

Government of Romania
Emergency Ordinance no. 76
of June 30, 2010

amending and supplementing Government Emergency Ordinance no. 34/2006
concerning the award of public procurement contracts, public works concession
contracts, and services concession contracts

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Given the need for urgent action to improve and adjust the public procurement system, while otherwise there is a risk of decrease in public funds spending, including EU funds, the worst result in this case being the postponement or delay of the implementation of major investment projects having social and economic impact at the national or local level,

taking into account that the present procedures for awarding public procurement contracts are hampered by the improper use of appeals and, respectively, complaints, by legal provisions whereby the contracting authority is unable to sign the contract if the decision of the National Council for Solving Complaints or the judgement of the court of first instance was appealed, with the subsequent result of influencing the process of awarding public procurement contracts, it is necessary to shorten those terms.

However, to avoid improper behavior on the part of economic operators that, while noting that they have no chances of winning in a court of law, deliberately delay the due course of the procedure, sanctions have to be imposed on these operators in order to reduce the very large number of complaints that hinder the process of awarding public procurement contracts.

Given all these explanations, as well as the long time implied by parliamentary procedures and also taking into account that the provisions of Regulation (EC) 1.177/2009 of the Commission of November 30th, 2009, amending Directives 2004/17/EC, 2004/18/EC, and 2009/81/EC of the European Parliament and Council in respect of their application thresholds for awarding procedures of procurement contracts enter into force on January 1st, 2010, and national legislation has to ensure implementation of those directives according to how they have been amended, an emergency ordinance has to be initiated, in order to amend Government Emergency Ordinance no. 34/2006 concerning the award of public procurement contracts, public works concession contracts, and services concession contracts, as approved with amendments by Law no. 337/2006, with subsequent amendments, whereby the adjustments required by the new European provisions to be provided, and the regulatory framework for public procurement to be further improved.

Under Art. 115 (4) of the Romanian Constitution, republished,

The Government of Romania adopts the present emergency ordinance.

Article I - Government Emergency Ordinance no. 34/2006 concerning the award of public procurement contract, public works concession contracts, and services concession contracts, published in the Official Gazette, Part I, no. 418 of May 15th, 2006, approved with subsequent amendments by Law no. 37/2006, as subsequently amended, is amended as follows:

1. Article 3, point a) is amended to read as follows:

"a) accepting the winning bid – communication of the result of the awarding procedure by which the contracting authority expresses its consent to engage legally in the public procurement contract to be concluded with the tenderer whose tender has been declared successful;"

2. In Article 3, a new point shall be introduced after point e), point e¹), as follows:

"e¹) contract - any public procurement contract or framework agreement;"

3. In Article 3, point p) is amended to read as follows:

"p) Tenderer - any economic operator that submitted a tender within the deadline for submission of tenders indicated in the notice/invitation of participation;

4. In Article 3 a new point shall be introduced after point v), point v¹), as follows:

"v¹) waiting periods - terms referred to in Article 205 (a) and Article 206 (3), after the completion of which contracts falling within the scope of this emergency ordinance may be concluded;"

5. In Article 3, point z) is amended to read as follows:

"z) days - calendar days, unless it is expressly stated that they are working days. The term expressed in days shall start from the beginning of the first hour of the first day of the term and shall end when the last hour of the last day of the term ends; the day during which an event took place or an act of the contracting authority has been issued is not taken into account for the calculation of the term. If the last day of a term expressed otherwise than in hours is a public holiday, a Sunday or a Saturday, the term ends at the end of the last hour of the next working day."

6. Article 9, point c) is amended to read as follows:

"c) the awarding, by a legal entity not acting as a contracting authority, of a works contract, when the following conditions are cumulatively fulfilled:

- the contract is directly funded/subsidized in proportion of more than 50% by a contracting authority;
- the estimated value of the respective contract is greater than the equivalent in RON of EUR 4,845,000."

7. Article 9, point c¹) is amended to read as follows:

"c¹) the awarding, by a legal entity not acting as a contracting authority, of a services contract, when the following conditions are cumulatively fulfilled:

- the contract is directly funded/subsidized in proportion of more than 50% by a contracting authority;
- the estimated value of the contract is greater than the equivalent in RON of EUR 193,000.”

8. Article 16 (1) is amended to read as follows:

"Article 16 - (1) In case the contracting authority awards a contract for the supply of services included in Annex no. 2B, then the obligation to apply the present emergency ordinance is necessary only for contracts the value of which is greater than that provided in Article 57 (2), is limited to the provisions of Articles 35 to 38, and Article 56, and requires the application of the principles laid down in Article 2 (2) throughout the award procedure. Complaints filed with respect to the award procedure of Annex no. 2B services contracts shall be solved under the provisions of Chapter IX."

9. After Article 43 a new Article shall be inserted, Article 43¹, as follows:

"Article 43¹ - (a) The participation guarantee shall be lodged by the tenderer in order to protect the contracting authority from the risk of any improper behavior on his behalf for the entire period up to the end of the contract.

(2) The contracting authority shall require tenderers to lodge the participation guarantee in order to enter the contract award procedure. Tender documentation must contain the following information:

a) The amount of the participation guarantee also specified in the notice/invitation for participation, equal to a fixed sum of up to 2% of the estimated contract value, but not less than the sums provided in Article 278¹ (1);

b) The validity period of the participation guarantee will be at least equal to the minimum period of validity of the tender, the latter being established according to the provisions of Article 276 (1), and as required by the tender documentation."

10. Article 46 (1) and (2) is amended to read as follows:

"Article 46 - (1) Notwithstanding the possibility of economic operators to submit alternative tenders according to Article 173 or to submit tenders for more than one different lots, the candidate/tenderer is not entitled within the same procedure to:

a) submit two or more individual and/or joint candidatures/tenders, under the sanction of exclusion from competition of all candidatures/tenders in question;

b) submit an individual/joint tender and be nominated as a subcontractor in another tender, under the sanction of exclusion of the individual tender or, as appropriate, of the joint tender of which the tenderer is an associated part.

(2) Affiliated enterprises have the right to participate to the same award procedure, but only if their participation is not likely to distort competition. In this sense, the economic operator is required to include in its tender the list of affiliated enterprises, to the extent that they exist."

11. Article 47 (1) is amended to read as follows:

"Article 47 - (1) The contracting authority shall ensure transparency in awarding public procurement contracts and concluding framework agreements by publication,

according to the provisions of this chapter, of the prior information notices, participation invitations/contract notices, and awarding notices."

12. Article 49 is amended to read as follows:

"Article 49 - (1) ESPP operator shall provide the National Authority for Regulating and Monitoring of Public Procurement unrestricted access to contract notices/participation invitations submitted by the contracting authorities, prior to their publication.

(2) The National Authority for Regulating and Monitoring of Public Procurement shall verify:

a) every notice submitted by the contracting authority for publication in ESPP, to the extent that the respective notice concerns the application of a procedure for the award of a contract with an estimated value greater than the thresholds specified in Article 124;

b) every participation invitation submitted by the contracting authority for publication in ESPP, with an estimated value equal to or less than the thresholds specified in Article 124.

(2¹) Within 3 working days from receiving the contract notice/participation invitation in the ESPP, the National Authority for Regulating and Monitoring of Public Procurement shall:

a) either issue to the ESPP operator the approval to publish the respective contract notice/participation invitation, if following the verification no errors/missing information is/are found;

b) or to reject the publication of the contract notice/participation invitation, if errors/missing information is/are found, notifying as well the contracting authority about this decision and how the errors/missing information can be remedied.

(2²) Errors mentioned under paragraph (2¹) represent information/requirements of the contract notice/participation invitation submitted for publication that are inaccurate or that lead to violations of public procurement law and principles underlying the award of the public procurement contract.

(2³) Within the verification process, not identifying the errors stipulated under paragraph (2²) does not affect the right of the National Authority for Regulating and Monitoring of Public Procurement to impose penalties, during supervision activities, cases referred to in Article 293.

(3) In the case specified in paragraph (2) a), the operator of the ESPP shall:

a) submit the notice for publication in the Official Journal of the European Union within at most one working day of receiving approval for publication, when, under the provisions of this emergency ordinance, there is an obligation to do so; the operator of the ESPP shall provide the electronic registration of the date the notice was submitted for publication as evidence of transmission time;

b) publish the notice in the ESPP within at most two working days of receipt of approval for publication.

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

(5) When, for technical reasons, the operator of the ESPP is not able to submit a specific

notice for publication in the Official Journal of the European Union, the contracting authority is responsible on its own for the submission for publication of the notice. The operator of the ESPP is required to notify the contracting authority about the occurrence of such a situation within one working day from the end of the term referred to in paragraph (3) a).

(6) After publication of the notice in the ESPP, the contracting authority may choose to submit the notice to the Autonomous Administration "Official Gazette", for publication in the Official Gazette, Part VI, Public Procurement.

(7) The Autonomous Administration "Official Gazette" shall publish the notices submitted for publication no later than eight days after their registration. In the case of the participation notice referred to in Article 114, the Autonomous Administration "Official Gazette" shall publish it no later than three days from the date of its registration."

13. Article 51 (1) is amended to read as follows:

"Article 51 - (1) The contracting authority shall submit for publication a prior information notice when seeking to avail itself of the provisions of Article 75 (2) or of Article 89 (2) and if:

a) the estimated total value of supply contracts to be awarded in the next 12 months for purchasing products from the same CPV group is greater than or equal to the equivalent in RON of EUR 750,000;

b) the estimated total value of services contracts to be awarded in the next 12 months for purchasing services within the same category listed in Annex 2A is greater than or equal to the equivalent in RON of EUR 750,000;

c) the estimated value of works contracts to be awarded in the next 12 months is greater than or equal to the equivalent in RON of EUR 4,845,000."

14. Article 53 (1) a) is amended to read as follows:

"a) in the ESPP and, as appropriate, in the Official Journal of the European Union, as well as, optionally, in the Official Gazette, Part VI, Public Procurement; or".

15. Article 55 is amended to read as follows:

"Article 55 – (1) The participation notice is published in the ESPP and, as appropriate, in the Official Journal of the European Union as well as, optionally, in the Official Gazette, Part VI, Public Procurement.

(2) Publication in the Official Journal of the European Union is mandatory in all cases where:

a) the contracting authority falls into one of the categories specified in Article 8 points a) - c) and the estimated value of the supply or services contract to be awarded is greater than the equivalent in RON of EUR 125,000;

b) the contracting authority falls into one of the categories specified in Article 8 points d) or e) and the estimated value of the supply or services contract to be awarded is greater than the equivalent in RON of EUR 387,000;

c) the estimated value of the works contract to be awarded is greater than the equivalent in RON of EUR 4,845,000."

16. Article 57 is amended to read as follows:

"Article 57 - (1) The award notice is published in the ESPP and, as appropriate, in the Official Journal of the European Union as well as, optionally, in the Official Gazette, Part VI, Public Procurement.

(2) Publication in the Official Journal of the European Union is mandatory in all cases where:

a) the contracting authority falls into one of the categories specified in Article 8, points a) - c) and the value of the supply or services contract that was awarded is greater than the equivalent in RON of EUR 125,000;

b) the contracting authority falls into one of the categories specified in Article 8 points d) or e) and the estimated value of the supply or services contract that was awarded is greater than the equivalent in RON of EUR 387,000;

c) The estimated value of the works contract that was awarded is greater than the equivalent in RON of EUR 4,845,000. "

17. Within Chapter II, "Common rules applicable to public procurement contract award", the title of Section 6 is amended to read as follows:

"Section 6

Special transparency rules applicable to public procurement of advertising services in the media

18. Article 58 (1) is amended to read as follows:

"Article 58 - (1) In the case of award of contracts for advertising in the media with a combined annual value, excluding VAT, estimated as greater than the equivalent in RON of EUR 15,000, the contracting authority shall publish a contract notice and an award notice in the public IT system available on the internet at a dedicated address, as well as on its own website."

19. Article 58 (2) is amended to read as follows:

"(2) For the purposes of paragraph (1), a *contract for advertising in the media* is defined as any services contract covering dissemination of advertising or other forms of promotion through print, audio-visual or electronic mass media."

20. In Article 69, a new point shall be introduced after point c), point d), as follows:

"d) persons who, while acting for the contracting authority, are involved in conflict of interest as defined by Law no. 161/2003 on certain measures for ensuring transparency in the exercise of public dignities, public office and business environment, preventing and sanctioning corruption, with subsequent amendments."

21. After Article 69 a new Article shall be inserted, Article 69¹, as follows:

"Art. 69¹ – The tenderer/candidate/associated tenderer/subcontractor that has as members of its board of administration/managing or supervisory body and/or that has stakeholders or associates, persons who are a spouse, a relative or in-law up to and including the fourth degree, or that are under commercial relations, as defined by Article

69 point a) with persons holding decision making positions within the contracting authority, shall be excluded from the awarding procedure.”

22. Article 79, paragraph (1) is amended to read as follows:

“Art. 79 – (1) Without prejudice to art. 78 par. (2), to the extent that clarification is required in a timely manner, the contracting authority's response to those requests must be published/submitted no later than six days before the deadline for submitting tenders.”

23. After article 84 a new Article shall be inserted, Article 84¹, as follows:

“Art. 84¹ – In case the contracting authority publishes the entire tender documentation on ESPP, the direct, complete, and unrestricted access of economic operators to the tender documentation is ensured starting with the date of the contract notice publication.”

24. Article 88 is amended to read as follows:

“Art. 88 – (1) The contract notice must contain at least the following information:

- a) references to the published contract notice;
- b) the date and time limit for submitting tenders;
- c) the address where the tenders must be sent;
- d) the language or languages of the tender;
- e) address, date and time for opening the tenders;
- f) where appropriate, details relating to additional documents that economic operators must submit to verify statements or to complete documents submitted during the first step of the procedure to demonstrate technical, economic and financial capacity.

(2) In case the tender documentation is only available by electronic means in the ESPP, the contracting authority shall also include in the participation invitation information as to how the respective tender documentation can be accessed.

(3) In case the tender documentation cannot be posted in the ESPP due to technical reasons, the contracting authority shall transmit the participation invitation together with a copy of the tender documentation to all selected candidates.”

25. In Article 122, letter c) is amended to read as follows:

“c) as a strictly necessary measure, when application terms for an open procedure, restricted procedure, negotiation with prior publication of a contract notice, or for request for tenders cannot be met due to reasons of extreme emergency, determined by unpredictable events which are under no circumstance due to an action or inaction of the contracting authority. The contracting authority does not have the right to set the contract period longer than it is necessary to cope with the emergency situation which determined the application of the negotiation without prior publication of a contract notice. In cases of force majeure or in duly motivated cases, the contracting authority has the right to issue a start order for works/services at the same time with the initiation of the negotiation without prior publication of a contract notice.”

26. In article 122, letter i) is amended to read as follows:

“i) when it is necessary to procure supplementary/additional works or services that have not been included in the original contract but which, due to unpredictable circumstances, have become necessary in order to fulfil the respective contract, and only if the following conditions are cumulatively met:

- the contract shall be awarded to the original contractor;
- the supplementary/additional works and/or services cannot be, technically and economically, separated from the original contract without the occurrence of major inconveniences for the contracting authority or, although separable from the original contract, are strictly necessary for its fulfilment;
- the cumulated value of the contracts that are to be awarded and of the addendums that are to be concluded for supplementary/additional works and/or services does not exceed 20% of the original contract value; in duly justified cases, the budget authority may approve of an increase of this percentage to a maximum of 50% of the original contract value, based on a justificatory note which shall state the reasons that led to exceeding the 20% ratio, and which shall be part of the procurement file.”

27. Article 123 is amended to read as follows:

“Art. 123 – When possible, except the cases provided by Article 122 points b), e), g), h), i) and j), the contracting authority shall invite to negotiations as many economic operators as to ensure real competition.”

28. Article 124 is amended to read as follows:

“Art 124 - The contracting authority is entitled to apply the request for tenders procedure only if the estimated value, excluding VAT, of the public procurement contract is equal to or less than the equivalent in lei of the following thresholds:

- a) supply contract: EUR 100,000
- b) services contract: EUR 125,000
- c) works contract: EUR 1,000,000

29. In article 125 paragraph (2), after letter f) a new letter shall be inserted, letter g), as follows:

“g) financing source;”

30. After article 148 a new article shall be inserted, article 148¹, as follows:

“Art. 148¹ – If the number of economic operators which fulfilled the qualification and selection criteria and which have produced admissible tenders is smaller than the minimum number indicated in the participation invitation/contract notice, the contracting authority has the right to:

- a) either to cancel the awarding procedure for concluding the framework agreement;
- b) or to carry on with the awarding procedure in order to conclude the framework agreement only with that/those economic operator/operators which fulfil the requested qualification and selection criteria and which have submitted an admissible tender.”

31. In article 161 paragraph (1), letter a) is amended to read as follows:

“a) as a final stage of the open procedure, restricted procedure, negotiation with prior publication of a contract notice applied in the cases provided by art. 110 let. a) or in the cases provided by art. 251 par. (1), 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 tender book;”

32. In article 167, paragraph (2) is amended to read as follows:

“(2) The electronic tender is carried out in one or several successive rounds.”

33. In article 81, letter a) is amended to read as follows:

“a) went into bankruptcy as a result of the decision of the bankruptcy judge;”

34. In article 181, letter b) shall be repealed.

35. In article 181, letter e) is amended to read as follows:

“e) provides false information or does not provide the information requested by the contracting authority, in order to prove the meeting of the qualification and selection criteria.”

36. In article 188 paragraph (3), letter a) is amended to read as follows:

“a) a list of the works executed during the last 5 years, together with performance certificates for the most important works. The respective certificates shall indicate the beneficiaries, regardless whether they are contracting authorities or private clients, the value, the time period and the site of works execution and shall mention if those works were executed in compliance with the applicable professional regulations and if these were completed.”

37. In article 200, paragraphs (2) and (3) is amended to read as follows:

“(2) In duly justified cases, the contracting authorities can extend the evaluation period just once.

(3) The reasons for the extension shall be provided in a justificatory note, approved by the leader of the contracting authority, note that shall be an integral part of the public procurement file.”

38. In article 202, after paragraph (1) a new paragraph shall be inserted, paragraph (1¹), as follows:

“(1¹) A tender has an apparently unusually low price in relation to what is to be supplied, executed or performed when the offered price, excluding VAT, is less than 85% of the estimated contract value, or, if within the awarding procedure there are at least five tenders which have not been considered as unacceptable and/or as inconsistent, when the offered price is less than 85% of the arithmetic mean of the tenders calculated without taking into account the lowest and the largest financial proposals.”

39. In article 205, paragraph (1) is amended to read as follows:

“Art. 205 – (1) The contracts falling under the present emergency ordinance may be concluded only after meeting the waiting periods of:

a) 11 days after the transmission of the communication regarding the outcome of the applied procedure, in case the estimated contract value, according to the provisions of Art. 23 and of Ch. II, Section 2, is greater than the thresholds provided in Art. 55 par. (2);

b) 6 days after the transmission of the communication regarding the outcome of the applied procedure, in case the estimated contract value, according to the provisions of Art. 23 and of Ch. II, Section 2, is equal or less than the thresholds provided in Art. 55 par. (2).”

40. In article 209 paragraph (1), letter a) is amended to read as follows:

“a) the contracting authority is in one of the situations provided under Art. 86 par. (2) let. a), art. 102 par. (2) let. a), art. 117 par. (2) let. a) or art. 148¹ let. a);”

41. In article 209 paragraph (1), after letter d) a new letter shall be inserted, letter e), with the following content:

“d) following a decision rendered by the National Council for Solving Complaints whereby it orders the elimination of any technical, economic or financial specifications from the contract notice/participation invitation, tender book or other documents issued in relation to the awarding procedure.”

42. In article 213 paragraph (1), letter n) is amended to read as follows:

“n) if the case is so, the complaints filed within the awarding procedure, together with the motivated decisions/judgments rendered by the National Council for Solving Complaints/court of justice;”

43. In article 215, paragraph (2) shall be repealed.

44. After article 218, a new article shall be inserted, article 218¹, as follows:

“Art. 218¹ – The contracting authority has the right to award the public works concession contract or the services concession contract by applying one of the procedures provided by Art. 18 par. (1) let. a)-c), as well as the negotiation procedure with prior publication of a contract notice in the situations provided by Art. 110 or by Art. 251 par. (1).”

45. Article 223 is amended to read as follows:

“Art. 223 – (1) The contract notice shall be published in the ESPP and, as appropriate, in the Official Journal of the European Union as well as, optionally, in the Official Gazette of Romania, Part VI, Public procurement.

(2) The publication in the Official Journal of the European Union is compulsory for the public works concession contract, when its estimated value exceeds the equivalent in lei of EUR 4.845.000.”

46. In article 227, paragraph (1) is amended to read as follows:

“Art. 227 – (1) If the concessionaire does not act as a contracting authority as provided by Art. 8 let. a)-c), it is still under the obligation, when awarding a works or services contract to a third party, to publish a contract notice in the Official Journal of the

European Union, in the ESPP and, optionally, in the Official Gazette of Romania, Part VI, Public procurement, in all situations when the estimated value of the contract that is to be awarded exceeds the equivalent in lei of EUR 4.845.000, except the cases provided by Art. 122. The estimated contract value shall be determined according to the rules provided under Art. 23 and Chapter II, Section 2.”

47. Article 253 is amended to read as follows:

“Art. 253 – If this is possible, except the cases provided by Art. 252 let. b), e), g), i), j) and k), the contracting authority shall invite to the negotiations a sufficient number of economic operators as to ensure real competition.”

48. In article 255, paragraph (1¹) is amended to read as follows:

“(1¹) If, on the same subject, both a complaint before the National Council for Solving Complaints has been filed, and a case has been brought before the Court of justice, for a sound judgment the latter can decide on the conjunction of cases, ex officio, by a court order. The court order can only be contested together with the merits of the case.”

49. In article 255, after paragraph (4) a new paragraph shall be inserted, paragraph (5), as follows:

“(5) Solving complaints related to the award of contracts for delegation of public utility community service management for which the applicable legislation refers to the application of the present emergency ordinance, shall be made according to the present chapter.”

50. In article 256, paragraph (2) shall be repealed.

51. After article 256², a new article shall be inserted, article 256³, as follows:

“Art. 256³ - (1) After receiving a complaint, the contracting authority has the right to take the remedial measures it deems necessary following the submitted complaint. Any such measures must be communicated to the complaining party, to the other economic operators involved in the awarding procedure, as well as to the National Council for Solving Complaints or to the first Court of justice, no later than one day after the date they have been adopted.

(2) When the complaining party considers that the adopted measures are sufficient for remedying the acts challenged as being unlawful, it shall send a complaint withdrawal notification to the National Council for Solving Complaints or to the first Court of justice and to the contracting authority. In this case the contracting authority is no longer required to communicate its point of view as provided by Art. 274.

(3) If the National Council for Solving Complaints or the first Court of justice receives a complaint for which there was issued no complaint withdrawal notification according to par. (2), the contracting authority has the right to conclude the contract only after the National Council for Solving Complaints has rendered its decision or the first Court of justice has gives its decision, but not before the waiting terms have been met, including the situations when these terms refer to the cases provided by Art. 287¹² par. (1) and Art. 287¹³ let. a). If the decision of the National Council for Solving Complaints

has been appealed to, the provisions of Art. 287⁷ and Art. 287⁸ shall be applied accordingly.

(4) The contract concluded without compliance to the provisions of par. (3) shall be deemed null and void.

(5) When within the same awarding procedure the contracting authority purchases products, services or works divided by lots, the provisions of par. (3) only apply for those lots for which complaints have been submitted.”

52. In article 258, after paragraph (4) a new paragraph shall be inserted, paragraph (4¹), as follows:

„(4¹) In exercising its authority, the president of the Council is assisted by a panel of 3 members, chosen from the public procurement complaints counsellors, through the corresponding application of the provisions of par.(2).”

53. In article 260, paragraph (1) is amended to read as follows:

“Art. 260 – (1) The number of Council members and the number of the technical and administrative staff are established by Government Decision.”

54. In article 262, after paragraph (4) a new paragraph shall be inserted, paragraph (5), as follows:

“(5) The period of exercising the public office of public procurement complaints counsellor shall be considered length of service in the work field specified at the time of taking office, i.e. legal, economic or technical.”

55. In article 263, paragraph (2) is amended to read as follows:

“(2) The evaluation of the Council’s activity shall be done once a year by a commission.”

56. In article 263, paragraph (5) is amended to read as follows:

“(5) The evaluation procedure of the Council and its president’s activity shall relate exclusively to their administrative and organizational activity and shall be established by Government Decision, following the motion of the General Secretariat of the Government.”

57. In article 263, after paragraph (6) a new paragraph shall be inserted, paragraph (7), as follows:

“(7) The individual professional performance evaluation of the Council members shall be done according to the Council’s organization and functioning regulation, approved by Government Decision, following the motion of the General Secretariat of the Government.”

58. In article 266, paragraph (1) is amended to read as follows:

“Art. 266 – (1) The Council is entitled to solve complaints filed within the awarding procedure before a contract is concluded, by specialized panels established according to the Council’s organization and functioning regulation, approved as provided by Art. 291.”

59. In article 271, paragraph (4) is amended to read as follows:

59. In Article 271, paragraph (4) is amended to read as follows:

“(4) In case of failure to accomplish the obligation provided for in paragraph (1), the provisions of Art. 274 and of Art. 256³ par. (3) shall not apply.”

60. In article 274, after paragraph (3) a new paragraph shall be inserted, paragraph (4), as follows:

“(4) Upon request, the complainant is given access to documents from the public procurement file submitted by the contracting authority to the Council, except the technical proposals of the other tenderers in the awarding procedure; the latter may be consulted by the complainant only by written consent from the other tenderers, consent that is annexed to the request submitted by the complainant to the Council.

61. After Article 274 a new article, article 274¹, shall be inserted, as follows:

“Art. 274¹ - The contracting authority is entitled to submit to the Council its point of view on the complaint/complaints, together with any other documents deemed clarifying and a copy of the public procurement file, before the deadline provided in Art. 205 par. (1).”

62. In article 276, paragraph (1) is amended to read as follows:

“Art. 276 - (1) The Council shall solve the complaint on the merits within 20 days from the date of receiving the public procurement file from the contracting authority, and within 10 days when an exception arises that prevents analysis on the merits of the complaint, according to Art. 278 par. (1). In duly justified cases, the term for solving the complaint can be extended once for another 10 days.”

63. In Chapter IX, “Means of solving complaints”, Section 5, composed of Article 277, shall be repealed.

64. In Article 278, paragraph (2) is amended to read as follows:

“(2) The Council examines the contested act in terms of legality and grounds and can render a decision whereby it annuls it in part or entirely, forces the contracting authority to issue an act or orders any other necessary measure in order to remedy the acts affecting the awarding procedure. In case the Council decides the elimination of any technical, economic or financial specifications from the contract notice/participation invitation, from the tender documentation or from other documents issued in relation to the award procedure, the contracting authority has the right to annul the application of the awarding procedure.”

65. In Article 278, paragraph (3) is amended to read as follows:

“(3) If the Council believes that, beside the acts contested during the award procedure, there are also other acts that infringe the provisions of the present government emergency ordinance, acts not referred to in the complaint, then it shall intimate both the National Authority for Regulating and Monitoring Public Procurement and the Unit for

Coordinating and Verifying Public Procurement within the Ministry of Finance, by submitting for this purpose all relevant data/documents in order to support the intimation.”

66. Article 278 paragraph (4) is amended to read as follows:

“(4) If the Council accepts the complaint and decides on adopting a remedy measure as regards the contested document, it shall also establish the time limit for carrying out its decision, which cannot exceed the term for exercising the appeal against the decision of the Council, as provided for in Art. 281 par. (1).”

67. In article 278, after paragraph (8), a new paragraph shall be inserted, paragraph (9), as follows:

“(9) The Council cannot decide the awarding of a public contract to a certain economic operator.”

68. After Article 278, a new article shall be inserted, article 278¹, as follows:

“Article 278¹ – (1) To the extent that the Council rejects the complaint, the contracting authority will retain the following amounts from the participation guarantee in relation to the estimated value of the contract:

- a) between RON 63,000 and RON 420,000 inclusively - 1% of this value;
- b) between RON 420,001 and RON 4,200,000 inclusively – 4,200 lei + 0.1% of the amount exceeding RON 420,001;
- c) between RON 4,200,001 and RON 42,000,000 inclusively – 7,980 lei + 0.01% of the amount exceeding RON 4,200,001;
- d) between RON 42,000,001 and RON 420,000,000 inclusively – 11,760 lei + 0.001% of the amount exceeding RON 42,000,001;
- e) between RON 420,000,001 and RON 4,200,000,000 inclusively – 15,540 lei + 0.0001% of the amount exceeding RON 420,000,001;
- f) over RON 4,200,000,001 – RON 19,320 + 0.00001% of the amount exceeding RON 4,200,000,001.

(2) To the extent that the competent court admits the complaint against the Council’s decision to reject the complaint, the contracting authority shall return to the complainant the amounts referred to in paragraph (1), within five working days from the rendering of the court decision.

69. In article 283, a new paragraph shall be inserted after paragraph (1), paragraph (1¹), as follows:

“(1¹) The Court having jurisdiction over solving the complaint against the Council’s decision on procedures for awarding services and/or works related to the transport infrastructure of national interest, as defined by the applicable law, is the Court of Appeals, the Administrative Litigation and Fiscal Section. Except the situations when

the subject matter of the complaint is the fine, the National Council for Solving Complaints is not a party in the case.”

70. In article 283, a new paragraph shall be inserted after paragraph (3), paragraph (4), as follows:

“(4) After solving the complaint by the Court, as provided for in paragraph (1) or paragraph (1¹), the court case file is returned to the Council.”

71. After Article 283, a new article shall be inserted, article 283¹, as follows:

“Article 283¹ – (1) In duly justified cases, to prevent imminent damage, the Presiding judge of the Court may order at the request of the interested party, by way of conclusion with the summoning of the parties, the suspension of the contract.

(2) The Court solves the suspension request taking into account its likely consequences on all categories of interests which could be affected, including the public interest. The Court shall be able to refrain from ordering the measure provided for in paragraph (1), if its negative consequences would outweigh its benefits. The decision not to order the suspension of the contract shall not bring any prejudice to any other right of the person who submitted the request provided for in paragraph (1).

(3) The conclusion provided for in paragraph (1) can be challenged by appeal, independently, within 5 days from its communication.

72. In article 285, paragraph (3) is amended to read as follows:

“(3) If the Court admits the complaint, overthrows 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 the Council rendered its decision, whereby breaching Article 256³ par. (3), the provisions of Article 287¹⁰ par. (1) let. b), par. (2)-(6), or, as appropriate, the provisions of Article 287¹¹ shall apply accordingly.”

73. After Article 285, a new article shall be inserted, article 285¹, as follows:

“Article 285¹ – The complaint against the Council’s decision is charged with 50% of the amounts referred to in Art. 287¹⁷.”

74. In article 286, paragraph (1) is amended to read as follows:

“Article 286 – (1) The first court of justice for the trials and the requests regarding documents issued by the contracting authorities before the conclusion of the contract, as well as granting compensation for damages caused in the award procedure, is the

Administrative Litigation and Fiscal Section of the Court in the jurisdiction of which lie the contracting authority's headquarters.”

75. In article 286, a new paragraph shall be inserted after paragraph (1), paragraph (1¹), as follows:

“(1¹) The first court of justice for the trials and the requests regarding the execution, the nullity, the annulment, the rescission, the termination or the unilateral cancellation of public procurement contracts is the Commercial Section of the Court in the jurisdiction of which lie the contracting authority's headquarters. The provisions of this section shall apply accordingly.”

76. Article 287⁸ is amended to read as follows:

“Article 287⁸ - If the decision whereby the Court has solved the case is communicated before the expiry of the deadlines, including when these deadlines are related to cases referred to in Art. 287¹² par. (1) and Art. 287¹³ let. a), the contracting authority is entitled to conclude the contract only after the respective deadlines have been met.”

77. In article 287¹⁰ paragraph (1), letter b) is amended to read as follows:

“b) The provisions of Art. 205 par. (1), Art. 206 par. (3), Art. 256³ par. (3) or those of Art. 287⁸ have been breached, if this violation has deprived the interested economic operator of the possibility of lodging an appeal before the conclusion of the contract, if this breach of law is combined with breaches of other provisions of the public procurement law, if the latter breach affected the chances of the said economic operator interested in obtaining the contract;”.

78. Article 287¹¹ is amended to read as follows:

“Article 287¹¹ – If a breach of the provisions of Art. 205 par. (1), Art. 206 par. (3), Art. 256³ par. (3) or those of Art. 287⁸, breach which is not subject to the provisions of Art. 287¹⁰ par. (1) let. b), the Court may decide, after considering all relevant aspects, to find the contract null or whether ordering alternative penalties as those provided for in Art. 287¹⁰ par. (2) is sufficient.”

79. In Article 287¹² paragraph (2), letters b) and c) is amended to read as follows:

“b) the contracting authority falls within one of the categories provided for in Art. 8 let. d)-e) and the estimated value of the supply contract or of the services contract to be awarded/concluded is equal to or lower than the equivalent in RON of EUR 387,000;

c) the estimated value of the works contract to be awarded/concluded is equal to or lower than the equivalent in RON of EUR 4,845,000.”

80. In Article 287¹⁶ paragraph (1) is amended to read as follows:

“Article 287¹⁶ – (1) The ruling of the court of first instance may be appealed within 5 days from its communication. The appeal shall be judged, as appropriate, according to Art. 286 par. (1) by the Administrative Litigation and Fiscal Section of the Court of Appeals and according to Art. 286 par. (1¹) by the Commercial Section of the Court of Appeals.”

81. In Article 287¹⁶ paragraph (2) is amended to read as follows:

“(2) The appeal does not suspend enforcement of the ruling and it is judged in emergency procedure and with priority.”

82. In Article 287¹⁷ paragraph (2) is amended to read as follows:

“(2) The requests that cannot be assessed in money are charged with RON 4.”

83. Article 291 is amended to read as follows:

“Article 291 – The Regulation on the organization and functioning of the Council is approved by Government Decision, by motion of the General Secretariat of the Government.”

84. In Article 293, letter c) is amended to read as follows:

“c) the breach of the provisions of Art. 20 par. (2), Art. 142 par. (2) and Art. 251 par. (2);”

85. In Article 293 letter g) is amended to read as follows:

“g) incorrect application of the rules for communication and transmission of data, having as effect the restriction of access of economic operators to the awarding procedure, violating the equal treatment and/or the transparency principle;”.

86. In Article 293 letter k) is amended to read as follows:

“Lack of justification on the part of the contracting authority of the advantages determined by applying evaluation factors;”.

87. In Article 293 letter m) is amended to read as follows:

“m) the refusal of providing to the N.A.R.M.P.P. the data referring to the award of public procurement contracts which the N.A.R.M.P.P. requests in order to fulfill its supervision function; ”

88. In Article 293, a new letter shall be inserted after letter m), letter m¹, as follows:

“m¹) Failure to provide information referring to the award of public procurement contracts within five days after receiving the written request from N.A.R.M.P.P.”

89. In Article 293, letter t) is amended to read as follows:

“t) the breach of the provisions of Art. 211-213 regarding the preparation and/or preservation the public procurement file;”

90. In Article 293, letter v) is amended to read as follows:

“v) any other violation of the provisions of the present emergency ordinance or of the legal acts issued for its application, resulting in the breach of the provisions of Art. 2, with the exception of par. (2) let. f).”

91. In Article 294, paragraph (1) is amended to read as follows:

“Article 294 – (1) The offences provided for in Art. 293 let. f), n), u), and v) shall be penalized with a fine between RON 20,000 and RON 40,000.”

92. In Article 294, paragraph (2) is amended to read as follows:

“(2) The offences provided for in Art. 293 let. a), c), k), m¹), q), s), and t) shall be penalized with a fine between RON 40,000 and RON 80,000.”

93. In Article 294, paragraph (3) is amended to read as follows:

“(3) The offences provided for in Art. 293 let. b), d), e), g), h), i), j), j¹), l), m), o), p), and r) shall be penalized with a fine between RON 80,000 and RON 100,000.”

94. In Article 294, a new paragraph shall be inserted after paragraph (5), paragraph (6), as follows:

“(6) By exception from the provisions of Art. 8, par. (4) of the Government Ordinance no. 2/2001 regarding the legal regime of offences, approved with modifications by Law no. 180/2002 with subsequent modifications, the sums collected from the fines provided for in Art. 294 par. (1)-(3) and imposed to natural persons are entirely transferred to the state budget.”

95. Article 296¹ is amended to read as follows:

“Article 296¹ – (1) Without prejudice to the provisions of Article 294 and if an economic operator has not appealed in this respect, the National Authority for Regulating and Monitoring Public Procurement has the right to request in Court, as provided for in

Article 2 of Decree no. 167/1958 on extinctive prescription, the establishment of absolute nullity of the contracts/framework agreements for the following reasons:

a) the contracting authority has awarded the contract without complying with the obligations related to the publication of a contract notice/participation invitation, according to the provisions of the present emergency ordinance;

b) the provisions of Art. 205 par. (1), Art. 206 par. (3), Art. 256³ par. (3), if this infringement has deprived an interested economic operator of the possibility of lodging an appeal before the conclusion of the contract, if this infringement is associated with infringements of other provisions of public procurement law, if the latter infringement affected the chances of the said interested economic operator of acquiring the contract;

c) the contracting authority has not observed the provisions of Art. 150 or those of Articles 158-160;

d) the public procurement contract, the public works concession contract or the services concession contract has been concluded without observing the minimum requirements provided for by the contracting authority in the tender book or, although the respective requirements have been complied with, the contract has been concluded in less favorable terms than the ones provided for by the technical and/or financial proposals which constituted the winning tender;

e) when the contracting authority aims to acquire the execution of a work, a service or a product, which would make the contract fall either under the public procurement contracts category, or under the public works concession contracts or services concession contracts category, but the contracting authority concludes another type of contract than those or does not conclude any contract, without observing the awarding procedures provided for by the present emergency ordinance.”

(2) The disputes referred to in par. (1) are solved in emergency procedure and with priority, by the Bucharest Court of Appeals, the Administrative Litigation Section, according to the provisions of Articles 720²-720⁷ and Article 720⁹ of the Code of Civil Procedure, that apply accordingly.

(3) The sentence of the Bucharest Court of Appeals may be appealed at the High Court of Cassation and Justice, the Administrative Litigation Section.”

96. In Article 300, paragraph (1) is amended to read as follows:

“Article 300 - The contracting authority shall submit to the National Authority for Regulation and Monitoring Public Procurement any information requested by the latter regarding the application of the awarding procedures and the awarded contracts.”

97. Article 302 is amended to read as follows:

“Article 302 - The thresholds provided for by Art. 9 let. c) and c¹), Art. 51 par. (1) let. c), Art. 55 par. (2), Art. 57 par. (2), Art. 223 par. (2), Art. 227 par. (1) and Art. 287¹² par. (2) can be modified by Government Decision, if this modification is determined by the need to respect the obligations assumed at the European level by the agreement on public procurement concluded within the World Trade Organization.”