

public procurement - draft laws published in May 2017

Draft Government Emergency Ordinance for the amendment and supplementing of some legal acts regulating the field of public procurement, sectorial procurement, concessions, as well as remedies and appeals was published on the website of the National Agency for Public Procurement on May 3, 2017.

The draft law aims at correlating the provisions of the various laws included in the legislative package regarding public procurement and concessions, and also it introduces more clarity in the wording of these legal acts and increased correlation with the sense intended by the European legislation in the field of public procurement.

This new draft law proposes the repeal of Government Emergency Ordinance no. 30/2006 on the duty of verifying the procedural aspects afferent to the award of public procurement contracts, public works concession contracts and services concession contracts, as such was approved with amendments and completions by Law no. 228/2007. The need to repealing the above mentioned legal norm has been generated by the need to avoid overlapping legislative provisions in said legal norm, the Government Emergency Ordinance no. 13/2015, Law no. 98/2016 and Law no. 99/2016.

As regards Law no. 98/2016, the Project provides the following:

- The clarification of the concept of “public law body” by introducing the explanations given by the European provisions;
- The clarifications regarding the conditions and modalities for applying the simplified procedure, by correlating such with Art. 7 para. (2) and Art. 113 para. (1) of the law, stipulating that such applies to the award of public procurement contracts, framework agreements and solutions contests the estimated value of which is below the legally provided thresholds;
- The clarification of the exceptional situation provided by Art. 19 to be clarified, according to which the contracting authority can apply the simplified procedure or, as the case may be, direct acquisition regarding individual lots, when the lawful conditions are complied with;
- The stipulation of the right for the contracting authority to request to the legal entities which participate with joint offers in the procurement procedure to adopt or establish a particular legal form only once their offer is declared the winning bid and under the limitation that such condition is stipulated either in the tender description or in the participation notice;
- The obligation of the contracting authority to request to the bidder/candidate to mention in their offer or in the participation request the identification data of proposed subcontractors, only if said are known when the offer or participation request are submitted;
- The stipulation of the contracting authorities’ right to also apply the negotiation procedure without prior publication of a procurement notice in the case when during a simplified procedure organized for the award of the respective products, services or works no offer has been submitted or only discarded or non-compliant offers have been submitted, providing that the initial conditions of the procurement are not substantially altered and that, upon request from the European Commission, said institution is provided with a report (for a better correlation with the text of the European directive);
- The clarification of the limitation of contracting authorities’ obligations– in the case of awarding public procurement contracts/framework agreements having as object social services and other specific services exclusively to those expressly mentioned;

- The clarification of the regulation according to which there are excluded from the awarding procedure the bidders/tenderers which, during the market consultation phase, provided the contracting authority with opinions, suggestions, recommendations regarding the public procurement procedure, either as part of consultancy services or by participating in other ways to preparing the procurement procedure;
- The repealing of the provisions according to which it is excluded from the public procurement procedure the legal entity or one of the individuals stipulated at Art. 164 para. (2) which are subject to a judicial investigation procedure for having committed one/more of the offences stipulated at Art. 164 para. (1), because such restrict the participation to the public procurement procedure of the bidders which have not been finally convicted for having committed a criminal offence;
- The clarification of the fact that the right to submit alternative offers or to bid for more distinct lots is excepted from the provision according to which the contracting authority can consider that the legal entity has concluded with other legal entities contracts which refer to rendering competition unfair;
- The clarification of the fact that, in the case of procedures carried out for the purpose of concluding a framework agreement, the requirement regarding the minimum level of the yearly turnover/the minimum turnover in the field of the framework-agreement object refers to the estimated value of the largest subsequent agreement;
- The mention that there cannot be applied the criterion *the lowest price/cost* in the case of public procurement agreements/design and execution framework agreements, in order to clarify the sense pursued by the lawgiver when adopting the normative act;
- The explicit stipulation that DUAE has to be filled in by the supporting third party/parties, as well as by the subcontractor/subcontractors;
- The establishment of the term of 3 business days in which the contracting authority's decision of annulling the awarding procedure can be made public;
- The introduction of a new provision according to which the public procurement agreement/framework agreement can be amended when the contractor with which the contracting authority has initially concluded the public procurement agreement/framework agreement is replaced by a new contractor can operate between an imminent early termination of the public procurement agreement/framework agreement, in the case when the contracting authority undertakes the obligations of the main contractor towards the subcontractors thereof;
- The exact regulation of the law applicable to subsequent contracts afferent to a framework agreement: subsequent contracts concluded throughout the duration of a framework agreement shall be governed by the law in force on the date of concluding such;
- The express mention that the amendment of the main elements of a public procurement agreement needs to be governed by the law in force on the date of concluding such amendments;
- The clarification of the actual modality in which the support of the supporting third party can be taken into account in regard to the requirement regarding experience.

As regards Law no. 99/2016 the following aspects are aimed:

- The clarification of the term "contracting authority", as well as the differentiation between "contracting authorities" and "contracting entities";
- The establishment of the right of the contracting entity to apply the negotiation procedure without a prior invitation to a competitive bidding procedure also in the case when during a simplified procedure no offer/participation request has been submitted or only discarded or non-compliant offers/participation requests have been submitted, providing that the initial conditions of the sector acquisition are not substantially altered;

- The stipulation of the right of the contracting entity to decide upon organizing a final electronic tender phase in the case of simplified procedures;
- The express mention of the right to request the legal entity to replace the supporting third party/parties only once, in order to clarify the sense pursued by the lawgiver in the text of the normative act.

As regards Law no. 101/2016, it is proposed that the law text should be clarified so as the party which considers itself damaged to be able to file complaints either with the National Council for Solving Complaints or with the court of justice, as well as for the shortening of the term for solving the complaint, whereas the express provision would be that such term is of 20 working days as of the date when the complaint is received (and not as of the date when the procurement procedure file is received, as provided by the current legislation), so as to avoid the artificial extension of the complaint solving term.

The draft law can be viewed at the following link:

http://anap.gov.ro/web/wp-content/uploads/2017/05/pOUG_modif_legi_rev2.pdf

Draft Government Decision for the approval of the general and specific contractual conditions for certain categories of public procurement agreements afferent to the investments objectives financed out of public funds was published on the website of the National Agency for Public Procurement on May 29, 2017.

The draft Government Decision proposes that three types of general and specific contractual conditions should be approved for certain categories of public procurement agreements afferent to the investments objectives financed out of public funds, namely those referring to (i) design, (ii) build and (iii) design and build. These types of contracts shall be used both for investments financed out of national as well as European public funds, which fact is aimed at ensuring a unitary practice on the level of contracting authorities in implementing this type of agreements.

In the context of implementing the Operational Programs for which the managerial authority is the Ministry of Regional Development, Public Administration and European Funds and which refer to the financing of infrastructure works, namely the Large Infrastructure Operational Program (a program with a total allocation of funds to be invested of Euro 11.88 billion and a non-refundable financial allocation of over 41% of the structural and investments funds allocated to Romania for the programs period 2014-2020) and the Regional Operational Program, there have been repeated requests from the representatives of the beneficiaries, constructors, consultants and professional associations represented on a national and international level for the use to be extended of certain standardized contractual conditions, especially in the case of significant investments, considering that such include the best international practices and the best risk allocation models so as to achieve the lowest costs on a long run.

The draft law can be viewed at the following link:

<http://anap.gov.ro/web/wp-content/uploads/2017/05/Proiect-de-hotarare-pentru-aprobarea-conditiilor-contractuale-generale-si-specifice.pdf>

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

Web: www.vf.ro