

## **GOVERNMENT OF ROMANIA**

### **GOVERNMENT DECISION**

On approving the application norms of the provisions referring to the award of the public works concession contracts and services concession contracts from the Governments' Emergency Ordinance no. 34/2006

Based on Article 108 of the republished Romanian Constitution, Article 218 paragraph (2) and Article 303 paragraph (4) of Government Emergency Ordinance No. 34/2006 regarding the award of public procurement contracts public works concession contracts and services concession contracts, approved with amendments and supplements by Law No. 337/2006

**The Government of Romania** enacts the present decision.

**Sole Article** – The application norms of the legal provisions on the award of the public works concession contracts and services concession contracts set forth by Government Emergency Ordinance No. 34/2006 regarding the award of public procurement contracts, public works concession contracts and services concession contracts, approved with amendments and supplements by Law No 337/2006, and which are provided in the Annex that constitutes an integral part of the present Government Decision, are hereby approved.

**PRIME-MINISTER**

**CALIN POPESCU TARICEANU**

**Application norms of the legal provisions referring to the award of the public works concession contracts and services concession contracts**

**CHAPTER I  
General Provisions**

**Article 1.** – In the application process of the procedures for awarding the public works concession contracts and the services concession contracts, when situations that are not explicitly regulated in the economy of the legislative text do exist, these can be solved only under the principles provided in Article 2 paragraph (2) of Government Emergency Ordinance No. 34/2006 regarding the award of public procurement contracts public works concession contracts and services concession contracts, approved with amendments and supplements by Law No 337/2006, hereinafter referred to as the *emergency ordinance*.

**Article 2.** – (1) During the awarding procedure, the contracting authority has the obligation to undertake whatever necessary steps in order to avoid any situation leading to a conflict of interests and/or disloyal competition.

(2) In case the contracting authority establishes that such situations have emerged, as those provided by Articles 67 – 70 of the Emergency Ordinance, it has the obligation to eliminate, as soon as possible, the effects resulting from this situation by adopting, according to its competences, as the case may be, corrective measures for amendment, termination, revoking, cancellation and other similar of the acts which have impaired the correct implementation of the awarding procedure or the activities related to these acts.

**Article 3.** – The distinction between the concession contract and the public procurement contract consists, according to risk allocation, in the following:

a) the contract whereby the contractor, having quality of concessionaire, receives the right to exploit the work and therefore is taking over most of the risks related to the development and operation of those works, shall be considered a concession contract of public works, otherwise it shall be considered a public procurement contract of public works;

b) the contract whereby the contractor, having quality of concessionaire, receives the right to exploit the services and therefore is taking over most of the risks related to the exploitation of those services, shall be considered a concession contract of services, otherwise it shall be considered a public procurement contract of services.

(2) Establishing the types of the concession contracts as well as the distinction between the public works concession contract and the services

concession contract is made similar with the provisions of Chapter I, Section 3 in the emergency ordinance.

**Article 4.** – (1) The contracting authority has the obligation to designate a coordination and supervision group for the award of each public works concession contract or service contract.

(2) The members of the coordination and supervision group provided in paragraph (1) are designated by the contracting authority among its own specialists, to which external experts can join, according to requirements.

(3) The main responsibilities of the group provided in paragraph (1) consist in:

- a) substantiating the concession decision such as provided in Chapter II
- b) elaborating the tender documentation according to the provisions of Chapter III
- c) establishing the procedure for awarding the concession contract in accordance with the provisions of art. 28 – 29.

**Article 5.** – (1) The contracting authority which has awarded and concluded a public works concession contract or a services concession contract has the quality of conceder.

**Article 6.** – (1) The contractor which has become a party of a public works concession contract or of a services concession contract has the quality of concessionaire.

(2) The quality of concessionaire can be held by any natural or legal person of private law, Romanian or foreign.

**Article 7.** – (1) The duration of a public works concession contract or of a services concession contract shall be set forth so that:

- a) to avoid the artificial restriction of access to competition;
- b) to ensure a minimum of profit following the exploitation within a given period of time;
- c) to ensure a reasonable price level for the services that shall be performed throughout the contract and the costs of which are to be borne by final users.

(2) The maximum duration of a public works concession contract or of a services concession contract, which can be accepted by the contracting authority, has to be justified based on the elements provided on paragraph (1) lett. a) – c) and has to be assumed through administrative act by the head of the contracting authority.

## CHAPTER II

## Substantiation of the Concession Decision

**Article 8** – (1) The contracting authority has the obligation to elaborate a substantiation study related to the concession decision in any event in which it intends to award a public works concession contract or a services concession contract.

(2) The substantiation study is approved under resolution, order, or decision of the contracting authority, as applicable.

**Article 9.** – (1) The study provided in art. 8 must focus upon the review of some relevant items including general aspects, technical feasibility, economic and financial feasibility, environmental issues, social aspects and institutional aspects of the project in the matter. In case of a project which implies the completion of public works, the substantiation study for the concession decision shall be based upon the feasibility study.

(2) For the purpose of the provisions of paragraph (1), a project means the ensemble of works/constructions which are to be executed and/or of the services which are to be rendered throughout the fulfilment of the public works concession contract or of the services concession contract.

**Article 10.** – The substantiation study of the concession decision must contain a review which should enable the definition and the quantification, in economic and financial terms, of the project risks, at the same time taking into consideration the alternatives identified by the allocation of risks among the parties to the future contract. For this purpose, the contracting authority can use, as a model, the preliminary matrix for risk allocation provided in annex No. 1.

(2) The contracting authority has the obligation to verify, based on the result of the review provided in paragraph (1), the accuracy of the establishment of the distinction provided in art. 3 letter a) or, as applicable, letter b).

**Article 11.** – (1) The results of the substantiation study of the concession decision must account for the requirement and opportunity of the concession and must prove that:

- a) the project is feasible;
- b) the project meets the demands and policies of the public authority;
- c) various alternatives for the completion of the project have been taken into consideration;
- d) the alternative whereby the project is provided to be completed by awarding a public works concession contract or of a service contract is more profitable as compared to the alternative whereby the project is provided to be completed by awarding a public procurement contract;
- e) the project benefits from financial support, stating, if applicable, which is the contribution of the contracting authority.

**Article 12.** – The contracting authority is entitled to procure advisory service, according to the provisions of this emergency ordinance, for the purpose of elaborating studies and reviews necessary for the substantiation of the concession decision.

**Article 13.** – (1) In the case provided in art. 12, the contracting authority, by the coordination and supervision group provided in art. 4, has the obligation to take all the steps to ensure that the elaboration of the study for the substantiation of the concession decision is being accomplished at an adequate level and that it reflects totally the requested demands and conditions.

(2) In the application of the provisions of paragraph (1), the main attributions of the coordination and supervision group are the following:

a) to facilitate access to documents, reports, databases, measurements and generally, to any available information which might serve for the elaboration of the substantiation study of the concession decision;

b) to facilitate the contacts of the advisor with other public authority and/or with private law persons;

c) to review every intermediary report and the final report, as well as to formulate remarks and proposals for amendment;

d) to ascertain the fulfilment by the advisor of the activities conducted in each stage;

e) to elaborate a report for ascertaining the finalization of the substantiating study of the concession decision and to submit this to the head of the contracting authority, for approval.

### CHAPTER III

#### **Elaboration of the tender documentation**

**Article 14.** – (1) After the approval of the substantiation study, the contracting authority, through the coordination and supervision group provided in art. 4, has the obligation to ensure the drafting of the tender documentation, by complying with the elaboration rules provided in art. 33 in the emergency ordinance.

(2) The contracting authority shall be entitled to procure advisory service, according to the provisions of the emergency ordinance, for the purpose of elaborating the tender documentation.

**Article 15.** – When elaborating the specifications book, the contracting authority must observe the provisions of art. 35-38 in the emergency ordinance.

**Article 16.** – (1) As specific to the public works concession contracts and services concession contracts, the specifications book must contain:

a) the long term, medium term and immediate objectives of the project;

b) the operating manner aimed for conducting the project, including, if applicable, investments which the concessionaire will be bound to make and the period of accomplishment thereof;

c) the description of the activities, technical and quality general terms;

d) if applicable, particular terms imposed by the nature of the activities which shall be included in the object of the concession contract, such as safety terms in operation, environment protection, labour protection, conditions regarding the use and preservation of the patrimony or regarding the protection and turning into good account the national patrimony, conditions regarding the protection of the state secret, use of some materials involving special treatment, particular conditions imposed under agreements and conventions to which Romania is a party;

e) the proposal of the contracting authority related to the allocation of the project risks;

f) if applicable, the option of the conceder for the organization form of the concessionaire;

g) if applicable, the option of creating a project company;

h) financial and insurance terms;

i) if applicable, the treatment of the assets, used and/or accomplished by the concessionaire during the fulfilment of the concession contract;

j) amount of securities that are to be established, if these are requested.

(2) For the purpose of the provisions in paragraph (2) letter g), a project company means a trade company resident in Romania, established by the conceder, by units which are subordinated or are under the authority thereof, and the concessionaire, and which operates pursuant to the law, having as exclusive purpose the fulfillment of the objectives of the public works or services concession.

**Article 17.** – (1) The contracting authority has the obligation to notify the qualification and selection criteria in the contract notice. The detailed manner of application of these criteria shall be disclosed in the tender documentation.

(2) The contracting authority is entitled to apply the qualification and selection criteria that refer only to:

a) the personal situation of the candidate or tenderer;

b) the suitability to pursue the professional activity;

c) the economic and financial standing;

d) the technical and/or professional ability;

e) the quality assurance standards;

f) the environmental management standards.

(3) The application of the qualification and selection criteria shall be made according to the provisions of Paragraphs 2 -5, Section 2, Chapter V in the emergency ordinance.

**Article 18.** – (1) The contracting authority has the obligation to notify the criteria for awarding the public works and services concession contract in the contract notice. The detailed manner of application of these criteria shall be disclosed in the tender documentation.

(2) The awarding criteria may refer, as applicable, to:

- a) the level of the use tariffs payable by the final beneficiaries;
- b) the level of royalties;
- c) the extent of taking over the risk by the concessionaire;
- d) financing and development plans disclosed;
- e) quality, technical and functional level of the proposed technical solutions;
- f) the manner of ensuring environment protection;
- g) manner of settlement of social affairs;
- h) deadlines for making the investments;
- i) period of the concession.

(3) When establishing the criteria for awarding the contract, the contracting authority is not entitled to use criteria which:

- a) have no direct relation to the nature and object of the public works or services concession contract that is to be awarded;
- b) does not reflect a real and evident benefit which the contracting authority can obtain, on its own name or on behalf of the final beneficiaries, by using the respective criterion.

(4) The weight set forth for each criterion must not lead to the distortion of the outcome of application of the procedure for awarding the public procurement contract. For each criterion the contracting authority is bound to set forth a weight which should fairly reflect the quantum of value of the financial benefits which the tenderers offer or the technical/functional importance of the proposed solutions.

#### CHAPTER IV

#### **Publication of the contract notice for the procedure of awarding the public works concession contract or the services concession contract**

**Article 19.** – The contracting authority has the obligation to send the contract notices for publication to the ESPP operator.

**Article 20.** – The sending for publication of the notices to the ESPP operator shall be made only by electronic means, by using the application form available at the Internet address [www.e-licitatie.ro](http://www.e-licitatie.ro).

**Article 21.** – Notices for which the emergency ordinance imposes the obligation to be published in the Official Journal of the European Union are

drafted by the contracting authority in an official language of the European Union and must observe the form enacted under the Regulations of the European Commission No. 1564/2005 which sets forth the standard format of the advertising notices within the awarding procedures provided in Directives 17/2004/CE and 18/2004/CE.

**Article 22.** – When establishing the deadlines for the submission of tenders, the contracting authority has the obligation to take into account also the 3 working days time margin, necessary for the verification of the notices by the National Authority for Regulating and Monitoring Public Procurement and for sending thereof to the Official Journal of the European Union by the ESPP operator, such as provided in art. 49 paragraph (2) and (3) of the emergency ordinance.

**Article 23.** – The ESPP operator has the obligation to publish the notice in the ESPP, no later than two working days as from the reception of the consent for publication, but in no way before the date of sending thereof to be published in the Official Journal of the European Union, if the provisions of the emergency ordinance impose this obligation.

**Article 24.** – In case of the notices for which the emergency ordinance does not provide the obligation to be published in the Official journal of European Union, the contracting authority has the obligation to include in the contents of the notices at least the information provided in the models disclosed in annex no. 2.

**Article 25** – In no more than one working day after the publication of the notice in the ESPP, the contracting authority has the obligation to send for publication the respective notice also to the Regie Autonome “Official Gazette of Romania”.

## CHAPTER V

### **Application of the awarding procedures and evaluation of tenders**

**Article 26.** – The contracting authority has the obligation to award the public works concession contract or the services concession contract by applying one of the procedures provided in art. 18 letter a) –c) in the emergency ordinance.

**Article 27.** – By exception from the provisions of paragraph (1), the contracting authority has the right to apply the negotiation procedure under the prior publication of a contract notice when, following the application of an open tender procedure, a restricted tender procedure or a competitive dialogue,



no tenders were submitted or none of the submitted tenders were considered admissible.

**Article 28.** – (1) The contracting authority shall apply the restricted tender procedure or open tender procedure when it can define clearly the technical specifications capable to meet the requirements and demands and can set forth accurately the financial framework and/or the legal framework of the project's implementation.

(2) In case the terms provided in paragraph (1) cannot be fulfilled, the contracting authority will apply the competitive dialogue procedure.

**Article 29.** – For the effective application of the awarding procedures provided in art. 27, the provisions of this chapter shall be supplemented by the stipulations of Sections 2 – 5 Chapter III in the emergency ordinance and the provisions of Sections 1 – 4 Chapter IV in Government Decision No. 925/2006 for the approval of the norms of implementation of the provisions referring to the awarding of the public procurement contracts in Government Emergency Ordinance No. 34/2006 regarding the awarding of public procurement contracts, of public works concession contracts and of services concession contracts, with subsequent amendments and supplements.

**Article 30.** – (1) The contracting authority has the obligation to designate, for the awarding of each public works or services concession contracts, the persons in charge for the evaluation of tenders, which shall be organized in an evaluation committee.

(2) Members of the evaluation committee must be minimum 5 and are usually nominated within the coordination and supervision group provided in art. 4 paragraph (1).

(3) The contracting authority shall designate, under resolution, order or decision, the president of the evaluation committee, from among the members thereof.

(4) The contracting authority shall be entitled to nominate alternate members for the members of the evaluation committee.

(5) The contracting authority is entitled to substitute a member of the evaluation committee by an alternate member only if the person who is to be substituted does not have the possibility, for fair reasons, to fulfil his attributions which derive from the capacity of member of the evaluation committee. After the substitution, the capacity of member of the evaluation committee is taken over by the alternate member who shall exercise his related attributions until the awarding procedure is closed.

**Article 31.** – (1) The president of the evaluation committee is entitled to propose the management of the contracting authority to co-opt independent experts in the evaluation committee.

(2) The proposal provided in paragraph (1) must specify the attributions and responsibilities specific to the experts who are to be co-opted in the evaluation committee and to account for the requirement of their participation in the evaluation process.

(3) Co-opted experts can be nominated once with the nomination of the evaluation committee or subsequently, according to the specific problems which might impose the expertise thereof.

(4) Experts co-opted for specific problems shall not have the right to vote in the evaluation committee, but have the obligation to elaborate a special report regarding the technical, financial or legal issues, upon which they shall express their point of view.

(5) The special report provided in paragraph (4) is intended to facilitate for the evaluation committee the enactment of decision within the tender review process and the establishment of the winning tender/tenders. The special report shall be attached to the awarding report and shall become part of the concession dossier.

**Article 32.** – (1) The attributions of the evaluation committee are as follows:

- a) to open the tenders and, as applicable, other documents attached to the tender;
- b) to check the fulfilment of the qualification criteria by tenderers/candidates, the way they have been requested under the tender documentation;
- c) to perform the selection/pre-selection of the candidates, if applicable;
- d) to perform the dialogue with the economic operators, in case of application of the competitive dialogue procedure;
- e) to perform negotiations with economic operators, in case of application of the negotiation procedures;
- f) to verify the technical proposals submitted by tenderers, in terms of the manner in which these meet the minimum requirements contained in the specifications' book or in the description documentation;
- g) to verify the financial proposals presented by tenderers;
- h) to set forth the admissible tenders;
- i) to apply the awarding criteria, such as provided in the tender documentation, and to establish the successful tender;
- j) in cases justified according to the provisions of art. 209 in the emergency ordinance, to elaborate a proposal of cancellation of the awarding procedure;
- k) to elaborate the report of the awarding procedure, such as this is provided in art. 213 paragraph (2) in the emergency ordinance.

(2) For the purpose of the provisions of paragraph (1), the tender is deemed admissible if the following terms are fulfilled, in a cumulative manner:

a) it does not match any of the events provided in art. 33 paragraph (3) in Government Decision No. 925/2006 for the approval of the norms of implementation of the provisions referring to the awarding of the public procurement contracts in Government Emergency Ordinance No. 34/2006 regarding the awarding of the public procurement contracts, of public works concession contracts;

b) it was submitted by a tenderer which fulfils the minimum qualification requirements;

c) it meets the requirements contained in the specification book;

d) it does not contain unfavorable clauses for the contracting authority;

e) the financial proposal is realistic and does not involve, on behalf of the contracting authority, a contribution of the nature to cause a majority allocation of operation risk to itself.

**Article 33.** – (1) The tender can be deemed inadmissible if it was submitted by a tenderer who, during the last 2 years, for reasons imputable thereto, failed to fulfil or fulfilled inadequately the contractual obligations, fact which caused or is of the nature to cause serious prejudice to the beneficiaries thereof.

(2) The fulfilment of the contractual obligations is evidenced by means such as the certificates/documents provided in art. 188 paragraph (1) letter a), paragraph (2) letter a) and paragraph (3) letter a) in the emergency ordinance.

**Article 34.** – (1) Throughout the conducting of the evaluation process, the committee and the co-opted experts shall be obliged to keep confidentiality as to the contents of the tenders as well as about any other information disclosed by the candidates/tenderers, the disclosure of which might impair their right to protect their intellectual property or trade secrets.

(2) Violation of the undertakings referring to confidentiality shall be sanctioned according to the law.

(3) Except for the tender opening session, it is only the members of the evaluation committee and, as applicable, the co-opted experts, who are entitled to participate in the meetings hereof.

(4) The rules for avoiding a conflict of interests, such as provided in Chapter II, Section 8 in the emergency ordinance, are equally applicable both to the evaluation committee as well as to the co-opted experts.

**Article 35.** – (1) The evaluation committee and the co-opted members have the obligation to sign, on their own liability, a confidentiality and impartiality statement whereby they undertake to observe the provisions of art. 34 paragraph (1) and whereby they confirm they are not in an event involving the existence of a conflict of interests.

(2) The statement provided in paragraph (1) must be signed before taking over the specific attributions in the evaluation process.

(3) In case where one of the members designated in the evaluation committee or one of the co-opted experts establishes he is in an event of incompatibility, then this has the obligation to forthwith request his substitution from the respective committee by another person. The incompatibility events can also be notified to the contracting authority by any other person.

(4) In case where such events are notified, the contracting authority shall have the obligation to check the signalled facts and, as the case may be, take the necessary steps to avoid/remedy any aspects which may determine the emergence of a conflict of interests.

**Article 36.** – (1) In case of application of the competitive dialogue procedure, throughout the dialogue conducted in the second stage of this procedure, the evaluation committee must discuss and clarify, in accordance with and within the limits of the term granted by the head of the contracting authority, essential items such as:

a) identification of technical, financial and legal responsibilities of the conceder and concessionaire;

b) allocation of risks and benefits between concessionaire and conceder;

c) modification, revision or adapting the actual studies, according to the terms of accomplishment proposed by the participants in the dialogue and insofar as these are agreed upon by the contracting authority;

d) clear identification of the performance standards, facilities, equipment that are to be provided throughout the fulfilment of the contract, as well as of the requirements of hand-over at the end of the contract term;

e) the method of control and identification of follow-up mechanisms related to costs, quality and safety of performances, of relationships to third parties as well as of other specific requirements of operation and maintenance;

f) alternative arrangements for cases in which the concessionaire goes bankrupt or insolvent, or in case where, for reasons that are beyond the parties' will, the concession terminates before its term;

g) establishment of mechanisms for solving conflicts;

h) items referring to the manpower taken over or employed for project accomplishment;

i) general terms of the contract that is to be concluded;

j) establishment of the categories of assets:

- return assets – represent those public assets sent free of charge to the management of the concessionaire, including those achieved throughout the project for the purpose of fulfilment of the concession's targets and which, at contract termination, shall be returned to the conceder *de jure*, free of charge, in good condition, operable and free of any encumbrances or obligations;

- its own assets – represent those assets which, at contract termination, shall remain in the ownership of the concessionaire;

k) other objectives set forth by the contracting authority.

(2) In case where the second stage of the competitive dialogue procedure cannot be finalized by identification of any solution corresponding to its fair requirements, the contracting authority shall be entitled to cancel the awarding procedure, considering, implicitly, that the terms provided in art. 209 paragraph (1) letter b) in the emergency ordinance are fulfilled.

**Article 37.** – In case of application of the negotiation procedure, the evaluation committee must discuss and clarify, in accordance with and within the limits of the term granted by the head of the contracting authority, the same essential items such as those provided in art. 36.

**Article 38.** – (1) Any decision of the evaluation committee must meet the vote of a 2/3 of its members.

(2) In the case of establishing the winning tender based on a score, the vote of the members of the evaluation committee is reflected by the individual score granted to each tender separately.

(3) The members of the evaluation committee who do not agree upon the enacted decision, are obligated to submit their point or view in written form, elaborating thus an Individual Note that will be attached to the report of the awarding procedure.

**Article 39.** – The evaluation committee is bound to set forth the winning tender, from among the admissible tenders, in accordance with the provisions of art. 200 in the emergency ordinance.

**Article 40.** – The report of the awarding procedure as well as, if applicable, the reports elaborated for the intermediary stages or phases of the applied awarding procedure, shall be forwarded to the head of the contracting authority for approval, according to the legal attributions that are incumbent thereupon.

## CHAPTER VI The participation guarantee

**Article 41.-** The contracting authority shall be bound to specify, in the tender documentation, if the participation guarantee is provided to be established by the economic operators as an obligation for their participation in the procedure. In case where the tender documentation provides such as an obligation, then this must also contain the following information:

- a) the amount of the participation guarantee, fixed, which can not exceed 2% from the estimated value of the contract;
- b) the date until the participation guarantee must be deposited;
- c) the period of validity of the participation guarantee.

**Article 42.** – (1) The participation guarantee is established under a bank guarantee letter, which is submitted in original, in amount and until the date and for the period provided in the tender documentation.

(2) The contracting authority is not entitled to impose the release of the bank guarantee letter by a certain bank, expressly nominated in the tender documentation.

**Article 43.** – The contracting authority is entitled to withhold the participation guarantee, the tenderer losing thus the established amount, when the latter is in any of the following events:

- a) the tenderer withdraws the tender within the period of validity thereof;
- b) its tender being adjudicated successful, the tenderer refuses to sign the contract with the period of the tender's validity.

**Article 44.** – (1) The participation guarantee, established by the tenderer which's tender has been adjudicated as winner, is returned by the contracting authority within no more than 3 working days as from the contract signing date.

(2) The participation guarantee, established by the tenderers which's tender has not been adjudicated winner, is returned by the contracting authority after the signing of the contract with the tenderer which's tender has been designated winner, but no later than 3 working days as from the date of the tender's validity period expiration.

## CHAPTER VII

### **Concluding the public works concession contract or services concession contract**

**Article 45.** – (1) The contracting authority has the obligation to finalize the procedure of awarding by concluding the public works concession contract or the services concession contract.

(2) By exception from the provisions of paragraph (1), the contracting authority is entitled to finalize the awarding procedure by cancelling thereof, but only in the circumstances provided by art. 209 in the emergency ordinance.

**Article 46.** – (1) The contracting authority has the obligation to communicate to all the candidates/tenderers the outcome of the procedure application, according to the provisions of Chapter V, Section 5, in the emergency ordinance.

(2) The communication to the tenderer designated as winner must also contain the invitation for signing the contract.

(3) The date set forth in the invitation provided in paragraph (2) cannot be prior to the due date of the term provided in art. 205 in the ordinance.

**Article 47.** – (1) The public works concession contract or the services concession contract must contain clear terms as to the rights and obligations of each party.

(2) The specifications book and the tender of the concessionaire constitute integral part of the concession contract. The general or particular terms of the concession contract must not be adverse to the essential requirements of the specifications book and neither to the obligations undertaken by the concessionaire within the tender.

**Article 48.** – (1) Pursuant to the concession contract, the concessionaire acquires the right to operate, totally or in part, the outcome of the works or to perform services that represent the object of the contract, according to the objectives and quality standards set forth by the conceder. The concessionaire is entitled to use and gather the fruits of the assets that represent the object of the concession, according to the nature of the asset and purpose set forth by the parties under the concession contract.

(2) Pursuant to the concession contract, the concessionaire has the obligation to ensure the efficient, continuous and permanent operation of the public works or services which represent the object of the concession, in accordance with the requirements and destination imposed by the conceder.

**Article 49.** – (1) The main purpose of the contract is to ensure, based on optimal management, the performance of activities at an adequate level, at prices accessible for the end users, as well as the maintenance and development of any return assets entrusted to the concessionaire for performing the respective activities. For such purpose, irrespective of the risk allocation, the recovery of the costs by the concessionaire must be set forth so that to determine this to make all the efforts necessary for downsizing the respective costs.

(2) The manner in which the recovery of the costs by the concessionaire is completed must include, as a must, the take-over of the largest part of the operation risks related to the public works concession or services concession contract.

(3) For the purpose of the provisions in paragraph (2), operation risk is composed of:

a) availability risk, failure to observe certain performance and quality parameters of the construction/service respectively, clearly determined and measurable, throughout the whole lifetime of the project;

b) market risk, failure to employ by the end users of the outcome of the performed works/services made available thereto respectively, in terms where the performance and quality parameters are observed in full.

(4) The conceder does not undertake to pay any amount of money if the fact that the operation risk is taken over in full by the concessionaire is set forth under contract. In case the contract contains terms in this respect, the conceder

is entitled to also receive royalties which can be set forth at a fixed level or in a certain percentage from the amount of the proceeds collected by the concessionaire, from the end beneficiaries, following the completed activities.

(5) Without prejudicing the provisions of art. 3, in case the operation risk is allocated between conceder and concessionaire, the financial contribution of the conceder throughout the fulfilment of the contract, as well as other undertakings thereof, must be set forth explicitly under the public works concession or services concession contract, as complementary support.

**Article 50.** – (1) The public works concession or the services concession contract must contain terms whereby the allocation of risks throughout the whole duration thereof is explicitly set forth.

(2) The conceder does not have the right, throughout the fulfilment of the public works concession or services concession contract, to accept or request amendments of the contractual terms which might have as effect a diminishing of the concessionaire's responsibilities to such extent that the largest part of the risks should be re-allocated to the conceder.

**Article 51.** – (1) The conceder must define, under contract, the level of performance and quality of the activities which the concessionaire is to perform as well as the manner in which this must respond in possible emergency events, establishing thus relevant and measurable benchmarks based upon which it shall complete the verification of the observation of the contractual obligations.

(2) The contractual terms must provide the conceder's right to verify the fulfilment of the performance and quality requirements as to the activities completed by the concessionaire ensuring, in this respect, also the right to verify relevant documents regarding these issues.

(3) The contractual terms must also provide the manner in which the concessionaire undertakes to present the conceder reports, on a periodical basis or at the mere request of the latter, regarding the satisfaction of certain parameters throughout the fulfilment of the contract.

**Article 52.** – (1) The public works concession contract or the services concession contract must specify the procedure whereby, at the time of project commencement, the transfer is completed, from conceder to concessionaire, of the infrastructure or of any assets that will be used for the fulfilment of the concession.

(2) The contract must establish the distinction between the return assets and one's own assets as well as the legal treatment thereof.

(3) The contract must also specify the procedure whereby, at the time of project finalization, the transfer of the object of the concession is made, from the concessionaire to the conceder.



**Article 53.** – The concessionaire is entitled to conclude contracts with third parties to ensure and turn into good account the operation of assets, activities and services which represent the object of the concession.

**Article 54.** – (1) The contract must provide the events in which this can terminate, as follows:

a) when the duration set forth according to the undertakings contained in the tender submitted by the concessionaire and of the particular contractual terms expires;

b) in case of establishing serious breaches by the concessionaire in the fulfilment of the contractual obligations, by unilateral termination by the conceder and subject to the payment of an indemnity incumbent upon the concessionaire;

c) in case of establishing serious breaches by the conceder in the fulfilment of the contractual obligations, by unilateral termination by the concessionaire and subject to the payment of an indemnity incumbent upon the conceder;

d) in case the national or local interest imposes, by unilateral denouncement by the conceder, but only subject to the payment of a fair and prior indemnity incumbent upon the conceder;

e) in case of force majeure or in the events of fair impossibility of the concessionaire to continue the contract, by waiver, without the payment of an indemnity.

(2) In addition to the stipulations provided in paragraph (1) letter b), the contract must contain adequate procedures of settlement of non-conformities in the fulfilment of the performance and quality requirements set forth according to the provisions of art. 51 paragraph (1), including penalties enforceable in case of establishing such non-conformities.

**Article 55.** – (1) The parties will compulsory establish the mechanisms of solving the divergences which may arise throughout the fulfilment of the contract and the courts vested to settle such disputes.

(2) The parties may insert in the contract the arbitration or compromiser clause which awards the competence to settle the litigations emerged from the performance of the contract to the arbitration courts.

**Article 56.** – Within 48 days as from the date of termination of the public works concession or services concession contract, the contracting authority is bound to send information referring to the identity of the successful tenderer, to the services or public works which represent the object of the concession contract, to the royalties which the contracting authority will receive or, as applicable, to the financial contribution which is to be paid by the contracting authority, in order to be published in the ESPP.

## CHAPTER VIII

### Transitory and final provisions

**Article 57.** – (1) The monitoring of awarding the public works concession contracts and the services concession contracts is completed by the National Authority for Regulating and Monitoring Public Procurement based on the information contained in the contract notices and in annual reports sent by the contracting authorities.

(2) The contracting authorities have the obligation to send to the National Authority for Regulating and Monitoring Public Procurement of an annual report regarding the contracts awarded in the previous year.

(3) The requested information are sent according to the model of report provided in annex no. 3, regularly, in electronic format or, in exceptional cases, on paper support, no later than March 31 of every year.

**Article 58.** – (1) The annual report in electronic format is sent to the e-mail address [monitorizare@anrmap.ro](mailto:monitorizare@anrmap.ro)

(2) The annual report in physical format is submitted to the registry office of the National Authority for Regulating and Monitoring of Public Procurements, the contracting authority having the obligation to request the registration number on the witness-copy thereof.

(3) Omission to send the annual report or the sending of an incomplete report or which contains erroneous information shall fall under the incidence of the provisions of art. 293 letter m) in the emergency ordinance.

**Article 59.** – (1) The National Authority for Regulating and Monitoring Public Procurement processes the relevant information contained in the contract notices as well as in the annual reports received from the contracting authorities, establishing a statistic database which is used for:

a) presentation in due time of the reports requested by the European Commission;

b) supervision of the manner of awarding the public works concession contracts and of the services concession contracts;

c) prevention and, as applicable, establishment of a violation of the laws in the field.

**Article 60.** – (1) In application of the provisions of art. 33 paragraph (2), the conceder has the obligation to grant the concessionaire with the verification documents containing information referring to the fulfilment of the contractual obligations by the concessionaire and possible prejudices, within 14 days as from the date of finalization of the respective contract.

(2) The verification documents provided in paragraph (1) are drafted in three counterparts, the conceder having, in addition to the obligations provided in paragraph (1), the following obligations:

- a) to submit a counterpart in the concession dossier; and
- b) to send a counterpart to the National Authority for Regulating and Monitoring Public Procurement, for monitoring purposes, within no more than 3 working days as from the date the term provided in paragraph (1) expires.

(3) Omission to send the verification document provided in paragraph 2 letter b) or sending a document containing erroneous information falls under the provisions of art. 293 letter m) in the emergency ordinance.

(4) Verification documents issued by the contracting documents in accordance with the provisions of paragraph (1) can be challenged in administrative court, according to the law.

**Article 61.** – President of the National Authority for Regulating and Monitoring Public Procurement is entitled to issue orders for:

- a) approval of specific forms used within the awarding procedures or in the process of supervising the public works concession contracts or of the services concession contracts;
- b) to approve certain user instructions and guidelines, general or punctual, referring to the provisions of the emergency ordinance and/or to this resolution.

**Article 62.** - Annexes 1-3 constitute integral part hereof.

**PRIME MINISTER**

**Călin POPESCU-TĂRICEANU**