

Law 337/2006 for the approval of G.E.O. 34/2006

Sole article

G.E.O. 34/2006 from 19th of April 2006 regarding the award of the public procurement contracts, public works concession contracts and services concession contracts, published in O.J.R. no. 418 from 15th of May 2006, is hereby approved with the following modifications and completions:

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 para (2) lett. f

f) efficient utilization of **public** funds

Article 3

a) **acceptance of the winning 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 winning 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;
- 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 3¹ (new)

The public procurement contracts are :

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

Article 4, paragraph (1) lett. c)

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)**;

Article 5, paragraph (2)

(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, paragraph (1)

(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.

Article 9, lett. c)

c) awarding the public procurement contract by **an economic operator**, in the case that the respective contract is directly financed/subsidized more than 50% by a contracting authority;

Article 12, lett. b)

b) completing the contract imposes special **safety measures, for protecting some essential national interests**, in accordance to the legal provisions in force;

Article 12, lett. c)

deleted

Article 13, lett. a)

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;

Article 14, paragraph (1) lett. c) and paragraph (2)

c) the application of a particular procedure of **some organizations 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.

Article 15, paragraph (1)

(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.

Article 18, paragraph (2)

(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 products, works or services, with a value that does not exceed, taking into account the provisions of Section 2 **from the present Chapter**, the equivalent of 5000 Euro without VAT, for **each public procurement** of products, works or services. The purchase is performed only on the basis of a proof document, which in this case is the public procurement contract; the obligation to observe the provisions of this law is limited to the stipulations of article 204 (2).

Article 20, paragraph (1)

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

Article 21, paragraph (1)

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

Article 49, paragraph 7 (new)

(7) **The Official Gazette of Romania publishes the notices transmitted for publication no later than 8 days from their registration date. In the case of the participation notice provided by Article 114, the Official Gazette of Romania publishes this notice no later than 4 days from the registration date.**

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, lett. a) and c)

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**;

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 110, paragraph (1), lett. a)

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

a) when, after applying the open procedure, the restricted procedure or the competitive dialogue, **no tenders have been submitted or** all the tender are considered to be unacceptable or irregular. The application of the negotiation procedure in the above mentioned cases is possible only after the initial open, restricted or competitive dialogue procedure was cancelled and only if the initial requirements provided by the tender documentation are not substantially modified;

Article 119, lett. b) and c)

b) the address where the negotiations shall take place and the date for starting the negotiations;

c) the language/languages used for within the negotiations;

Article 122, lett. a)

deleted

Article 151, paragraph (1)

(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.

Article 177, paragraph 4 (new)

(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 181, lett. a)

a) is bankrupt or is under liquidation procedure, his affairs **are being leaded 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;

Article 188, paragraph (3) lett. g) (new)

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

Article 190, paragraph (2)

(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.**

Article 215, paragraph 2 (new)

(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 225, lett. a)

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.**

Article 235, lett. b)

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 exceeded 30% of its total production of electricity, having regard to the average for the preceding three years, including the current year.

Article 238, paragraph (1)

(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.

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.

Article 252 lett. g)

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;

Article 255 paragraph (1)

(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.**

Article 257 paragraph (3)

(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.**

Article 266, paragraph (1), lett. (a)

a) solve legal disputes formulated during the awarding procedure that precede the signing of the contract, **through the specialized panels, established in accordance with the Regulation for organisation and functioning, according to the provisions of art.291**

Article 278, paragraph (8)

(8) The Council can force, by request of the contester, the other part to pay for the judging expenses made during the procedure of solving the complaint.

Article 279, paragraph (1) and paragraph (3)

(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.

(3) The decision of the Council, **adopted according to the paragraph (1)**, will be substantiated and communicated in writing to the parties within 5 days from the issuing date. The decision shall be published on the Council's web site.

Article 280, paragraph (5)

(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 283, paragraph (2)

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

Article 286, paragraph (2)

(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.**

Article 288

Deleted

Article 293, lett. m)

m) the refusal to submit to the NARMPP the information referring to the awarding of public procurement contracts, which **this is** entitled to receive according to law.

**Article 295, paragraph (3)
deleted**

Article 301, paragraph (1)

(1) The operator of ESPP is the General Inspectorate for Communications and Information Technology.

Article 303, paragraph (1)

(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.

Article 304¹ (new)

Starting with the date the 1st of January 2007, the National Authority for Regulating and Monitoring Public Procurement shall keep the monitoring Register of the public procurement contracts, for the contracts with a greater value than 100.000 Euro.

**Annex 3A, Section “Public procurement contract participation 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.