

## public procurement - draft laws published in February 2018

**The Draft Government Decision approving the Methodological Norms for the application of the provisions of the Emergency Ordinance no. 98/2017 on the ex-ante control function of the award of procurement contracts/framework agreements, sectorial contracts/ framework agreements and works concession and service concession contracts** was published on the National Agency's website for Public Procurement (NAPP) on February 26, 2018.

The draft law proposes to approve the Methodological Norms for the application of the provisions of the Emergency Ordinance no. 98/2017 on the ex-ante control function of the award of procurement contracts/framework agreements, sectorial contracts/framework agreements and works concession and service concession contracts, published in the Official Gazette of Romania, Part I, no. 1004 of 18.12.2017.

In this respect, the Methodological Norms for the application of the Emergency Ordinance no. 98/2017 on the ex-ante control function of the award of procurement contracts/framework agreements, sectorial contracts/framework agreements and works concession and service concession contracts contain provisions on:

- the scope of ex ante control and its organization at the level of the National Agency for Public Procurement;
- carrying out the ex-ante control activity of the tender documentation, the simplified/competitive bidding/ contract notice, the erratum type announcement and the proposal to respond to the clarification/additional information requests;
- carrying out the activity of controlling the process of evaluating the bids/applications and awarding the contract;
- specific aspects of ex ante control of negotiated procedures without prior publication and contractual changes;
- NAPP's endorsement;
- conciliation procedure;
- amending and supplementing some acts in the field of public procurement

Thus, among the most important provisions we indicate the regulation of the methodology for the selection of the procedures that will be subject to ex ante control, their inclusion in the verification program by applying filters, criteria and sub-criteria. The filters will consider a) the scope of the contract; and (b) the estimated value, consistent with threshold values that are periodically established through the operational procedure; and the risk criteria are: (i) the financial impact of the procurement or that of the contractual change; (ii) the complexity of the scope of

work of the contract or that of the contractual change; and (iii) the history and experience of the contracting authority in the field of public procurement.

Also, amendments to GD no. 395/2016, HG nr. 394/2016 and GD no. 867/2016, approving the Methodological Norms to Law no. 98/2016 on public procurement, Law no. 99/2016 on sectorial acquisitions and Law no. 100/2016 on works and service concessions are proposed. Among the most important, we mention (1) the express provision that the contracting authority does not retain the tender bond if the successful bidder refuses to sign the public procurement contract/ framework agreement during the period of validity of the bid, awarded after a procedure which was subject to ex ante control and in which NAPP issued a conditional approval, and the contracting authority carried out and finalized the award procedure without remedying the deficiencies found by NAPP; and (2) inclusion of persons empowered by NAPP within the category of persons participating in the bids evaluation committee meetings.

The draft can be consulted on the website [www.achizitiipublice.gov.ro](http://www.achizitiipublice.gov.ro) or by accessing the following link:

<http://anap.gov.ro/web/wp-content/uploads/2018/02/HG-aprobare-norme-ex-ante.pdf>

**Draft Government Decision for amending and supplementing the Methodological Norms for the application of the provisions regarding the award of the sectorial contract/framework agreement under Law no. 99/2016 - GD no. 394/2016 and the Methodological Norms for the application of the provisions of Law no. 98/2016 - GD no. 395/2016**, was published on the website of the National Agency for Public Procurement (NAPP) on February 26, 2018.

Among the most important amendments of GD 395/2016, we note:

- (1) the elimination of the market consultation stage from the obligatory stages of the public procurement procedure (it remains, however, an option for the contracting authorities);
- (2) the mention in the annual procurement program of the unique identification code of each contract subject for which an award procedure is included in the annual program;
- (3) details of how the market consultation process will be conducted, namely individual or joint meetings or events open to interested persons / organizations, where discussions are held on their views, suggestions or recommendations have or have been referred to topics of general interest such as, but not limited to, market structure, price trends and other specific business features in the sector of interest, technical, innovative aspects, social integration, or aspects related to environmental protection, which can be used in the award procedure. Thus, it is proposed to remove the provision that, during the consultation process, the contracting authority has the obligation to preserve the confidentiality of the information declared by the participants to the consultation as confidential, classified or protected by an intellectual property right, according to the law, the idea being that the market consultation will no longer involve

- the disclosure of confidential information about the products, services or works of those present in the consultation procedure;
- (4) within the definition of the awarding documentation, the DUAE form is included as a separate document;
  - (5) the repeal of the provision that the price can be adjusted by updating if certain conditions have emerged on the market as a result of which the price indexes for the constituent elements of the bid are diminished/increased, the effect of which is reflected in the increase/lowering of the costs on which the contract price was based;
  - (6) the repeal of the provision that, in the case of service contracts having as subject intellectual services such as consultancy/technical assistance, studies, design or supervision related to high complexity projects, the award criterion provided in paragraph (1) shall be mandatory and the ratio assigned to the price factor shall not be higher than 40%;
  - (7) reduction the tender bond from 2% to 1% of the estimated value of the public procurement contract;
  - (8) introduction of new exceptions to direct procurement procedures - if the estimated procurement value is less than: a) 100,000 lei for products and services, or 280,000 lei for works, the contracting authority may purchase directly without using the electronic catalog or prior notice through a negotiated procedure involving the consultation of at least three candidates; b) 70,000 lei, the contracting authority may purchase directly on the basis of a single bid, following a negotiation; c) 4,500 lei, the contracting authority has the right to pay directly, on the basis of the legal commitment, without the prior acceptance of a bid;
  - (9) the insertion of the provision whereby subcontractors on whose capacity the bidder/applicant relies for proving that certain qualification and selection criteria are met are also considered as third-party supporters, in which case the subcontracting agreement is at the same time a firm commitment;
  - (10) insertion of the provision that, during the performance of the contract, the price can be adjusted by updating if certain conditions have emerged on the market, as a result of which the price indexes for the constituent elements of the bid have increased/ diminished, the effect of which is reflected in the increase /decrease of costs on which the price of the contract was based; the price update will be made under certain conditions detailed in the draft decision.

The draft can be consulted on the website [www.achizitiipublice.gov.ro](http://www.achizitiipublice.gov.ro) or by accessing the following link: [http://anap.gov.ro/web/wp-content/uploads/2018/02/pHG\\_394\\_395\\_modif\\_norme-002.pdf](http://anap.gov.ro/web/wp-content/uploads/2018/02/pHG_394_395_modif_norme-002.pdf)