

## public-private partnership and concessions - legal changes

published in November and December 2016

**Government Decision no. 867/2016 approving the Methodological Norms for applying the provisions relating to award of concession contracts for works and services from Law no. 100/2016 on concessions for works and services** was published in the Official Gazette of Romania, Part I, no. 985 of December 7, 2016.

The Methodological Norms establish that, in terms of the concession contracts for works / services whose value is less than the threshold of Lei 23,227,215, they can be concluded by the simplified procedure, which is initiated by publication of a simplified concession notice in SEAP, along with the corresponding awarding documentation.

Also, the norms introduced a new decisional tool available to the contracting authority in every stage of the concession, namely the *financial model*. This is approved along with the contracting strategy and reflects the historical relationship between revenue expenditure and capital value, achieving thus, through the evolution scheme of the income or the periodic cash flow of an entity or property and calculating financial profitability indicators.

It also established *new rules for assessing the award documentations* published in SEAP, the National Agency for Public Procurement will evaluate compliance with applicable legislation before submission for publication of the invitation / notice, insofar as the estimated value of the concession is equal to or greater than the threshold of Lei 23,227,215.

According to the Decision, the award of a concession contract is the result of a concession process which takes place in several stages, expressly provided: planning stage, substantiation and preparation; stage of organizing the competition and awarding the contract; the post award stage and the execution and monitoring of contract implementation, and introduces a new approach to be followed by all authorities in the evaluation of bids, irrespective of the award procedure chosen, *namely the breakdown of this process by stages completed by interim reports which will be communicated to the bidders*.

On the whole, the application norms contain provisions regarding: registration, renewal and recovery of SEAP registration; planning and preparation of the concession; general rules for participation and conduct of the award; award conduct procedures; execution, modification and completion of the concession contract.

**Law no. 233/2016 on the public-private partnership** was published in the Official Gazette, Part I no. 954 of 25 November 2016 and came into force on December 25, 2016.

The public-private partnership is regulated as covering the development or rehabilitation or expansion of goods for provision of a public service and / or operation of a public service, the new law implementing a series of objectives aimed at improving and clarifying the legal framework applicable to public investment projects, as follows:

- the mechanism of public-private partnership envisages cooperation between the public partner and the private partner based on the relatively long duration of contractual relations in order to allow the private partner to recover their investment and make a reasonable profit;
- the following may be a public partner: central or local public authorities and institutions, as well as structures within these that have the delegated quality of authorizing officer and have competences in the field of public procurement; public bodies; associations comprising at least one of the above mentioned authorities; the private partner can be any legal entity or association of legal entities that do not belong to the categories of public partners;

- The law regulates both institutional public-private partnership (made under the contract concluded between the public and private sectors whereby they establish the project company that, after registration with the Trade Registry, will become party to the contract) and the contractual one (public-private partnership conducted under a contract concluded between the public and private partners and the project company whose share capital is wholly owned by the private partner);
- financing investment realized in the public-private partnership projects can be provided, as the case may be: fully, from financial resources provided by the private partner or financial resources provided by the private partner together with the public partner;
- contracts for public-private partnership, qualified by law as administrative contracts may be concluded also for carrying out a relevant activity in the sectors of public interest and the achievement by a private operator of community services of public utilities, the award procedure being the one governed by the law on public procurement;
- the law recognizes the possibility of the public partner to unilaterally change the contract of public-private partnership and to terminate the contract for reasons of public interest, with adequate compensation to the private partner;
- the law provides for the possibility of replacing the private partner and that the private partner or the project company may not assign or encumber their rights and obligations arising from the contract of public-private partnership; also, the private partner may not alienate or encumber shares or stock in the project company, without the prior express consent of the public partner and the project funders, except as expressly provided in the Law;
- the private partner may establish guarantees on shares or stock in the project company, exclusively in favor of project funders of public-private partnership which are credit institutions or financial institutions and only for the duration of the public-private partnership contract;
- last but not least, one must mention that the public-private partnership contract shall be concluded according to Romanian law, regardless of nationality of the private partner.

For additional details on this material, please do not hesitate to contact us.

**Voicu & Filipescu SCA**

31 General Ernest Brosteanu Street

010527, Bucharest, Romania

Tel: +40 21 314-02-00

Fax: +40 21 314-02-90

E-mail: [office@vf.ro](mailto:office@vf.ro)

Web: [www.vf.ro](http://www.vf.ro)