

PPP & concessions - legal changes published in February 2020

Government Emergency Ordinance no. 7/2020 for amending and supplementing the Government Emergency Ordinance no. 39/2018 regarding the public-private partnership and for establishing measures regarding public investments was published in the Official Gazette of Romania, Part I, no. 93 of February 7, 2020, coming into force on the same date.

Emergency Ordinance no. 7/2020 introduced a series of changes in the Government Emergency Ordinance no. 39/2018 regarding the public-private partnerships, taking into account the need to ensure a unitary approach in the field of public investments, as well as the need to carry out infrastructure projects at national level. Amendments to the Government Emergency Ordinance no. 39/2018 regarding the public-private partnerships refer to the following aspects:

- in the case of requests for financing from private investment funds or companies, as well as from the sovereign development and investment funds, it is established that only the public partner will include their contribution in financing the private partner, not and/or the National Strategy and Forecast Commission (as established by previous regulations);
- it is provided that the financing requests made by the private investment funds or companies will be sent to the public partner until the Substantiation Study is approved, in order to communicate to the private investors the necessary financing from own resources (the previous regulation established that these requests were sent to the National Strategy and Forecast Commission);
- in order to establish and use public funds necessary to make payments to the project company or the private partner during the operation and maintenance of the project realized under public-private partnership, it is established that budgetary funds are provided for the financing of public-private partnership contracts within the budgets of the main authorizing officers of public authorities with the role of public partner or who have under their authority or coordination public partners in the public-private partnership contract; the aforementioned public authorities are to be established by decision of the Government approving the List of strategic investment projects to be prepared and assigned under public-private partnerships;
- it introduces the provision according to which the projects financed under a public-private partnership contract are highlighted in a separate annex within the budgets of the main authorizing officers of the public authorities with the role of public partner who have under their authority or coordination public partners in the public-private partnership contract;
- it is specified that, at the proposal of public authorities with the role of public partner, the Government may decide that certain projects that it considers strategic be prepared and assigned by them for the field of activity in which investments in public-private partnership will be implemented;
- it is mentioned that only the public partner bears the costs generated by carrying out the substantiation study and the award procedure, not the National Strategy and Forecast Commission (as previously provided).

Emergency Ordinance no. 7/2020 also regulates the taking over of certain projects expressly indicated by the National Strategy and Forecast Commission by the relevant ministries, indicating that the modalities of carrying out these strategic investment projects and the identification of the financing sources are under their exclusive jurisdiction.

Government Emergency Ordinance no. 23/2020 for the modification and completion of some normative acts with an impact on the public procurement system was published in the Official Gazette of Romania, Part I, no. 106 of February 12, 2020, coming into force on the same date.

Emergency Ordinance no. 23/2020 (hereinafter referred to as “**EGO 23/2020**” or “**Emergency Ordinance**”) has modified a number of primary normative acts in the field of public procurement, sectoral procurement and concessions.

Regarding the Law no. 100/2016 on the concessions of works and the concession of services, the amendments brought by O.U.G. 23/2020 concern aspects such as the notion of “*contracting authority/entity*”, the reasons for exclusion, as well as the award criteria.

Thus, EGO 23/2020 makes **clarifications regarding the notions of contracting authority/entity**, in order to correctly transpose Directive 2014/23/EU of the European Parliament and Council of 26 February 2014 on awarding of concession contracts. To this end, a series of articles of Law no. 100/2016 have been modified in the sense of replacing the phrase “*contracting entities*” with the phrase “*contracting authorities/entities*”.

Also, the new amendments provide **the obligation of the contracting authorities referred to in art. 9 and of the contracting entities from art. 10 paragraph (1) a) of Law no. 100/2016 to exclude the economic operators at any time of the award procedure when they become aware that they are in one of the situations of exclusion (either before or during the procedure, considering the facts committed or omitted by the operators)**, namely:

- they were convicted by a final decision of a court for committing one of the offenses expressly provided by law at art. 79 of Law no. 100/2016;
- they have violated their obligations regarding the payment of taxes or contributions to the general consolidated budget, and this was established by a final and binding court decision or an administrative decision according to the law of the country where the respective economic operator is set up or if the breach of the obligations regarding the payment of taxes or contributions to the general consolidated budget can be proven by any appropriate means.

Last but not least, **regarding the award criteria**, EGO 23/2020 states that they do not give the contracting authority/entity unlimited freedom of choice, instead they must have a direct connection with the purpose of the works concession or the service concession [such as: the degree of risk taking by the concessionaire, the level of the updated payments made by the contracting authority, the level of the operating fees, the way of execution of the works/the provision of the services based on performance indicators (qualitative, technical, functional, financial, etc.); the way of ensuring the environmental protection, the way of solving of some social problems; the level of the royalty, the duration of the concession, the innovation].

In addition, essential clarifications have been introduced regarding the change of the order of award criteria in the event that the contracting authority/entity receives an offer proposing an innovative solution with an exceptional level of functional performance, which could not have been foreseen by a diligent contracting authority/entity. In this situation, if the award criteria were published at the time of publication of the concession notice, the contracting authority/entity has the obligation to publish a new concession notice, in compliance with the minimum legal deadlines. It is also

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specified that changing the order of the award criteria in the aforementioned hypothesis does not lead to discrimination.