

EMERGENCY ORDINANCE No 19 of 7 March 2009

on certain measures in the field of the legislation regarding public procurement

ISSUER: THE GOVERNMENT

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Considering the need of adopting certain emergency measures in order to improve and ensure the flexibility of the public procurement system and considering the fact that the failure to adopt such measures would lead to a decrease of the spending degree of the assigned public funds, including the Community funds, the worst consequence in this case being the postponement/delay of the implementation of major investment projects with a social and economic impact, at national or local level, the most affected being the projects included in the Regional Operational Programme, SOP Transport and SOP Environment, Under Article 115 (4) of the Constitution, republished,

The Government of Romania hereby adopts this emergency ordinance.

ARTICLE I

In article 3 from the Emergency Government Ordinance no 74/2005 regarding the setting-up of the National Authority for Regulating and Monitoring Public Procurement, published in the Official Gazette of Romania, Part I, No 572 of 4 July 2005, as approved with amendments by Law No 111/2006, point (f) shall be amended as follows:

“(f) initiate, organize and teach, by means of its own personnel, perfecting and training courses for the personnel of the public authorities and institutions which apply public procurement legal provisions.”

ARTICLE II

The Government Emergency Ordinance No 34/2006 regarding the award of the public procurement contracts, public works concession contracts and services concession contracts, published in the Official Gazette of Romania, Part I, No 418 of 15 May 2006, as approved with the subsequent amendments and completions by Law No 337/2006, with the subsequent amendments and completions, shall be amended and completed as follows:

1. In Article 8, the introductory part of point (b) shall be amended as follows:

“(b) any body, other than those referred to in point (a), having legal personality, which has been established for the specific purpose of meeting needs of general interest, not having an industrial or commercial character and which is found in at least one of the following situations:”

2. The following Article 12¹ shall be inserted after Article 12:

“Article 12¹ – (1) This emergency ordinance does not apply for the award of the public procurement contract by structures of the contracting authorities which are active on the territory of other states, when the value of the contract, estimated according to the provisions of the 2nd section of Chapter II, is equal to or smaller than the thresholds provided for in article 124.

(2) For the award of the public procurement contracts subject to the provisions of paragraph 1 and whose estimated value is larger than the one provided for in article 19, the application of the general principles provided for in article 2 (2) must be ensured, the local advertisement and the compliance with the provisions of Article 35–38 represent minimum requirements.”

3. In Article 14 (1), the following point (d) shall be inserted after point (c):

“(d) the implementation of a specific procedure provided for in the community law, within the context of territorial cooperation programmes and projects”

4. Article 19 shall be amended as follows:

“Article 19. – The contracting authority has the right to directly purchase products, services or works, if the procurement value, estimated according to the provisions of Section 2 from

the present Chapter, does not exceed the equivalent of 15 000 Euro, for each public procurement of products, works or services. The procurement is carried out on the bases of a supporting document which, in this case, is considered to be a public procurement contract, and the obligation of compliance with the provisions of this Emergency Ordinance is limited only to the provisions of Article 204 (2).”

5. Article 40 shall be amended as follows:

“Article 40. – (1) The contracting authority has the obligation to provide the award documentation for any economic operator, ensuring, by electronic means, the direct, non-restricted and complete access to the award documentation.

(2) Notwithstanding the provisions of paragraph 1 if it is not possible to attach the award documentation within the ESPP due to technical reasons, the contracting authority has the obligation to provide for any economic operator who has requested it or, where applicable, who has been sent an invitation to tender, a copy of the award documents in printed or magnetic support.

(3) In the case provided for in paragraph 2, the contracting authority has the obligation to ensure the free acquirement of the award documentation for any economic operator, who collects it directly from the headquarters of the contracting authority or from another address indicated by it. In case the documentation is sent by mail, the contracting authority has the right to request from the economic operators who wish to benefit from this facility a payment which must not exceed the costs incurred for sending the respective documentation.”

6. Article 58 (1) shall be amended as follows:

“Article 58. – (1) In case of awarding media publicity contracts, with a cumulated annual value, without VAT which is estimated to be higher than the RON equivalency of 20 000 EUR, the contracting authority has the obligation to publish a participation notice and an award notice in the public information system available on the internet at a dedicated address, as well as on its own web page.”

7. Article 76 (1) shall be amended as follows:

“Article 76. – (1) Without prejudice to the provisions of Article 71, if the estimated value of the public procurement contract is equal to or smaller than the value provided for in Article 55 (2), the contracting authority has the obligation to transmit the participation notice for publication in ESPP at least 20 days before the closing date for the submission of tenders.”

8. Article 84 shall be amended as follows:

“Article 84. – Without prejudice to the provisions of Article 71, if the estimated value of the public procurement contract is equal to or smaller than the value provided for in Article 55 (2), the contracting authority has the obligation to transmit the participation notice for publication in the ESPP at least 10 days before the closing date for the submission of applications.”

9. Article 85 (4) shall be amended as follows:

“(4) The minimum number of candidates, indicated in the participation notice provided for in paragraph 3, must be sufficient to ensure a genuine competition and, in any case, it cannot be lower than 5.”

10. Article 86 (2) (b) shall be amended as follows:

“(b) or to continue the restricted procedure only with the candidate(s) meeting the required criteria.”

11. Article 89 (6) shall be amended as follows:

“(6) If, on grounds of urgency, the number of days provided for in paragraphs 1 and 2, as well as the one which results following the application of the provisions of paragraph 4 can not be observed, the contracting authority has the right to accelerate the application of the procedure by reducing the respective period, but not to less than 10 days.”

12. Article 90 (1) shall be amended as follows:

“Article 90. – (1) Without prejudice to the provisions of Article 71, if the estimated value of the public procurement contract is equal to or smaller than the value provided for in Article 55 (2), the contracting authority has the obligation to transmit the invitation to tender at least 15 days before the closing date for the submission of tenders.”

13. In Article 90, paragraph 4 shall be repealed.

14. Article 99 shall be amended as follows:

“Article 99. – Without prejudice to the provisions of Article 71, if the estimated value of the public procurement contract is equal to or smaller than the value provided for in Article 55 (2), the contracting authority has the obligation to transmit the participation notice for publication in ESPP at least 20 days before the closing date for the submission of applications.”

15. Article 101 (3) shall be amended as follows:

“(3) The minimum number of candidates indicated in the participation notice, provided for in paragraph 2, must be sufficient to ensure a genuine competition and, in any case, it cannot be lower than 3.”

16. Article 102 (2) (b) shall be amended as follows:

“(b) or to continue the competitive dialogue procedure only with the candidate(s) meeting the required criteria.”

17. Article 114 shall be amended as follows:

“Article 114. – Without prejudice to the provisions of Article 71, if the estimated value of the public procurement contract is equal to or smaller than the value provided for in Article 55 (2), the contracting authority has the obligation to transmit the participation notice for publication in the ESPP at least 10 days before the closing date for the submission of applications.”

18. Article 116 (4) shall be amended as follows:

“(4) The minimum number of candidates indicated in the participation notice, provided for in paragraph 3, must be sufficient to ensure a genuine competition and, in any case, it cannot be lower than 3.”

19. Article 117 (2) (b) shall be amended as follows:

“(b) or to continue the negotiation procedure with the prior publication of a participation notice only with the candidate(s) meeting the required criteria.”

20. Article 121 (2) shall be amended as follows:

“(2) The contracting authority shall carry out negotiations until the winning tender will be identified and established, taking into account the provisions of Article 200.”

21. In Article 121, paragraphs (2) and (3) shall be repealed.

22. Article 124 shall be amended as follows:

“Article 124. – The contracting authority has the right to apply the request for tenders procedure only in case the estimated value, without VAT, of the public procurement contract is equal to or smaller than the equivalent in RON of the following thresholds:

(a) for the supply contract: EUR 100 000;

(b) for the service contract: EUR 100 000;

(c) for the works contract: EUR 750 000.”

23. Article 178 (1) shall be amended as follows:

“Article 178. – (1) If, for the criteria of the nature of those provided for in Article 176 points (c) and (d), the contracting authority considers that it is justified to impose certain minimum requirements that the tenderers/candidates must meet in order to be considered qualified, then these requirements must be specified, according to the transparency principle, within the participation notice.”

24. Article 179 shall be amended as follows:

“Article 179. – The contracting authority has the obligation to comply with the proportionality principle when it sets the qualification and selection criteria, and these criteria must have a concrete connection with the object of the contract which is to be awarded. To

this purpose, the level of minimum requirements from the award documentation, as well as the documents that prove the fulfilment of such requirements must be limited only to those strictly necessary to ensure the fulfilling of the respective contract in optimal conditions, taking into consideration the specific demands imposed by its value, nature and complexity.”

25. Article 186 (2) shall be amended as follows:

“(2) If the tenderer/candidate proves his economic and financial situation, also invoking the support granted by another person, according to the provisions of the Paragraph 1, then he has the obligation to prove the support he benefits from, as a rule, by presenting a firm commitment of this person, concluded in an authentic form by which the respective person confirms the fact that they will make the invoked financial resources available for the tenderer/candidate. The person who ensures the financial sustainability must not find itself in the situation that determines the exclusion from the awarding procedure according to the provisions of Article 180.”

26. Article 200 shall be amended as follows:

“Article 200. – (1) Within 20 days from the opening of the tenders, the contracting authority has the obligation to establish the winning tender, based on the award criterion set in the participation notice and in the award documentation, provided that the respective tenderer meets the imposed selection and qualification criteria.

(2) In properly motivated cases, the contracting authority can extend the evaluation period with maximum 20 days.

(3) The proper reasons are presented in an explanatory note, approved by the authorising officer of the contracting authority, and it is part of the public procurement file.”

27. Article 205 shall be amended as follows:

“Article 205. – (1) The contracting authority has the right to conclude the public procurement contract/framework agreement only after the expiry of the time limits of:

(a) 11 days from the transmission date of the communication regarding the result of the implementation of the procedure, if the estimated value, according to the provisions of Chapter II section 2 of the public procurement contract/framework agreement is larger than the thresholds provided for in Article 55 (2);

(b) 6 days from the transmission date of the communication regarding the result of the implementation of the procedure, in the case when the estimated value, according to the provisions of Chapter II section 2 of the public procurement contract/framework agreement is equal to or smaller than the thresholds provided for in Article 55 (2).

(2) The public procurement contract/framework agreement concluded before the conclusion of the time limits provided for in paragraph 1 is null and void.

(3) The contracting authority does not have the obligation to comply with the time limits provided for in paragraph 1 in the following cases:

(a) when this emergency ordinance does not stipulate the obligation of publishing a notice or an invitation to tender;

(b) when the public procurement contract/framework agreement is to be concluded with an economic operator which has been the single tenderer to the respective award procedure and there are no other economic operators involved in the award procedure;

(c) when a contract subsequent to a framework agreement is awarded or when it is awarded following the use of a dynamic procurement system;

(4) The provisions of the present article shall be applied accordingly also when organizing a solution competition, as well as when awarding the contracts provided for in Chapter VII.”

28. Article 206 (1) shall be amended as follows:

“Article 206 – (1) The contracting authority has the obligation to inform the economic operators involved in the award procedure about the decisions regarding the result of the selection, the result of the award procedure of the public procurement contract or the conclusion of a framework agreement, the admission in a dynamic procurement system, the result of the solution competition or, where appropriate, the annulment of the award

procedure and the possible eventual initiation of a new procedure, in written form and as soon as possible, but no later than 3 working days as from the date they were issued, within the time limit provided for in Article 200.”

29. In Article 206, after paragraph 1, a new paragraph 1¹ shall be inserted as follows:

“1¹ Within the meaning of the provisions of paragraph 1, any candidate/tenderer that the contracting authority has not yet informed on decisions that directly regard its own candidature/tender or any candidate/tenderer whose candidature/tender has not yet been permanently rejected by the contracting authority is considered an economic operator involved in the award procedure. A rejection is considered permanent if it has been communicated to the economic operator concerned and either it has been considered legal by the National Council for the Resolution of Contestations, or by the Court which was notified on this matter, or it has not been or it can not be the subject of an appeal.”

30. Article 207 (2) (d) shall be amended as follows:

“(d) any economic operator provided for in points (a)–(c), the time limit until which they can submit a contestation, keeping in view the provisions of Article 256² (1).”

31. Article 209 (1) (a) shall be amended as follows:

“(a) the contracting authority is in one of the situations referred to in Article 86 (2) (a), Article 102 (2) (a) or Article 117 (2) (a);”

32. Article 210 shall be amended as follows:

“Article 210. – The contracting authority has the obligation to inform in writing all the participants to the award procedure, within maximum 3 working days from the date of annulment, both the ceasing of the obligations that they created for themselves by submitting tenders, as well as the concrete reason of the annulment, within the time limit provided for in Article 200.”

33. Article 210¹ shall be amended as follows:

“Article 210 (1) - Except for the negotiation without prior publication of a tender notice, within maximum 48 days from the annulment of the award procedure, the contracting authority has the obligation to send information regarding the reasons for annulment to the ESPP.”

34. Article 255 shall be amended as follows:

“Article 255. - (1) All persons who consider themselves aggrieved in their right or legitimate interest, by an act of the contracting authority, through the infringement of the legal provisions on public procurement, are entitled to request the annulment of the act, the obligation for the contracting authority to issue an act, the recognition of the alleged right or legitimate interest by administratively-jurisdictionally means, or in Court, under this emergency ordinance.

(2) Within the meaning of the provisions of paragraph 1, aggrieved person means any economic operator who is involved in the award procedure, who:

(a) has a legitimate interest regarding the award procedure; and

(b) has suffered, suffers or may suffer a prejudice, as a consequence of an act of the contracting authority, capable of producing legal effects, or as a consequence of the non-solving of a request regarding the award procedure within the legal time limit.

(3) Within the meaning of the provisions of paragraph 1, act of the contracting authority means any administrative act, any other administrative operation which produces or may produce legal effects, the non-solving within the legal time limit of an obligation provided for in the present emergency ordinance, the omission or refusal to issue an act or to conduct a certain operation, related to or within the award procedure.”

35. In Article 256, the paragraphs 1 and 1¹ shall be amended as follows:

“Article 256. – (1) For the purpose of solving the contestations by administrative-jurisdictional means, the party who considers himself/herself aggrieved has the right to address The National Council for the Resolution of Contestations, in compliance with the provisions of Article 256² and 270 – 271.

(1¹) Notwithstanding the provisions of paragraph 1, the contestations regarding the award procedures for services and/or works related to transport infrastructure of national interest are drawn up and judged under the provisions of Law no 554/2004 on administrative litigation, with the subsequent amendments and completions, the time limits provided for in paragraphs (1²)–(1⁴). By derogation from the provisions of the Law no 554/2004, with the subsequent amendments and completions, the time limits provided for in Article 2 (1) (h), Article 7 (1) and Article 11 (1) are reduced to 5 days. The provisions of Article 287⁸ (1) are applicable.”

36. Article 256¹ shall be amended as follows:

“Article 256¹. – (1) Before applying to the competent Court, the aggrieved party notifies the contracting authority on the alleged violation of the legal provisions on public procurement and the intention to bring the matter before the competent Court. The provisions of Article 205 and 256² shall remain applicable.

(2) The notification provided for in paragraph 1 does not have as an effect the suspension de jure of the award procedure. After receiving the notification, the contracting authority can adopt any measures it considers necessary to remedy the alleged violation, including the suspension of the award procedure or the revocation of an act issued within this procedure.

(3) The measures adopted under paragraph 2 shall be communicated within one working day both to the person who notified the contracting authority and to the other economic operators involved in the award procedure.

(4) The aggrieved party who, being notified according to the provisions of paragraph 2, considers that the measures taken are sufficient to remedy the alleged violation, shall send to the contracting authority a notice of waiver of the right to introduce legal proceedings or, where appropriate, waiver to the judgement of the action.

(5) The lack of notification provided for in paragraph 1 does not impede the presentation of the request before the competent Court.

(6) The provisions of paragraphs 1 – 5 shall apply accordingly, in the case provided for in Article 256 (1).”

37. After Article 256¹, a new Article 256² shall be inserted as follows:

“Article 256². – (1) The aggrieved party can bring the matter before the National Council for the Resolution of Contestations or, where appropriate, the competent Court with a view to the annulment of the document and/or the acknowledgment of the alleged right or of the rightful interest, within:

(a) 10 days from the date of acknowledgment, in the terms of this emergency ordinance, of an act of the contracting authority considered unlawful, if the value of the contract to be awarded, estimated in accordance with the provisions of Chapter II Section 2 is bigger than the value thresholds provided for in Article 55 (2);

(b) 5 days from the date of the acknowledgment, in the terms of this emergency ordinance, of an act of the contracting authority considered unlawful, if the value of the contract to be awarded, estimated in accordance with the provisions of Chapter II Section 2 is equal or smaller than the value thresholds provided for in Article 55 (2).

(2) If the request provided for in paragraph (1) regards the content of the award documentation, published in ESPP, under Article 75 (5), Article 89 (4) and Article 127 (2), the date of acknowledgement is the date of publication of the award documentation.

(3) The party cannot ask for the resolution of the same request simultaneously to the National Council for the Resolution of Contestations and to the competent Court. Otherwise, the administrative-jurisdictional is presumed to be relinquished, the party having the obligation to notify to the Council the presentation of the request to the competent Court.”

38. Article 257 (1) shall be amended as follows:

“Article 257. – (1) The National Council for the Resolution of Contestations, hereinafter referred to as the Council, independent body with administrative-jurisdictional activity, which is active by the General Secretariat of the Government.”

39. Article 261 (2) shall be amended as follows:

“(2) The members of the Council shall be selected according to their professional skills and good reputation. The candidates shall have long term University studies, 9 years of experience in the legal, economic or technical field, as well as an experience of at least 2 years in the field of public procurement.”

40. Article 262 (3) shall be amended as follows:

(3) The auxiliary staff has the statute of contractual staff and, as regards the salary, it is assimilated to the contractual staff of the National Authority for Regulating and Monitoring Public Procurement.”

41. Article 263 (2) – (6) shall be amended as follows:

“(2) The activity of the Council shall be evaluated twice a month by a commission.

(3) The commission provided for in paragraph 2 is made up of 5 members, as follows:

(a) a representative of the Government, who also has the function of President of the commission;

(b) a representative of the Ministry of Public Finance;

(c) a representative of the National Agency of Civil Servants;

(d) a representative of the National Authority for Regulating and Monitoring Public Procurement;

(e) a representative of the Competition Council.

(4) Within the meaning of paragraph 2 the commission draws up an evaluation report which is forwarded to the Prime Minister through the General Secretariat of the Government. Based on the proposals from the evaluation report, the Prime Minister can order, by decision, the dismissal from function of those counsellors for the resolutions of contestations who obtained an unsatisfactory evaluation.

(5) The evaluation procedure of the Council’s activity and of its President is established by order of the Secretary General of the Government and it is published in the Official Gazette of Romania, Part I.

(6) Notwithstanding the provisions of paragraph 2 in case of special circumstances, the evaluation procedure can be performed as many times as necessary, also before that time limit.”

42. In article 270 (1), points (c¹) and (c²) shall be repealed.

43. Article 270 (1) (d) shall be amended as follows:

“(d) the object of the contestation;”.

44. Article 271 (1) and (4) shall be amended as follows:

“Article 271. – (1) Under the penalty of rejecting the challenge as being late, it shall be submitted both to the Council and to the contracting authority, no later than the expiry of the time limits provided for in Article 256². The party submitting the contestation shall also attach a copy of the contested document, if it has already been issued, as well as copies of the documents provided for in Article 270 (1), if available.

.....
(4) In case of failure to fulfil the obligation provided for in paragraph 1, the provisions of Article 274 and those of Article 277 (3), shall not apply.”

45. Article 272 shall be repealed.

46. Article 274 (1) shall be amended as follows:

“Article 274. – (1) In order to solve the contestation/contestations, the contracting authority has the obligation to transmit to the Council, within maximum 3 working days from the date of the expiry of the time limit provided for in Article 205 (1), its point of view on it/them, together with any other documents considered probatory, as well as, under the penalty of paying the fine provided for in Article 275 (3), a copy of the public procurement file. The absence of the contracting authority’s point of view shall not impede the solving of the contestation(s), provided that its/their notification has been proven.”

47. Article 274 (3) shall be repealed.

48. Article 276¹ shall be repealed.

49. The title of Section 5 shall be amended as follows:

“SECTION 5

Remedy measures“

50. Article 277 shall be amended as follows:

“Article 277. – (1) After receiving a challenge, the contracting authority shall be entitled to adopt the remedy measures that it shall consider to be necessary following that challenge. Any such measures shall be communicated to the party who submitted the contestation, to the other economic operators involved in the award procedure, as well as to the Council, no later than 1 working day from the date they were adopted.

(2) If the party who submitted the contestation considers that the measures adopted are sufficient to remedy the acts invoked as illegal, it will submit to the Council and to the contracting authority a notification of waiving the contestation. In this case, the contracting authority no longer has the obligation to communicate its point of view according to the provisions of Article 274.

(3) Receiving a contestation by the contracting authority, for which it has not been taken waiver according to the provisions of paragraph (2) suspends de jure the award procedure starting with the expiry date of the time limit provided for in Article 205 (1) until the expiry date of the time limit provided for in Article 281 (1), if the interested party did not lodge a complaint before the competent Court. If the Council's decision has been contested with a complaint, the provisions of Article 287⁷ and 287⁸ shall remain applicable.

(4) The contract concluded during the suspension period is null and void.

(5) If within the same award procedure, the contracting authority acquires products, services or works split in batches, the provisions of paragraph (3) are applicable only to the batches for which a contestation has been lodged.”

51. Article 278 (4) shall be amended as follows:

“(4) If the Council allows the challenge and decides on the adoption of a remedy measure regarding the contested document, it shall also mention the time limit during which it must be accomplished, which cannot be shorter than the time limit to exercise the means of appeal against the decision of the Council, as provided for in Article 281 (1).”

52. Article 279 (5) shall be amended as follows:

“(5) The decision by which the Council ordered the adoption of remedy measures will be presented in copy, within the same time limit provided for in paragraph 3, to the National Authority for Regulating and Monitoring Public Procurement, who has the obligation to monitor the fulfilment of the remedy measures.”

53. Article 280 (5) shall be repealed.

54. Article 281 (1) and (3) shall be amended as follows:

“Article 281. – (1) The Council’s decisions regarding the resolution of the contestation and the obligation to pay the fine can be contested by a complaint to the Court provided for in Article 283 (1) within 10 days from the communication, both for reasons of lack of lawfulness and lack of substance.

.....
(3) The party who lodges the complaint has the obligation to communicate within the time limit provided for in paragraph 1 a copy of it, as well as of the proving documents to the adverse party, presenting the proof of the communication before the Court until the first term of judgment”

55. Article 283 shall be amended as follows:

“Article 283. – (1) The court which is competent to solve the complaint against the decision adopted by the Council is the Court of Appeal, the Legal Administrative and Fiscal Department in the jurisdiction of which the headquarters of the contracting authority is located. With the exception of the cases where the object of the complaint is the contestation of the fine, The National Council for the Resolution of Contestations does not have the capacity of party in the proceedings.

(2) The complaint shall be solved by a panel of 3 judges.

(3) The complaint shall be solved according to the provisions of Article 304¹ of the Code of Civil Procedure. The provisions of Section 9 shall apply accordingly.”

56. Article 284 shall be repealed.

57. Article 285 (1) – (3) shall be amended as follows:

“Article 285. – (1) The Court, allowing the complaint, amends the decision of the Council, ordering, as appropriate:

(a) the total or partial annulment of the document from the contracting authority;

(b) the obligation for the contracting authority to issue the document;

(c) the fulfilment of an obligation by the contracting authority, including the elimination of any discriminatory technical, economic or financial specifications, from the announcement/invitation to tender, from the award documentation or from other documents issued in relation to the award procedure;

(d) any other measures necessary to remedy the violation of the legal provisions on public procurement.

(2) The Court, notified with a complaint against a decision of the National Council for the Resolution of Contestations, by which it solved the contestation on exception, allowing the complaint, shall cancel the decision and shall keep the cause in order to judge it in substance taking into consideration the reasons which determined the cancellation of the decision.

(3) If the Court admits the complaint, modifies the decision of the Council and finds out that the act of the contracting authority has infringed the provisions of the public procurement legislation and the contract has been concluded before ruling, the provisions of Article 287¹⁰ (b) shall apply accordingly.”

58. Article 286 shall be amended as follows:

“Article 286. – (1) Processes and requests regarding documents of the contracting authorities, granting compensations for damages caused in the award procedure, as well as those on the accomplishment, nullity, annulment, resolution, cancellation or unilateral withdrawal of public procurement contracts are solved in the first instance by the Legal administrative and fiscal department of the Court in the jurisdiction of which the contracting authority’s headquarters are located.

(2) Litigations regarding the conduct of award procedures of the public procurement contracts, of the public works concession contracts and services concession contracts, as well as those regarding the rights and obligations under these procedures are settled urgently and with priority, according to the provisions of Articles 720² – 720⁷ and Article 720⁹ of the Code of Civil Procedure, that apply accordingly.”

59. Article 287 shall be amended as follows:

“Article 287. – (1) The compensation for the reparation of the prejudice caused in the award procedure shall be requested only in Court, under the provisions of Article 256² (1) or by separate action.

(2) The compensation for the prejudice caused by an act of the contracting authority or as a result of the failure to solve within the legal time limit a request regarding the award procedure, by infringement of the legal provisions on public procurement, can be granted only after the annulment, according to the law, of that act, or, as the case may be, after the revocation of the act or the adoption of any other measures of remedy by the contracting authority.

(3) If payment of compensation is requested for the reparation of the prejudice representing expenditure for the drawing-up of the offer or for the participation to the award procedure, the aggrieved party has only to produce evidence of the infringement of the provisions of this Emergency Ordinance, as well as of the fact that they would have had a real chance to win the contract, and it was compromised as a result of the said infringement.”

60. After Article 287, 18 new Articles, 287¹ – 287¹⁸, shall be inserted as follows:

“Article 287¹. – (1) The judge, as soon as they find out that the conditions provided for in the law for the request for summoning to Court, shall order by resolution its communication, as well as the communication of the documents to the defendant.

(2) The defendant has the obligation to lodge a defence within 3 days from the communication of the request for summoning to Court.

(3) The defence shall be immediately communicated to the plaintiff, who has the obligation to lodge a response to the defence within 3 days from the communication. The defendant will acknowledge the response to the defence from the file of the case.

(4) The counterclaim shall be submitted within the time limit provided for in paragraph (2).

Article 287². – (1) The communication of summons and of other procedural documents can be undertaken by the Court registry, by telefax, electronic mail or by other means which ensure the transmission of the text of the document and the acknowledgement of its reception. The parties, if they have such means of communication, have the obligation to indicate the corresponding data in the request for summoning in Court, respectively in the defence.

(2) The party who received the summons for a hearing personally, by a representative or by the clerk or the person in charge of receiving the correspondence, shall not be summoned during the entire proceedings to that Court, the party being presumed to know the hearings subsequent to the hearing for which they received the summons.

Article 287³. – Within 1 working day from receiving the summons, the contracting authority must notify the other applicants involved in the award procedure on the existence of a litigation regarding the award procedure.

Article 287⁴. – (1) On the date of submitting the response to the defence, the judge establishes by resolution the first hearing, which will be of maximum 20 days from the date of the registration of the request for summons, ordering the summoning of the parties.

(2) The subsequent hearings cannot be longer than 10 days.

Article 287⁵. – (1) The lack of the party legally summoned cannot impede the judgement of the cause, unless otherwise stipulated in the law.

(2) If at any hearing only one of the parties is present, the Court, after examining all the items in the file and hearing the arguments of the present party, shall rule on the basis of the administered evidence, also examining the exceptions and defences of the absent party.

(3) The provisions of paragraphs (1) and (2) shall apply accordingly also in the case where the two parties are absent, although they have been legally summoned, if at least one of them requested in written for the cause to be judged by default.

Article 287⁶. – The Court shall order only once and exceptionally the postponement of the judgement of the cause, for well-founded reasons which are not attributed to the party or to the party’s representative.

Article 287⁷. – (1) In well-grounded cases and in order to prevent an imminent damage, the Court, until the settlement of the substance of the cause, can order, at the request of the interested party, by motivated conclusion with the citing of the parties, provisional measures such as:

(a) suspension measures or measures ensuring the suspension of the award procedure in that stage;

(b) other measures intended to stop the implementation of certain decisions of the contracting authority.

(2) The Court settles the suspension request or the request regarding another provisional measure, taking into consideration the probable consequences of this measure on all the categories of interests which could be affected, including on the public interest. The Court shall be able to refrain from ordering the measures provided for in paragraph 1, if their negative consequences would be greater than their benefits. The decision not to order provisional measures must not bring any prejudice to any other right of the person who submitted the request provided for in paragraph (1).

(3) The conclusion provided for in paragraph 1 can be contested by an appeal, separately, within 5 days from the communication.

Article 287⁸. – (1) Regardless of the Court's decision on the suspension of the award procedure, the contracting authority does not have, in any situation, the right to conclude the contract before the settlement of the cause by the Court.

(2) If the decision by which the Court settled the cause is communicated before the expiry of the time limits provided for in Article 205 from this Emergency Ordinance, the contracting authority has the right to conclude the contract only after the expiry of the time limits.

(3) If within the same award procedure, the contracting authority acquires products, services, or works split in batches, the provisions of paragraph 1 are applicable only to the batches for which a challenge has been lodged.

Article 287⁹. – The Court, by allowing the request, can order the total or partial annulment of the contracting authority's document, the obligation for the contracting authority to issue the document, the fulfilment of an obligation by the contracting authority, including the elimination of any discriminatory technical, economic or financial specifications from the announcement/invitation to tender, from the award documentation or from other documents issued in relation with the award procedure, as well as any other measures necessary for the remedy of the infringement of the legal provisions on public procurement.

Article 287¹⁰. – The Court can ascertain the nullity of the contract in the following cases:

(a) the contracting authority awarded the contract without observing the obligations relating to the publishing of an announcement/invitation to tender according to the provisions of this emergency ordinance;

(b) the contracting authority did not observe the provisions of Article 205 (1) or those of Article 287⁸ (1) and (2), preventing, thus, an economic operator concerned to address the Court before the conclusion of the contract, the said economic operator having real chances to obtain the contract and these chances were compromised as a result of an infringement of the provisions on public procurement;

(c) the contracting authority did not observe the provisions of Article 150 or those of Articles 158–160.

Article 287¹¹. – (1) If the public procurement contract has produced legal effects or if the measure provided for in Article 287¹⁰ had negative effects bigger than the positive ones and only if there are imperative reasons of general interest, the Court can order:

(a) the limitation of the contract effects by reducing its period of execution; and/or

(b) the application of a fine for the contracting authority of up to 2% of the value of the contract object, its amount being in inverse ratio with the possibility of limiting the effects of the contract according to the provisions of point (a).

(2) The economic interests in direct connection with the contract, such as costs arising from delays in the execution of the contract, costs resulting from the launch of a new award procedure, costs related to the legal obligations generated by the absence of the contract effects do not constitute imperative reasons of general interest.

Article 287¹². – (1) The provisions of Article 287¹⁰ (a) do not apply when the contracting authority, considering that it falls within one of the situations provided for in this emergency ordinance in which it has the right not to submit for publication a notice/invitation to tender, proceeded as follows:

(a) voluntarily published in ESPP and in the Official Journal of the European Union a notice for transparency, expressing its intention to terminate the contract; and

(b) concluded the contract observing, by its own initiative, the provisions of Article 205 (1) and those of Article 206 (3).

(2) Within the meaning of paragraph 1 point (a), the publication of the tender notice in the Official Journal of the European Union is not necessary in the following situations:

(b) The contracting authority falls under one of the categories provided for in Article 8 points (a) – (c) and the estimated value of the supply contract or of the services contract to be awarded is equal to or smaller than the equivalent in RON of 125 000 EUR;

(b) The contracting authority falls under one of the categories provided for in Article 8 points (d) or (e) and the estimated value of the supply contract or of the services contract to be awarded is equal to or smaller than the equivalent in RON of 400.000 EUR;

(c) the estimated value of the works contract to be awarded is equal to or smaller than the equivalent in RON of 5 000 000 EUR.

Article 287¹³. – The provisions of Article 287¹⁰ point (c) do not apply when the contracting authority, considering that it observed the provisions of Article 150 or, as the case may be, of Articles 158 – 160, proceeded as follows:

(a) communicated to the involved tenderers the decision to award the contract, subject to the provisions of Article 206 (1)–(2) and those of Article 207; and

(b) concluded the contract observing, by its own initiative, the provisions of Article 205 (1) and those of Article 206 (3).

Article 287¹⁴. – (1) Ascertaining the nullity of the contract, in the conditions provided for in Article 287¹⁰ can also be requested by separate action within maximum 30 days from the date of the publication of the award notice provided for in Article 56 or, as the case may be, from the date on which the provisions of Article 287¹³ point (a) were fulfilled. If an award notice was not published or the publication of the award notice was not conducted under the conditions provided for in Articles 47–48 and in Article 56, the request for acknowledging the nullity of the contract can be submitted within maximum 6 months from the date of its conclusion.

(2) The request submitted after the expiry of the time limits provided for in paragraph (1) is solved according to the provisions of Article 287¹¹.

Article 287¹⁵. – The judgment shall be pronounced within 3 days from the closure of debates and it shall be communicated to the parties within maximum 5 days from the ruling.

Article 287¹⁶. – (1) The judgment ruled in the first instance can be contested by appeal within a period of 5 days from its communication. The appeal shall be judged by the fiscal and administrative litigation department of the Court of Appeal.

(2) The appeal suspends the execution and it is judged in emergency procedure and with priority.

(3) If the appeal is allowed, the Court of appeal, by amending or annulling the judgment, shall re-judge in all the cases the litigation in substance.

Article 287¹⁷. – (1) The requests submitted, according to the provisions of this Emergency Ordinance, to the Courts, having as object the public procurement contracts, the public works concession contracts and the services concession contracts shall be charged with 2% of the contract value.

(2) The requests for the compensation of the prejudice caused during the award procedure shall be charged with 2% of its value.

(3) Requests for the cancellation of the non-patrimonial legal act, compelling the authority to issue a non-patrimonial legal act, recognizing the claimed right and other applications unrated in money are also charged with 2 000 RON. If by these requests the reparation of the prejudice caused in the award procedure is also requested, it is charged by value, according to the provisions of paragraph (2).

Article 287¹⁸. – The provisions of this Emergency Ordinance shall be completed by the provisions of Law no 554/2004, with the subsequent amendments and completions, if they are not contrary to this regulation.”

61. Article 291 shall be amended as follows:

“Article 291. – The Regulation of organization and functioning of the Council is approved by Government decision, on proposal of the President of the Council and with the opinion of the General Secretariat of the Government.”

62. Article 296¹ shall be amended as follows:

“Article 296¹. – Without prejudice to the provisions of Article 294 and if an economic operator has not used a legal remedy in this respect, the National Authority for Regulating and Monitoring Public Procurement has the right to request in Court the pronouncement of nullity of the contracts/framework agreements for the following reasons:

(a) the contracting authority is in one of the cases provided for in Article 287¹⁰;

(b) the public procurement contract, the public works concession contract or the services concession contract has been concluded without observing the minimum requirements provided for by the contracting authority in the tender dossier or, although the respective requirements have been complied with, the contract has been concluded in less favourable conditions than the ones provided for in the technical and financial proposals which made up the winning tender;

(c) when the contracting authority aims to obtain the execution of a work, a service or a product, fact which would make the contract fall either under the public procurement contracts category, or under the public works concession contracts category, but the contracting authority concludes another type of contract than the here mentioned, without obeying the awarding procedures stipulated by the present emergency ordinance.”

63. In Article 300, a new paragraph 1¹ shall be inserted after paragraph 1 as follows:

“(1¹) The contracting authority has the obligation to send to the National Authority for Regulation and Monitoring the Public Procurement, for the causes in which it was a party, a copy of the judgment ruled in accordance to Article 287¹⁵, within maximum 30 days from the date when the judgment became final and indefeasible.”

ARTICLE III

(1) The provisions regarding the settling of the dispute in Court provided for in the Government Emergency Ordinance no 34/2006, approved with amendments and completions by Law no 337/2006, with its subsequent amendments and completions, as amended and completed by this Emergency Ordinance, shall apply only to the proceedings which started after the entrance into force of the latter.

(2) The cases which are in the course of proceedings at the date of entrance into force of this Emergency Ordinance shall continue to be judged by Courts legally invested according to the law under which they commenced.

(3) The provisions regarding the resolution of the contestations provided for in the Government Emergency Ordinance no 34/2006, approved with amendments and completions by Law no 337/2006, with its subsequent amendments and completions, as amended and completed by this Emergency Ordinance, shall apply only to the contestations submitted after the entrance into force of the latter. The contestations lodged before the Council which are in the course of proceedings at the date of entrance into force of this Emergency Ordinance shall be settled according to the law under which they commenced.

ARTICLE IV

The Emergency Government Ordinance No 34/2006 regarding the award of the public procurement contracts, public works concession contracts and services concession contracts, published in the Official Gazette of Romania, Part I, No 418 of 15 May 2006, as approved with its subsequent amendments and completions by the Law No 337/2006, with its subsequent amendments and completions, as well as with the ones brought by this Emergency Ordinance, shall be republished in the Official Gazette of Romania, Part I, after its approval by law, the texts being given a new numbering.

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This Emergency Ordinance transposes the Directive 2007/66/EC of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public

contracts, published in the Official Journal of the European Union (OJ) no L335 of 20 December 2007.

PRIME MINISTER
EMIL BOC

Countersigned by:

The Secretary General of the Government,
Daniela Nicoleta Andreescu

Head of the Department
for European Affairs,
Vasile Pușcaș

Vice prime-minister
Minister of Administration
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Corneliu Burada

Ministry of Public Finances,
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Bucharest, 7 March 2009.
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