

**Government Emergency Ordinance  
regarding the award of the public procurement contracts, public works  
concession contracts and services concession contracts**

**CHAPTER I**  
General provisions

**Section 1**  
Purpose. Principles

**Article 1**

The present law regulates the procedures for awarding the public procurement contracts, public works concession contracts, services concession contracts and the legal remedies related to these.

**Article 2**

(1) The purpose of this law is:

- a) promoting the competition between the economic operators;
- b) guaranteeing equal treatment and non-discrimination of economic operators;
- c) ensuring transparency and integrity of the public procurement process;
- d) ensuring the efficient utilization of public funds through applying the awarding procedures by the contracting authorities;

(2) The awarding of public procurement contract is subject to the following principles:

- a) non-discrimination;
- b) equal treatment;
- c) mutual recognition;
- d) transparency;
- e) proportionality;
- f) efficient utilization of public funds
- g) assumption of responsibility.

**Section 2**  
Definitions

**Article 3**

For the purposes of this law, the following terms and expressions have the following meanings:

a) **acceptance of the successful tender:** the legal act by which the contracting authority expresses its consent to be legally engaged in a public procurement contract that will be concluded with the tenderer whose tender has been declared as successful tender;

b) **framework agreement:** written agreement between one or more contracting authorities and one or more economic operators, with the purpose of establishing the essential terms that will govern the public procurement contracts that are to be awarded in a certain period, in particular regarding the price and, where appropriate, the quantities envisaged;

c) **candidate:** any economic operator that submits its application/candidature for a restricted or negotiated procedure or a competitive dialogue;

d) **candidature:** all documents used by a candidate to demonstrate his personal situation, technical and professional ability and financial and economical standing, in order to obtain an invitation for submitting a tender, in the case of application of restricted procedure, negotiation or competitive dialogue.

e) **competitor:** any economic operator which has presented a project within the design contest;

f) **public procurement contract:** contract that includes as well the category of sectorial contract as is defined at art. 229 paragraph (2), with pecuniary interest and concluded in written form between one or more contracting authorities, on the one hand, and one or more economic operators, on the other hand, and having as its object the execution of works, the supplying of goods or the providing of services in the sense of the provisions of the present law;

g) **public works concession contract:** is the contract having the same characteristics as the public works contract, except for the fact that the contractor, having quality of concessionaire, receives from the contracting authority, having quality of conceder, in consideration for the works to be carried out, the right to exploit the work or this right together with payment;

h) **services concession contract:** is the contract having the same characteristics as the services contract, except for the fact that the contractor, having quality of concessionaire, receives from the contracting authority, having quality of conceder, in consideration for the provision of services, the right to exploit the services or this right together with payment;

i) **contractor:** the tenderer that became part in a public procurement contract, according to law;

j) **tender documentation:** documentation that contains all information related to the subject-matter of public procurement contract, as well as to the awarding procedure of the contract, including the terms of reference or, where appropriate, the descriptive documentation;

k) **special or exclusive right:** the right that results from any form of authorization granted, according to the law, by a competent authority or by administrative acts issued by a competent authority, having as effect to limit the exercise of activities in the field of certain public services only to one or to a limited number of persons, affecting substantially the ability for other persons to carry out such activities;

l) **public funds:** sums allocated from the budget provided at art. 1 paragraph (2) from Law 500/2002 regarding public finance, with the subsequent modifications;

m) **public undertaking:** an legal entity which carry out economic activities, that is directly or indirectly dominantly influenced by a contracting authority defined in art. 8 let. a), b) or c) by virtue of its ownership, its financial participation therein or the specific rules provided in the act that sets-up up the respective entity; the presumption of exerting the dominant influence is applied in all the situations when, in relation with such an entity one or more contracting authorities defined in art. 8 lett. a), b) or c), directly or indirectly:

- hold the majority of the subscribed capital; or
- detain the control of the majority of votes in the executive structure, like the general assembly; or
- can appoint more than half of the members of the administration council, managerial or supervisory body;

n) **electronic auction:** repetitive process realized after an initial full evaluation of tenders, in which the tenderers have the possibility, exclusively by electronic means, to revise downwards the presented prices and/or improve certain elements of the tender; the final evaluation has to be realized automatically by the electronic means;

o) **electronic means:** the use of electronic equipment for the processing and storage of data, which is transmitted, conveyed and received by wire, radio, optical means or by other electromagnetic means;

p) **tenderer:** any economic operator which has submitted a tender;

q) **tender:** the legal act by which the economic operator expresses his will to be engaged, from a juridical point of view, in a public procurement contract; the tender contains the financial proposal and the technical proposal;

r) **economic operator:** any supplier of products, provider of services or executor of works – natural or legal person, governed by public or private law, or a group of such persons which legally offers on the market products, services and/or the execution of works;

s) **operator of ESPP:** the legal person governed by public law that ensures to the contracting authorities the technical support for the application of the awarding procedures by electronic means;

ș) **awarding procedure:** the stages that have to be followed by the contracting authority and by the candidates/tenderers in order that the agreement of the parties involved in the public contract will be considered valid; the awarding procedures are: open procedure, restricted procedure, competitive dialogue, negotiation, request for tenders, design contest;

t) **financial proposal:** part of the tender which contains information regarding the price, tariff, other appropriate financial and commercial conditions in accordance with the requirements stipulated by the tender documentation;

ț) **technical proposal:** part of the tender elaborated on the basis of the requirements from the terms of reference or, on a case by case basis, from the descriptive documentation;

u) **"written" or "in writing":** any expression consisting of words or figures which can be read, reproduced and subsequently communicated. It includes information, which is transmitted and stored by electronic means;

u<sup>1</sup>) **dynamic procurement system** – an entirely electronic process, limited in time and opened throughout its entire period for any economic operator which fulfills the qualification and selection criteria and which has presented a draft tender in compliance with the requirements of the tender book.

v) **electronic system for public procurement - ESPP** – the public utility it system, accessible by Internet at a dedicated address and utilized with the goal of applying the awarding procedures by electronic means;

x) **Treaty:** the Treaty establishing the European Community, signed on 25 March 1957, with subsequent modifications and completions.

y) **the "Common Public Procurement Vocabulary (CPV)":** the reference nomenclature applicable to public procurement contracts as adopted by Regulation (EC) No 2195/2002, published in the O.J. of the EU L340 of 16/12/2002 while ensuring equivalence with the other existing nomenclatures;

z) **days:** calendar days, except for the case where working days is provided;

### **Article 3<sup>1</sup> - new article**

The public procurement contracts are :

- a) Works contract;
- b) Supply contract;
- c) Services contract;

### **Section 3**

#### Types of public procurement contracts

##### **Article 4**

Public works contract is that public procurement contract which has as object:

- a) either the execution of works related to one of the activities listed in Annex no. 1 or the execution of a work; or
- b) both the design and execution of works related to one of the listed in Annex no. 1 or the design and execution of a work; or
- c) the realisation, by whatever means, of a work corresponding with the necessities and objectives of the contracting authority and, insofar these don't correspond with the provisions of letter a) and b);

(2) According to the provisions of paragraph (1), a work means the outcome of building or civil engineering works taken as a whole which is sufficient of itself fulfil a technical or economic function.

##### **Article 5**

(1) The public supply contract is the public procurement contract, other than the public works contract, which has as object the supply of one or more products, through purchasing, renting or hire purchase, leasing, with or without the option to buy.

(2) The public procurement contract having as main object the supply of products and as an incidental matter, their sitting and installation operations, shall be considered to be a public supply contract.

##### **Article 6**

(1) The public service contract is that public procurement contract, other than public works contract or public supply contract having as object the execution of one or more services, so these are provided for by Annex 2A and 2B.

(2) The public procurement contract having as main object the supply of services and only incidentally activities within the meaning of Annex 1, shall be considered to be a public service contract.

##### **Article 7**

The public procurement contract that has as object supplying both products and services is considered to be:

- a) supply contract, if the estimated value of products is higher than the estimated value of services provided in the respective contract;
- b) services contract, if the estimated value of the services is higher than estimated value of the products provided in the respective contract.

### **Section 4**

#### Contracting Authorities

##### **Article 8:**

For the purpose of this law, a contracting authority means:

- a) any state organism – public authority or public institution - established at central, regional or local level;
- b) any body governed by public law, other than those stipulated by letter a), having legal personality, which has been established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character and which is found in at least one of the following situations:
  - it is financed for the most part by a contracting authority as it is provided at letter a) or by other body governed by public law;
  - it is subordinated or under supervision of a contracting authority as it is provided at letter a) or of other body governed by public law;
  - more than a half of the members of the administrative/managerial board or supervisory body is appointed by a contracting authority as it is provided at letter a) or by other body governed by public law;
- c) any association formed by one or more contracting authorities as they are provided at letter a) or b);
- d) any public undertaking that carries out one or more of the activities stipulated by Chapter VIII, Section 1, when it awards public procurement contracts or concludes framework agreements destined for the carrying out of the respective activities.
- e) any subject of law, other than the ones stipulated at letter a) – d), which conduct one or more of the activities stipulated at chapter VIII, section 1, based on a social or exclusive right, like it is defined at art. 3 let. k), given by a competent authority, when it's awarding a public procurement contract or it concludes a framework agreement meant for conducting the respective activities.

## **Section 5**

### Scope. Exceptions

#### **Article 9**

This law is applied with regard to:

- a) awarding of the public procurement contract, including the sectoral contract, in the second case being applicable the provisions of Chapter VIII;
- b) concluding of the framework agreement;
- c) the award of works contract by an economic operator which does not have the quality of contracting authority, in case the following conditions are cumulatively fulfilled:
  - 50% of the respective contract is directly subsidized by a contracting authority;
  - the estimated value of the respective contract is larger than the equivalent in lei of Euro 2.500.000;
- c<sup>1</sup>) the award of the services contract by an economic operator which doesn't have the quality of contracting authority, in case the following conditions are cumulatively fulfilled:
  - 50% of the respective contract is directly subsidized by a contracting authority;
  - the estimated value of the respective contract is larger than the equivalent in lei of Euro 125.000.
- d) awarding the public procurement contract by a contracting authority in the name of and for another natural/legal person, in the case that the respective contract is directly financed/subsidized more than 50% by a contracting authority;

- e) organizing of the design contest;
- f) awarding of the public works concession contract and services concession contract, in which case there are applicable the provisions of Chapter VII.

#### **Art. 10**

(1) In the cases stipulated at art. 9 let. c) and c<sup>1</sup>), the contracting authority has the obligation to impose by the financing contract, the application of the provisions of the present emergency ordinance for awarding the respective public procurement contracts.

(2) In case of the award by an economic operator which does not have the quality of a contracting authority of a supply contract out of which more than 50% is directly subsidized by a contracting authority, the later has the obligation to impose by means of the financing contract, in order to award the respective contract:

- a) either the application of the provisions of the present ordinance
- b) or the application of a specific procedure established by means of internal norms, by the respective contracting authority, with the condition of ensuring the transmission of an invitation for participation to the respective procedure to at least 3 economic operators.

(3) the provisions of par. (2) are applicable also in the case of the award of the services and works contracts, out of which more than 50% is directly subsidized by a contracting authority, but which's estimative value is smaller or equal to the thresholds stipulated at art. 9 let c) and c<sup>1</sup>)..

#### **Article 11**

(1) A contracting authority in the field of national defence has the obligation to respect the provisions of this law, subject to the cases which:

- a) may lead to supplying the information the disclosure of which it considers contrary to the essential security interests of the country; or
- b) implied the protection of essential security interests of the country which are connected with the production of or trade of arms, ammunitions and materials/systems of war.

(2) The Government, by government decision, has the right to decide the specific circumstances and procedures to be applied for awarding the public procurement contracts in cases provided by paragraph (1) let. a) and b).

(3) The application of the provisions of paragraphs (1) and (2) should not lead to affect the competition on the market of products or services that are not intended for specific military purpose.

#### **Article 12**

This law shall not apply for the awarding of public procurement contract in the case it fulfils one of the following conditions:

- a) the contract is included in the state secret information category, in compliance with the law in force regarding the protection of classified information.;
- b) completing the contract imposes special safety measures, for protecting some essential national interests, in accordance to the legal provisions in force;

#### **Article 13**

This law shall not apply for the awarding of public procurement service contract that:

- a) has as object the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or the rights thereon. The

awarding of contracts for procurement of financial services, that are concluded irrespective of their form, related to the purchasing or renting contract, shall be subject to this law;

- b) refers to the acquisition, development, production or co-production of programme materials, by institutions of radio-diffusion and television;
- c) refers to arbitration and conciliation services;
- d) refers to financial services in connection with issue, purchase, sell or transfer of securities or of other financial instruments, as well as the central bank services of the National Bank of Romania;
- e) refers to employment contracts;
- f) refers to research - development services totally financed by the contracting authority whose results are not exclusively needed for the contracting authority for its use in the conduct of its own affairs.

#### **Article 14**

(1) The present law shall not apply when the public procurement contract is awarded pursuant to:

(a) an international agreement concluded in conformity with the Treaty with one or more States that are not members of European Union, and covering supplies or works intended for implement for joint implementation or exploitation of a project, by the signatory States, and only if through the respective agreement a specific procedure for awarding this contract was mentioned;

(b) an international agreement regarding the stationing of troops and only if by the respective agreement a specific procedure for awarding the respective contract was provided;

(c) the application of a procedure specific to certain international bodies and institutions.

(2) In the case provided by paragraph (1), letter a), the contracting authorities have the obligation to inform the National Authority for Regulating and Monitoring Public Procurement about the agreements in existence related to their field of activity.

(3) The National Authority for Regulating and Monitoring Public Procurement has the obligation to transmit to the European Commission the information received according paragraph (2).

#### **Article 15**

(1) The present law shall not apply for awarding the services contract to another contracting authority or to an association of contracting authorities, in the case when these enjoy by an exclusive right to supply those services pursuant to a law or other published regulation with normative character, insofar these latter ones are compatible with the Treaty.

(2) The contracting authority that, based on its legal competencies, grants to an entity not defined as contracting authority special or exclusive rights to carry out a public service activity, has the obligation to impose, by the authorization that it issues with this purpose, the observance by the respective entity of the non-discrimination principle when it awards supply contracts to third parties.

#### **Article 16**

(1) In the case when the contracting authority awards a public procurement contract having as object the supply of services as included in Annex 2B, then the obligation to apply this law is mandatory only for the contracts with a greater value than as stipulated in art. 57 paragraph (2) and are limited only to the provisions of articles 35-38 and to the provisions of art. 56.

(2) In the case when the public procurement contract stipulated by paragraph (1) has as object, besides providing services included in Annex 2B, the supply of services included in Annex 2A, the provisions of paragraph (1) are applicable only if the estimated value of services included in Annex 2B is higher than the estimated value of services included in Annex 2A.

(3) The contracting authority does not have the right to combine, within the same contract, services included both in Annex 2B and Annex 2A, with the purpose to benefit of the provisions of paragraph (1) when it awards the respective public procurement contract.

## Chapter II

Commons rules applicable to the award of the public procurement contract

### Section 1

General Rules

#### Article 17

The contracting authority has the obligation to respect the principles provided for by art. 2 paragraph (2) in relation with the economic operators which are interested to participate to an awarding procedure.

#### Article 18

(1) The procedures for awarding the public procurement contract are:

a) **open procedure**, respectively the procedure to which any interested economic operator has the right to submit tender;

b) **restricted procedure**, respectively the procedure to which any economic operator has the right to submit his candidature and where only selected candidates by the contracting authority, are invited to submit tender;

c) **competitive dialogue**, respectively the procedure to which any economic operator has the right to submit his candidature, and by which the contracting authority conducts a dialog with the admitted candidates, with the purpose of identifying one or more suitable solutions that are able to respond to its needs and on the basis of which the selected candidates will elaborate the final tender;

d) **negotiation**, respectively the procedure by which the contracting authority carries out consultations with the selected candidates and negotiates the contractual clauses, including the price, with one or more of those. The negotiation can be:

- negotiation with prior publication of a contract notice;

- negotiation without publication of a contract notice.

e) **request for tenders**, respectively the simplified procedure by which the contracting authority requests for tenders from several economic operators.

(2) The contracting authority has the right to organize a design contest, respectively a special procedure by which it purchases, particularly in the field of territory or town planning, architecture, engineering or data processing, a plan or project selected by a jury, after being put out to competition, with or without prize awarding.



## **Article 19**

The contracting authority has the right to directly purchase goods, services or works, to the extent that the value of the procurement, estimated according to the provisions of section 2 of the present chapter, does not exceed the equivalent in lei of Euro 10.000 for each procurement of goods, services or works. The procurement is made based on a document in proof which, in this case, is considered to be a public procurement contract, and the obligation obeying the provisions of the present emergency ordinance is limited only to the provisions of art. 204 par. (2).

## **Article 20**

(1) The contracting authority has the obligation to award the public procurement contract, by applying the open procedure or the restricted procedure.

(2) By exception to provisions of paragraph (1), the contracting authority has the right to apply the other procedures provided by art. 18 paragraph (1) only in specific circumstances provided by art. 94, art. 110 paragraph (1), art. 122 or art. 124.

## **Article 21**

(1) Any contracting authority has the right to apply the awarding procedures provided within art. 18, by using electronic means.

(2) The application of the awarding procedures by using electronic means is carried out by using the ESPP.

(3) The Government, has the right to establish, by government decision, the obligation of some contracting authorities to apply the awarding procedures by using only electronic means.

## **Article 22**

(1) The Government has the right to approve by means of government decision the designing and implementation of a centralized national system intended for the specialized purchase of particular products, services or works from or through a central purchasing body.

(2) The central purchasing body is a contracting authority as provided by art. 8 letter a), b) or c), which:

- purchases in its own name products and/or services that are or can be intended for one or more other contracting authorities;
- awards public procurement contracts or concludes framework agreements, in the name of and for one or more other contracting authorities.

(3) It is considered that the contracting authority which purchase supplies, services and/or works from or through a central purchasing unit body have complied with the provisions of the present law insofar the central purchasing body has complied with them when it carried out the activities provided at paragraph (2).

## **Article 23**

The contracting authority does not have the right to divide the public procurement contract in more distinct contracts with lower value, nor to use methods for calculating the estimated value of the contracts for obtaining an under-evaluation of the estimated value of the contract, with the purpose to avoid the application of the provisions of the present law.

## **Article 24**

Without prejudice to the other provisions of the present law, the contracting authority has the obligation to ensure the protection of the information which the economic operator has designed as confidential, insofar, objectively, the disclosure of this information would prejudice the legitimate interest of the economic operator, in particular where the commercial secrecy and intellectual property is concerned.

## **Section 2**

### **Rules for estimating the value of the public procurement contract**

#### **Article 25**

(1) The contracting authority has the obligation to estimate the value of the public procurement contract on the basis of calculation and addition of all payable amounts for carrying out the respective contract, without VAT, taking into account any form of option and any eventual renewals or increase of contract value insofar as these can be anticipated at the estimation time.

(2) When the contracting authority provides, according to the present law, the possibility to award certain prizes for candidates/tenderers, then it shall include them when calculating the estimated value of the public procurement contract.

#### **Article 26**

The estimated value of the public procurement contract shall be calculated before the procedure for awarding the respective contract is initiated. This estimate must be valid at the moment at which the contract notice is sent or, in cases where such notices are not required, at the moment at which the invitation for participation is sent.

#### **Article 27**

(1) In the case when, by awarding the supply contract, the contracting authority intends to obtain products that also imply operations/works of installation and setting up in order to function, then the estimated value of this contract shall include the estimated value of the respective operations.

(2) In the case when, at the estimation time of the supply contract value, the contracting authority has not established the method to purchase the products, respectively by purchasing them, including by instalments, rental or leasing with or without the option to buy, then the estimated value of this contract must be considered as equal with the highest value of the values that correspond to each method of obtaining the products.

(3) In the case when, at the estimation time of the supply contract value, the contracting authority has established the method to purchase the products, respectively by rental, hire-purchase or leasing with or without the option to buy, then the estimation method varies, depending on the duration of the respective contract, as follows:

a) in the case of a fixed-term contract, if the duration of the contract is lower or equal to 12 months, then the estimated value must be calculated by taking into consideration all instalments payable during the respective contract;

b) in the case of a fixed-term contract, if the duration of the contract is greater than 12 months, then the estimated value must be calculated by taking into consideration all instalments payable during the respective contract, adding also the estimated residual value of products at the end of the period for which the contract has been concluded;

c) in the case of a contract without fixed-term or the duration of the contract cannot be determined at the estimation time, then the estimated value must be calculated by multiplying the monthly value that must be paid with 48.

(4) In the case when the contracting authority intends to award a supply contract which must be renewed within a certain period of time, then the estimation of the value of this contract must have as a calculation base:

a) either the total value of the all successive supply similar contracts of some, awarded in last 12 months, adjusted, if is possible, with predictable modifications that can occur in the following 12 months on purchased quantities and afferent values;

b) or, the total estimated value of the all successive similar supply contracts of that are anticipated to be awarded in the following 12 months, starting with the moment of the first delivery.

(5) In the case when the contracting authority intends to purchase similar products, but divided on lots whose purchase is accomplished by awarding more distinct supply contract, then the estimated value is considered to be the cumulated value of all lots. In the case when the cumulated value of all lots exceeds the threshold provided for by Article 124, letter a), then the contracting authority has the right to apply the request of tender procedure only for the lots which cumulatively comply with the following conditions:

a) the estimated value, without VAT, of the respective lot is smaller or equal to the equivalent in lei of Euro 75.000;

b) the cumulated value of all lots for which is applied the request for tender procedure does not exceed 20% of the total value of products that are to be supplied.

#### **Article 28**

(1) In the case when, the contracting authority intends to award a services contract for which the total price cannot be anticipated but the estimation of a monthly average tariff is possible, then the estimation method varies depending on the duration of the respective contract, as follows:

a) in the case of a fixed-term contract, when the duration does not exceed 48 months, the estimated value must be calculated taking into account the whole duration of the contract;

b) in the case of a contract without fixed-term or when the duration exceeds 48 months, the estimated value must be calculated by multiplying the monthly value with 48.

(2) In the case when the contracting authority intends to award a services contract which must be renewed during a given period, then the value of this contract must have as a calculation base:

a) either the total updated value of the all successive similar services contracts awarded in last 12 months, adjusted, if possible, with predictable modifications that can occur in the following 12 months regarding the purchased quantities and afferent values;

b) or, the total estimated value of the all successive similar services contracts that are anticipated to be awarded in the following 12 months, beginning with the moment of the first performance.

(3) In the case when the contracting authority intends to purchase similar services, but divided on lots whose purchase is accomplished by awarding more than one distinct services contracts, then the estimated value is considered to be the cumulated value of all lots. In the case when the cumulated value of all lots exceeds the threshold stipulated by Article 124. letter b), then the contracting authority has the right to apply the request for tenders procedure only for the lots that cumulatively accomplish the following conditions:

a) the estimated value, without VAT, of the respective lot is smaller or equal to the equivalent in lei of Euro 75.000;

b) the cumulated value of the lots for which the request for tenders is applied, does not exceed 20% of the total value of the services that are to be performed.

(4) In the case when, the contracting authority intends to purchase insurance services, then the estimated value of these services contracts shall be calculated on the basis of insurance premiums that are to be paid, as well as any other forms of remuneration afferent to the respective services.

(5) In the case when, the contracting authority intends to purchase banking services or other financial services, then the estimated value of these services contracts shall be calculated on the basis of the fees, commissions, interests and any other forms of remunerations afferent to respective services.

(6) In the case when the contracting authority intends to purchase design services, town design, landscape architecture, engineering and other technical services, then the estimated value of these services contracts shall be calculated on the basis of the fees/commissions that are to be paid and any other remuneration forms afferent to respective services.

#### **Article 29**

(1) In case the contracting authority intends to purchase works for which it will provide the executor with supplies, machinery, technological equipments or any other fitting-out or endowments needed for the execution of works, then the estimated value of the respective works contract will include the cost of the works as well as the total estimated value of the mentioned facilities.

(2) In case when the object of the work contract is the execution of an assemble of works which, on a case by case basis, requires also supplying equipments, installations, tools or other afferent endowments, then the estimated value is determined by taking into consideration the total value of the entire assemble.

(3) In the case when the execution of a certain work is possible on lots, for which the contracting authority intends to award to one or more executors distinct work contracts, then the estimated value must be determined by taking into account the cumulated value of all lots. In case that the cumulated value of all lots exceeds the threshold provided by Article 124. letter c), then the contracting authority has the right to apply the request for tenders procedure only for the lots that cumulatively accomplish the following conditions:

a) the estimated value, without VAT, of the respective lot is smaller or equal to the equivalent in lei of Euro 500.000;

b) the estimated cumulated value of the objects/lots for which the present exception is applied does not exceed 20% of the total estimation value of the works.

#### **Article 30**

In case when the contracting authority intends to organize a design contest, the estimated value that must be taken into account is determined as follows:

a) if the design contest is organized as an independent procedure, the estimated value includes the total value of all prizes/payments that are going to be awarded to the competitors, as well as the estimated value of the services contract that could be subsequently concluded according to the provisions of art. 122 letter h) or art. 252 letter i) if the contracting authority has not excluded such an award in the contest contract notice;

b) if the design contest is organized as a part of an awarding procedure of a services contract, then the estimated value taken into consideration is the estimated value of the respective services contract, including any possible prizes/payments to the competitors.

### **Article 31**

In the case when the contracting authority intends to conclude a framework agreement, then the estimated value is calculated by adding the maximum estimated value of all public procurement contracts intended to be awarded on the basis of that framework agreement for its total term.

### **Article 32**

In the case when the contracting authority intends to use a dynamic purchasing system, then the estimated value is calculated by adding the maximum estimated value of all public procurement contracts intended to be awarded by using that dynamic purchasing system for its total term.

## **Section 3**

### Rules for elaboration of the tender documentation

### **Article 33**

(1) The contracting authority has the obligation to state accurately within the tender documentation any request, rule, criteria, and other necessary information, in order to ensure that the tenderer/candidate is completely, justly and explicitly informed regarding the way of conducting the awarding procedure.

(2) The tender documentation shall contain, but not be limited by it, at least the following:

- a) general information regarding the contracting authority, particularly regarding the address – inclusive telephone no., fax no., e-mail – contact persons, communication means, etc;
- b) instructions regarding the mandatory deadlines and necessary formalities for participating to the awarding procedure;
- c) if requested, the minimum qualifications requirements and documents that shall be submitted by the tenderers/candidates in order to fulfil the selection and qualification criteria;
- d) the terms of references or, in the case of applying the competitive dialogue or negotiation procedure, the descriptive documentation;
- e) instructions regarding the elaboration and submission of the technical and financial proposal;
- f) detailed and complete information regarding the awarding criteria applicable for establishing the winning tender in line with the provisions of Chapter V – Section 3;
- g) instructions regarding the use of the means of legal dispute;
- h) information regarding the compulsory clauses of the contract.

### **Article 34**

(1) The contracting authority has the right to point out within the tender documentation the competent institutions which from the economic operators can obtain information regarding the provisions on tax payment and/or environment protection.

(2) The contracting authority has the obligation to point out in the tender documentation the compulsory rules related to the specific employment protection and working conditions that are in force at national level and that have to be respected during the performance of the contract or to indicate the competent bodies which from the economic operators may obtain appropriate information regarding the respective regulations. In this case, the contracting authority shall request the economic operators to indicate that they have taken into account, when drawing up their tender, of the specific employment protection and working conditions.

### **Article 35**

(1) The terms of references contains compulsory the technical specifications.

(2) Technical specifications are technical requirements, prescriptions, technical characteristics needed to describe in an objective manner any product, service or work in order to meet the requirements of the contracting authority.

(3) Technical specifications define, if necessary, and without limiting to these, characteristics such as quality level, technical and performance level, requirements regarding the impact on the environment and the safety for use as well as dimensions, terminology, symbols, tests and testing methods, packaging, marking and labelling, and instructions for the use of product, systems for insuring the quality, conditions and procedures for conformity certification with relevant standards or assessment and other such requirements. In case of works contracts, the technical specifications can also refer to design and evaluation, examination, inspection and reception conditions of the works or techniques, procedures and methods of execution as well as to other conditions with technical character that the contracting authority is able to describe, according to the law in force and general or specific regulations, related to the delivered works, materials or other elements of those works.

(4) Technical specifications are defined as to correspond whenever possible, to the needs/exigencies of any user, including persons with disabilities.

(5) Technical specifications shall afford equal access to the competition for any tenderer and must not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

(6) Without prejudice to mandatory national technical rules, insofar these are compliant with the community law, the contracting authority has the obligation to define the technical specifications:

a) either by reference, as a rule, in the following order of preference, to national standards transposing European standards, European technical approvals, common technical specifications used in the European Community, international standards or other technical references established by the European standardization bodies. When the above mentioned do not exist, the technical specifications are defined by reference to national standards, national technical approvals or national technical specifications relating the use of the products or the design, calculation and execution of the works. Each reference shall be accompanied by the words 'or equivalent';

b) or in terms of performance and/or functional requirements that have to be described sufficiently accurate in order to permit the tenderers to understand exactly the subject-matter of the contract, and, in this manner, the contracting authority to award the respective contract;

c) or in terms of performance and/or functional requirements, as these are provided within lett. b), as well as referring to standards, technical approvals, common technical specifications provided by letter a) as a presumptive mean of the conformity with the performance level and with the respective functional requirements;

d) or in terms of performance and/or functional requirements, as these are provided within lett. b), for certain characteristics and by referring to standards, technical approvals, technical specifications, provided for by letter a) for the other characteristics.

### **Article 36**

(1) In case the contracting authority defines the technical specification within the terms of references opting for the methods provided for by Article 35 paragraph (6), letter a), then the contracting authority cannot reject a tender on the grounds that the products and services provided in the technical proposal do not comply with the specifications to which it has referred, once the tenderer proves by any adequate means that the technical proposal satisfies in an equivalent manner the requirements of the contracting authority.

(2) In case when the contracting authority defines the technical specifications from the terms of references by specifying the performances and/or functional requirements, then no tender can be rejected if the tenderer demonstrates by any appropriate means that the products, services or works offered ensure the accomplishment of the performances or functional requirements as they comply with:

- a) a national standard transposing an European standard;
- b) an European technical approval;
- c) a common technical specification used in European Community;
- d) an international standard;
- e) other technical regulations established by European standardization bodies.

(3) According to the provisions of paragraph (1) and (2), an adequate mean to prove the conformity with the technical specifications required, can be the technical dossier of the manufacturer or a test report issued by a recognized body which might be, by case, a neutral testing and calibration laboratory or a certification and inspection body that ensures the respect for the application of the European standards; the contracting authority has the obligation to accept certificates from recognized bodies established in any Member State.

### **Article 37**

(1) The performances and functional characteristics provided at art. 35 paragraph (6) lett. b) through which are defined the technical specifications may also include environmental characteristics.

(2) When the contracting authority lays down environmental characteristics in terms of performance or functional requirements, then it may use the detailed specifications, or, if necessary, parts thereof, as defined by European or (multi-) national “eco-labels”, or by any other eco-label, provided that the following conditions are cumulatively met:

- a) those specifications are appropriate to define the characteristics of the supplies or services that represent the object of the public procurement contract;

- b) the requirements for the “eco-label” are drawn up on scientific basis;
- c) the “eco-labels” are adopted using a specific procedure that allowed the involvement of all interested parties - such as government bodies, consumers, producers, distributors and environmental organizations;
- d) “eco-labels” are accessible/available to all interested parties;

(3) The contracting authority has the right to indicate within terms of references that the products and services bearing the “eco-label” are presumed to implicitly comply with the technical specifications laid down in the contract documents. On the other hand, the contracting authority does not have the right to consider a technical proposal as being non-compliant for the single reason that the products or services do not have the mentioned “eco-label” if the tenderer proves by whatever appropriate means that the products /services correspond to the requested technical specifications.

(4) In the meaning of paragraph (3), an appropriate mean for proving the conformity with the technical specifications could be a technical dossier of the manufacturer or a test report from a recognized body as referred to in article 36 paragraph (3); the contracting authority has the obligation to accept certificates from recognized bodies established in any Member State.

### **Article 38**

(1) It is forbidden to define in the terms of reference the technical specifications that indicate a specific source, production, make, a particular process, or trade marks, patents, types or a specific origin with the effect of favouring or eliminating certain economic operators or certain products.

(2) By exception from the provisions of paragraph (1), such reference is allowed, only in an exceptional situation where a sufficiently precise and intelligible description of the subject-matter of the contract for all interested parties is not possible by applying the provisions of art. 35 and 36 and only accompanied by the words “or equivalent”.

### **Article 39**

The contracting authority has the right to impose within the tender documentation, to the extent that these are compatible with Community law, special conditions relating to the performance of the contract with the goal to obtain certain social effects or related to environmental protection and promoting the sustainable development.

### **Article 40**

(1) The contracting authority has the obligation to provide the tender documentation for every interested economic operator that requires so.

(2) The contracting authority has the right to select from one of the following ways of obtaining the tender documentation by economic operators:

a) ensuring, by electronic means, the direct, non-restricted and complete access to the tender documentation;

b) providing the tender documentation, on paper or magnetic support, to all economic operators who have submitted a requirement in this respect, or, by case to those who were sent an invitation for participation.

(3) Within the provisions of paragraph (2), letter b), the contracting authority has the right to establish a price for obtaining the tender documentation with the condition that this price does not exceed the multiplication of the documentation costs, adding, if necessary, the costs of its delivery by post.



## **Section 4**

### Rules for participation to the awarding procedure

#### **Article 41**

Any economic operator has the right to participate, individually or in an operators' group in the awarding procedure.

#### **Article 42**

The tenderer/candidate that is entitled to carry out a certain activity, according to the legislation of the state where it is established, cannot be rejected from a awarding procedure having as only reason that, according to national legislation, this type of activity may be provided only by a legal persons or only by natural persons.

#### **Article 43**

(1) The contracting authority has the right to impose that participation to the awarding procedure shall be reserved only for sheltered workshops or for those tenderers that agree to perform the contract in the context of sheltered employment programmes for protected employment, where the major part of the employees are persons with disabilities who cannot carry on a professional activity in normal conditions because of the nature and gravity of their disabilities,

(2) When the contracting authority decides to limit the participation to the awarding procedure according to the provisions of paragraph (1), this decision must be explicitly specified in the contract notice for the awarding procedure.

#### **Article 44**

(1) More economic operators have the right to be associated and to form a group with the purpose to present together the candidature or to submit a common tender, not having the obligation to assume a specific legal form of their association.

(2) The contracting authority has the right to ask the group to assume a specific legal form of their association only if the common tender is declared winner and only if such a requirement represents a necessary condition for performing the contract.

#### **Article 45**

(1) Without diminishing his responsibility regarding the performance of the future public procurement contract, the tenderer has the right to include in his technical proposal the possibility to subcontract a part of the respective contract.

(2) In the case when the contracting authority requires so, the tenderer has the obligation to point out the share/shares of the contract that he intends to subcontract and the identification data of the proposed subcontractors.

#### **Article 46**

(1) The candidate/tenderer, within the same procedure, does not have the right, unless otherwise stipulated in the tender documentation:

- a) to submit two or more candidatures/individual and/or common tenders under the sanction of the exclusion out of the contest of all the candidatures/tenders in the matter;

to submit a common/individual tender and to be nominated as subcontractor within another tender, under the sanction of the exclusion out of the contest of the individual tender or, by case, of the tender where the tenderer is associated

(2) Affiliated undertakings have the right participate within the same awarding procedure, but only in the case when their participation does not distort competition.

(3) To the meaning of the provisions in article 46(2), “affiliated undertaking” means any entity:

a) that can be subject to a directly or indirectly dominant influence exerted by another entity;

b) that can exert a dominant influence over another entity; or

c) as a consequence of being associated with an entity, is under the dominant influence of another entity.

## **Section 5**

### Rules of publicity

#### **Paragraph 1**

##### Publication of notices

#### **Article 47**

(1) The contracting authority has the obligation to ensure the transparency of the award of the public procurement contracts and of the conclusion of the framework agreements by publishing the prior information notice, contract notice and awarding notice.

(2) In the case of contracts with an estimated value higher than the thresholds provided by art. 55 paragraph (2), the contracting authority has the obligation to include in the notices provided by paragraph (1) at least the information provided in Annex no. 3A and, where appropriate any other information deemed useful by the contracting authority, by using the standard forms adopted by the European Commission.

(3) The modalities for the application of paragraph (2), as well as the content of the notices in the case when, according to the present law, the contracting authority has not the obligation to send it for publication in the Official Journal of the European Union, will be laid down by Government Decision.

#### **Article 48**

(1) With the exception provided at art. 299, the contracting authority has the obligation to transmit for publication the notices provided at art. 47, par. (1), only by electronic means, to the operator of ESPP.

(2) In the cases provided by the present law, the operator of ESPP has the obligation to ensure the transmission for publication of the notices to the Official Journal of the European Union.

#### **Article 49**

(1) The operator of ESPP has the obligation to provide to the National Authority for Regulating and Monitoring Public Procurement the un-restricted access to the notices transmitted by the contracting authorities, before their publication.

(2) The National Authority for Regulating and Monitoring Public Procurement shall verify each notice transmitted for publication in ESPP by the contracting authority, insofar the respective notice regards the application of the awarding procedure of a contract with an estimated value bigger than the thresholds provided by art. 124. In a period of 2 working days from the date of receiving the notice, the National Authority for Regulating and Monitoring Public Procurement has the obligation:

a) either to issue to the operator of the ESPP the clearance for publication of the respective notice, in the case when after verifying it no errors/omissions are detected;

b) or to reject the publication of the respective notice, in the case when after verifying it errors/completing omissions are detected and to inform the contracting authority on this decision and on the manner of correcting the errors/omissions;

(3) In the case provided by paragraph (2) lett. a), the operator of ESPP has the obligation to:

a) transmit the notice for publication in the Official Journal of the European Union no later than one working day from receiving the publication clearance, in the case when the present law provides for such an obligation; the ESPP operator has the obligation to ensure itself that it can prove the date when the notice was sent for publication;

b) publish the notice in ESPP no later than two working days from the date of receiving the publication clearance;

(4) The ESPP does not have the right to publish the transmitted notice from the contracting authority or to send it for publication in Official Journal of the European Union, without the publication clearance issued by National Authority for Regulating and Monitoring Public Procurement.

(5) In the case when, due to technical reasons, the ESPP operator does not have the possibility to send a certain notice for publication in the Official Journal of the European Union, the contracting authority has the responsibility to transmit for publication the respective notice by its own means. The ESPP operator has the obligation to inform the contracting authority regarding such a situation emerging, in maximum one day after the period stipulated at par. (3) let. a) expires.

(6) After publication of the notice in ESPP, the contracting authority has the obligation to transmit the notice for publication also to the Official Gazette of Romania, Part VI - Public procurement.

(7) The Autonomous Administration "Official Gazette" publishes the notices sent for publication in maximum eight (8) days from their registration date. In the contract notice's case stipulated at art. 114, the Autonomous Administration "Official Gazette" publishes the respective notice in maximum 3 days from the registration date.

## **Article 50**

(1) In the case when the provisions of this law lay down the obligation to publish the notice in the Official Journal of the European Union, then the respective notice cannot be published at national level before the date of dispatch that notice to the European Commission.

(2) The notice published at national level shall not contain other information than the already existing information in the notice published in the Official Journal of the European Union and shall specify the sending date to the European Commission.

## **Paragraph 2**

The prior information notice

## **Article 51**

(1) The contracting authority has the obligation to send for publication an prior information notice where take the option to benefit from the provision laid down in art. 75 paragraph (2) or in art. 89 paragraph (2) and if:

a) the estimated total value of the contracts/framework agreements for acquiring products within the same CPV group that are to be awarded in the following 12 months, is equal or greater than RON equivalency of EUR 750.000;

b) where the estimated total value of the contracts/framework agreements for acquiring services within the same category listed in Annex 2A that are to be awarded in the following 12 months, is equal or greater than RON equivalency of EUR 750.000;

c) where the estimated value of the works contracts/framework agreements is to be awarded in the following 12 months and whose estimated value is equal or greater than RON equivalency of EUR 5.000.000.

(2) The contracting authority has the right to send for publication a prior information notice in other cases which are not provided in paragraph (1).

(3) Publishing the prior information notice does not create an obligation for the contracting authority to effectuate the respective public procurement

## **Article 52**

(1) In the cases provided by article 51 align. (1) letters a) and b), the contracting authority has the obligation to transmit for publication the prior information notice as soon as possible after the beginning of the budgetary year.

(2) In case provided by art 51 align. (1) letter c) the contracting authority has the obligation to transmit for publication the prior information notice as soon as possible after the decision approving the planning of the respective works contract or framework agreement.

## **Article 53**

The prior information notice is published:

a) in the Official Journal of the European Union, in ESPP and in Official Gazette of Romania, Part. VI, Public procurement; or

b) only in ESPP provided that before the publication, an informative notice was sent to the European Commission.

(2) In the case provided at paragraph (1) letter b), the prior information notice has to contain also the date of dispatch of the informative notice to the European Commission.

## **Paragraph 3** Contract notice

## **Article 54**

The contracting authority has the obligation to send for publication a contract notice when:

a) it initiates an open procedure, restricted procedure, competitive dialogue or negotiation with the publication of a contract notice, in order to award a public procurement contract or to conclude a framework agreement;

b) it sets up a dynamic purchasing system;

c) it initiates the awarding process of a public procurement contract through a dynamic purchasing system; in this case will publish a simplified notice;

d) it organizes a design contest.

## **Article 55**

(1) The contract notice is published in ESPP, in Official Gazette of Romania, Part. VI, Public procurement and, by case, in Official Journal of the European Union.

(2) The publication in the Official Journal of the European Union is mandatory in all the situations where:

a) the contracting authority finds itself in one of the categories provided by art. 8, letters a)-c) and the estimated value of the supply or services contract/framework agreement, that is to be awarded/concluded is greater than the RON equivalency of 125.000 Euro;

b) the contracting authority finds itself in one of the categories provided by art. 8 letters d) or e) and the estimated value of the supply or services contract/framework agreement, that is to be awarded/concluded, is greater than RON equivalency of 420.000 Euro;

c) where the value of the contract/framework agreement of works, that is to be awarded/concluded is greater than RON equivalency of 5.000.000 EURO.

#### **Paragraph 4** Awarding notice

#### **Article 56**

(1) The contracting authority has the obligation to transmit for publication an awarding notice within 48 days after it:

a) has finalized the awarding procedure – open tender, restricted tender, competitive dialogue, negotiation with/without prior publication of a contract notice, request for tenders – by awarding the public procurement contract or by concluding the framework agreement;

b) has finalized a design contest by establishing the winner;

c) has awarded a public procurement contract by a dynamic purchasing system.

(2) For the services included in Annex 2B, the obligation provided in paragraph (1) shall be applied only to contracts with a value greater than the thresholds provided in art. 57 paragraph (2) let. a) or, by case, let. b). In these cases the contracting authority has to point out in the notice dispatched whether they agree to its publication.

#### **Article 57**

(1) The awarding notice is published in ESPP, in Official Gazette of Romania, Part. VI, Public procurement and, by case, in Official Journal of the European Union.

(2) The publication in the Official Journal of the European Union is mandatory in all the situations where:

a) the contracting authority finds itself in one of the categories provided by art. 8, letters a)-c) and the value of the supply or services contract/framework agreement, that has been awarded/concluded is higher than the RON equivalency of 125.000 Euro;

b) the contracting authority finds itself in one of the categories provided by art. 8 letters d) or e) and the value of the supply or services contract/framework agreement, that has been awarded/concluded, is higher than RON equivalency of 420.000 Euro;

c) the value of the contract/framework agreement of works, that has been awarded/concluded is higher than RON equivalency of 5.000.000 EURO.

#### **Section 6**

Special rules for transparency applicable to the

### **Article 58**

(1) In the case of awarding media publicity contracts, with an annual value higher than the RON equivalency of 2000 Euro, without VAT, the contracting authority has the obligation to publish a contract notice and a awarding notice in the public information system available on the internet at a dedicated address, and on its own web page if exists.

(2) Regarding the provisions of align. (1), by a media publicity contract its understood any services contract having as an object the creation, the producing and/or the diffusion of advertisement or any other forms of promotion by mass written information, audiovisual or electronic means;

(3) The obligation foreseen at align. (1) does not exonerate the contracting authority to respect the general provisions applicable to the publicity rules, as they are provided within section 5 of the present chapter.

(4) The contracting authority has the obligation to point out in the contract notice provided by align. (1) the qualification and selection criteria, and in the situation when the awarding criterion is the most advantageous tender from economic point of view, the pointing calculation algorithm; the notice has to be accompanied by an opportunity reference with the purpose of explaining the reasoning for the purchasing of the publicity services and indicating the followed impact followed and the measuring criteria of the desired result.

(5) No longer than 120 days from the ending date of the publicity services contract, the contracting authority has the obligation to publish in the before mentioned information system provided by align. (1) an evaluation report of the impact of purchasing publicity services.

(6) The media publicity contracts have to contain compulsory the next specific clauses regarding the obligation of the parts to ensure, inclusively on the entire period of the performing of the contract, the access of the public to at least the following information: the final beneficiaries of the publicity funds, the allocation criteria of these funds, the sums allocated to each final beneficiary and the completion dead-lines of the contractual provisions.

(7) The access of the public to the information provided at paragraph (6) is ensured with the help of the contracting authority which has the obligation to detain actualized information regarding the way the contract is carried out.

(8) In the case of media publicity contracts the name of the contracting authorities has to be mentioned compulsory in the publicity material.

## **Section 7**

### Communication and data transmission rules

### **Article 59**

(1) Any communication, requirement, information, notification and any other of these provided by this law, shall be sent in written form.

(2) Any document in written form shall be registered in the moment of sending, respectively, in the moment of receiving it.

(3) The communication, sending and stocking of the information is accomplished in order to ensure the integrity and confidentiality of respective data.

### **Article 60**

(1) The written documents shall be sent by any of the following means:

- a) by post;
- b) fax;
- c) electronic means;
- d) a combination of the means provided at let. a) – c).

(2) The contracting authority has the right to impose in the tender documentation, the communication ways it intends to use during the application of the procedure.

#### **Article 61**

(1) The communication ways imposed by the contracting authority shall not restrict the access of economic operators to the awarding procedure.

(2) The instruments used for electronic communication, as well as their technical characteristics, must be non-discriminatory, generally available to any economic operator and interoperable with information and communication technologies products in general use.

(3) In case the documents are delivered by electronic means, the legal provisions regarding the electronic signature are applicable.

#### **Article 62**

(1) The economic operator has the right to transmit a request to participate in the awarding procedure by any of the modalities provided by art. 60 align (1) or by phone; in this latter case the economic operator has the obligation to confirm the request to participate in writing, as soon as possible.

(2) The contracting authority has the right to impose that any requirement for participation to the awarding procedure, which has been delivered by fax, has to be confirmed, in a reasonable term, by letter delivered by post or other electronic means. In this case, the contracting authority has the obligation to specify the respective requirement and also the completion dead-line in the contract notice.

#### **Article 63**

(1) The economic operator has the right to transmit its tender only by post, or, if the contracting authority provides for this possibility, by electronic means.

(2) In case the contracting authority establishes that the tenders are to be delivered by post, the tenderer has implicitly the right to directly deliver the tender at contracting authority headquarters or to another address indicated by contracting authority .

#### **Article 64**

The contracting authority has the right to establish that the requirements to participate and/or the tenders, shall be transmitted by electronic means, only if the following requirements are fulfilled:

- a) the information regarding the specific possibilities for electronic transmission, including encryption, are available for any interested economic operator;
- b) the electronic devices for reception guarantee in a corresponding way the integrity and confidentiality of the received data;
- c) the economic operators shall submit before the time limit for submitting documents, certificates, declarations and other, required according to Chapter V, section 2, in case these are not available in electronic format.

#### **Article 65**

Regarding the provisions of art. 64, guaranteeing the integrity and confidentiality of received data requires that the electronic devices, through their technical characteristics and/or through the specific used procedure, allow cumulatively the accomplishment of at least the following conditions:

a) the moment of receiving the tenders or requirements for participation and of the submission of plans or projects can be precisely determined;

b) before the time limit for the transmission of the data, no person has the access to the transmitted data;

c) in the case when the interdiction of access to the transmitted data provided by letter b) has been breached, the unauthorized access can be clearly detectable;

d) only authorized persons have the right to establish or modify the date of opening of received data;

e) the access to received data in all the phases of the process is possible only by an simultaneous action of at least two authorized persons/systems and only after the opening date established according to provisions of letter d);

f) after the opening date of received data, the access to respective data remains possible only for authorized persons.

## **Section 8**

### Rules to avoid the conflict of interests

#### **Article 66**

During the application of the awarding procedure, the contracting authority has the obligation to take all necessary measures to avoid the situations that can lead to a conflict of interests and/or unfair competition.

#### **Article 67**

The natural or legal person that has participated at the elaboration of the tender documentation, as an economic operator, has the right, to be tenderer, associated tenderer or subcontractor, only in the case when its involvement in the elaboration of the tender documentation does not distort the competition.

#### **Article 68**

The natural or legal persons who are directly taking part in the process of verification/evaluation of the candidatures/tenders have no right to be candidates, tenderers, associated tenderers or subcontractors, under the sanction of the exclusion from the awarding procedure.

#### **Article 69**

The following persons have no right to be involved in the verification/evaluation of the tenders/candidatures:

a) persons holding part of the equity, parts of interest or shares of one of the tenderers/candidates or subcontractors, or persons that are member in Board of Directors/Management or Supervising Body of one of the tenderers/candidates or subcontractors;

b) husband/wife or relatives, in-laws, up to the forth degree, in relation with one of the persons that are member in Board of Directors/Management or Supervising Body of one of the tenderers/candidates;

c) persons whereof established that they can have an interest that could affect their impartiality during the verification/evaluation process of the tenders/candidatures.



## **Article 70**

The contractor has no right, in order to perform the public procurement contract, to employ natural or legal persons which have been involved in the evaluation/verification process of the tenders/candidatures submitted within the application of awarding procedure, during at least 12 months after the conclusion of the contract, under the sanction of the annulment of this contract on grounds of immoral clause.

## **Chapter III**

### Awarding procedures

#### **Section 1**

##### Phases before initiating the awarding procedure

#### **Article 71**

Without prejudice to the applicability of the provisions of the present law regarding the minimal periods that have to be ensured between, on the one hand, the date of transmission for publishing the contract notice or the date of transmission of participation invitations and, on the other hand, the time limit for submitting the tenders/candidatures, the contracting authority has the obligation to establish the respective period depending on the complexity of the contract and/or the specific requirements and in such a manner that the interested economic operators will benefit from a proper and sufficient period of time in order to elaborate the offers and to prepare the qualification documents required by the tender documentation.

#### **Article 72**

The contracting authority has the obligation to prolong the period for the elaboration of tenders in the case when these cannot be elaborated without visiting the sites or after on the spot inspection of the appendix documents to the terms of references, as also in the case when the contracting authority does not have the possibility to transmit the tender documentation or the answer to the clarifications request within the time limits provided by this law, although requested in due time. In such a situation, the time limit for submitting the tenders is extended by a period of time long enough in order that any interested economic operator will dispose of reasonable time necessary for obtaining complete and relevant information for the elaboration of the tender.

#### **Section 2**

##### Open procedure

#### **Article 73**

- (1) The open procedure process is carried out, as a rule, in a single phase.
- (2) The contracting authority has the right to decide the organization of a supplementary phase of electronic auction, case in which it has the obligation to announce this decision in contract notice and within the tender documentation.

#### **Article 74**

The open procedure is initiated by sending for publication, according to the provisions of Article 55, a contract notice by which it requires the interested economic operators to submit tenders.

## **Article 75**

(1) Without prejudice to the provisions of art. 71, in the case when the estimated value of the public procurement contract is bigger than the value provided by art. 55 paragraph (2), the period between the date of transmission of the contract notice for publication in Official Journal of the European Union and the time limit for submitting the tenders has to be at least 52 days.

(2) In the case when the contracting authority has published an prior information notice regarding the public procurement contract that will be awarded, then it has the right to reduce the period provided by paragraph (1) up to 36 days.

(3) The reduction provided for by paragraph (2) is allowed in the case when the prior information notice included all the information stipulated for the contract notice – to the extent to which this information is available at the time the prior information notice was published - and was sent for publishing with up to 12 months and at least 52 days before the sending date for publishing of the contract notice.

(4) In the case when the contract notice is sent for publishing in the Official Journal of European Union, in electronic form, the period provided by paragraph (1) or, if the case, by paragraph (2), can be reduced with 7 days.

(5) In the case when the contracting authority publishes in ESPP all the tender documentation and allows, starting with the publishing date of the contract notice, the direct access and without restriction of the economic operators to this documentation, then it has the right to reduce the periods of time provided for by paragraph (1), as well as those that resulted from the application of provisions of paragraph (4), with 5 days.

(6) The reduction provided for by paragraph (5) is allowed only in the case when the contract notice points out the Internet address where the tender documentation is available on-line.

## **Article 76**

(1) Without prejudice to the provisions of art. 71, in the case when the estimated value of the public procurement contract is equal or smaller than the value provided by art. 55 paragraph (2), the contracting authority has the obligation to transmit the contract notice for publication in ESPP with at least 28 days before the time limit for submitting the tenders.

(2) In the case when the contracting authority publishes in ESPP the entire tender documentation and allows, starting with the publishing date of the contract notice, the direct and unrestricted access of economic operators to this documentation, then it has the right to reduce the period provided by paragraph (1) by 5 days.

(3) The reduction provided for by paragraph (2) is allowed only in the case when the contract notice contains specifications regarding the internet address where the tender documentation is available on-line.

## **Article 77**

(1) Any interested economic operator has the right to require and obtain the tender documentation.

(2) In the case provided by Article 40, paragraph (2) letter b), the contracting authority has the obligation to make the tender documentation available to the economic operator as soon as possible, in a period of time that must not exceed 4 days from the date of receiving a requirement from the economic operator.

(3) The interested economic operator has the obligation to undertake all the needed diligences so that the observance by the contracting authority of the period provided for by paragraph (2) shall not lead to the situation in which the tender documentation should be made available in less than 2 days before the time limit for submitting the tender.

#### **Article 78**

(1) Any interested economic operator has the right to make requests for clarifications regarding the tender documentation.

(2) The contracting authority has the obligation to answer clearly, completely and without ambiguities, as soon as possible, to any request for clarifications, in a period of time that shall not exceed, as a rule, 3 working days from receiving the respective request from the economic operator.

(3) The contracting authority has the obligation to send the answers to the requested clarifications to all the economic operators that obtained the tender documentation according to the provisions of this law, taking the necessary measures in order not to disclose the identity of the economic operator that made the request for clarifications.

#### **Article 79**

(1) Without prejudice to the provisions of art. 78 par. (2), to the extent that the clarifications are requested in due time, the contracting authority's answer to these requests must be sent no later than 6 days before the deadline set for submitting the tenders.

(2) In the case when the economic operator has not transmitted the request for clarifications in due time, and by doing so, the contracting authority finds itself in the situation not to be able to respect the time limit provided by paragraph (1), the contracting authority has further the obligation to respond to the request for clarifications insofar the necessary period for the elaboration and transmission of the answer towards all the economic operators is possible before the time limit for submitting the tenders.

#### **Article 80**

The contracting authority has the obligation to open tenders at the date, hour and place indicated in the contract notice, to the extent that the declaration of the submission deadline hasn't become necessary, in compliance with the provisions of art. 72 or as a result of a complaint submission.

### **Section 3**

#### **Restricted procedure**

#### **Article 81**

(1) The restricted procedure is carried out, as a rule, in two phases:

- a) the selection of the candidates, by applying the selection criteria;
- b) the evaluation of the tenders that were submitted by the selected candidates, by applying the awarding criteria.

(2) The contracting authority has the right to decide the organization of a supplementary phase of electronic auction, case in which it has the obligation to announce this decision in the contract notice and within the tender documentation.

#### **Article 82**

The restricted procedure is initiated by sending for publication a contract notice, according to art. 55, by which it requires the interested economic operators to submit candidatures

### **Article 83**

1) Without prejudice to the provisions of art. 71, in the case when the estimated value of the public procurement contract is bigger than the value provided by art. 55 paragraph (2), the period between the date of transmission of the contract notice for publication in Official Journal of the European Union and the time limit for submitting the candidatures has to be at least 37 days.

(2) In the case when, by emergency reasons, the observance of the number of days provided for by paragraph (1) cannot be done the contracting authority has the right to accelerate the procedure by reducing the period provided for by paragraph (1), but not less than 15 days.

(3) In the case when the contract notice is sent for publishing in the Official Journal of European Union, in electronic form, the period provided by paragraph (1) can be reduce by 7 days, and, if the case provided by paragraph (2), the period can be reduced with 5 days.

### **Article 84**

(1) Without prejudice to the provisions of art. 71, in the case when the estimated value of the public procurement contract is equal or smaller than the value provided by art. 55 paragraph (2), the contracting authority has the obligation to transmit the contract notice for publication in ESPP with at least 16 days before the time limit for submitting the applications.

### **Article 85**

(1) Any economic operator has the right to submit its candidature for the first phase of the restricted procedure.

(2) In the stage stipulated at art. 81 par (1) let. a), the contracting authority has the right to limit the number of candidates which shall be selected to submit tenders, provided a sufficient number of available candidates exist. When it selects the candidates, the contracting authority has the obligation to apply objective and non-discriminating criteria, using for this purpose only the selection criteria stipulated in the contract notice.

(3) The contracting authority has the obligation to indicate in the contract notice the selection criteria and the rules that are applicable, the minimum number of candidates that it intends to select and, if the case, the maximum number.

(4) The minimum number indicated in the contract notice, stipulated in paragraph. (3), cannot be lower than 5.

### **Article 86**

(1) The number of selected candidates after the first phase of the restricted procedure must be at least equal with the minimum number indicated in the contract notice.

(2) In the case when the number of candidates that comply with selection criteria is lower than minimum number indicated in the contract notice, the contracting authority has the right:

a) either to cancel the restricted procedure;

b) or to carry on the restricted procedure only with those candidates that accomplish the required criteria, insofar as those number is, still sufficient to ensure a genuine competition.

#### **Article 87**

(1) The contracting authority has the obligation to transmit, simultaneously, a participation invitation to the second phase of the restricted procedure, to all selected candidates.

(2) It is forbidden to invite for the second phase of the restricted procedure an economic operator that did not submit the candidature in first phase or that did not accomplish the selection criteria.

#### **Article 88**

(1) The participation invitation contains at least the following information:

- a) references regarding the published contract notice;
- b) the deadline date and hour settled for submitting tenders;
- c) the address where the tenders will be submitted;
- d) the language or languages for elaboration of the tender;
- e) the address, date and hour for opening tenders;

f) if it is the case, specifications regarding the supplementary documents which the economic operators must present with the purpose of verifying the declarations or completions of the documents, submitted in the first phase in order to demonstrate the technical, economical and financial capacity.

(2) The contracting authority has the obligation to send the participation invitation together with a copy of the tender documentation.

(3) When the tender documentation is directly accessible by electronic means in ESPP, the contracting authority has the obligation to insert in the participation invitation information regarding the way to access the respective documentation.

#### **Article 89**

(1) Without prejudice to the provisions of art. 71, in the case when the estimated value of the public procurement contract is bigger than the value provided by art. 55 paragraph (2), the contracting authority has the obligation to transmit the participation invitation with at least 40 days before the time limit for submitting the tenders.

(2) In the case when the contracting authority has published an prior information notice regarding the public procurement contract that will be awarded, this has the right to reduce the period provided for by paragraph (1) usually, by up to 36 days, but never lower than 22 days.

(3) The reduction provided for by paragraph (2) is allowed in the case when the prior information notice included all the information stipulated for the contract notice – to the extent to which this information is available at the time the prior information notice was published - and was sent for publishing with up to 12 months and at least 52 days before the sending date for publishing of the contract notice.

(4) In the case when the contracting authority publishes in the ESPP the entire tender documentation and authorizes, starting with the date of publishing of the contract notice the direct and non-restricted access of the economic operators to this documentation, then it has the right to reduce the periods provided for by paragraph (1) by 5 days.

(5) The reduction provided for by paragraph (4) is allowed exclusively in the case when the contract notice contains specifications regarding the internet address where the tender documentation can be found.

(6) In the case when, by emergency reasons, the number of days provided for by paragraph (1) and paragraph (2), as well as the one resulted following the application of the provisions of paragraph (4) cannot be observed, the contracting authority has the right to accelerate the application of the procedure by reducing the respective periods, but to no less than 12 days.

### **Article 90**

(1) Without prejudice to the provisions of art. 71, in the case when the estimated value of the public procurement contract is equal or smaller than the value provided by art. 55 paragraph (2), the contracting authority has the obligation to transmit the participation invitation with at least 22 days before the time limit for submitting the tenders.

(2) In the case when the contracting authority publishes in the ESPP the whole tender documentation and authorizes the direct and unrestricted access of the economic operators to this documentation, starting with the publishing date of the contract notice, then it has the right to reduce the period provided for by paragraph (1) with another 5 days.

(3) The reduction provided for by paragraph (2) is allowed exclusively in the case when the contract notice contains specifications regarding the internet address where the tender documentation can be found.

(4) In the case when, by emergency reasons, the number of days provided for by paragraph (1), as well as those resulted after the application of paragraph (2) provisions cannot be observed, the contracting authority has the right to accelerate the application of the procedure by reducing the respective periods, but to no less than 12 days.

### **Article 91**

(1) Any selected candidate has the right to require clarifications regarding the tender documentation.

(2) The contracting authority has the obligation to answer, clearly, completely and without ambiguities, as soon as possible, to any of the required clarification in a period of time which shall not exceed, as a rule, 3 working days after receiving such a request.

(3) The contacting authority has the obligation to send the answers to all the selected candidates, taking the necessary measures not to disclosure the identity of the person that requested those clarifications.

### **Article 92**

(1) Without prejudice to the provisions of art. 91 par. (2), to the extent that the clarifications are requested in due time, the contracting authority's answer to these requests must be sent no later than 6 days before the deadline set for submitting tenders.

(2) In case that the economic operator has not transmitted the request for clarification in a due time, and by doing so, the contracting authority finds itself in the situation not to be able to respect the time limit provided by paragraph (1), the contracting authority has further the obligation to respond to the request for clarifications insofar the necessary period for the elaboration and transmission of the answer towards all the economic operators is possible before the time limit for submitting the tenders.

### **Article 93**

The contracting authority has the obligation to open tenders at the address, date and hour indicated in the invitation for participation, to the extent that the declaration of the submission deadline hasn't become necessary, in compliance with the provisions of art. 72 or as a result of a complaint submission.

## **Section 4** Competitive dialogue

### **Article 94**

(1) The contracting authority has the right to apply the competitive dialogue procedure for awarding a public procurement contract if the two following conditions are cumulatively fulfilled:

- (a) the respective contract is considered to be particularly complex;
- (b) the application of the open or restricted procedure would not allow awarding of the respective public procurement contract.

### **Article 95**

According to the provisions of art. 94 letter a), the particularly complex contract is considered the public procurement contract for which the contracting authority is not objectively able:

- a) to define technical specifications, technical means that can satisfy the needs and exigencies; and/or
- b) to establish the legal and/or financial framework for the implementation of a project.

### **Article 96**

The competitive dialogue is carried out in three phases:

- a) the phase for pre-selection of candidates;
- b) the dialogue phase with the admitted candidates after the pre-selection phase are taking place, in order to identify the solution/solutions that could correspond to the contracting authority needs and based on the candidates will submit the final tender;
- c) the evaluation phase of the final submitted tenders.

### **Article 97**

The competitive dialogue is initiated by sending for publishing, according to Article 55 provisions a contract notice by which interested economic operators are requested to submit tenders.

### **Article 98**

(1) Without prejudice to the provisions of art. 71, in the case when the estimated value of the public procurement contract is bigger than the value provided by art. 55 paragraph (1), the period between the date of transmission of the contract notice for publication in Official Journal of the European Union and the time limit for submitting the candidatures has to be at least 37 days.

(2) In the case when the contract notice is sent for publishing in the Official Journal of European Union, in electronic form, the period provided by paragraph (1) can be reduced with 7 days.

#### **Article 99**

Without prejudice to the provisions of art. 71, in the case when the estimated value of the public procurement contract is equal or smaller than the value provided by art. 55 paragraph (2), the contracting authority has the obligation to transmit the contract notice for publication in ESPP with at least 30 days before the time limit for submitting the candidatures.

#### **Article 100**

Any economic operator has the right to submit his candidature for participation in the competitive dialogue.

#### **Article 101**

(1) When it pre-selects the candidates, the contracting authority has the obligation to apply objective and non-discriminating criteria, using for this purpose only the pre-selection criteria stipulated in the contract notice.

(2) The contracting authority has the obligation to indicate in the contract notice the pre-selection criteria and the rules that are applicable, the minimum number of candidates that it intends to pre-select and, if the case, the maximum number.

(3) The minimum number indicated in the contract notice, stipulated in paragraph. (2), cannot be lower than 3.

#### **Article 102**

(1) The number of admitted candidates after the first phase of the competitive dialogue has to be equal with at least the minimum number indicated in the contract notice.

(2) In the case when the number of candidates that fulfil the pre-selection criteria is lower then the minimum number specified in the contract notice, the contracting authority has the right:

a) either to cancel the competitive dialogue;

b) or to continue the competitive dialogue only with those candidates that comply with the required criteria, insofar the number of those is still sufficient to a genuine competition.

#### **Article 103**

(1) The contracting authority has the obligation to simultaneously send a participation invitation to the second phase of the competitive dialogue, to all pre-selected candidates.

(2) It is forbidden to invite to the second phase of the competitive dialogue an economic operator that did not submit the candidature in first phase or that did not comply with pre-selection criteria.

#### **Article 104**



- (1) The participation invitation must contain at least the following information:
  - a) references regarding the published contract notice;
  - b) the address where the dialogue shall take place, as well as the date and hour of its launch;
  - c) the language/languages used for the discussions;
  - d) if the case, clarifications regarding the supplementary documents that must be presented by the economic operators in order to verify the declaration or in order to complete the documents, presented in the first phase for proving the technical and economic-financial capacity.

(2) The contracting authority has the obligation to send a participation invitation with a copy of the tender documentation which will include the descriptive documentation.

(3) In the case when the tender documentation is directly accessible by electronic means, in the ESPP, the contracting authority has the obligation to include in the participation invitation the information regarding the way to access of the respective documentation.

### **Article 105**

(1) The contracting authority has the obligation to include in the descriptive documentation at least a description of the necessities, objectives, constraints of the contracting authority, on the basis of which the consultations will take place in order to identify the suitable solution or solutions, as well as, if the case, premiums that will be awarded to the participants at the dialog.

(2) The contracting authority has the right to provide for, within the descriptive documentation, the procedure to take place in successive stages in order to reduce the number of discussed solutions. The successive reduction of the solutions shall be made only by applying the award criteria provided in tender documentation.

### **Article 106**

(1) The contracting authority carries out consultations, with every admitted candidate, individually. Within these discussions are discussed the options referring to technical, financial arrangement, methods to resolve problems related to the legal framework, as well as any other elements of the future contract, so that the identified solutions correspond to objective needs of the contracting authority.

(2) During the discussions, the contracting authority has the obligation to ensure the equal treatment of all candidates. In this purpose, the contracting authority has not the right to provide information in a discriminatory manner, which could create a supplementary advantage for a candidate.

(3) The contracting authority has the obligation not to disclose to other candidates the proposed solutions or other confidential information, communicated within the consultation by a candidate, without his agreement.

(4) The contracting authority carries out the dialog until it identifies the suitable solution/solutions.

(5) Having declared that the dialogue phase is concluded and having so informed the candidates, the contracting authority has the obligation to invite the selected participants to submit the final tender on the basis of the solution/solutions presented during the consultations and that have to contain all the necessary elements by which the completion modality of the future contract is presented.

### **Article 107**

(1) The contracting authority has the obligation to send a request for final tenders with a sufficient number of days before the deadline for tender submitting, so that every selected candidate to benefit of a reasonable period for elaboration of the final tender.

(2) The period for elaboration of the final tender shall not be shorter than a minimum period established by common accord with the selected candidates during the consultation phase within the second phase of the competitive dialogue.

### **Article 108**

The request for final tender must contain at least the following information:

- a) references regarding the published contract notice;
- b) the deadline date and hour set for tenders submission;
- c) the address where the tenders shall be submitted;
- d) the language/languages used for the consultations;
- e) the address, date and hour of opening tenders;
- f) if the case, clarifications regarding the supplementary documents that must be presented by the economic operators in order to verify the declaration or in order to complete the documents, presented in the first phase for proving the technical and economic-financial capacity.

### **Article 109**

(1) During the evaluation phase, the contracting authority has the right to require clarification and fine-tunes of the tender. The contracting authority shall assess the tenders received on the basis of the award criteria laid down in the tender documentation and shall establish the winner tender in accordance with article 198 paragraph (2).

(2) The contracting authority has the right to require to the tenderer identified as having the most technical and economical advantageous tender to confirm certain elements of the tender or some engagements assumed within the tender.

(3) In any of the situation provided for by paragraph (1) and (2), such clarification, fine-tuning, additional information and confirmations may not involved changes in the base characteristics of the tender or of the solutions on the base of call for final tenders was launched, that may conduct to competition distortion and may create a supplementary advantage in respect with other tenderers.

## **Section 5**

### **Negotiation with prior publication of a contract notice**

### **Article 110**

(1) The contracting authority has the right to apply the negotiation with prior publication of a contract notice in the following cases:

a) when, as a result of applying the open tender, the restricted tender, the competitive dialogue or the request for tenders procedures, no tender has been submitted or only unacceptable or irregular tenders were submitted. The application of the negotiation procedure is possible in this case only after the annulment of the initial open tender, restricted tender, competitive dialogue or request for tenders procedure and only if the initial requirements stipulated in the tender documentation were not substantially modified;

b) in exceptional situations, duly justified, when the nature of the works/products/services or the risks attaching thereto, do not allow a prior overall pricing of the future public procurement contract;

c) when the services that will be purchased, *inter alia* the financial services within category 6 of Annex 2A or intellectual services, such as services involving the design of works, so that the terms of references cannot be elaborated with sufficient precision to permit the awarding of the contract by applying rules governing open or restricted procedures;

d) when the works that will be executed are needed exclusively for purpose of research, testing or technological development, and only if these are not carried out in order to obtain a profitability and do not aim at recovering the research and development costs.

(2) In the cases provided by paragraph (1) lett. a), the contracting authority has the right not to transmit for publication the contract notice if it invites to the negotiations all of, and only, the tenderers which satisfy the qualification and selection criteria during the prior procedure and that have submitted tenders in accordance with the formal requirements provided in the tender documentation.

#### **Article 111**

In the cases provided for by Article 110, letter a), the contracting authority has the right to decide the organization of a final phase of electronic auction, case when it has the obligation to announce this decision within the contract notice and within the descriptive documentation.

#### **Article 112**

The negotiation, with publication of a contract notice, is initiated by sending for publishing of a contract notice according to article 55, by which interested economic operators are required to submit candidatures.

#### **Article 113**

(1) Without prejudice to the provisions of art. 71, in the case when the estimated value of the public procurement contract is greater than the value provided by art. 55 paragraph (2), the period between the date of transmission of the contract notice for publication in Official Journal of the European Union and the time limit for submitting the candidatures has to be at least 37 days.

(2) In the case when, by emergency reasons, the number of days provided for by paragraph (1) cannot be observed, the contracting authority has the right to accelerate the procedure by reducing the respective period, but to no less than 15 days.

(3) In the case when the contract notice is sent for publishing in the Official Journal of European Union, in electronic form, the period provided by paragraph (1) and (2) can be reduced with 7 days respectively 5 days.

#### **Article 114**

(1) Without prejudice to the provisions of art. 71, in the case when the estimated value of the procurement contract is equal or lower than the value provided by art. 55 paragraph (2), the contracting authority has the obligation to transmit the contract notice for publication in ESPP with at least 12 days before the time limit for submitting the candidatures.

#### **Article 115**

(1) Any economic operator has the right to request and to obtain a copy of the descriptive documentation.

(2) In the case provided for by Article 40, paragraph (2) letter b), the contracting authority has the obligation to make the descriptive documentation available to the economic operator as soon as possible, in a period of time that shall not exceed 4 days from the receiving of a request from the economic operator.

(3) The descriptive documentation shall contain a description of the needs, objectives and constraints of the contracting authority, based on which the negotiation will take place.

#### **Article 116**

(1) Any economic operator has the right to submit its candidature in order to participate in the negotiation with prior publication of a contract notice.

(2) When it pre-selects the candidates, the contracting authority has the obligation to apply objective and non-discriminatory criteria, using for this purpose only the pre-selection criteria stipulated in the contract notice.

(3) The contracting authority has the obligation to indicate, in the contract notice, the selection criteria and the applicable rules, the minimum number of candidates it intends to preselect and, if applicable, their maximum number.

(4) The minimum number indicated in the contract notice, provided for by paragraph (3) shall not be lower than 3.

#### **Article 117**

(1) The number of selected candidates shall be at least equal with the minimum number indicated in contract notice.

(2) If the number of candidates that fulfil the selection criteria is lower than the minimum number indicated in the contract notice, the contracting authority has the right:

- a) either to cancel the negotiation with the publication of a contract notice;
- b) or to continue the negotiation procedure with publication of a contract notice only with those candidates that fulfil the required criteria, if their number is still sufficient in order to ensure genuine competition.

#### **Article 118**

(1) The contracting authority has the obligation to transmit, simultaneously, a participation invitation to the second phase of the negotiation procedure with publication of a contract notice, to all preselected candidates.

(2) It is forbidden to invite for the second phase of the negotiation procedure with publication of a contract notice an economic operator that did not submit the candidature in first phase or that did not accomplish the preselection criteria.

#### **Article 119**

The request for final tender must contain at least the following information:

- a) references regarding the published contract notice;
- b) the address where the negotiation shall take place, as well as the date and hour;
- c) the language/languages used for within the negotiations;
- d) if the case, clarifications regarding the supplementary documents that must be presented by the economic operators in order to verify the declaration or in order to complete the documents, presented in the first phase for proving the technical and economic-financial capacity.
- e) detailed and complete information regarding the awarding criteria applicable for establishing the winning tender in line with the provisions of Chapter V – Section 3.

### **Article 120**

(1) The contracting authority carries out the negotiations with every preselected candidate, individually. During the negotiations all technical, financial and legal aspects of the future contract shall be determined

(2) During the negotiations, the contracting authority has the obligation to ensure application of the equal treatment principle. In this purpose, the contracting authority has no right to issue information in a discriminatory manner, information that could create supplementary advantages for one or more candidates.

(3) The contracting authority has the obligation not to disclose to other candidates the tender or other confidential information, communicated within the negotiation by a candidate, without his agreement.

### **Article 121**

(1) The contracting authority has the right to provide for, within the descriptive documentation, the procedure to take place in successive stages in order to reduce the number of proposed tenders to be negotiated. The successive reduction of the proposed tenders shall be made only by applying the award criteria provided in tender documentation.

(2) The contracting authority shall carry out negotiations until the most advantageous technical and economical tender will be identified, based on the contract award criteria.

(3) The contracting authority has the obligation to require the candidate from which it obtained, as a result of the negotiations, the most advantageous technical and economical tender, to confirm the result of the negotiations by submitting a final tender.

(4) The tenderer does not have the right to modify in the final tender the elements agreed during the negotiation process.

## **Section 6**

### **Negotiation without publication of a contract notice**

#### **Article 122**

The contracting authority has the right to apply the negotiation without publication of a contract notice, only in the following cases:

a) due to technical, artistic reasons or to reasons related to the protection of exclusive rights, the public procurement contract can be awarded only to a particular economic operator;

b) insofar as is strictly necessary when the time limits for open procedure, restricted procedure or negotiation with prior publication of a contract notice, cannot be respected due to extreme emergency reasons caused by unpredictable events that can not be imputed to an action or a non-action of the contracting authority. The contracting authority has no right to establish longer period contract duration that it is necessary in order to manage the respective emergency situation that determined the application of the negotiation without publication of a contract notice;

c) as a strictly necessary measure, when the application period of the open tender, restricted tender, negotiation with prior publication of a contract notice, competitive dialogue or request for tenders procedure cannot be fulfilled due to extreme emergency reasons resulted from unpredictable events which are not due, on any account, to an action or inaction of the contracting authority. The contracting authority does not have the right to establish a contracting period larger than the necessary period, in order to face an emergency situation which determines the application of the negotiation procedure without prior publication of a contract notice;

d) purchasing additional quantities of the products that will partially replace or extend the equipments/ installations initially supplied from the original supplier is necessary, and only if a change of the initial supplier would oblige contracting authority to acquire products that have different technical characteristics from the existing products would determine technical incompatibilities or disproportionate difficulties in operation and maintenance. The length of such contracts or recurrent contracts shall not, as a general rule, exceed more than 3 years;

e) the products are quoted to the commodity exchange and their purchasing is carried out by transactions in this system;

f) for purchasing raw materials traded and transacted at the commodity exchange, their procurement being done as a result of the transactions on the commodity spot market;

g) as a result of a design contest, the services contract shall be awarded, according to the initially established rules, to the winner competitor or to one of the winners, in the last case the contracting authority having the obligation to send an invitation to the negotiation to all winning competitors;

h) the purchasing of additional services or works is necessary, even if these have not been included in the initial services or works contract previously awarded to a contractor but have become, due to unforeseen circumstances, necessary for the performance of the respective contract and only if the following conditions are cumulatively observed:

- the contract shall be awarded to the initial contractor;
- the additional works/services contract cannot be separated, from both technical and economical point of view, from the original contract because, otherwise, this would bring major inconvenience to the contracting authority or, even if separable from the original contract, they are strictly necessary for the completion of the contract;
- the aggregated value of the contracts awarded for additional works and services shall not exceed 50% of the value of the initially awarded services/works contract.

i) following the awarding of a services/works contract, the contracting authority intends to purchase new services or new works similar to the services or works foreseen by the original contract and only if the following conditions are observed, cumulatively:

- the contract is awarded to the initial contractor and the new works/services shall repeat works or services that are similar to the ones foreseen in the initial awarded contract and are in conformity with the requirements foreseen in the terms of reference elaborated when the initial contract was awarded;
- the initial works/services contract was awarded by open or restricted procedure;
- the cumulative value of the contracts which shall be awarded or of the additional documents which shall be concluded for additional works and/or services does not exceed 50% of the initial contract value;

- in the contract notice for the awarding of the original services or works contract, it has been mentioned that, for the subsequent purchase of similar services or works, the contracting authority may choose the winner economic agent under the terms and conditions of the applied procedure;
- the contracting authority has the right to apply this procedure within maximum three years from the awarding of the original contract.

### **Article 123**

In the case when is possible and insofar the conditions provided for by article 122, letters h), i) and j) are not breached, the contracting authority has the obligation to invite to negotiation a sufficient number of economic operators in order to ensure a genuine competition.

## **Section 7**

### Request for tenders

### **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 smaller or equal to the equivalent in lei of the following thresholds:

- b) for the supply contract: Euro 75.000;
- c) for the services contract: Euro 75.000;
- d) for the works contract: Euro 500.000.

### **Article 125**

(1) Beginning with January, 1<sup>st</sup> 2007, the request for tenders is initialised by publishing a participation invitation to the awarding procedure in the ESPP.

(2) The participation invitation shall contain at least the following information:

a) the deadline date and hour set for receiving tenders;

b) the address to which the tenders will be submitted;

b<sup>1</sup>) the date and hour for opening tenders

c) the language/ languages in which the tender shall be elaborated;

d) a short description of the object of the public procurement contract that is to be awarded;

e) the means of obtaining the tender documentation.

(3) In case the tender documentation is directly accessible by electronic means, the contracting authority has the obligation to insert in the participation invitation information regarding the ways of accessing the respective documentation.

### **Article 126**

(1) Until December, 31<sup>st</sup> 2006, the contracting authority has the right not to publish the participation invitation in ESPP, provided that it is sent to at least 3 economic operators.

(2) Beginning with January, 1<sup>st</sup> 2007, the contracting authority, has the right, in strongly justified cases, to request to the National Authority for Regulating and Monitoring Public Procurement the approval for a derogation from the obligation provided at art. 125 paragraph (1), for a period of time that cannot surpass 12 months from the date of entering in force of the present law.

(3) The National Authority for Regulating and Monitoring Public Procurement has the right to reject the request for obtaining a derogation in the case when it is not properly motivated.

### **Article 127**

(1) Without prejudice to art. 71, in the case provided by art. 125, paragraph (1), the contracting authority has the obligation to publish the participation invitation with at least 10 days before the time-limit for submitting the tenders.

(2) If the contracting authority publishes in the ESPP the whole tender documentation and allows, starting with the date of publication of the participation invitation a direct and non restrictive access of economic operators to this documentation, then the contracting authority has the right to reduce the period provided by paragraph (1) with 4 days in the case of awarding a supply contract with reduced complexity.

(3) The ESPP operator has the obligation to publish the participation invitation and, if case, the tender documentation, in no more than one day from the date of receiving.

### **Article 128**

(1) Without prejudice to art. 71, in the case provided by art. 126 paragraph (1), the contracting authority has the obligation to send the participation invitation with at least 12 days before the time-limit for submitting the tenders.

### **Article 129**

The contracting authority has the obligation to open tenders at the address, date and hour stipulated in the invitation for participation, to the extent that the declaration of the term for submitting tenders has not become necessary, according to the provisions of art. 72 or as a result of a complaint submission.

### **Article 130**

(1) In the case provided by art. 126 paragraph (1), the contracting authority has the obligation to cancel the request for tenders, if after transmitting the participation invitation a minimum number of 2 suitable tenders have not been submitted.

(2) In the case provided at paragraph (1), after cancelling the request for tenders, the contracting authority has the obligation to send the participation invitation also to other economic operators if it wants to apply a new request for tenders. In case when, after applying a new procedure, the contracting authority receives only a single suitable tender, then it has the right to award the public procurement contract to respective tenderer.

## **Section 8**

### **Design contest**

### **Article 131**

The contracting authority has the right to organise a design contest, as described by art. 18, paragraph (2) as an independent procedure, with prizes or/and payments to participants, or as a part of another procedure that leads to the awarding of a services contract.

### **Article 132**

The contracting authority has the obligation to announce, in the contest documentation, any information, requirement, rule, criteria or other similar information in order to ensure the correct and complete information of the potential competitors regarding the design contest.



### **Article 133**

The documentation for the contest shall contain at least:

- a) general information regarding the contracting authority;
- b) instructions regarding the deadline that shall be respected and the formalities to be fulfilled for the participation in the contest;
- c) the minimum qualification requirements that were required by the contracting authority, as well as the documents that need to be presented by the competitors in order to prove the fulfilment of the respective requirements;
- d) all the requirements necessary for the competitors for elaborating and presenting the plans and projects;
- e) the amount of the prizes that will be awarded, if design contest is organized as an independent procedure;
- f) the commitment of the contracting authority to conclude the services contract with the winner or one of the winners of the contest, when the contest is organized as part of another procedure for awarding the service contract;
- g) detailed and complete information regarding the criteria applied for establishing the winner project/projects.

### **Article 134**

(1) The design contest shall be initiated by publishing a contract notice in which the interested economic operators are required to submit plans and projects, according to the provisions of Article 55. The notice shall contain at least the information provided in Annex 3D and it shall be elaborate according to the standard format adopted by the European Commission.

(2) The number of days between the date of publishing the contract notice and the date of submitting plans and projects shall be established so that the economic operators will benefit of a reasonable period of time for their elaboration.

(3) Without prejudice to the provisions of paragraph (2), the contracting authority has the obligation to send the contract notice for publication with at least 52 days before the time-limit for submitting the plans and projects.

### **Article 135**

If the contracting authority requires that the plans and projects should be sent by electronic means, the conditions foreseen in art 64 and 65 are applicable, as a consequence.

### **Article 136**

(1) The contracting authority has the obligation to take all needed measures so that the communications, messages change and information archives shall be carried out in such a way that the integrity and confidentiality of all information communicated by competitors is ensured.

(2) The contain of the presented plans or projects shall remain confidential, at least until the deadline for their submission and the jury shall ascertain the content of plans and projects only after the expiry of the time limit for their submission.

### **Article 137**

(1) The contracting authority has the right to carry out a preliminary selection of the competitors, using objective, non-discriminatory and clear criteria that have to be explicitly specified in the contest documentation.

(2) The number of the selected competitors shall be sufficient, so that genuine competition is ensured.

#### **Article 138**

(1) For the purpose of evaluating the plans and projects presented in the design contest, the contracting authority has the obligation to appoint a jury formed of at least 3 members that shall be independent from the competitors, natural persons with relevant professional qualification and relevant experience in that field, as well as with recognized moral probity.

(2) If the competitors are required to prove a specific professional qualification, then at least one third of the members of the jury shall have same qualification or equivalent.

#### **Article 139**

(1) The plans and projects shall be presented anonymously and their anonymity shall be kept until the moment when the jury adopts a decision or issues an opinion.

(2) The jury is autonomous for the decisions or opinion issued.

#### **Article 140**

(1) The jury has the obligation to assess the submitted plans and projects using exclusively the evaluation criteria indicated in contest notice.

(2) The jury has the obligation to issue a report signed by all its members that shall comprise the ranking of the plans and projects based on their qualitative evaluation, any specific observation, as well as, if the case, list of problems that are to be clarified.

#### **Article 141**

(1) The jury has the right to invite the competitors to answer to the problems identified in the report provided for by art. 140, paragraph (2), for the clarification of any aspects referring to the proposed solution/project.

(2) The jury has the obligation to issue complete minutes of the discussions carried out according to paragraph (1) provisions.

### **Chapter IV**

#### Special modalities for awarding the public procurement contract

#### **Section 1**

##### The framework agreement

#### **Article 142**

(1) The contracting authority has the obligation to conclude a framework agreement, as a rule, by applying the open or restricted procedures.

(2) By exception to the provisions of paragraph (1), for closing a framework agreement, the contracting authority has the right to apply the other procedures provided by Article 18 only in the specific circumstances provided in this law.

#### **Article 143**

The contracting authority does not have the right to use abusively or improperly the framework agreements, as such as to prevent, restrict or distort the competition.

#### **Article 144**

(1) The contracting authority does not have the right to decide that the duration of a framework agreement should exceed four years but in exceptional cases that can be duly justified, especially by the specific object of the contracts that follow to be awarded based on the respective framework agreement.

(2) The contracts awarded on the basis of a framework agreement may only be concluded between the contracting authority/contracting authorities and the economic operator/economic operators that are parties to the respective agreement.

#### **Article 145**

When the contracting authority awards a public procurement contract on the basis of a framework agreement provisions, it shall not impose or accept substantial modifications of the initially established elements/ conditions in the respective framework agreement.

#### **Article 146**

The contracting authority has the obligation to select the economic operator or, by case, the economic operators that will be part of the respective framework agreement, by applying the selection and awarding criteria provided by Chapter V.

#### **Article 147**

(1) When the contracting authority concludes the framework agreement with only one economic operator, then the respective agreement shall provide at least:

- a) the obligations assumed by the economic operator in the technical proposal;
- b) the unit price that the economic operator provided in the financial proposal, based on which the price of every subsequently awarded contract will be calculated.

(2) The contracting authority has the right to award the public procurement contracts that are subsequent to the framework agreement only by respecting the technical and financial conditions and only with respect to the limit quantities foreseen in the respective framework agreement.

(3) Every time the contracting authority intends to award a public procurement contract that is subsequent to the framework agreement, it has the obligation to consult in writing the economic operator, requesting it to supplement a tender as necessary.

#### **Article 148**

In case the contracting authority concludes the framework agreement with more economic operators, their number cannot be smaller than 3, to the extent that a sufficient number of economic operators which have fulfilled the qualification and selection criteria and which have presented admissible tenders exist.

#### **Article 149**

(1) When the contracting authority concludes the framework agreement with more than one economic operator, then the respective agreement shall provide at least:

- a) the obligations assumed by each economic operator in the technical proposal;
- b) the unit price that each economic operator has foreseen in the financial proposal;

(2) The contracting authority has the right to award public procurement contracts that are subsequent to the framework agreement concluded with more than one economic operator as follows:

- a) either without reopening of the competition; or
- b) by reopening of the competition between the signatory operators of the framework agreement.

(3) The contracting authority has the right to award public procurement contracts with regard to the conditions foreseen in paragraph (2), letter a) only if all the terms that will govern the respective contracts were established in the framework agreement.

(4) The contracting authority has the right to award public procurement contracts in the conditions provided by paragraph (2) letter b):

- a) either by respecting the terms provided in the framework agreement;
- b) or, if not all the terms have been lay down in the framework-agreement, by detailing these or, where appropriate, by introducing other terms referred to in the specifications of the framework agreement.

### **Article 150**

In the case provided by art. 149 paragraph (4) letter b), the contracting authority has the obligation to reopen the competition in accordance with the following procedure:

- a) for every contract to be awarded, the contracting authorities shall consult in writing the signatory economic operators of the respective framework agreement;
- b) the contracting authorities shall fix a sufficiently long time limit that for submitting tenders, having the obligation to take into account the aspects as also the complexity of the subject-matter of the contract and the time needed for submitting tenders;
- c) the tenders shall be submitted in writing, and their content shall remain confidential until the stipulated time limit for reply has expired;
- d) the contracting authorities shall award each contract to the tenderer who has submitted the best tender on the basis of the award criteria set out in the terms of reference of the framework agreement.

## **Section 2**

### **Dynamic purchasing system**

#### **Article 151**

(1) The contracting authority has the right to utilize a dynamic purchasing system only using ESPP and only for the purchase of common used products, with characteristics generally available on the market that can satisfy its needs.

(2) The contracting authority does not have the right to abusively or improperly use the dynamic purchasing system as such as to prevent, restrict, or distort the competition.

(3) It is forbidden to collect any charges for participation from the economic operators or from the parties to the dynamic purchasing system.

#### **Article 152**

The contracting authority does not have the right to set-up that the duration of a dynamic purchasing system may exceed 4 years, except in duly justified exceptional cases.

### **Article 153**

The contracting authority has the obligation to follow the rules of the open procedure in all the phases of the dynamic purchasing system.

### **Article 154**

With the purpose of launching the dynamic system of purchasing and awarding the public procurement contracts within this system, the contracting authority has the obligation to use only electronic means, observing at the same time the provision regarding the communications and the sending rules of the tenders established by Article 59, paragraph (3), Article 61, Article 64 and Article 65.

### **Article 155**

When the contracting authority sets up a dynamic purchasing system, it has the obligation to:

- a) publish a contract notice in which the fact is clearly pointed out that in order to award the public procurement contract/contracts, a dynamic purchasing system will be used, as well as the internet address where the tender documentation is available.
- b) indicate in the terms of reference, among the characteristics of the products that will be purchased, relevant information concerning the characteristics of the dynamic purchasing system, the electronic equipment used and the technical connection and details for accessing the system;
- c) allow through electronic means, starting with the moment of publishing the contract notice and till the conclusion of the dynamic purchasing system, the direct, full and unrestricted access to the tender documentation.

### **Article 156**

(1) After the launch of the dynamic purchasing system and for the entire period of its duration the contracting authority has the obligation to allow any interested economic operator to submit an indicative tender In order to be admitted within the system.

(2) After receiving an indicative tender, the contracting authority has the obligation to verify if the tenderer meets the qualification criteria established and if the technical proposal meets the requirements within the terms of references.

(3) The contracting authority has the obligation to finalize the checking provided for by paragraph (2) within 15 days since an indicative tender has been received.

(4) After finalizing the verification provided for by paragraph (2), the contracting authority has the obligation to immediately inform the tenderer regarding the admittance in the dynamic purchasing system or, according to the case, about the rejection of the indicative tender.

### **Article 157**

The tenderer has the right to improve his indicative tender at any time, if his technical proposal meets the requirements in the terms of references.

### **Article 158**

(1) With the purpose of awarding the public procurement contracts through the dynamic system of public procurement, the contracting authority has the obligation to publish for every contract a new simplified contract notice soliciting the submitting of indicative tenders by any economic operator interested, according to the provisions of article 156.

(2) The contracting authority has the obligation to establish a deadline for submitting draft tenders which, as regarding the simplified contract notice publication date stipulated at par. (1), does not have to be sooner than:

- e) 15 days, in case the estimated value according to art. 32 is larger than the equivalent in lei of Euro 125.000;
- f) 5 days, in case the estimated value according to the provisions of art. 32 is equal or smaller than the equivalent in lei of Euro 125.000..

#### **Article 159**

(1) The contracting authority has the obligation to invite every tenderer admitted within the dynamic procurement system to submit a final tender for the public procurement contract that will awarded, establishing to this end a time limit for submitting.

(2) The contracting authority has not the right to invite the tenderers to submit a final tender before finalizing the checking of every indicative tender submitted within the time limit provided in article 158 (2).

#### **Article 160**

The contracting authority has the obligation to award the respective public procurement contract to the tenderer that has the better tender according to the awarding criteria provided in contract notice published with the occasion of launching the dynamic purchasing system. The contracting authority has the right to supplementary detail these criteria, within the invitation provided by Article 159, paragraph (1).

### **Section 3**

#### **Electronic auction**

#### **Article 161**

(1) The contracting authority has the right to use the electronic auction in the following situations:

a) as the final phase of the open procedure, of the restricted procedure, of the the negotiation with prior publication contract notice applied in cases provided for by Article 110, letter a) or of the request for tenders, before the award of the public procurement contract and only if the technical specifications have been precisely defined in the terms of reference.

b) on the reopening of the competition among the parties to a framework agreement under the conditions provided for by art 149, paragraph (4) and art. 150.

c) on the reopening of competition for the public procurement contract to be awarded under the dynamic purchasing system.

(2) The contracting authority has the obligation to state the decision of using the electronic auction in the notice for participation and in the tender documentation.

#### **Article 162**

The contracting authority does not have the right to abusively or improperly use the electronic auction as such as to:

a) to prevent, to restrict or to distort the competition;

b) to modify the object of the public procurement contract as it was provided in the contract notice and in the tender documentation.

### **Article 163**

The awarding of the services and works contracts that imply intellectual activities as consultancy, design and other similar activities, cannot be subject of the electronic auctions.

### **Article 164**

When the contracting authority intends to apply the electronic auction, it has the obligation to include within the information and instructions provided for by Article 33, the followings:

a) the features of the tender which will be the subject of repetitive tendering process, provided that such features are quantifiable and can be expressed in figures or percentages;

(b) any limits on the values till which the features provided for by letter a) can be improved, as they result from the specification relating to the subject of the contract;

(c) the information which will be made available to tenderers in the course of the electronic auction and, the moment when these information will be made available to them;

(d) the relevant information concerning the electronic auction process;

(e) the conditions under which the tenderers will be able to bid and, in particular, the minimum differences which, where appropriate, will be required when bidding;

(f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

### **Article 165**

(1) Before proceeding with an electronic auction, the contracting authority has the obligation to make a full initial evaluation of the tenders in accordance with the requirements provided for by the terms of reference and with the awarding criterion set within the tender documentation.

(2) The contracting authority has the obligation to invite all the tenderers which have submitted admissible tenders to present new prices and/or, by case, new values of the tender elements. The invitation shall be sent by electronic means, to all the respective tenders at once.

(3) The invitation shall specify the starting date and time of the electronic auction and any relevant information concerning individual connection to the electronic equipment used.

(4) The electronic auction may not start sooner than two working days after the date on which invitations are sent out.

### **Article 166**

In case the contract is awarded on the basis of the most advantageous tender from the technical-economic point of view, the invitation provided for by Article 165, paragraph (3) shall also contain information regarding:

a) the result of the first evaluation of the tender submitted by the receiver tenderer;

b) the mathematical formula to be used in the electronic auction to determine automatic rerankings on the basis of the new prices and/or on the new values submitted by the tenderers. That mathematical formula incorporate the weighting of the criteria fixed to determine the most advantageous tender from the economic point of view, according to the indications provided in the contract notice or in tender documentation.

#### **Article 167**

(1) Within the electronic auction, the repetitive tendering process refers to:

a) either, only to prices, when the awarding criterion is the lowest price;

b) or, to prices and/or on the new values of the features of the tenders indicated in the tender documentation, when the awarding criterion is the most advantageous tender from the economic point of view.

(2) The electronic auction takes place in several successive rounds.

#### **Article 168**

(1) During every round of the electronic auction, the contracting authority has the obligation to instantly communicate to all the tenderers, at least the information needed, in order to determine, at any time, the position that they have in the rank. The contracting authority has the right to communicate other information regarding:

a) the number of the participants in the respective round of the electronic auction;

b) new prices or values submitted within the auction round by other tenderers, only if the tender documentation provides for such an option.

(2) During the performance of the rounds of electronic auction, the contracting authority doesn't have the right to disclose the identity of the tenderers.

#### **Article 169**

(1) The electronic auction is closed by one, or by a combination of the following modalities:

a) at a certain moment fixed in advance that was communicated to the tenderers within a participation invitation;

b) when the number of auction rounds, set in the invitation to take part in the auction, has been completed; the invitation shall indicate also the timetable for each round.

c) when they no longer receive new prices or new values which meet the requirements concerning the minimum differences; in that event, the contracting authority shall state in the invitation to take part in the auction the time, which they will allow to elapse after receiving the last submission before they close the electronic auction.

(2) The contracting authority has the obligation to award the contract in accordance with art. 200, on the basis of the results obtained after closing the electronic auction.

## **Chapter V**

### Awarding the public procurement contract

#### **Section 1**

##### Tender. Variants



### **Article 170**

The tenderer has the obligation to elaborate the tender in accordance with the provisions of the tender documentation.

### **Article 171**

The tender is compulsory, as regards the content, for the entire validity period established by the contracting authority.

### **Article 172**

(1) The economic operator has the obligation to submit the tender at the address and until the submission deadline date and hour set in the contract notice or in the invitation for participation.

(2) The risks associated with tender submission, including the force majeure, are the responsibility of the economic operator.

(3) The tender submitted to another address of the contracting authority than the established one or, after the specified submission deadline has expired, is returned unopened.

(4) The content of the tenders shall remain confidential till the date of their opening; and the contracting authority shall ascertain the content of tenders only after the expiry of the time limit for their submission.

### **Article 173**

(1) The contracting authority has the right to allow the tenderers to submit variants only when the awarding criterion is the most advantageous tender from the economic point of view.

(2) The contract notice has to explicitly specify if the submission of the variants is authorised, or if this possibility is forbidden. When this specification is missing, the alternative tenders/variants cannot be taken into account.

### **Article 174**

(1) The contracting authority that permits the submission of variants has the obligation to specify in the terms of reference the minimum compulsory requirements that must be accomplished by these tenders and any other specific requirements for their submission.

(2) The contracting authority shall not take into account the variants, which do not accomplish the minimum requirements provided for by paragraph (1).

### **Article 175**

In the case when the contracting authority announced the possibility to submit alternative tenders, the contracting authority doesn't have the right to reject a variant having as only reason the fact that, if this is declared winner:

a) the supply contract for the awarding of which the procedure was organised is transformed into a services contract; or

b) the services contract for the awarding of which the procedure was organised is transformed into supply contract.

## **Section 2**

Selection and qualification of the tenderers/candidates

### **Paragraph 1**

**Article 176**

The contracting authority has the right to apply the selection and qualification criteria regarding only:

- 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 in the cases provided for in article 188 paragraph (2) let. f) and paragraph (3) let. e).

**Article 177**

(1) The economic operators have the right to present certificates issued by a competent public authority or by a body of public or private law that respects the European certification standards in order to demonstrate the fulfilment of the qualification and selection criteria provided by art. 176.

(2) The contracting authority does not have the right to impose to the candidates/tenderers the obligation to present a specific certification, the latter ones having the right to present, in order to fulfil certain requests, any other equivalent documents with such a certification or by which they can prove, conclusively, the fulfilment of the respective request. The contracting authority has the right to invite the economic operators to clarify or supplement the documents received.

(3) The Government has the right to set-up, by government decision, the certification modalities or inclusion on official lists, at national level, of the economic operators that opt for such certification system. In this case, the National Authority for Regulating and Monitoring the Public Procurement shall inform the European Commission thereof.

(4) In case of using the official lists of the appointed economic operators, the contracting authorities shall request additional documents by which the fulfilment of the obligations relating to the payment of taxes to the state as well as the obligations relating to the payment of social security contributions, in accordance with the legal provisions, is attested.

**Article 178**

(1) For the application of the criteria like those provided by Article 176, letter c) and d), the contracting authority has the obligation to specify within the contract notice the minimum requirements that shall be accomplished by tenderers/candidates to be qualified in accordance with Paragraph 4 and 5 of this Section.

(2) The contracting authority doesn't have the right to require the accomplishment of some minimum requirements, regarding the economic and financial standing and the technical and/or professional ability, which may conduct to a restriction of the participation to the awarding procedure

**Article 179**

The contracting authority has the obligation to observe the proportionality principle when establishing the qualification and selection criteria, as well as the level of the minimum requirements, taking into account the specific exigencies imposed by the nature and the complexity of the contract that is awarded.

## **Paragraph 2**

### Personal situation of the candidate or tenderer

#### **Article 180**

The contracting authority has the obligation to exclude, from the procedure applied for the award of the public procurement contract, any tenderer/candidate whereof it has information that, in the last 5 years, it was convicted by definitive court judgement, for participation in a criminal organization, for corruption, for fraud and/or for money laundering.

#### **Article 181**

The contracting authority has the right to exclude within the award of the public procurement contract procedure any tenderer/candidate if the tenderer/candidate:

a) a) is bankrupt or is under liquidation procedure, his affairs are being led by a judiciary administrator, or his business activities are suspended or he has entered into an arrangement with creditors, or is in a similar situation regulated by law;

b) is the subject of a legal procedure for his declaration on one of the situations provided for by letter a);

c) has not fulfilled his obligations relating to the payment of taxes to the state as well as the obligations relating to the payment of social security contributions in accordance with the legal provisions of Romania or of the country in which he is established;

c<sup>1</sup>) in the past 2 years it has not fulfilled or has not properly fulfilled its contractual obligations, due to reasons imputable to the tenderer in the matter, fact which has produced or by its nature shall produce serious prejudices to its beneficiaries.

d) has been convicted in the last 3 years by definitive court judgement, for an act that doesn't correspond with the professional ethics or for a grave professional misconduct;

e) presents false information or doesn't present the information required by the contracting authority, regarding the afferent situation provided for by letters a)-d).

#### **Article 182**

(1) In order to demonstrate the fact that the tenderer/candidate is not in one of the situations provided for by Article 180 and Article 181, the contracting authority has the obligation to accept as sufficient and relevant any document considered edifying from this point of view, in the country of origin of the tenderer/candidate or whence it is established, such as certificates, extract from judicial records or any other equivalent documents issued by competent authorities from that country.

(2) In the case when the contracting authorities have doubts concerning the personal situation of the candidates/tenderers, it has the right to request information directly to the competent authorities which issue documents as those provided for in paragraph (1).

(3) Where the country in question does not issue documents as those provided for in paragraph (1), or where these do not cover all the situations referred to in article 180 and article 181, the contracting authority has the obligation to accept a declaration on oath, or in countries where there is no provision for declaration on oath, a solemn declaration made by the person concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body.

### **Paragraph 3**

Suitability to pursue the professional activity

#### **Article 183**

The contracting authority has the right to require to any economic operator to present relevant documents in order to prove its registration form as natural or legal person or registration/ attestation or affiliation from the professional point of view, according to the provisions from the country where the economic operator is established.

### **Paragraph 4**

Economic and financial standing

#### **Article 184**

(1) The contracting authority has the right to ask the economic operator, participating to the award of a public procurement contract, to prove his economic and financial standing.

(2) When the contracting authority asks for the demonstration of the economic and financial standing, it has the obligation to indicate within the tender documentation, the documents by which the economic operator will prove his economic and financial standing.

#### **Article 185**

(1) Proof of the economic and financial standing may, by case, be furnished by one or more of the following references:

a) appropriate banking statements or where appropriate, evidence of professional risk indemnity insurance;

b) balance-sheets or extracts from the balance sheets, where publication of the balance-sheet is required under the law of the country in which the tenderer/candidate is established;

c) statements regarding the overall turnover or regarding the turnover in the activity field cover by the contract for a maximum of the last three years available, as far as the information on these turnovers is available; in this case the contracting authority has the obligation to take into consideration the date on which the economic operator was set up or started trading.

(2) If for any valid reason, the economic operator is unable to provide the references requested by the contracting authority, he may prove his economic and financial standing by any other documents that can be considered appropriate by the contracting authority insofar as those reflect the real image of the economic and financial situation of the tenderer/candidate.

#### **Article 186**

(1) The economic and financial capacity of the tenderer/candidate can be supported, in order to carry out a contract, by another entity, irrespective of the legal relation between the tenderer/candidate and the respective entity.

(2) When the tenderer/candidate proves his economic and financial capacity invoking the support of another entity, according to the provisions of the paragraph (1), then he has the obligation to demonstrate the support he benefits of, by presenting a firm commitment of the respective entity to confirm the fact that he will put at the tenderer's/candidate's disposal the invoked financial resources. The entity that ensures the financial sustainability does not have to find itself in the situation that determines the exclusion from the awarding procedure according to the provisions of art. 180.

(3) When a group of economic operators submits a common tender/candidature, the economic and financial standing is demonstrated by taking into consideration the resources of all members of the group. In case the group benefits of the financial support of a third entity, or of some third entities, the economic and financial capacity is demonstrated under the conditions provided for by paragraph (2).

## **Paragraph 5**

### Technical and/or professional ability

#### **Article 187**

(1) The contracting authority has the right to ask the economic operator who participates in the awarding procedure of the public procurement contract to prove his technical and/or professional ability.

(2) When the contracting authority asks for the demonstration of the technical and/or professional ability, it has the obligation to indicate within the tender documentation the references by which the economic operators will prove their technical and/or professional ability.

(3) The technical and/or professional ability of a tenderer/candidate is estimated depending on his experience, abilities and efficiency, as a result of the evaluation of the information presented during the awarding procedure.

#### **Article 188**

(1) When a procedure is applied in order to award a supply contract, the contracting authority, with a view to verify the technical and professional ability of the tenderers/candidates, has the right to ask them, depending on the nature, quantity and complexity of the products that shall be supplied and/or only if this information is relevant for carrying out the contract, the followings:

a) a list of the principal deliveries effected in the past three years containing sums, dates and beneficiaries, irrespective if those are public authorities or private clients.

Evidence of deliveries shall be given by presentation of certificates issued or countersigned by an authority or by clients. In the case when the beneficiary is a private client and, due to objective motives, the economic operator does not have the possibility to obtain certificates/confirmations from this beneficiary, the evidence of the product deliveries effected is realized by a declaration of the economic operator.

b) a declaration regarding technical equipments and measures used to ensure quality, as well as, if it is the case, study resources and research facilities;

c) information regarding the staff/technical body of the tenderer/candidate or of the body whose engagement was obtained by the tenderer/candidate, particularly to ensure the quality control;

d) certificates drawn up by authorized institutions attesting the conformity of products clearly identified by reference to the relevant specifications or standards.

e) samples, descriptions and/or photos, the authenticity of which shall be demonstrated in case the contracting authority requires it.

(2) When a procedure is applied in order to award a service contract the contracting authority, with a view to verify the technical and professional ability of tenderers/candidates, has the right to ask them, depending on the nature, volume and complexity of the services that shall be supplied and only if this information is relevant for carrying out the contract, the followings:

a) a list of the main services provided in the past three years containing sums, dates and beneficiaries, irrespective if those are public authorities or private clients.

Evidence of services provided shall be given by presentation of certificates issued or countersigned by an authority or by private clients. In the case when the beneficiary is a private client and, due to objective motives, the economic operator does not have the possibility to obtain certificates/confirmations from this beneficiary, the evidence of the provided services is realized by a declaration of the economic operator.

b) a declaration regarding technical equipments and measures used to ensure quality, as well as, if it is the case, study resources and research facilities;

c) information regarding the staff/ technical body of the tenderer/ candidate or of the body of which engagement was obtained by the tenderer/ candidate, particularly to ensure the quality control;

d) information regarding the education, professional experience and the qualification of the managerial staff and also of the persons responsible for managing the services contract;

e) a declaration regarding the average annual manpower of the service provider and the number of managerial staff for the last three years;

f) if it is the case, information regarding the environmental management measures that the economic operator will be able to apply when performing the contract;

g) information regarding the tools, plants or technical equipments available to the service provider for carrying out the contract;

h) information regarding the proportion of the contract which the services provider intends possibly to subcontract;

(3) When a procedure is applied in order to award a works contract the contracting authority, with a view to verify the technical and/or professional ability of tenderers/candidates, has the right to ask them, depending on the nature, volume and complexity of the works that shall be supplied and only if this information is relevant for carrying out the contract, the followings:

a) a list of the works carried out over the past five years, confirmed by certification of satisfactory execution of the most important works, containing value, dates and site of the works, the way which in the contractual obligations were carried out, irrespective if the beneficiaries are contracting authorities or private clients.

b) information regarding the staff/ technical body of the tenderer/ candidate or of the body whose engagement was obtained by the tenderer/ candidate, particularly to ensure the quality of control;

c) information regarding the education, professional experience and the qualification of the managerial staff and also of the persons responsible for managing the works contract;

d) a declaration regarding the average annual manpower and the number of managerial staff for the last three years;

e) if it is the case, information regarding of the environmental management measures that the economic operator will be able to apply when performing the contract;

f) a declaration regarding the tools, plants or technical equipments available to contractor for carrying out the works contract;

g) information regarding the share/shares of the contract that shall be submitted by the subcontractors and their specialization.

### **Article 189**

In case the products that shall be supplied or the services that shall be provided, have a complex character or there are for a specific purpose, the contracting authority has the right to verify, directly or through a competent authority in the country where the economic operator is established, subject to that body's agreement, the production capacities of the supplier or the technical capacity of the provider, the methods used for studies and researches, as well as the measures applied for quality control.

### **Article 190**

(1) The technical and professional ability of a tenderer/candidate may be supported, in order to carry out a contract, also by another entity, irrespective of the legal relations between the tenderer/candidate and respective entity.

(2) In the case when the tenderer/candidate proves his technical and professional ability invoking the support of another person, according to provisions of paragraph (1), then he has the obligation to prove the support he benefits of, as a rule by presenting a firm engagement by which the respective person confirms the fact that will put to the tenderer/candidate disposal the invoked technical and/or professional resources. The person that ensures the technical sustainability does not have to find itself in the situation that determines the exclusion from the awarding procedure according to the provisions of art. 180 and of art.181.

(3) When a group of economic operators submits a common tender/candidature, the technical and professional ability is demonstrated by taking into consideration the resources of all members of the group. In case the group benefits of the technical and professional support of a third entity, or of some third entities, the technical and professional ability is demonstrated under conditions provided for by paragraph (2).

## **Paragraph 6**

### **Quality assurance standards**

### **Article 191**

When the presentation of certificates drawn up by independent bodies, attesting the compliance of the economic operator with certain quality assurance standards is required, then the contracting authority shall refer to quality assurance systems based on the relevant European standards series certified by bodies in conformity with the European standards series concerning certification.

### **Article 192**

According to mutual recognition principle, the contracting authority has the obligation to accept equivalent certificates issued by bodies established in Member States of the European Union.

#### **Article 193**

When the economic operator doesn't have a quality certificate as it is requested, the contracting authority has the obligation to accept any other evidences presented by the economic operator insofar the presented evidences confirm the assurance of an appropriate level of quality.

### **Paragraph 7**

#### **Environmental management standards**

#### **Article 194**

When it is required to demonstrate the measures provided for by Article 188, paragraph (2), letter f) and paragraph (3) letter e) are carried out by presenting some certificates drawn up by independent bodies attesting that the economic operator observes certain environmental protection standards, then the contracting authority shall refer:

- a) either to the Community Eco-Management and Audit Scheme (EMAS);
- b) or to the environmental protection standards based on the relevant European or international standards certified by bodies in conformity with the Community law or the relevant European or international standards concerning certification.

#### **Article 195**

According to mutual recognition principle, the contracting authority has the obligation to accept equivalent certificates issued by bodies established in Member States of the European Union.

#### **Article 196**

When the economic operator doesn't have an environmental management certificate as it is requested, the contracting authority has the obligation to accept any other evidences presented by the economic operator, insofar the presented evidences confirm the assurance of an appropriate level of environment protection.

### **Section 3**

#### **The awarding criteria of the public procurement contract**

#### **Article 197**

The contracting authority shall specify in the contract notice the contract awarding criterion, that once established cannot be changed for the entire period of the awarding procedure.

#### **Article 198**

(1) Without prejudice to provisions of normative and administrative acts regarding the remuneration of certain services, the public procurement contract awarding criterion, may be only:

- a) either the most advantageous tender from the technical-economic point of view;
- b) or only the lowest price.



(2) When the award of the public procurement contract is achieved by applying the competitive dialogue, the awarding criterion used shall be always the most advantageous tender from the technical-economic point of view.

#### **Article 199**

(1) In case the “most advantageous tender from the technical-economic point of view” criterion is applied the winning tender is one who receives the highest score when applying a system of various criteria for which are established relative weights or a specific calculation algorithm. In case where, for justified reasons, it is not possible to establish the relative weighting for each of the criteria, the contracting authority has the obligation to specify in the contract notice or in tender documentation at least the descending order of importance of the criteria that will be used.

(2) The various criteria provided for by paragraph (1) that can be taken into account, could be price, characteristics of the quality level, technical level or functional level, environmental characteristics, running costs, cost-effectiveness rapport, post-sale services and technical assistance, delivery date or execution date, other significant elements for the evaluation of the tenders.

(3) Based on the provisions of par (1) the contracting authority has the obligation to state, clearly and detailed, in the tender documentation the evaluation factors of the tender with their relative ratios or the calculus algorithm, as well as the concrete advantages recognition methodology which shall result from the technical and financial proposals presented by the tenderers. The evaluation factors of the tender with their relative ratios or the calculus algorithm, as well as the concrete advantages recognition methodology must have an obvious connection to the specific of the contract, and after they have been established, cannot be changed during the entire awarding procedure application duration.

### **Section 4**

#### The assignation of the winning tender

#### **Article 200**

The contracting authority has the obligation to establish the winning tender on the basis of the awarding criterion established within the contract notice and within the tender documentation if the respective tenderer accomplishes the imposed selection and qualification criteria.

#### **Article 201**

(1) During the application of the awarding procedure, the contracting authority has the right to require clarifications and, by case, completions to the documents presented by tenderers/candidates, in order to demonstrate the accomplishment of the requirements established by the selection and the qualification criteria and/or the conformity of the tender with the requirements.

(2) The contracting authority doesn't have the right to create an advantage in favour of a tenderer by using the required clarifications/completions.

#### **Article 202**

(1) When a tender has a price which appears to be abnormally low in relation with the goods, works or services that shall be provided, the contracting authority has the obligation to request the tenderer in writing and before taking a decision regarding the rejection of the tender, details of the tender which it considers relevant, as well as to verify the evidence supplied in order to justify the respective price.

(2) The contracting authority must take into account the evidence supplied from the tenderer under the provisions of the paragraph (1), especially those referring to:

(a) the economic foundation of the formation of the price afferent to the utilized execution methods, the production process or the provided services;

(b) the technical solutions chosen and/or any other exceptionally favourable conditions of which the tenderer benefits for the execution of the works, for the supply of the goods or of services;

(c) the originality of the tender from the point of view of the accomplishment of all the requirements provided in the terms of reference;

(d) the compliance with the provisions regarding the employment protection and the working conditions applicable for the execution of works, for the delivery of services, or for the supply of goods.

(e) the possibility of the tenderer to benefit of a State aid.

### **Article 203**

(1) When the contracting authority establishes that a tender is abnormally low because the tenderer has obtained a State aid, the tender can be rejected on that ground alone, only if, after the clarifications were required, the tenderer cannot prove, in a reasonable period of time established by the contracting authority, that the state aid was legally granted.

(2) When the contracting authority rejects a tender under circumstances provided for by paragraph (1), it has the obligation to send a notification to National Authority for Regulation and Monitoring of Public Procurement.

### **Article 204**

(1) The contracting authority has the obligation to conclude the public procurement contract with the tenderer whose tender is declared winner, on the basis of the technical and financial proposals listed in the respective tender.

(1<sup>^</sup>1) In case the contracting authority cannot conclude the contract with the tenderer which's tender has been established as successful due to the fact that the tenderer in the matter is in a force majeure situation, it has the right to:

a) either to declare as successful the tender on the second place;

b) or to annul the application of the procedure for awarding the public procurement contract.

(2) The contracting authority has the obligation to ensure the getting and keeping of the justifying documents, which prove any public procurement.

### **Article 205**

(1) The contracting authority has the right to conclude the public procurement contract/framework agreement only after the fulfillment of the terms of:

g) 10 days as from the date of transmitting the communication regarding the result of applying the procedure, according to the provisions of art. 206 and 207, in case the estimated value according to the provisions of ch. II section 2 of the public procurement contract/framework agreement is larger than the thresholds stipulated at art 55 par (2);

h) 5 days form the date of transmitting the communication regarding the result of applying the procedure, according to the provisions of art. 206 and 207, in case the estimated value according to the provisions of ch. II section 2 of the public procurement contract/framework agreement is smaller or equal to the threshold stipulated at art. 55 par. (2).

(2) The public procurement contract/framework agreement concluded before the fulfillment of the terms stipulated at par. (1) is considered null and void.

(3) The contracting authority does not have the obligation to comply with the terms stipulated at par. (1) in the following cases:

a) when the present emergency ordinance doesn't stipulate the obligation of publishing a contract notice or an invitation for participation in ESPP;

b) when the public procurement contract/framework agreement is to be concluded with an economic operator which has been the single tender to the respective awarding procedure;

c) when a contract subsequent to a framework agreement is awarded.

(4) The provisions of the present article are to be applied accordingly also in the case when using the dynamic procurement systems, as well as in the case when awarding the contracts stipulated at ch. VII.

## **Section 5**

### **Informing the candidates / tenderers**

#### **Article 206**

(1) The contracting authority has the obligation to inform the candidates/tenders in written form, as soon as possible but no later than 3 days about the decisions regarding the awarding of the public procurement contract, the conclusion of a framework agreement, the admittance into a dynamic purchasing system, or, by case, the annulment of the awarding procedure and eventual recommence of a new procedure or implementing a dynamic purchasing system.

(2) The communication provided for by paragraph (1) shall be sent also by fax or by electronic means.

(3) In case the contracting authority doesn't transmit the communication regarding the result of applying the procedure also by fax or by electronic means, than the term stipulated at art. 205 par. (1) are increased by 5 days.

#### **Article 207**

(1) Within the communication provided in article 206 paragraph (2), the contracting authority has the obligation to communicate to the winner tenderer/tenderers the acceptance of the submitted tender/tenders.

(2) Within the communication provided in article 206 paragraph (2), the contracting authority has the obligation to inform the candidates/tenderers that have been rejected or those who's tender has not been declared winning on the grounds that the respective decision is based on, as follows:

a) for each unsuccessful candidate of the reasons for the rejection of his candidature;

b) for each rejected tender, the concrete reasons that stud at the bottom of the rejection decision, the arguments based on which the tender has been considered unacceptable and/or irregular being detailed, especially the tender elements that have not complied with the functioning and performance requirements stipulated in the tender book;

c) for any tenderer which has presented an acceptable and regular tender, and therefore admissible but which hasn't been declared as successful, the relative characteristics and advantages of the successful tender/tenders related to its tender, the name of the tenderer that is to be awarded the public procurement contract or, by case, of the tenderers with which a framework agreement shall be concluded.

d) for any economic operator out of the ones stipulated at letter a)-c), the deadline until they can submit a complaint, taking into account the provisions of art. 272.

### **Article 208**

The contracting authority may decide to withhold certain information referred to by article 207 paragraph (2) letter c), but only in the situation where that communication:

- a) would impend law enforcement or, would otherwise be contrary to the public interest;
- b) would prejudice the legitimate commercial interests of economic operators, public or private or prejudices the fair competition between them.

## **Section 6**

### **Annulment of the award of public procurement contract procedure**

### **Article 209**

(1) By exception of art. 204, the contracting authority has the right to annul the application of the procedure for the award of the public procurement contract if such decision is taken, as a rule, before the date of the transmission of the communication regarding the result of applying the procedure and, anyhow, only before the date of the concluded the contract, in the following cases:

a) it was not possible to ensure an appropriate level of competition, meaning that the number of candidates/tenderers is lower than the minimum number provided for each procedure in the present law;

b) only unacceptable and/or irregular tenders have been submitted;

c) no tender has been submitted or only tenders which, although they may be taken into consideration, cannot be compared due to the uneven way of dealing with the technical or financial solution, have been submitted;

d) serious infringement affects the procedure for the award of the contract or the conclusion of a contract is impossible.

(2) In the purpose of paragraph (1), letter d), the awarding procedure is considerate to be affected when there are cumulatively accomplished the followings conditions:

a) within the tender documentation and/or in manner of application of the awarding procedure there are ascertained errors or omissions having as effect the infringement of the principle provided for by Article 2, paragraph (2), letters a)-f);

b) the contracting authority has not the possibility to adopts corrective measures because these measures could also conduct to infringement of the principles provided for by Article 2, paragraph (2), letters a)-f).

### **Article 210**

The contracting authority has the obligation to inform in writing all the participants to the public procurement procedure, in no more than 3 days from the date of annulment, both the ceasing of the obligations of the participants, created by submitting tenders, as well as the reason of the annulment.

## **Chapter VI**

### Award procedure file

#### **Article 211**

The contracting authority shall draw up the file of the public procurement for each awarded contract, framework agreement and every establishment of a dynamic purchasing system.

#### **Article 212**

The public procurement file together with the tenders accompanied by the qualification and selection documents are kept by the contracting authority as long as the public procurement contract/framework agreement produces legal effects, but no less than 5 years from the date of finalizing of the respective contract. In the case of the awarding procedure annulment, the file is kept at least 5 years as from the date of the respective procedure annulment.

#### **Article 213**

(1) The public procurement file must include the documents drawn up/received by the contracting authority within the awarding procedure, like the following, but without limiting to these:

- a) the note regarding the settlement of the estimated value;
- b) the prior information notice and the proof of transmitting it for publication, if the case;
- c) the contract notice

(2) The report of the awarding procedure, provided for by paragraph (1), letter g) is elaborated before the conclusion of the public procurement contract/ framework agreement/dynamic purchasing system, containing at least the following elements:

- a) the name and the address of the contracting authority;
- b) the object of the public procurement contract/ framework agreement or dynamic purchasing system;
- c) if the case, the name of the candidates that participate to the procedure;
- d) if the case, the name of the selected and not selected candidates, as well as the reason for their selection or non-selection;
- e) the name of the tenderers that participate to the procedure;
- f) the name of the tenderers rejected and the reasons that led to this decision;
- g) if the case, the reasons for the rejection of tenders found to be abnormally low;
- h) the name of the tenderer/ tenderers whose tender was declared winner and the reasons that led to this decision;
- i) in the case of the winning tender/tenderers, the part of the contract that they have declared to subcontract and the name of the subcontractors.
- j) if the case, the justification of the annulment decision of the awarding procedure.

#### **Article 214**

The provisions of article 213 paragraph (1) will apply accordingly for the awarding of the contracts stipulated in Chapter VII.

### **Article 215**

(1) The public procurement dossier has the character of a public document. The access of persons to this information is enabled by respecting the time-limits and procedures stipulated by the legal provisions regarding the free access to public interest information and can't be restricted unless this information is classified as secret or protected by an intellectual property right, according to the law.

(2) The unjustified restriction of access at the award procedure file, the head of the contracting authority will be sanctioning by The National Authority for Regulating and Monitoring Public Procurement, according to the provisions of the present law.

### **Article 216**

In case the contracting authority applies an awarding procedure by electronic means, uses a dynamic procurement system or an electronic procurement system, it has the obligation to ensure complete traceability of the actions that it carries out during the awarding procedures, so that the preparation of the public procurement contract, according to the stipulation of art. 213 shall not be affected.

## **Chapter VII**

### **Concession contracts**

#### **Section 1**

##### **General principles and rules for awarding of the concession contract**

### **Article 217**

The awarding of the concession contract is based on the principles provided for by Article 2 paragraph (2).

### **Article 218**

(1) The contracting authority has the obligation to award the concession contract according to the present section of the law.

(2) The fundament of the decision for the realization of the project, the way of transferring and recuperating the object of the concession, the modalities for preparing the tender documentation and the specific ways for applying the procedures provided by this law for awarding the concession contract are set-up by Government Decision.

### **Article 219**

(1) The estimation rules provided by Chapter II, Section 2, are applied accordingly in order to determine the estimate value of the concession contract.

(2) The solving of disputes made during the awarding procedure of the concession contract is provided by Chapter IX.

### **Article 220**

The present law shall not apply in the case when the concession contract:

- a) is awarded in one of the situations provided by Article 12 - 14; or
- b) is awarded by a contracting authority that exerts, among its activities, one or more relevant activities provided for by Article 232-241 and only in the case when the concession contract is awarded in order to perform the respective activities; or

c) which has as subject matter the concession of public goods and only in the case when the contracting authority does not intend to acquire the execution of works or services, in this case the respective contract being included either in the category of public procurement contracts or in the category of concession contracts for which the provisions of this law shall be applied.

#### **Art 221**

The present law shall not apply when it is necessary to purchase additional works or services, that were not included in the original concession contract, but which, due to un-predictable circumstances, became necessary for the performance of the respective contract, if the following conditions are cumulatively observed:

- a) the contract is to be awarded to the initial contractor;
- b) the additional services or works cannot be separated, from the economic and technical viewpoint, of the original contract without major inconveniences for the contracting authority or, even if separable of the initial contract, they are strictly needed for completion of the contract;
- c) the cumulated value of the awarded contracts for supplementary/additional works and services cannot exceed 50% of initial value of the contract.

#### **Art 222**

(1) The contracting authority has the obligation to ensure the transparency of concession contracts awarding.

(2) The awarding procedure of a concession contract is initiated by publishing a contract notice.

(3) The contracting authority must include in the contract notice mentioned in paragraph (2) at least the information from Annex 3B and, where appropriate any other information deemed useful by the contracting authority, by using the standard forms adopted by the European Commission.

The content of the notices for which, according to the present law, the contracting authority has not the obligation to send it for publication in the Official Journal of the European Union, will be laid down by Government Decision.

(4) The provisions of articles 48 – 50 are applied accordingly.

#### **Article 223**

(1) The contract notice is published in ESPP, in Official Gazette of Romania, Part. VI, Public procurement and, by case, in Official Journal of the European Union.

(2) The publication in the Official Journal of the European Union is mandatory in all the situations where the estimated value of the concession contract that is to be awarded is greater than the RON equivalency of 5,000,000 EURO.

#### **Art 224**

(1) The contracting authority must establish the number of days between the date of publishing of the contract notice and the applications submitting date so that the economic operators benefit from a adequate and sufficient period of time in order to elaborate the applications.

(2) Irrespective of the applied procedure and without prejudice to the provisions of paragraph (1), the contracting authority has the obligation to send to publishing the contract notice with at least 52 days before the limit date for submitting the applications.

(3) In the case when the contract notice is sent for publishing in the Official Journal of European Union, in electronic form, the period provided by paragraph (2), can be reduced with 7 days.

(4) The provisions of article 72 are applied accordingly.

#### **Art 225**

When the contracting authority awards a concession contract, it has the right to request:

a) the concessionaire: to award contracts to a third parties, in a percentage of minimum 30% of total value of works that are the subject of the concession, giving the candidates the possibility to increase the share/shares of the contract that will be subcontracted.

b) to candidates: to specify in the application the value/percentage of the work for which the concession contract is to be awarded which intent to assign to third parties.

### **Section 2**

#### **Rules for awarding the public procurement contracts by concessionaires**

#### **Art 226**

In case the concessionaire has the quality of contracting authority in the purpose of Article 8, letter a) – c), provisions, he has the obligation to observe the provisions of Chapters I-VI of the present law when awarding a public procurement contract to third parties.

#### **Art 227**

(1) When the concessionaire does not have the quality of contracting authority in the purpose of Article 8 let. a) – c), he still has the following obligations when awarding a work or service contract to a third party to publish a contract notice in Official Journal of The European Union, in the ESPP and in Official Gazette of Romania, Part VI – Public procurement, in all situations in which the estimated value of the contract, that will be awarded is higher than RON equivalency of EUR 5,000,000, except for the cases provided for in article 122.

(2) The concessionaire has also the obligation to respect the following conditions:

a) the number of days between the date of dispatch of the contract notice and the candidatures submitting date shall be at least 37 days; and

b) the number of the days between the date of dispatch of the participation invitation and the tenders submitting date shall be at least 40 days.

(2) When the awarding procedure of the contract implies an initial phase for selection, then the concessionary must meet the following conditions:

(a) the number of days between the publishing of the contract notice date and the candidatures submitting date must be at least of 37 days; and

(b) the number of days between the date of sending the participation invitation and the date of tenders submitting must be at least of 40 days.

(3) In the case when the contract notice is sent for publishing in the Official Journal of European Union, in electronic form, the periods provided by paragraph (2), can be reduced with 7 days.



(4) In the case when the concessionaire publishes in ESPP all the tender documentation and allows, starting with the publishing date of the contract notice, the direct access and without restriction of the economic operators to this documentation, then it has the right to reduce the periods of time provided for by paragraph (2) let b), with another 5 days.

(5) The provisions of article 72 are applied accordingly.

(6) The concessionaire has the obligation to include in the notice provided by align. (1) at least the information provided in Annex 3C and, where appropriate any other information deemed useful by the concessionaire, by using the standard forms adopted by the European Commission.

(7) The provisions of articles 48 - 50 are applied accordingly.

### **Art 228**

(1) The groups of companies constituted for obtaining the concession or their related undertakings cannot be considered third parties.

(2) In the purpose of paragraph (1) provisions, related undertaking means any undertaking:

a) over which the concessionaire can exert directly or indirectly a dominant influence; or

b) which can exert a dominant influence over the concessionaire; or

c) which, as the concessionaire, is under the dominant influence of another person. For the “dominant influence” term, the provisions of art. 3 let. m) shall apply accordingly

(3) The economic operator that participates to the awarding procedure of a concession contract has the obligation to include in the application a list containing the legal persons that have the quality of related undertakings; the concessionaire will have the obligation to permanently update the list, till the concession contract finalisation.

## **CHAPTER VIII**

### **Sectorial contracts**

#### **Section 1**

#### **Relevant activities**

#### **Paragraph 1**

#### **Scope**

### **Article 229**

(1) The provisions of Chapters I-VI are applicable to sectorial contracts insofar as this chapter doesn't provide otherwise.

(2) As regards the provisions of the paragraph (1), sectorial contract means the public procurement contract that is awarded for performing a relevant activity in the following sectors of public utilities to be carried out:

a) water;

b) energy

c) transport services;

d) postal services.

### **Article 230**

When awarding a sectorial contract in view of performing several relevant activities, the contracting authority has the obligation to observe the rules that are applicable to the main activity for which the contract is principally intended.

### **Article 231**

(1) In the case when the contracting authority that belongs to the categories stated by article 8, letters a)-c), awards a public procurement contract for more activities, among which at least one is a relevant activity and another falls under Chapter I – VI provisions, and objectively, it is impossible to determine for which activity the contract is mainly intended, then the contracting authority has not the right to include this contract in the sectorial contracts category and has the obligation to respect the provisions of Chapter I - VI.

(2) In the case when the contracting authority that belongs to the categories stated by article 8, letters a)-c), awards a public procurement contract for more activities, among which at least one is a relevant activity and another one is not subject to this law, and objectively, it is impossible to determine for which activity the contract is mainly intended, then the contracting authority has the obligation to include this contract in the sectorial contracts category.

(3) In the case when the contracting authority, that belongs to the categories stated by article 8, letters d) or e), awards a public procurement contract for more activities, among at least one is a relevant activity and, objectively, it is impossible to determine for which activity the contract is mainly intended, then the contracting authority has the obligation to include this contract in the sectorial contracts category.

## **Paragraph 2**

### **Water**

### **Article 232**

It is considered to be relevant activities in the public utilities sector provided for by article 229, paragraph (2) letter a) the following:

- a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water;
- b) the supply of drinking water to those networks provided for by letter a).

### **Article 233**

The contracting authority that performs one of the activities provided for by article 232, has the obligation to observe the provisions of this chapter when it awards a contract or organize a design contest that is connected with:

- a) hydraulic engineering projects, irrigations or land drainage, on condition that the volume of used water for supply the drinking water represent more than 20% of the total volume of water made available through this projects or installations for irrigation or drainage; or
- b) disposal or treatment of sewage.

### **Article 234**

The supply of drinking water to the public networks, by a contracting authority defined by article 8 letter d) or e), it is not considered relevant activity in the purpose of article 232 if the following conditions are cumulatively accomplished:

a) the production of drinking water takes place because its consumption is destined for performing another activity than those defined in this law as being relevant activity;

b) the supply to the public network depends only on the entity's own consumption and has not exceeded 30% of the entity's total production of drinking water, having regard to the average for the preceding three years, including the current year.

### **Paragraph 3** Energy

#### **Article 235**

It is considered to be relevant activities in the public utilities sector provided for by article 229, paragraph (2) letter b) the following:

a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas, heat or electricity;

b) the delivery (furnishing) of gas, heat or electricity to those networks provided for by letter a).

#### **Article 236**

The delivery of gas or heat to the networks with destination to the public, by a contracting authority defined by article 8 letter d) or e), it is not considered relevant activity in the purpose of article 235 if the following conditions are cumulatively accomplished:

a) the economic operator produces heat or gas as an unavoidable consequence of carrying out an activity other than that defined in this law as relevant activity;

b) the delivery of gas or heat to the public network is aimed only at the economic exploitation of such production and amounts to no more than 20% of the entity's turnover having regard to the average for the preceding three years, including the current year.

#### **Article 237**

The delivery of electricity via public networks, by a contracting authority defined by article 8 letters d) or e) is not considered relevant activity in the purpose of article 235 if the following conditions are cumulatively accomplished:

a) the economic operator produces electricity for ensuring the own consumption needed to perform an activity other than those defined in this law as relevant activities;

b) the delivery of electricity via public networks depends only on the economic operator's own consumption and the transported quantity does not exceed 30% of its total production of electricity, having regard to the average for the preceding three years, including the current year.

### **Paragraph 4** Transport services

#### **Article 238**

(1) It is considered to be relevant activities in the public utilities sector provided for by article 229, paragraph (2) letter c) the provision or the operation of networks intended to ensure the provision of services for the benefit of the public, in the field of railways transportation, and services passengers road transport, based on schedule, such as bus, tram, tube, trolley bus or cable transport.

(2) In the purpose of paragraph (1) provisions, it is considered that there is a network for providing transportations services, in the case when the operation conditions – such as the condition on the routs to be served, the capacity made available or frequency of the service - are pre-established by a competent authority.

### **Article 239**

The carrying out of transportation services carried out with buses is not considered to be relevant activity when other entities have the right to provide the same services, in the same geographical area under the same conditions as the contracting authorities.

## **Paragraph 5** Postal services

### **Article 240**

(1) It is considered to be relevant activities in the public utilities sector provided for by article 229, paragraph (2) letter d), the supply of the following services:

a) postal services, whether are reserved or not, in the meaning of article 12 of the Government Ordinance no. 31/2002 regarding the postal service with subsequent modifications and completions, respectively the services consisting of the clearance, sorting, routing and delivery of postal items - correspondence, books, catalogues, newspapers, periodicals and postal packages containing merchandise with or without commercial value - irrespective of weight;

b) mail service management services, respectively services both preceding and subsequent to dispatch;

c) added-value services linked to and provided entirely by electronic means including the secure transmission of coded documents by electronic means, address management services and transmission of registered electronic mail;

d) services concerning postal items not included in letter a), such as direct mail bearing no address;

e) financial-postal services, as defined in category 6 of Annex 2A and in article 13 let. d), including in particular postal money orders and postal giro transfers;

f) philatelic services;

g) logistics services that combine physical delivery and/or warehousing with other non-postal functions.

(2) The supply of the services provided for by paragraph (1) letters b)-g), are relevant activities only if the respective entity providing these services provides also postal services in the meaning of paragraph (1) let. a) and only if the activity on that market is not directly exposed to competition pursuant to article 248.

## **Paragraph 6** Other relevant activities

### **Article 241**

For the purpose of the present emergency ordinance, are considered as relevant activities the activities which involve exploiting a geographical area in order to:

- a) prospecting or extracting rough oil, natural gases, coal or other solid fuels;
- b) providing the transporters which operate by air, sea or fluvial with airports, maritime/fluvial ports or with other transport network terminals

## **Section 2**

### Specific exceptions

#### **Article 242**

This law is not applicable to the sectorial contracts that are awarded with the purpose to procure:

- a) products that will be resold or lease to a third party, under the conditions when the contracting authority does not benefit by a special or exclusive right in this purpose, and other entities have the right to sale or to lease similar products in the same conditions as the contracting authority;
- b) products, services or works destined to perform some relevant activities in a third country, under the conditions that in the performance of those activities the physical use of a network or of a geographical area within the European Community is not involved.

#### **Article 243**

This law is not applicable for the contracts awarded by a contracting authority that is part of one of the categories provided for by article 8 letter d) or e) and which have as object the products, services or works purchase in order to carry out other activities than relevant activities.

#### **Article 244**

This law is not applicable for the contract that has as object purchasing of water, if this is awarded by a contracting authority that performs relevant activities of provided for by article 232.

#### **Article 245**

The present emergency ordinance shall not apply for the contract which has as object the purchase of energy, of extractive industry energetic products or of other fuels meant for energy production, if it is awarded by a contracting authority which performs activities similar in nature with the ones stipulated at art. 235 and art. 241 let. a).

#### **Article 246**

- (1) This law is not applicable for awarding of the sectorial contract:
  - a) by a contracting authority to an affiliated undertaking;
  - b) by an association of more contracting authorities, formed exclusively with the purpose to carry out a relevant activity, to an undertaking which is affiliated with one of these contracting authorities;
- (2) The provisions of par. (1) shall apply in the case of:
  - a) a supply contract, provided at least 80% of the average turnover in the product supply field, in the last 3 years, of the affiliated

enterprise comes from furnishing such products to the enterprises with which it is affiliated;

- b) a services contract, provided at least 80% of the average turnover in the services field, in the last 3 years, of the affiliated enterprise comes from rendering such services for the enterprises with which it is affiliated;
- c) a works contract, provided at least 80% of the average turnover in the works field, in the last 3 years, of the affiliated enterprise comes from performing such works for the enterprises with which it is affiliated;

(3) In the purpose of paragraph (1) and paragraph (2) provisions, the affiliated undertaking represents any undertaking which has the annual accounts consolidated with those of the contracting authority, in accordance with the provisions on consolidated accounts or any undertaking that is in any of the following situation:

a) the contracting authority may exerts, directly or indirectly, a dominant influence over it;

b) it exerts, directly or indirectly, a dominant influence over a contracting authority;

c) in common with the contracting authority, they are, directly or indirectly under dominant influence of another undertaking.

For the “dominant influence” term, the provisions of art. 3 let. m) shall apply accordingly.

(4) Taking into account the setting up date of an affiliated enterprise or the date it has begun its activity, in case the turnover is not available for the past 3 years, it's enough for the enterprise to show that the turnover stipulated at par (2), let. a), b) or c) is credible, this fact being proved based on a business plan.

(5) In case more than one affiliated enterprise to the contracting authority renders similar services, supplies similar products or performs similar works, the percentages stipulated at par. (2) shall be calculated taking into account the total turnover resulted form supplying products, rendering services or, by case, performing works, by the respective affiliated enterprises.

#### **Article 247**

(1) This law is not applicable for the awarding of sectorial contract:

a) by an association of more contracting authorities, exclusively formed with the purpose to carry out a relevant activity, to one of the respective contracting authority;

b) by a contracting authority, to an association of contracting authorities, of which itself is a part and which it was set up exclusively with the purpose to carry out a relevant activity.

(2) The provisions of paragraph (1) are applicable only if the association was set up in order to perform the relevant activity during a period of a least three years, and the legal instrument used for setting up the association provides that the respective contracting authorities will make part of the respective association for a period at least equal with the mentioned period.

#### **Article 248**

(1) This law is not applicable for awarding the sectorial contracts in the case when the relevant activity for which these are intended is directly exposed to competition on a market without restricted access.

(2) For the purposes of paragraph (1), the question of whether an activity is directly exposed to competition shall be decided by the European Commission upon to a request formulated by the interested contracting authority, which will contain all information needed to adopt a pertinent decision regarding the situation.

(3) The specific procedure for formulating and sending the request provided for by paragraph (2) is established by Government Decision.

#### **Article 249**

The contracting authority has the obligation to send to the National Authority for Regulation and Monitoring of Public Procurement, any information required regarding the contracts for which the provisions of articles 242-243 and article 246-247 are applicable.

### **Section 3**

#### Specific rules for awarding the sectorial contracts

#### **Article 250**

(1) The procedures for awarding the utilities contracts are:

- a) open procedure;
- b) restricted procedure;
- c) negotiation with prior publication of the contract notice ;
- d) negotiation without publication of the contract notice;
- e) request for tenders.

(2) The provisions of article 18 paragraph (2) are applicable in case of award of sectorial contracts.

(3) For the purpose of awarding the sectorial contracts, the contracting authority can also use the special awarding methods mentioned in Chapter IV, in compliance with the provisions of the present section.

#### **Article 251**

(1) The contracting authority has the obligation to award the utilities contract, as a rule, by applying the open procedure, restricted procedure or negotiation with prior publication of the contract notice.

(2) By exception from paragraph (1) provisions, the contracting authority has the right to apply the other procedures provided for by article 250 paragraph (1), only in specific circumstances provided for by article 252 or article 124.

#### **Article 252**

When it awards a sectorial contract, the contracting authority has the right to apply the procedure of negotiation without publication of the contract notice only in the following cases:

- a) given the situation when, after applying the open tender procedure, the restricted tender procedure, the negotiation with the prior publication of a contract notice or the request for tenders procedure, no tender has been presented or only irregular tenders have been presented due to the fact that these are completely irrelevant in relation with the contract's object. In this case, the application of the negotiation's procedure is possible only annulling the initial procedure and only if the initial requirements stipulated in the tender documentation are not substantially modified;

b) when, due to technical, artistic reasons, or to reasons related by protection of exclusive rights, the public procurement contract can be awarded only to a particular economic operator;

c) as a strictly necessary measure, when the application periods of the open tender procedure, restricted tender procedure, the negotiation with the prior publication of a contract notice or request for tenders, cannot be respected due to extreme emergency reasons, determined by unpredictable events that are not due on any account to an action or inaction of the contracting authority. The contracting authority has no right to establish the contract's duration on a larger period of time than it's necessary, in order to face the emergency situation that caused the application of the negotiation procedure without prior publication of a contract notice;

d) when the contract that will be awarded is exclusively destined in the purpose of research, experiment, studies or technical development and only if these are not accomplished for obtaining profit or to recover the research and development costs, and insofar the respective contract does not affect the awarding based on competition of the subsequent contracts that are intended for the proposed purpose;

e) when it is necessary to purchase, from the original supplier, additional quantities of products designated to partially replace or to extent the equipments/ installations anterior supplied and only if the change of the initial supplier would oblige the contracting authority to acquire products having disproportionate incompatibilities or technical difficulties of performance and maintenance because of technical characteristics that are different compared to those existing.

f) in order to procure raw materials traded and transacted on the commodity exchange, its procurement shall be performed as a result of the market transactions on the commodity spot market.

g) when the products can be purchased under particularly advantageous condition from an economic operator that definitively winds up his business, from a judiciary administrator that manages the businesses of an economic operator in bankruptcy or winding up his activity, by an agreement with the creditors of an economic operator that is in bankruptcy or is winding up his activity or by an other similar procedure, regulated by law;

h) when it is possible to purchase products with a considerable more low price than the market price, as a result of a very advantageous situation, available only for a short period of time;

i) when, as a result of a design contest, the services contract shall be awarded, according to the initially established rules, to winner competitor or to one of the winners, in the last case the contracting authority having the obligation to send the invitation for negotiations to all winning competitors.

j) when the contracting authority intends to purchase additional services or works which, even if not included in the initial services or works contract previously awarded to a contractor have become, due to unforeseeable circumstances, necessary for the performance of the respective contract and only if the following conditions are observed:

- the contract to be awarded to the initial contractor;

- the additional works/services cannot be separated from the technical and economical point of view, from the original contract because otherwise this would bring major inconvenience to the contracting authority or, even if separable from the original contract, are strictly necessary for the completion of the contract;

k) when, following the awarding of a works contract, the contracting authority intends to purchase new works similar to the works foreseen by the original contract and only if the following conditions are observed:



- the contract is awarded to initial contractor and the new works consist in repetition of works similar with those provided in the contract initially awarded and are in conformity with the requirements of the terms of reference elaborated for the award of the original contract;
- the original contract of works was awarded through open procedure, restricted procedure or negotiation with prior publication of the contract notice;
- the estimated value of the original works contract has been determined including the value of similar works to be subsequently purchased;
- in the contract notice for the award of the original works contract has been mentioned that the contracting authority has the right to choose for subsequent purchase of similar works from the economic operator whose tender will be declared winner within the respective procedure.

### **Article 253**

In the case when this thing is possible and insofar the conditions provided for by article 252, letters i), j) and k) are not breached; the contracting authority has the obligation to invite to negotiation a sufficient number of economic operators in order to ensure a genuine competition.

### **Article 254**

(1) Without infringement of the provisions of the agreements and conventions to which Romania is part, in the case when two or more tenders are relatively equivalent regarding the points obtained as a result of application of the awarding criteria, the contracting authority has the right to declare as being winner the tender that contains, in a proportion more than 50%, products that have as origin – as determined in accordance with Council Regulation (EEC) no. 2913/92 of 12 October 1992 - the member states of European Union or third countries with which the European Community has concluded bilaterally or multilaterally agreements ensuring comparable access for Community undertakings to the markets of those countries, against of a tender that contains, in a proportion lower than 50% such products.

(2) In the purpose of paragraph (1) provisions, the tenders relatively equivalent mean those tenders for which the difference between the prices provided in the financial proposal do not exceed 3%.

## **Chapter IX**

### Means of legal dispute

### **Section 1**

#### General provisions

### **Article 255**

(1) The person that considers itself as being harmed in its right or an legitimate interest, by an act of the contracting authority by infringing the legal provisions on public procurement, is entitled to contest that act either by administratively-jurisdictionally means, in the conditions of the present law, or in justice, in the conditions of Law no. 544/2004 on administrative litigation with the subsequent modifications.

(2) The damages are requested only by legal action in court, in accordance with the provisions of the legislation on administrative legal disputes.

(3) Within the meaning of paragraph (1), a person that considers itself as being harmed is any person who cumulatively complies with the following conditions:

a) he/she has a legitimate interest regarding to a certain public procurement contract falling under the scope of the present act;

b) he/she has suffered, suffers or may be suffered a prejudice, as a consequence of an act of the contracting authority, capable of producing legal effects.

(4) A contracting authority's act means:

a) any administrative act;

b) the failure of issuing an administrative act or an any other act of the contracting authority or the refusal of issuing it;

c) any other act of the contracting authority, other than those stipulated by letter a) or b), that produces or may produce legal effects.

(5) The object of the legal dispute can be, by case, the annulment of the act or obliging the contracting authority to issue an act or obliging the contracting authority to take any necessary measures needed for correcting the acts that affect the awarding procedure.

### **Article 256**

For the purpose of solving of the complaints using the administrative-judicial approach, the injured part has the right to address The National Council for Solving Complaints in compliance with the provisions of Art.270 – 272.

#### **Art.256<sup>1</sup>**

(1) In the case of abusive exertion of the right to submit complaints using the administrative-judicial way, the National Council for Solving the Complaints can sanction the objector, at the contracting authority's request and after rendering the solving complaint decision, with a fine between 10 000 lei and 35 000 lei, in accordance with the provisions of Art.280, par.(4).

(2) The abusive exertion of the right to submit complaints during the awarding procedure gives the contracting authority the right to remedy measures which, at the contracting authority's request, may be given to it by the court.

## **Section 2**

### **National Council for Solving Legal Disputes in the field of Public Procurement**

#### **Article 257**

(1) By the present law, The National Council for Solving Legal Disputes is set-up, hereinafter referred to as Council, administrative-jurisdictional body that functions besides the National Authority for Regulating and Monitoring Public Procurement.

(2) The Council functions based on a regulation of organization and functioning, approved in conformity with Art.291.

(3) In what regards the fulfillment of its activity, the Council shall obey only the law in force, the sessions of the Council are legally constituted with the majority of its members.

(4) As regards its decisions, the Council is independent and it is not subordinated to the National Authority for Regulating and Monitoring Public Procurement

#### **Article 258**

- (1) The Council is managed by a President, elected from among its members.
- (2) In order to apply the provisions of par.(1), the Council's members elect the President by secret vote, with absolute majority.
- (3) The President is elected for a 3 years mandate, with the possibility only one renewal of the mandate.
- (4) The competencies of the President of the Council are set up by the regulation for organizing and functioning. In fulfilling his attributions, the president of the Council issues orders.
- (5) The President of the Council forwards to the Prime-Minister the proposals for appointing the members of the Council for those candidates that are declared as admitted after the examination, except for the cases provided at article 290 paragraph (4).

#### **Article 259**

The President of the Council has the obligation to draw up an annual activity report which will be submitted to the Parliament by March, 31<sup>st</sup> of the next year.

### **Section 3**

The statute of the staff of the National Council for Solving Legal Disputes

#### **Article 260**

- (1) The Council has 21 members and 16 employees as technical-administrative staff, totalizing 37 posts.
- (2) At least half of the Council's members must have a law degree.

#### **Article 261**

- (1) The members of the Council are selected on the basis of a competitive examination and are appointed in their post by the Prime-Minister, in the conditions of the law.
- (2) The members of the Council shall be selected based on their professional skills and good will. The candidates shall have graduate studies and at least 5 years of experience in law, economy or technical fields, having relevant experience of 2 years in public procurement and/or competition.
- (3) The technical-administrative staff is employed by examination, in the conditions of the law.

#### **Article 262**

- (1) The Council's members are civil servant with special statute, named counselors for solving public procurement complaints. From the point of view of remuneration, they are assimilated to the public function of deputy general secretary within the Government's working apparatus.
- (2) The Council's members benefit of increased basic salaries up to 75% against those scheduled by the law..
- (2<sup>^</sup>1) The Council's President also benefits of the management increase, corresponding to the general manager function.
- (3) The technical-administrative staff of the Council has the statute of a contractual staff and benefits from the salaries applicable to the contractual staff from the apparatus of the National Authority for Regulating and Monitoring the Public Procurement.

(4) The provisions of the present law shall be completed with the provisions of the Law no. 188/1999 regarding the statute for the public servants and the Law no. 52/2003 regarding the Labour Code, with the subsequent modifications and completions, insofar they do not countervail the present law.

### **Article 263**

(1) The main task of the Council's members is to fulfill the Council's attributions conferred by the present emergency ordinance.

(2) The Council's activity and the personal performances of its members are evaluated by a college in the first term of every year, focused on the period between first of January and 31 of December of the preceding year.

(3) The College mentioned at par.(2) is composed of 5 members as it follows:

a) the President of the National Council for Solving Complaints;

b) the President of N.A.R.M.P.P.;

c) the representative of the Ministry of Justice;

d) two representatives of the Romanian Parliament, one senator and one deputy as well, designated by the Parliament's two Chambers.

4) For the purpose of the provisions in par.(2), the College draws up an evaluating report which is forwarded to the Prime Minister. Based on the proposals emerged from the evaluation report, the Prime Minister can dispose, by decision, to relieve from function those counselors for solving complaints who did not obtain satisfactory evaluations.

(5) The evaluation procedure of the Council's activity and of the individual professional performances of its members is established by the College's regulation which is approved by order of the N.A.R.M.P.P.'s President and shall be published in the Official Gazette of Romania, Part 1.

(6) Excepting for the term mentioned in par.(2), in situations of exceptional circumstances, if necessary, the evaluation procedure can be performed any time necessary before that term.

### **Article 264**

(1) The members of the Council are not allowed to:

a) carry out commercial activities, directly or conducted by other persons;

b) be associates or members in the executive, management or control bodies in civil companies, trading companies, including banks or other credit institutions, insurance or financial institutions, national companies, national associations or state enterprises;

c) be members of economic interest groups;

d) be members of political parties and carry out political activities or participate in political activities.

e) held any public or private function, with the exception of the didactic activities, of scientific research and of literary-artistic creation;

f) carry on any other professional activity or of consultancy.

(2) The members of the Council have the obligation to submit the declarations of wealth and interests in line with Law no. 161/2003 regarding some measures for ensuring transparency in carrying out public dignity functions, public functions and functions in the business environment, preventing and sanctioning corruption, with the subsequent amendments and completions.

(3) Under the sanction of nullity of the rendered decision, the members of the Council are not allowed to participate in solving a legal dispute if they are subject to one of the following situations:

- a) when he/she, the husband/wife, their ascendants or descendents have a particular interest in solving the legal dispute or when he/she is married, related or in-law, up to the fourth grade, with any party involved;
- b) if he/she was under criminal trial with any of the parties involved up to 5 years prior to the legal dispute in process;
- c) if he/she issued a public position on the legal dispute in process;
- d) if he/she received goods or promises to receive goods or any other advantages from any of the parties involved.

#### **Article 265**

(1) The responsibility for ascertaining disciplinary violations belongs to the Discipline Committee, set-up within the Council.

(2) The Discipline-Committee has a total number of 5 members, out of which 2 appointed by the President of the Council and 3 selected from the members of the Council by vote with simple majority.

### **Section 4**

#### Procedure of solving legal disputes before the Council

#### **Article 266**

(1) The Council has the competence for solving the complaints formulated within the awarding procedure, before the conclusion of the contract, through specialized panels of judges constituted in compliance with the organization regulatory, Art.29.

(2) In fulfilling its attributions, the Council issues decisions.

#### **Article 267**

(1) The legal dispute shall be solved by a panel formed by 3 members of the Council, out of which one of them has the statute of the president of the panel.

(2) Within each panel, at least its president has to hold a degree in law.

#### **Article 268**

The cases regarding the legal disputes shall be randomly distributed to the panels.

#### **Article 269**

The procedure before the Council shall respect the principles of law, celerity, contradiction and right to defence.

#### **Article 270**

(1) The legal dispute shall be in written form and include the following elements:

- a) the name, address and residence of the complainant, or, for legal persons, the name and premises, as well as, according to each case, the registry number in the register of companies and the fiscal code. For legal persons, the representatives and their positions shall be pointed out.
- b) the name and premises of the contracting authority;
- c) the name of the subject matter of the contract and the procedure applied;
- d) the object of the complaint, formulated in compliance with the provisions in Art.255, Par.(5);
- e) the factual and legal justification of the request;
- f) if available, evidence to support the request;
- g) the signature of the part or of its legal representative;

h) the copy of the notification made to the contracting authority regarding the submission of the legal dispute.

(2) The subject-matter of the legal dispute is constituted by the acts issued during the public procurement procedure, the failure of issuing or the refusal of issuing it. The provisions of art. 255 are being applied accordingly.

(3) In the case when the Council considers that not all the data provided by paragraph (1) is included in the submitted legal dispute, it will require the person that submitted the legal dispute to supplement it within 5 days. In the case when the person does not respect this, the legal dispute shall be rejected.

#### **Article 271**

(1) The legal dispute shall be submitted to the Council and the contestator will attach to its legal dispute also the copy of the challenged act, insofar this act has been issued, as well as copies of the documents provided by art, 270, paragraph (1), if these are available;

(2) Together with the submission of the complaint or the next working day the latest, the complainer shall forward to the contracting authority, under the sanction of the complaint's annulment, a copy of it and of the writings stipulated at par. (1), if available;

(3) In a 5 days term since the reception of the notification regarding the complaint, the contracting authority has the obligation to inform about this issue the others participants in the awarding procedure. The notification must also include a copy of that certain complaint;

(4) All the notifications or communications of the procedural acts shall be made with confirmation of receiving. The provisions of article 60 paragraph (1) are applied accordingly;

(5) Given the situation of non-fulfilling the obligations provided in par.(2), the provisions in Art.277, par.(1) are not applicable .

#### **Article 272**

(1) The legal dispute can be submitted in all the phases of the public procurement procedure and against any act of the contracting authority as defined in article 255 paragraph (4).

(2) ) In case the estimated value, according to the provisions of ch. II, section 2, of the contract/framework agreement that is to be awarded/concluded is larger than the thresholds stipulated at art. 55, par. (2), the complaint may be submitted in a 10 days term since the date the complainer took knowledge, according to the present emergency ordinance, of a contracting authority's act that it considered by him as illegal."

(3) In case the estimated value, according to the provisions of ch. II, section 2, of the contract/framework agreement that is to be awarded/concluded is larger than the thresholds stipulated at art. 55, par. (2), the complaint may be submitted in a 10 days term since the date the complainer took knowledge, according to the present emergency ordinance, of a contracting authority's act that it considered by him as illegal;

(4) If the tender documentation is published in ESPP, in compliance with Art 75 par.(5), Art.89, par.(4) and Art.127, par.(2), the acknowledgement date is considered to be the date of publishing the tender documentation.

(5) Excepting the provisions in par.(1), the complaint regarding the provisions of the tender documentation can be submitted only in the scheduled term for tender submission

### **Article 273**

(1) The legal disputes against the same awarding procedure will be treated as connected in order that a unitary solution is rendered. For these legal disputes the continuity of the same panel will be ensured.

(2) Until the solving of the legal dispute by the Council, the participants within the same awarding procedure can associate themselves by an own request that has to contain all the elements provided within art. 270 paragraph (1).

### **Article 274**

(1) ) In a 5 days term from the reception of the complaint's copy, the contracting authority has the obligation to send its point of view regarding the complaint to the Council, together with any relevant documents as well as , under the sanction of a fine stipulated at art. 275 par (3), a copy of the public procurement folder. The absence of the contracting authority's point of view doesn't stop solving the complaint, to the extend that its communication has been proven.

(2) The contracting authority will notify his point of view to the contesteer, within the same period of time as provided at paragraph 1.

### **Article 275**

(1) ) For the purpose of solving the complaint, the Council has the right to ask for explanations from the parties, to administer proofs and to request any other documents/information to the extend that these are relevant in relation with the complaint's object. The Council also has right to ask for any necessary information from other legal/natural persons in order to solve the complaint.

(2) The application of the provisions in par (1) must not lead to the expiration of the solving complaint term, in compliance with art. 276.

(3) The contracting authority has the obligation to respond to any request of the Council and to send it any other documents that are relevant for solving the complaint, in no more than 5 days as from the reception of the request, under the sanction of a fine amounting to 10 000 lei, applied to the leader of the contracting authority.

(3^1) The Council has the obligation to rend its decision regarding the fine the fifth day the latest as from the expiring term stipulated in par.(3).

(3^2) The Council's decision regarding to the fine, not contested in due time, constitutes writ of execution and shall be executed by the qualified bodies , in compliance with the legal provisions regarding the financial debts force of execution and with the procedure mentioned in these provisions.

(4) The Council has the right to ask for an independent expert opinion for technical and financial aspects. The duration available for completing the expertise shall be within the time limit available for the Council in order to solve the dispute. The cost of the expertise shall be supported by the part that formulated the request for performing it.

(5) The procedure is written and the parties shall be audited if the panel finds it necessary for solving the legal dispute.

(6) The parties may be represented by lawyers and can submit written conclusions during the procedure. Also, the parties may ask for the submission of verbal conclusions in front of the panel, without prejudicing the time limits provided by article 276.

### **Article 276**

(1) The Council has the obligation to solve the complaint in no more than 30 days as from the reception of the public procurement folder from the contracting authority.

(2) Disobeying the complaint's solving term mentioned in par (1) may start the evaluation procedure in conformity with the provisions in art.263, par. (6)".

### **Section 5**

#### Provisionally measures

### **Article 277**

(1) The submitting of the legal dispute to the Council, rightfully suspends the procedure of public procurement until the date of resolving the legal dispute by the Council. The contract concluded in the period of suspension of the awarding procedure is null and void.

(2) The suspension period affects correspondingly any other period affected by the suspension, with the exception of the periods for exerting the means of legal dispute.

(3) In the situation of strongly motivated cases and if one part requests so, the Council may rend a decision whereby it disposes, as a temporary measure, stopping the suspension period of the awarding procedure, starting with the expiring term mentioned in par. (4). The Council has the obligation to rend its decision over that request in no more than 5 days as from its reception.

(4)The Council's decision regarding the temporary measure can be attacked in court in no more than 10 days as from the communication, in compliance with the provisions in art.283..

(5) If the contracting authority wants to procure products, services or works divided in lots by awarding different procurement contracts, the provisions in par. (1) operate only over the lots that are mentioned in the complaint.

### **Section 6**

The solutions that can be pronounced by the Council for solving the legal disputes

### **Article 278**

(1) The Council shall firstly render decision on the procedural incidents and ground exceptions and when deems that these are lawfully based the case will not be examined on the merits.

(2) The Council examines the disputed act and may render decision that annuls in part or in full the respective act, forces the contracting authority to issue an act or orders any other necessary corrective measures to remedy the aspects of unlawfulness or groundlessness that affect the acts within the procedure for public procurement.

(3) In the situation when the Council deems that other infringements of the legal provisions regarding the disputed act exists, besides those invoked by the conteste, it may order ex-officio the remedy of the respective infringements.

(4) If the Council approves the complaint and disposes a remedy measure for the attacked document, it shall specify the exertion term for the appeal which cannot be shorter than the exertion term of the mean of appeal against the Council's decision as it is stipulated in art.280, par (5). N.A.R.M.P.P. has the obligation to monitor the fulfillment of the remedy measure, and for this purpose, the Council shall transmit to it all its motivated decisions, in copies.



(5) The Council may reject the legal dispute by being ungrounded, late, with an obvious lack of interest or as being submitted by a person without having this quality or not being mandated to formulate the respective dispute, or on any other procedural incident or ground exception.

(6) Depending on the decision rendered, the Council shall decide on the resuming or annulling the public procurement procedure.

(7) The Council may take act, at anytime during the procedure of solving the legal dispute, of the withdrawal of the legal dispute by the contesteur.

(8) The Council can force, by request of the contesteur, the other part to pay for the judging expenses made during the procedure of solving the complaint.

#### **Article 279**

(1) The decision of the Council rendered for solving the dispute shall be taken with the vote of the majority members of the panel, without possibility to abstain.

(2) After rendering decision, the panel will draft a minute which shall be signed, by all the members of the panel and shall be entered in a special register kept by the Council.

(3) The Council' decision, adopted in compliance with par (1), shall be motivated and communicated to the parties in written in a 5 days term as from the day it was ruled. Without its motivation, the decision shall be published on the Council's web site, within the same term.

(4) The motivated decision shall be published on the Council's web site, within the official gazette, with no reference to the identification data of the decision and of the parties and to personal data as well, in no more than 10 days as from the date of becoming definite and irrevocable.

#### **Article 280**

(1) The decision of the Council by which it annuls in part or entirely the disputed act or by which it forces the contracting authority to issue an act or to order any other corrective measure in order to remedy the aspects of groundlessness or of unlawfulness that affect the awarding procedure has the power of a writ of execution (its fulfilment is mandatory).

(2) In case where the time limit provided by article 278 paragraph (4) is not observed by the contracting authority the head of the institution that has not carried out all the necessary steps for the enforcement of the Council's decision will be subject to a fine for each day of delay equivalent to 20% of the minimum monthly wage, if the interested party so requests.

(3) The decision of the Council is mandatory for the parties; a contract concluded without observance of the Council's decision is null and void.

(4) The decision of the Council on the fine, unappealed in due time, represents a writ of execution and is enforced by the competent bodies, according to the legal provisions regarding the forcible execution of fiscal debts and to the procedure stipulated within this article.

(5) The decision of the Council regarding the solving of the legal dispute and the decision to pay penalties can be attacked by complaint, within 10 days from the communication on the reason of unlawfulness or groundlessness, according to the provisions of art.283.

### **Article 281**

(1) The complaint shall be forwarded to the Council, under the sanction of its nullity which shall send the folder to the competent court in no more than 3 days as from the expiring term of exercising the mean of appeal.

(2) The complaint shall be in written and motivated; the provisions of Article 270 paragraph (1) of the present law shall be applied accordingly.

(3) The party formulating the complaint has the obligation to notify, within the time limit provided by art. 280 paragraph (5), the other party a copy of the complaint as well as the evidence that accompany it, having also the obligation to present before the Court on the occasion of the first hearing the proof of its communication.

### **Section 7**

Abrogated.

### **Section 8**

Means of appeal against the decisions of the Council

### **Article 283**

(1) The Court with competences for solving the complaint against the Council's decision is the appeal court, the contentious-administrative and fiscal section in the contracting authority's location aria. The National Council for Solving the Complaints is not a party in the case.

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

(3) The complaint formulated against the decisions of the Council shall be judged in emergency procedure and with priority.

(4) The party cannot request, except for the situation provided at article 118 paragraph (3) from the Civil procedure Code, the postponement of the judging session for preparing the defence or to acknowledge the demands or the communicated documents, if the proof for subpoenaing (citation) or communication is submitted before the Court with at least 5 days before the date of judging.

(5) By exception for subpoenaing at the first judging session, any part may request the approval of the Court to fulfil, by the means of a Court executor, the procedure of citing or the communication of documents to the other party.

(6) The procedure of solving the complaint is the recourse, according to the provisions of art. 304, point 1 of the Civil procedure Code.

### **Article 284**

(1) At request, the court can dispose the suspension of the awarding procedure and/or the Council's decision, until the solving of the complaint against the Council's decision.

(2) The contract concluded in the suspension period is null and void.

### **Article 285**

(1) By admitting the complaint, the Court will be able to modify the Council's decision ordering, by case, for the correction of the aspects of unlawfulness and groundlessness that affect the acts issued:

- a) the annulment in full or in part of the act of the contracting authority;
- b) the obligation of issuing the act by the contracting authority;
- c) the fulfilment of an obligation by the contracting authority;

d) any other necessary measures.

(2) Given the situation when the Council has solved the cause on exception in a wrong way, the court shall cancel that decision and shall transmit the cause to the Council in order to be solved in substance taking into account also the reasons that determined the decision's cancellation.

(3) In the case when the Court admits the complaint, modifies the decision of the Council and finds that the act of the contracting authority has infringed the provisions of the public procurement legislation and the contract has been concluded before disposing the suspension of the awarding procedure according to art. 284 paragraph (1), the harmed party is entitled to compensations (damages).

(4) Abrogated.

(5) The decision of the Court is irrevocable.

## **Section 9**

### **Solving complaints in Court**

#### **Article 286**

(1) For solving legal disputes in order to award damages, only the Court is competent.

(2) In the case when the person that considers itself as being harmed, then it will have to prove:

a) that the provisions of the present law were breached; and

b) that it had a real chance to win the contract and this chance was compromised as a consequence of breaching the provisions of the present law.

c) that as a consequence of breaching the provisions of the present law that chance has been prejudiced.

(3) For solving the disputes regarding the awarding procedure submitted after the conclusion of the public procurement contract, the competent authority is only the Court.

#### **Article 287**

(1) Regarding the procedures provided by art. 286 the provisions of the Law no. 554/2004 on administrative disputed claims shall be applied accordingly.

(2) The provisions of the present law shall be completed with the provisions of Law no. 544/2004 on administrative disputed claims insofar these are not contrary.

(3) The parties cannot address any legal dispute both in front of the Council and in front of the Court. In the case when more then one party adress simoultaneously the Council and the Court, the Court will suspend the judgement until the silving of the case by administrative – jurisdictional means.

(4) The Court can request to the Council to express its opinion regarding the infringement of the public procurement legislation.

#### **Article 288**

**Deleted**

## **Section 10**

### **Measures regarding the operationalisation of the Council**

#### **Article 289**

(1) The council will become operational by the date of entering in force of the present law.

(2) Until December. 31<sup>st</sup>, 2006 the Council shall function without being a legal person and the financing of the expenses of the Council will be ensured from the state budget, by the budget of the National Authority for Regulating and Monitoring Public Procurement.

#### **Article 290**

(1) Starting with the date of January, 1<sup>st</sup>, 2007, the Council will become legal person and its president will have the quality of credit *ordonateur* and the financing of the expenses of the Council will be ensured from the state budget by the budget of the Chancellery of the Prime-Minister.

(2) For the functioning of the Council, the Government will transmit in its administration a proper building.

(3) The Government, by government decision may elaborate norms for applying paragraph (1).

(4) Until becoming a legal person, the proposal for appointing the Council's members will be forwarded to the Prime – Minister by the president of the National Authority for Regulating and Monitoring Public Procurement, for the candidates declared as admitted after the examination according to the provisions of art. 261 paragraph (1) and (2).

#### **Article 291**

In no more than 60 days as from the publication of the present Government's emergency Ordinance, the Government, by decision, approves the Council's organization and functioning regulation, at the Council's President's recommendation and with the N.A.R.M.P.P.'s notice.

#### **Article 292**

(1) Until December 31<sup>st</sup>, 2006 the number of posts afferent to the Council is available within the number of total posts of the National Authority for Regulating and Monitoring Public Procurement.

(2) The Government, as a result of the Council's President recommendation and with the N.A.R.M.P.P.'s notice, as a result of a big number of cases, can consent by decision the setting up of Council's local agencies in the appeal courts residence cities and/or supplementing the number of the Council's employees, in compliance with art 260, par (1).

### **CHAPTER X**

#### **Contraventions and sanctions**

##### **Section 1**

##### **Contraventions**

#### **Article 293**

The following deeds constitute contraventions and are sanctioned:

a) the incorrect application of the rules for estimating the value of the public procurement contract in order to infringe the provisions of Article 23;

b) the infringement of provisions of Article 33 as well as of the rules for elaboration the technical specifications;

c) the infringement of the provisions of Article 20 paragraph (2) and Article 251 paragraph (2);

d) the application of other procedures for awarding that the ones allowed by the present law;

e) the infringement of the publicity rules stipulated by the present emergency ordinance and/or non fulfilling the obligation of registration in ESPP by the contracting authorities, as it is provided in the public procurement's legislation;

f) the infringement of the special rules provided by art. 58;

g) incorrect application of the rules for communication and transmission of data, having as effect the restriction of access of the economic operators to the awarding procedure, breaching the equal treatment or the transparency principle;

h) using other qualification and selection criteria than the ones provided for in the present law;

i) infringement of the principle of proportionality by using the qualification and selection criteria as a mean to restrict the competition;

j) using other criteria for awarding the public procurement contract than the ones provided for in the present law;

(j<sup>1</sup>) changing the awarding criteria stipulated in the tender documentation during the application of the awarding procedure;

k) infringement of the principle of efficiency of the utilisation of funds by using evaluation factors which do not reflect advantages of economic nature for the benefit of the contracting authority or which have a evident disproportionate weight in the total score in relation to their quantifiable economic advantages;

l) incorrect application, within the selection and/or evaluation process, of the criteria established through the documentation for awarding the contract or application of other criteria that those established through the documentation;

m) ) the refusal of transmitting to the N.A.R.M.P.P. the necessary data regarding the public procurement awarding contracts which it requests in order to fulfill its functions and attributions, or non-transmitting the data within the term provided in the present Emergency Ordinance, or, if the case, within the requested term;

n) the infringement of the obligation provided in art.204, par.(1);

o) the annulment of an awarding procedure in other cases than those provided in art. 209;

p) the infringement of the provisions in art.204 par (1);

q) the infringement of the provisions in art.204 par (1<sup>1</sup>);

r) the infringement of the provisions in art. 206-207;

s) non-fulfilling within the provided term the Council's decision, in compliance with the present emergency Ordinance's conditions, after it becomes definitive and irrevocable;

t) the infringement of the provisions in art. 211-213 regarding the drawing-up and keeping the public procurement folder;

u) non-setting up the compartment provided in art. 304<sup>1</sup>;

v) any other violation of the present emergency ordinance's provisions or of the normative acts issued for its application, having as a result the infringement of the provisions in art 2.

## **Section 2**

### **Sanctioning the contraventions**

#### **Article 294**

(1) The contraventions stipulated at art. 293 let. f), m), n), u) and v) shall be sanctioned with a fine between lei 10.000 and lei 35.000.

(2) The contraventions stipulated at art. 293 let. a), c), k), q), s) and t) shall be sanctioned with a fine between lei 35.000 and lei 70.000.

(3) The contraventions stipulated at art. 293 let. b), d), e), g), h), i), j), j<sup>1</sup>), l), o), p) and r) shall be sanctioned with a fine between lei 70.000 and lei 100.000.

(4) The fines stipulated for the contraventions provided by art. 293 are applicable to legal persons as well as natural persons.

(5) The natural or legal person who performs a contravention has the right to pay in no more than 48 hours from the drawing up date of the official report or, by case, as from its communication date, half of the minimum of the fines stipulated at art. 294 (1) – (3).

#### **Article 295**

(1) The ascertainment of the contraventions and application of fines is carried out by the representatives of the National Authority for Regulating and Monitoring Public Procurement.

(2) Applying the sanctions regarding the fine are prescribed in a time limit of 12 months from the date of committing the infringement.

(3) Any person has the right to notice the N.A.R.M.P.P. about the infringement of the public procurement legal provisions. For the purpose of exercising this right, the respective persons shall transmit together with the notification, also the relevant data/documents, as proofs, to the N.A.R.M.P.P

#### **Article 296**

The contraventions provided by article 293 are subjected to the provisions of the Government Ordinance no. 2/2001 regarding the juridical regime of the contraventions, approved with modifications and completions by Law no. 180/2002 with subsequent modifications and completions.

#### **Art. 296<sup>1</sup>.**

(1) Without prejudicing the provisions of art. 294, NAMRPP has the right to request in court the absolute nullity ascertainment of the contracts/framework agreements in the following cases:

- a) the respective contracts/framework agreements have been concluded without publishing the contract notices, if these actions have taken place in other circumstances than the ones allowed by the present emergency ordinance;
- b) in the situations stipulated at art. 205, par. (2), art. 277 par (1) and art. 284 par (2);
- c) the public procurement contract, the public works concession contract and the services concession contract which have been concluded without obeying the minimum requirements provided by the contracting authority in the tender book or, although the respective requirements have been fulfilled, the contract has been concluded in less favorable conditions than the ones provided in the technical and financial proposal which have constituted the tender declared as being successful.
- d) 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.

(2) The competent court for ascertaining the absolute nullity is the contentious-administrative and fiscal section of the court in which's competences area resides also the contracting authority.

## **CHAPTER XI**

### **Final and transitory provisions**

#### **Article 297**

Unless the present law does not provide otherwise, the provisions of the common law are applied.

#### **Article 298**

The contracts and the awarding procedures ongoing at the time the present law will enter into force shall be completed in accordance with the legal provisions in force at the moment of their initiation.

#### **Article 299**

(1) Until December 31<sup>st</sup>, 2006, the contracting authority has the obligation to transmit for publication the notices provided by art. 47 paragraph (1) only to the Official Journal of Romania.

(2) In the case provided by paragraph (1), the contracting authority has the obligation to respect the minimum time periods provided by the present law between the date of transmission for publication and the date of submitting tenders or, by case, the date of submitting candidatures.

(3) Without prejudice to paragraph (1), until December 31<sup>st</sup>, 2006, the contracting authority has the right to transmit for publication the notices provided by art. 47 paragraph (1) also to the Official Journal of the European Union and/or ESPP;

(4) Starting with January 1<sup>st</sup>, 2008, the publication of the notices stipulated by the present emergency ordinance in the Official Gazette of Romania shall not be compulsory.

#### **Article 300**

(1) The contracting authority has the obligation to submit to the National Authority for Regulating and Monitoring Public Procurement any required information regarding the application if the awarding procedures.

(2) The National Council for remedies has the obligation to transmit to the National Authority for Regulating and Monitoring Public Procurement:

a) the report provided for by art. 259, to acknowledge its presentation before the Parliament; and

b) any other information that it requires regarding the adopted decisions that concern the remedies.

#### **Article 301**

(1) The operator of ESPP is the General Inspectorate for Communications and Information Technology.

(2) On the basis of the data available in the ESPP system, the ESPP operator has the obligation to put at the disposal of the National Authority for Regulating and Monitoring Public Procurement, in electronic format, the reports it required for ensuring the necessary information to establish the statistical database.

### **Article 302**

The thresholds provided by art. 55 paragraph (2) and by art. 57 paragraph (2) can be modified by Government Decision, if this modification is determined by the observance of the obligations assumed at European level, by the agreement on public procurement closed within the World Trade Organization.

### **Article 303**

(1) The National Authority for Regulating and Monitoring Public Procurement shall elaborate the norms for the application of the present law, including the model of the public procurement contract, public works concession contract and services concession contract and submits them to the Government for adoption within 60 days since the publication in the Official Gazette of Romania of the present law.

(2) Based on the provisions of art. 248 align. (3), the National Authority for Regulating and Monitoring Public Procurement shall elaborate the norms regarding the specific procedure for establishing if a relevant activity is exposed directly to competition, and submits it to the Government for adoption within 90 days since the publication in the Official Gazette of Romania of the present law.

(3) The National Authority for Regulating and Monitoring Public Procurement and the Ministry for Communications and Information Technology shall elaborate the norms for the application of the present law for procurement through electronic means and submit them to the Government for adoption within 90 days since the publication in the Official Gazette of Romania of the present law.

(4) Based on article 218 paragraph (1), the National Authority for Regulating and Monitoring Public Procurement shall elaborate the norms regarding the procedures for awarding concession contracts of public works and submits them to the Government for adoption within 90 days from the publication in the Official Gazette of Romania of the present law.

### **Article 304**

(1) By Government decision there can be established the situations and modalities in which the economic operator and the contracting authority have the right to apply for a conciliation procedure.

(2) By Government Decision, the Government can set up the modalities which in the contracting authorities have the right to utilize, in order to award sectorial contracts, preliminary qualification systems.

### **Article 304<sup>^1</sup>**

(1) In view of awarding the contracts the contracting authority has the obligation to set up an internal compartment specialized in public procurement until January 1<sup>st</sup>, 2008.

(2) In the case of the newly set up contracting authorities, the obligation stipulated by par (1) shall be fulfilled in no more than 3 months as from the setting up date of the contracting authority.

(3) To the extent that the organizational structure of the contracting authority does not allow setting up a separate compartment, the obligation stipulated at par. (1) and (2) shall be fulfilled by means of an administrative action of the contracting authority's manager whereby, by case, one or more persons within the respective contracting authority are designated to fulfill the main attributions of the internal specialized compartment, as stipulated by the public procurement law.



### **Article 305**

Upon the entering into force of the present law the following are abrogated:

- a) Law 219/1998 on concessions regime, with subsequent modifications and completions, as well as the normative acts issued for it's application;
- b) Government Emergency Ordinance 60/2001 on public procurement, with subsequent modifications and completions, as well as the normative acts issued for it's application;
- c) Article 5 paragraph (6) and (7) from GO no. 80/2001 regarding the setting up some expenses normative for the authorities of the public administration and public institutions, approved by Law no. 247/2002 with the subsequent modifications and completions;
- d) Government Ordinance 16/2002 on public-private contracts, with subsequent modifications and completions, as well as the normative acts issued for it's application;
- e) Government Ordinance 20/2002 on public procurement through electronic means, with subsequent modifications and completions, as well as the normative acts issued for it's application;
- f) Article 3 of Government Emergency Ordinance 34/2005 on designating the National Agency for Housing to perform activities of construction and/or rehabilitation of households in areas affected by calamities;
- g) Government Decision 1186/2001 approving the procedures for public procurement of goods and services implying national defence, public order, with subsequent modifications and completions.
- h) Article 7 of Government Decision 273/2003 on establishing subsidiaries, commercial companies for repairs and services through the reorganisation of some activities within S.C. Termoelectrica SA;
- i) The point 3.12 of the Annex of Government Decision 1293/2003 for the approval of the Mandate on implementing the strategy of privatisation of the companies/national companies and commercial companies functioning under the authority of the Ministry for Transport, Constructions and Tourism;

### **Article 306**

The annex no. 1, 2 and 3 are integrated parts of the present law.

### **Article 307**

(1) The present law shall enter into force on the 30<sup>th</sup> of June 2006.

(2) By exception to the provisions of paragraph (1):

a) the provisions of art. 14 paragraph (3) and art. 254 shall enter into force beginning with January 1<sup>st</sup>, 2007.

b) The provisions of art 257 paragraph (1) shall enter into force beginning with the date of publication of the present law in the Official Gazette of Romania.

### **Modification in Annex 3A, Section "Public procurement contract contract notice", lett.c) of point 3 and point 23**

c) By case, indicate whether a framework agreement will be concluded;

23. The criteria to be used for the award of the contract: 'lowest price' or 'most economically advantageous tender', **as well as their relative weight** shall be mentioned where they do not appear in the tender documentation or in the descriptive documentation, in the case of the competitive dialogue or negotiation.

Art. 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 May 15<sup>th</sup>, 2006, approved with amendments and supplements by Law 337/2006, with the subsequent amendments and supplements, as well as with the ones brought by the present emergency ordinance, shall be republished in the Official Gazette of Romania, Part I, after approving it by law, the texts being given a new numeration.

PRIME MINISTER  
CĂLIN POPESCU TĂRICEANU