, if the evaluation commission does not reach an agreement after the reanalysis of the points of divergence, the final decision is adopted with the vote of the majority of its members.

The members of the evaluation commission who do not agree with the decision adopted have the obligation to present their divergent point of view in writing, elaborating in this respect an individual note which becomes an annex to the report of the award procedure.

Under the conditions of art. 215 para. (4) and art. 209 of the Law no. 98/2016 and of art. 134 para. (5) of GD no. 395/2016, the evaluation commission requests clarifications, *within one working day from the deadline for submission of tenders*, regarding any discrepancies regarding the fulfilment of the formal conditions of the participation security, as well as its amount or validity, granting the bidder a period of 3 days to respond to the request for clarification, under the sanction of rejecting the bid as unacceptable.

The evaluation commission has the obligation to analyse and verify each bid both in terms of the proposed technical elements and in terms of the financial aspects involved.

The technical proposal must comply with the minimum requirements set out in the specifications or in the descriptive document.

The financial proposals must be included in the funds that can be made available for the fulfilment of the public procurement contract, respectively be correlated with the elements of the technical proposal to avoid the defective execution of the contract.

The evaluation commission has the obligation to establish the formal or confirmatory clarifications and completions, necessary for the evaluation of each request for participation/offers, as well as the time allowed for their transmission, the deadline can only be set at working days, without specifying a specific time within it.

GEO no. 26/2022 sets clear deadlines for requesting supporting documents based on the European Single Procurement Document ("ESPD").

In order to expedite the completion of the evaluation process, GEO no. 26/2022 amends the provisions relating to the presentation of updated supporting

documents demonstrating the fulfilment of the qualification and selection criteria, in accordance with the information contained in the ESPD, in order to establish a deadline of one (1) day working hours for the contracting authority from the moment of establishing the tenderer ranked first after the application of the award criteria, respectively within one (1) working day from the issuance of the corresponding opinion (in the situation where the documentation is subject to ex-ante control) to request the presentation of these updated supporting documents to the bidder declared the winner. Exceptions are made for multi-stage procedures, where supporting documents must be requested before invitations for the second stage are sent.

The tenderer/candidate will be given a period of seven (7) working days to respond to the request for clarification, under penalty of rejection of the tender as unacceptable. This term can be extended, at the request of the tenderer/candidate, by a maximum of three (3) working days.

After determining the first ranked bidder following the application of the award criterion, the evaluation commission has the obligation to request him the proving documents regarding the fulfilment of the qualification criteria.

During the process of evaluation, the evaluation commission can request clarifications, regarding any discrepancies regarding the fulfilment of the formal conditions of the participation security, as well as its amount or validity. The clarifications request can also concern the documents/clarifications regarding the subcontractor/supporting third party.

According to the provisions of art. 49 para. (1) of the Law no. 98/2016, in order to verify the fulfilment of the qualification and selection criteria by the third party/third parties who grant support, the contracting authority may request from the third party/s at any time during the evaluation process, documents and additional information in relation to the commitment given or the documents presented, if there are reservations regarding the correctness the information or documents presented or regarding the possibility of executing the obligations assumed by that commitment.

The evaluation commission will establish the deadline depending on the volume and complexity of the formal or confirmatory clarifications and completions necessary for the evaluation of each request for participation/offers. The term thus established will, as a rule, be of at least 1 working day.

In case the evaluation commission requests a candidate/bidder clarifications and, as the case may be,

completions of the documents presented by him within the offer or request to participate, according to the provisions of art. 209 of Law no. 98/2016, and the candidate/bidder does not submit the requested clarifications/completions or the clarifications/completions submitted are not conclusive within the term specified by the evaluation commission, *his offer will be considered unacceptable.*

In case the bidder modifies through the answers he presents to the evaluation commission the content of the technical proposal or the financial proposal, *its offer will be considered unacceptable.*

By exception to the above, the tender will be considered admissible insofar as the changes made by the tenderer in connection with his technical proposal fall into one of the following categories:

- a. can be included in the category of formal defects; or
- b. represent corrections of some minor technical deviations, and a possible modification of the total price of the offer, induced by these corrections, would not have led to the modification of the ranking of the bidders participating in the award procedure.

Minor technical deviations are defined as omissions/deviations from the technical proposal that can be completed/corrected in a way that does not lead to the submission of a new bid.

An amendment to the technical proposal cannot be considered a minor technical deviation from the initial offer in the following situations:

- a. the theoretical quantification in monetary value of the respective deviation/omission exceeds 1% of the total offer price;
- b. the theoretical quantification in monetary value of the respective deviation/omission leads to the evasion of the application of those provisions of the law that establish obligations of the contracting authority in relation to certain value thresholds;
- c. following the correction of the respective deviation/omission, it is found that the ranking of the bidders would change;
- d. the change would imply a qualitative decrease compared to the initial offer;
- e. the amendment concerns a part of the tender for which the award documentation clearly excluded the possibility for the tenderers to deviate from the exact requirements of the respective documentation, and the initial tender was not in accordance with these

requirements.

By exception from the above, the tender will be considered admissible insofar as the changes made by the tenderer, *at the request of the evaluation committee*, in connection with its financial proposal, represent arithmetic errors, respectively aspects that can be clarified in compliance with the principles provided in art. 2 para. (2) of Law no. 98/2016, the elements of the financial proposal being corrected, implicitly together with the total price of the offer, by restoring the related calculations.

If the bidder does not agree with the correction of arithmetic errors, his bid will be considered *unacceptable*.

If the evaluation committee finds that the price elements of an offer are apparently unusually low, in relation to market prices, using as reference in this regard information such as statistical bulletins, or quotations of stock exchanges, the evaluation commission will request from the tenderer who submitted the tender in question explanations regarding the possibility of fulfilling the contract under the quality conditions imposed by the award documentation.

The provisions of art. 136 para. (4) of GD 395/2016 state that the price of an offer is unusually low if it represents less than 80% of the estimated value of the contract, therefore, if the price of the offer represents less than this value the evaluation committee has the obligation to request a clarification from the bidder concerning this aspect.

The clarification request may concern:

- a. the economics of the manufacturing process, of the services provided or of the construction method;
- b. the technical solutions chosen or any exceptionally favorable conditions available to the tenderer for the supply of the products or services or for the execution of the work;
- c. the originality of the work, supplies or services proposed by the tenderer;
- d. compliance with obligations referred to the compliance with applicable obligations in the fields of environmental, social and labor law established by Union law, national law, collective agreements or by the international environmental, social and labor law;
- e. compliance with obligations referred to the subcontractors;
- f. the possibility of the tenderer obtaining State aid.

The explanations brought by the bidder shall be accompanied by conclusive evidence regarding the elements requested in the clarification request, as well as, as the case may be, documents regarding the prices that can be obtained from suppliers, the situation of stocks of raw materials and materials, the organization and methods used in the work process, the salary level of the bidder's staff, the performance and costs involved in certain machines or work equipment.

If the tenderer does not present the requested information and/or documents to the evaluation committee or they do not duly justify the low level of the proposed price or costs, the bid will be considered *non-compliant*.

The evaluation commission has the obligation to reject the unacceptable and non-compliant offers.

Tenders which have not been rejected by the evaluation committee following the verification and evaluation shall constitute *admissible tenders*.

The evaluation commission has the obligation to determine the winning bid from the admissible bids.

After the completion of the verifications provided in art. 132 and 133 of GD no. 395/2016, the evaluation committee completes (introduces) in the ESPP, using the technical facilities accessible through this computer system, the names of the candidates/tenderers whose applications/tenders are admissible, as well as of the rejected candidates or tenderers whose tenders have been declared unacceptable and/or non-compliant.

If the criterion used is the "lowest price", the ranking of the tenders shall be established by the ascending order of the respective prices, the winning tender being the one in the first place, respectively the one with the lowest price.

If two or more tenders are equally placed first, the contracting authority shall request a new financial proposal from the tenderers and the contract shall be awarded to the tenderer whose new financial proposal has the lowest price.

In case of conclusion of a framework agreement with several economic operators, without resumption of competition, when two or more tenders have an equal total value of the financial proposal and are ranked on the same place, in order to draw, the contracting authority requests them new financial proposals, without this affecting the top positions in the ranking.

In case of conclusion of a framework agreement with several economic operators, with resumption of

competition, when two or more tenders have the same total value of the financial proposal and are ranked on the same place, the contracting authority shall mention in the award documentation if it shall apply the above provisions or if it will conclude the framework agreement with all the economic operators ranked on the places corresponding to the maximum number established in the participation notice.

If the award of the public procurement contract/framework agreement is made on the basis of the criterion "best value for money" or "best value for cost", the evaluation of the tenders shall be carried out by awarding, for each offer in part, a score resulting from the application of the calculation algorithm established in the award documentation.

In the case provided above, the ranking of the bids is established by the descending order of the respective scores, the winning bid being the one from the first place, respectively the one with the highest score.

If two or more offers are ranked first, with equal scores, the tie will be made taking into account the score obtained for the evaluation factors in descending order of their weights. If the tie is maintained, the contracting authority has the right to request new financial proposals, and the winning tender will be designated the one with the lowest financial proposal.

If the award of the public procurement contract/framework agreement is made on the basis of the "lowest cost" criterion, the evaluation of the tenders shall be carried out by awarding, for each individual tender, a score resulting from the application of the algorithm set out in the award documentation.

In the case provided above, the ranking of the bids is established by the descending order of the respective scores, the winning bid being the one from the first place, respectively the one with the highest score.

And in the case two or more bids are ranked first, the tie will be made by requesting new financial proposals, and the winning bid will be designated the one that will present the lowest price.

Regardless of the criteria applied for the award of the contract, the comparison of the prices provided in the financial proposals of the bidders is made at their value without VAT.

The contracting authority will not use the lowest cost/lowest price as the award criterion in the case of:

- a. certain categories of public procurement contracts/framework agreements for works or

services which have as their object intellectual services;;

- b. public procurement contracts/framework agreements for design and execution or services that are related to trans-European transport infrastructure projects and county roads.
- c. certain categories of public procurement contracts/framework agreements of products having an impact on the environment throughout the life cycle.

The contracting authority may use the criterion of the lowest price only in the situation when it purchases products, services or works whose estimated value of the contract does not exceed the thresholds provided in art. 7 para. (1) or if the negotiated procedure without prior publication of a contract notice provided if the works, products, or services can only be provided by a particular economic operator.

12. Does your jurisdiction have specific rules for the treatment of bids assessed to be "abnormally low" for the purposes of a particular procurement (i.e. a low priced bid, significantly lower than any other bid or a bid whose pricing raises questions of sustainability/viability over the contract term)? If so, is there a definition of what "abnormally low" means and please can you provide a short summary of the specific rules?

N/A

13. Please describe any rights that unsuccessful bidders have that enable them to receive the reasons for their score and (where applicable in your jurisdiction) the reasons for the score of the winning bidder. Are regulated procuring bodies required to provide these reasons for their award decision before awarding the contract in question?

On the basis of the information entered into the ESPP by the contracting authority, the computer system shall automatically generate notifications to all participating tenderers regarding the outcome of the award procedure.

The contracting authority also has the obligation to

transmit the award communications to the tenderers/participants.

The contracting authority has the obligation to conclude the public procurement contract/framework agreement with the tenderer whose tender has been established as the winner of the procurement procedure.

In case the contracting authority cannot conclude the public procurement contract/framework agreement with the tenderer whose tender has been established as the winner, due to the fact that the tenderer in question is in a situation of force majeure or in the fortuitous impossibility to execute the contract/framework agreement, it has the obligation to declare as the winner the bid ranked second, under the conditions in which such bid exists and is admissible.

In the situation provided above, in the conditions in which there is no admissible bid ranked second, the contracting authority has the obligation to cancel the procedure for awarding the public procurement contract/framework agreement, under the conditions of art. 212 para. (1) letter a) of Law no. 98/2016.

The contracting authority holds the obligation to inform each candidate/tenderer of the decisions taken regarding the result of the selection, the outcome of the procedure, respectively the award/conclusion of the public procurement contract/framework agreement or admission to a dynamic procurement system, *including the reasons for any decision not to award a contract*, not to conclude a framework agreement, not to implement a dynamic procurement system or to resume the award procedure as soon as possible, but not later 3 days from the issuance of the respective decisions.

Within the communication regarding the result of the procedure provided above, the contracting authority has the obligation to include:

- a. to each rejected candidate, the concrete reasons that were the basis for the decision to reject his/her request to participate;
- b. to each rejected bidder, the concrete reasons that were the basis for the decision to reject its bid;
- c. to each tenderer who has submitted an admissible tender but has not been declared successful, the characteristics and relative advantages of the successful tender (s) in relation to his tender, the name of the tenderer to whom the public procurement contract is to be awarded or, after case, of the tenderer/tenderers with whom a framework agreement is to be concluded;
- d. to each tenderer who has submitted an

admissible tender, information on the progress and progress of negotiations and dialogue with tenderers.

The contracting authority has the right not to communicate certain information provided in par. (1) and (2) on the award of the public procurement contract, the conclusion of the framework agreement or the admission to a dynamic procurement system, in the event that their disclosure:

- a. prevented the application of legal provisions or were contrary to the public interest;
- b. harmed the legitimate commercial interests of an economic operator, public or private, or could harm fair competition between economic operators.

Unsuccessful bidders have the following means by which they can establish even more in-depth additional details of the winning bid:

The unsuccessful bidders can request that access to the public procurement file be granted to them in compliance with the terms and procedures provided by the legal regulations on free access to information of public interest and may be restricted only to the extent that this information in the technical proposals, financial proposals and /or substantiation/price justifications/cost were declared and proven according to the provisions of art. 57 para. (4) of Law no. 98/2016 as confidential.

By exception from the provisions mentioned above, *after communicating the result* of the award procedure, the contracting authority is obliged to allow, upon request, within a working day from the date of receipt of the request, unrestricted access of any tenderer/candidate to the report of the award procedure and information that is not part of the technical proposals, financial proposals and/or price/cost substantiation/justifications.

All contracting authorities are legally required to provide all the reasons which substantiated their decision to award a specific tenderer the bid in question.

14. What remedies are available to unsuccessful bidders in your jurisdiction? In what circumstances (if any) might an awarded contract be terminated due to a court's determination that procurement irregularity has occurred?

Unsuccessful bidders may challenge the contracting authority's/entity's decision before the national competent authorities.

The procedural remedies that economic operators have in order to challenge the decisions of the contracting authorities are regulated by Law no. 101/2016. The legal provisions provide an alternative system of jurisdiction in their favor:

A. the bidders may challenge these decisions the National Council for Solving Complaints („**NCSC**”), which is an administrative-jurisdictional body, regulated by Law no. 101/2016 on remedies and appeals concerning the awarding of public procurement contract, sectorial contracts and concession and for the organization and functioning of the National Council for Solving Complaints (“*Law no. 101/2016*”) with appeal at the Court of Appeal, administrative and fiscal contentious section, in whose territorial area the headquarters of the contracting authority is located.

As in the case of classical proceedings before the courts and in this case, the proceedings before the NCSC ensure the adversarial nature of the procedure. The documents of the proceedings shall be communicated to the parties, the procedure being an adversarial one. Thus, although the procedure is not an oral one (except in exceptional circumstances in which NCSC can appreciate that it is necessary to hear the parties — usually in order to clarify technical aspects which have a complex degree of technicality), that ensures that the parties exercise their rights of defence.

In accordance with the principle of litigant-led conduct of litigation, the Council shall examine the challenged act from the point of view of its legality and soundness and may:

- a. pronounce a decision annulling it in whole or in part;
- b. oblige the contracting authority to issue an act/to adopt the necessary measures to restore legality, with a clear and precise indication of the operations to be carried out by the contracting authority;
- c. annul the award procedure in case it is not possible to remedy the contested act.

If NCSC admits the challenge and orders that remedial action be taken, the Council shall also specify the time-limit within which it must be complied with by the contracting authority, which shall not be shorter than the time-limit for bringing an action against the Council’s decision.

The Council may not decide to award the contract to a particular economic operator unless it has been designated by the contracting authority or its status as the successful tenderer results from the information contained in the dispute resolution file.

If the challenge concerns the outcome of the award procedure and the re-evaluation of the tenders is ordered, the Council will clearly and precisely indicate the limits of the re-evaluation, respectively the identity of the tenders subject to re-evaluation, the stage (s) of the re-evaluation procedure the concrete measures to be taken by the contracting authority in the evaluation.

The Council may also reject the challenge as unfounded, belated, devoid of purpose, brought by an unqualified person or by a person who is not a representative, and on any other procedural or substantive exception, which prevents the resolution of the appeal on the merits.

NCSC’s Decision can be challenged with a complaint in front of the Court of Appeal, that is resolved urgently and especially, within a term that will not exceed 45 days from the date of the legal notification of the court, in panels specialized in public procurement, composed of 3 judges.

B. The jurisdictional – the procedure before the Tribunal

In addition to the administrative-jurisdictional procedure, Romanian legislation also allows judicial procedure before a competent Tribunal, as a first instance court solving the complaint. The Decision of the Tribunal can be challenged with in front of the Court of Appeal. The complaint in front of the Court of Appeal is resolved urgently and with priority, within a term that will not exceed 45 days from the date of the legal notification of the court, in panels specialized in public procurement, composed of 3 judges. If a challenge is filled with the NCSC or before the Tribunal, the conclusion of the contract/framework agreement shall be suspended until the challenge is solved by the NCSC through a decision.

The contracting authority has the obligation to conclude the contract with the successful tenderer, is the challenge was dismissed – maintaining the result of the award procedure by the NCSC/Tribunal, even if the appeal of the complaint has been lodged against that decision and the case has not been definitively resolved.

Any contract concluded in noncompliance with the above rules is void in accordance with the provisions of art. 58 para. 2 – e) of the Law no. 101/2016.

15. Are public procurement law challenges common in your jurisdiction? Is there a perception that bidders that make challenges against public bodies suffer reputational harm / harm to their prospects in future procurement competitions? If so,

please provide brief comment. Assuming a full hearing is necessary (but there are no appeals), how much would a typical procurement claim cost: (i) for the defendant and (ii) for the claimant?

Public procurement challenges are very frequent in Romania. As mentioned before, in Romania, public procurement disputes are dealt in first instance either by the NCSC or by the Tribunals.

As a rule, challenging the contracting authority's/entity's decision is not causing any negative impact on the claimants' reputation. Law no. 101/2016 ensures that every unsuccessful bidder damaged by a contracting authorities'/entities' decisions has the right to address its discontent regarding the award procedure to the NCSC or to a court of law.

Regarding the incurred costs, challenges filed with NCSC are exempt from the payment of any stamp duty but shall be subject to a security as set forth by law. Generally, the claimant has to pay a security of 2% of the estimated value of the award. However, the security is capped at:

- i. RON 35,000/RON 88,000 - if the value of the contract is below the aforementioned thresholds.
- ii. RON 220,000/RON 2,000,000 - if the value of the contract is equal or above the aforementioned thresholds.

The security is a guarantee intended to cover any possible loss that could be caused to the contracting authority as a result of the challenge. Usually, the security is returned to the claimant, since in almost most of the cases no loss is caused to the contracting authorities and/or claimed to have been caused to the contracting authorities.

However, according to the new amendments of the Law no. 101/2016, in the event that the contracting authority definitively wins the appeal filed in the public procurement procedure, it has the obligation to take the necessary steps to retain the deposit set up by the Council by the economic operator who filed the appeal, in order to cover the damages created of the delays recorded in the completion of the award procedure.

If before the legislative amendment, the contracting authorities only had the option of filing actions against economic operators to request compensation for the damages caused, they currently have this obligation

Since the bidders know that there is a substantial risk of

losing the security of the challenge and that, in any case, its recovery will most likely only be subsequent to another litigation, it is possible that the new rule determines the bidders to balance more carefully when deciding to formulate challenges against the contracting authority's decisions.

It is also worth mentioning that the appellants have the possibility to claim damages in the event that the contracting authority has gone ahead and concluded the framework agreement/procurement contract in compliance with the NCSC decision or the first court decision, before the final settlement of the appeals (given that the appellant has been awarded the contract by the final decision of the final court of law).

In this case, any damages established by the court shall be borne from the contracting authority's budget, according to the provisions of the court's final decision. The contracting authority may order the adoption of measures against the person/persons involved in the public procurement award that has determined the adoption of damages, only if the courts find the persons' fulfilment or omission, with guilt, consisting in gross negligence, of any act or deed in connection with the exercise, under the conditions of the law, of the powers and duties incumbent on them.

As previously mentioned, contracting authority's decisions can also be challenged before the competent tribunal. In such cases, claimants must pay a stamp duty of to 2% of the contract's estimated value, without exceeding the amount of RON 100,000,000.

Additional costs may involve the fees that the claimant must pay for its legal representation, if the case may be (e.g., if the claimant appoints a lawyer as its conventional representative).

Generally, defendants don't have to pay any stamp duty or security.

16. Typically, assuming a dispute concerns a complex contract, how long would it take for a procurement dispute to be resolved in your jurisdiction (assuming neither party is willing to settle its case). Please summarise the key stages and typical duration for each stage.

Usually, irrespective of the complexity of the contract, the average time for solving a procurement dispute in Romania is of around 1 to 2 months or even more in remote cases such as, just as an example, where the NCSC deems the challenge as incomplete and requests

further clarifications from the challenger in order to be able to consider the challenge formally complete and to further initiate the procedure for establishing the thoroughness of the sustained claims.

A reasonable timeframe for the challenge to be resolved in front of the courts would be 2 to 3 months.

As mentioned before, in Romania, public procurement disputes are mainly dealt by the NCSC.

Depending on the estimated value of contract, parties can fill a complaint with NSCS within 10 or 7 days as of the next day following their acknowledgment of the illegal act emitted by the contracting authority.

The 10 days' timeframe applies if the estimated value of the contract is equal or above the European thresholds involving mandatory publication of the award procedure with OJEU and the 7 days' timeframe applies if the estimated value of the contract is below the European thresholds involving mandatory publication of the award procedure with OJEU.

NSCS shall solve the complaint within 20 calendar days as of the date the contracting authority transmitted the procurement file and its "point of view" to the claimant's complaint. However, NSCS will solve the complaint within 10 days if a decision can be issued based on a procedural objection.

The above-mentioned terms can be prolonged by the NSCS under exceptional and duly justified situations and only by maximum 10 days.

Subsequently, within 10 days as of its issuance and communication to the involved party, the NCSC decision can be challenged before competent Courts of Appeal and shall be solved within a maximum of 45 days.

Except for the administrative-jurisdictional procedure, any third party prejudiced by contracting authorities'/entities' decisions is entitled to a judicial procedure before a competent Tribunal. Under such circumstances, the complaints shall be solved within 45 days as of the date on which the court was notified, but in practice, this term is very often prolonged. Tribunal's decision can be also challenged before the competent Court of Appeal, in 10 days as of the date of its communication. The Court of Appeal's decision is final.

Complex public procurement contract can be defined as that contract that presents an object that has a high degree of technical complexity. Technical complexity arises when the contracting authority does not have the ability to define the means to satisfy its needs and/or to achieve its objectives, for two reasons:

- i. either the contracting authority does not have the capacity to define the technical means to be used to achieve the prescribed solution;
- ii. either the contracting authority does not have the capacity to determine which of the possible solutions would be the best to meet its needs.

In both cases, the contract in question should be considered particularly complex. Also, although the law does not define the notion of a complex contract, another hypothesis in which a procurement contract can be considered complex is the one in which the object of the contract is either the supply of products with a high degree of technology (means of transport - trains, metros, buses, medical equipment), or the design and execution of extremely complex works.

Although the grounds for settlement are the same regardless of the complexity of the contracts, the procedural rules being the same regardless of the object of the case, in exceptional situations, in which it is necessary - NCSC can order the hearing of the parties in order to clarify technical aspects, which may involve extending the duration of the resolution of the appeal before the NCSC.

Also, in the case of complex contracts, although the rule in the field of public procurement is that disputes are judged urgently, in exceptional situations, in procedures aimed at awarding complex, the courts can include the expertise as evidence, an aspect likely to extend the term for the resolution of disputes.

Consequently, the rule is that the settlement terms in the case of complex contracts are the same as in the case of other procedures, there is a possibility that the terms related to the settlement of some appeals may be extended considering the object of the procedure.

17. What rights/remedies are given to bidders that are based outside your jurisdiction? Are foreign bidders' rights/remedies the same as those afforded to bidders based within your jurisdiction? To what extent are those rights dependent on whether the host state of the bidder is a member of a particular international organisation (i.e. GPA or EU)?

Foreign bidders have the same rights and remedies as Romanian bidders.

Based on the principles of non-discrimination, equal treatment and mutual recognition, foreign bidders are not treated differently or less favourably than the national ones. In this regard, contracting authorities/entities apply identical rules, requirements and criteria for all bidders, irrespective of their nationality.

As a frequent practice, to prove its compliance with Romanian legal provisions on public procurement and contracting authorities'/entities' requirements, foreign bidders are entitled to present any relevant documents issued by the competent authorities from their country (e.g., certificates, records and any such documents).

Hence, foreign bidders can participate in national public procurement procedures and have the chance to become contractors under the same conditions as the bidders based in Romania.

18. Where an overseas-based bidder has a subsidiary in your territory, what are the applicable rules which determine whether a bid from that bidder would be given guaranteed access to bid for the contract? Would such a subsidiary be afforded the same rights and remedies as a nationally owned company bidding in your jurisdiction?

Any subsidiary established in Romania is considered a Romanian legal entity, regardless of the nationality of its parent-company.

As Romanian legal entities, and on the basis of public procurement principles, subsidiaries of foreign bidders are given the same rights and remedies as national bidders.

Law no. 98/2016 expressly defines an "economic operator" as being any natural or legal person, public or private, or group or association of such persons, including any temporary association formed between two or more of these entities, which lawfully offers the execution of works on the market, the provision of products or the provision of services, and which is/are established in:

- a. a Member State of the European Union;
- b. a Member State of the European Economic Area (EEA);
- c. third countries which have ratified the World Trade Organization (GPA) Government Procurement Agreement, in so far as the awarded public procurement contract falls

under Annexes 1, 2, 4 and 5, 6 and 7 to Union Appendix I to that agreement;

- d. third countries that are in the process of accession to the European Union;
- e. third countries which are not covered by point c) above but which are signatories to other international agreements by which the European Union is obliged to grant free market access in the field of public procurement.

19. In your jurisdiction is there a specialist court or tribunal with responsibility for dealing with public procurement issues? In what circumstances will it have jurisdiction over a public procurement claim?

As mentioned before, in Romania, public procurement issues are mainly dealt by the NSCS, an administrative-jurisdictional body. Furthermore, the NSCS decisions can be challenged before national courts of law.

In addition to the administrative-jurisdictional procedure before the NCSC, but still as a first instance court, claimants can also address a complaint directly to a court of law, more specifically, to a Tribunal. The bidder is the one choosing the body that will judge the challenge.

However, the term for resolving a complaint filed by means of an administrative-jurisdictional procedure is significantly shorter (minimally ranged between 10-20 calendar days from the date the complaint was filed) and strictly observed by the NSCS.

Competence regarding the adjudication of the challenge rests with the NCSC or the Tribunal depending on the option of the bidder.

If the bidder formulates the challenge both before the court and before the NCSC, the competence will belong to the tribunal - it is considered that at the time of submitting the challenge before the Tribunal, the bidder waived the adjudication of the challenge formulated before the NCSC.

Also, to the extent that several economic bidders contest the same decision of the contracting authority, one of them formulating the challenge before the NCSC, and the other before the Tribunal, both challenges will be judged by the Tribunal.

Against the first decision of either the NCSC or of the first instance (tribunal), the claimant can further appeal the decision in front of the Court of Appeal. The appeal should be minimally solved within 45 days as of the date

on which the court was notified of the claim, but, in practice, this term is very often prolonged to up to 2-3 months till the final decision is reached.

20. Are post-award contract amendments/variations to publically procured, regulated contracts subject to regulation in your jurisdiction? Are changes to the identity of the supplier (for example through the disposal of a business unit to a new owner or a sale of assets in an insolvency situation) permitted in your jurisdiction?

Both post-award contract amendments and changes to the identity of the supplier (contractor) are regulated under the Romanian legislation.

Pursuant to Law no. 98/2016, public procurement contracts/framework agreements may be amended without the need of a new award procedure in the following situations:

- a. where the *amendments*, regardless of their value, were acknowledged in the original procurement documents as clear, precise and unequivocal, review clauses which may include price revision clauses were included in the contract terms.
- b. for additional works, services and supplies provided by the original contractor, up to a maximum of 50% of the value of the original contract, which have become necessary and that were not included in the original award procedure and where the change of the contractor:
 - o is impossible due to economic or technical reasons, such as requirements of compatibility or interoperability with the existing equipment, services or installations procured under the original award procedure, and
 - o would cause significant increase of costs for the contracting authority.
- c. where the following conditions are met:
 - o the amendment has become necessary due to circumstances that could not have been foreseen by a contracting authority acting diligently.
 - o the amendment does not alter the general nature of the contract.
 - o the increase of the price does not

exceed 50% of the value of the original contract/framework agreement.

- d. where the original contractor is replaced by a new one, in the following situations:
 - o as a result of a review clause or an option set forth by the contracting authority under specific conditions stipulated by law.
 - o *as a result of a universal succession in the reorganization process*, including by merger, division, acquisition or insolvency, the rights and obligations of the original contractor resulting from the public procurement contract are taken over by another economic operator meeting the criteria of qualification and selection initially established, if such change does not involve other substantial amendments of the contract and is not made in order to circumvent the provision of public procurement regulation.
 - o the contracting authority undertakes the obligations of the main contractor towards its subcontractors, respectively towards the contracting authority.
- e. where the amendments, regardless of their value, are not *substantial*.
- f. where the following conditions are met:
 - o the value of the amendment is below the thresholds as set forth by European legislation.
 - o the value of the amendment is below 10% of the original contract's price - as for services and supplies public procurement contracts, and below 15% of the original contract's price - as for works public procurement contracts.
 - o the amendment does not affect the general nature of the contract or framework agreement under which the subsequent contract is awarded.

When amending a contract/framework agreement under letters b) and c) as referred above, contracting authorities must publish an announcement in this regard with OJUE.

For the situation of successive modifications of

contracts/framework agreements mentioned under letter f) above, GEO 26/2022 specified that their value will be determined on the basis of the cumulative net value of successive changes, without taking into account changes that do not lead to an increase in the contract price, and without prejudice to the general nature of the contract/framework agreement. This clarification is opportune in the context that there are changes in contracts for which implementation reservations or other legal mechanisms can be used.

Amendments of public procurement contracts/framework agreements shall be deemed *substantial* where *at least one* of the following conditions is met:

- i. the amendment introduces conditions which, if included in the original award procedure, would have allowed the selection of candidates other than those originally selected or the acceptance of a tender other than that originally accepted or would have attracted other participants in the award procedure.
- ii. the amendment changes the economic balance of the public procurement contract/framework agreement in favour of the contractor in a manner that was not foreseen in the original procurement contract/framework agreement.
- iii. the amendment considerably extends the subject-matter of the public procurement contract/framework agreement.
- iv. a new contractor replaces the original contractor, in other cases than those mentioned at the above letter d).

21. How common are direct awards for complex contracts (contract awards without any prior publication or competition)? On what grounds might a procuring entity seek to make a direct award? On what grounds might such a decision be challenged?

At a national level there have been attempts of awarding large PPPs (e.g., infrastructure, highways, hospitals) but no significant success stories, generally PPPs have been successful in local projects, of relatively low values. According to the legal provisions PPP's contracts are awarded according to the provisions of Law no. 98/2016, of Law no. 99/2016, or of Law no. 100/2016. In this case, direct awards (PPP) can be challenged before NSCS or court of law, under the same conditions as any other public procurement procedure and also by a third party who justifies any prejudice in the conclusion of the

contract.

Direct awards for complex contracts whose value is above the thresholds as set forth by European Legislation are practically non-existent, whereas, pursuant to Romanian legislation, direct awards can only be used if the estimated value of the procurement contracts is below RON 270,120 – for supply or services contracts or RON 900,400 – for works contracts. Any other direct awards will be deemed null and void.

In this case, or if the case of direct award of PPP's the decisions of the contracting authority can be challenged before the court of law, under the contentious procedure, governed by the provisions of the Law no. 554/2004.

22. Have your public procurement rules been sufficiently flexible to allow contracting authorities to respond to the ongoing COVID-19 pandemic? What measures have been most used and in what areas have any difficulties arisen? How have these evolved since 2020 and is it likely that lessons learned from procurement during this period will give rise to longer term changes?

Both Directive 2014/24/EU on public procurement and the national public procurement laws (Law no. 98/2016 on public procurement and Law no. 99/2016 on sectorial procurement), which transposed the Directive, provide specific rules and guidelines on how to purchase products, services and works in exceptional situations, as is the situation created by the Covid-19 Pandemic.

All the normative acts mentioned above permit the contracting authorities "that during exceptional situations and to the extent that it is absolutely necessary, for reasons of extreme urgency due to events beyond the control of the contracting authority, and where deadlines for open or restricted procedures or competitive negotiated procedures cannot be met the contracting authorities" to use the public procurement procedure titled "negotiation without prior publication".

Regarding the negotiation without prior publication of a notice of participation, one of the cases in which the contracting authority will have the right to apply the procedure without the prior publication of a tender notice for the award of public procurement contracts/framework agreements for works, products or services is clarified, namely as an absolute measure necessary, when, for reasons of extreme urgency,

determined by events that could not be foreseen by the contracting authority, the deadlines for the procedures of open tender, restricted tender, competitive negotiation or simplified procedure cannot be respected.

Obviously, the situations invoked to justify the extreme urgency must in no case be attributable to the contracting authority.

Previously, reference was made to a strictly necessary measure and to generally unforeseeable events, not necessarily those that could not be foreseen by the contracting authority. Considering the exceptional nature of situations of this kind, the contracting authority will not have the right to establish in the procurement documents the duration of the contract for a period longer than necessary to deal with the unforeseen situation that determined the application of the negotiation procedure without the prior publication of a tender notice, except for trans-European transport infrastructure projects, when it can be justified to establish such a longer duration.

In other words, when unforeseen events occur or when goods, services or works can be provided / performed or executed only by a certain operator, the "classic" public procurement procedures, procedures that involve both the publication in ESPP of a participation notice and various deadlines for elaboration of documentation, response, etc. are not applicable.

In this case, regardless of the value of the procurement to be made, the contracting authority / contracting entity has the following obligations:

- i. Preparation of an explanatory note regarding the procurement;
- ii. Inclusion of the procurement in the Annual Public Procurement Program;
- iii. Sending invitations to participate in negotiations, accompanied by the award documentation, to one or, whenever possible, to several economic operators.
- iv. Submission of an award notice within 30 days of signing the public procurement contract;
- v. This award procedure can be challenged, in accordance with the provisions of Law no. 101/2016 on remedies and remedies for the award of public procurement contracts.

Each contracting authority has the right to choose both the method of transmission of the procurement documentation (email, publication on its website, by mail, telephone), as well as the economic operator(s) it invites to the public procurement procedure.

As a note, the contracting authority must comply with

the legal provisions on avoiding conflicts of interest (according to art. 59 and art. 60 of Law no. 98/2016 and art. 72 and art. 73 of Law no. 99/2016) and the reasons for exclusion (art. 164, art. 165 and Article 167 of Law no. 98/2016 and Article 177, Article 178 and Article 80 of Law no. 99/2016).

However, by Decree no. 195 of March 16, 2020 ("Decree no. 195/2020") on the establishment of the *state of emergency in the territory of Romania* issued by the President of Romania, *clarifications* were introduced regarding the public procurements that can take place during the state of emergency established in the territory of the country.

In short, Decree no. 195/2020 provided that certain contracting authorities, such as: the central public authorities, entities where the state is the majority shareholder, health units, public health directorates, ministries with their own health system) *may directly purchase materials and equipment necessary to combat the pandemic*.

As a first remark, not all contracting authorities/entities could apply the direct purchase procedure referred to in Decree no. 195/2020.

Another observation is related to the applicable threshold used for the direct purchase of products (and whether they can exceed the value of RON 135,060). In accordance with art. 7 paragraph (5) of Law no. 98/2016 and art. 12 paragraph (12) of Law no. 99/2016, products and services worth no more than RON 135,060 can be awarded directly, as well as works worth RON 450,200. Decree 195/2020 does not mention any value threshold for direct acquisition. *NOTE* - the above threshold values were applicable for direct purchase procedures as of the COVID crisis timeframe.

Therefore, some contracting authorities have arguably considered that under the provisions of Decree no. 195/2020, as long as it is not explicitly mentioned that the direct procurement depicted under Decree no. 195/2020 may not exceed the threshold of RON 135,060, they can therefore award contracts that far exceed the normal legislative thresholds of RON 135,060 or RON 450,200, value thresholds applicable at that time.

The most common measures that have been most used by the contracting authorities recently have been to use the public procurement procedure titled "negotiation without prior publication" given its rapid terms and deadlines and somewhat straightforward approach in order to reduce the waiting times or uncertainties that usually arise under the more transparent public procurement procedures.

The main difficulties arisen from this approach, which is now commonly used between the contracting authorities, is the fact that the transparency of public procurement procedures has substantially decreased, mainly because as of the start of the pandemic, the main issue with the public procurement consisted in its speedy timeframes, more specifically, reducing the timeframes needed for successfully awarding the contract and reaching the envisioned result of the procedure.

Several subsequent difficulties arise from this on-going demand for swiftness, mainly proven through the ever-so increased number of challenges forwarded by bidders in regards with various reasons for which procurement

procedures can be deemed void or unlawful in this paradigm shift, and also the increased number of procurement procedures which are annulled by the contracting authorities after establishing that certain parts of the documentation are not able to lawfully achieve their goal of awarding the contract.

23. Have your public procurement rules been sufficiently flexible and/or been adapted to respond to other events impacting the global supply chain (e.g. the war in the Ukraine)?

N/A

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