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Public Procurement & Public Private Partnerships

Legal Guide - Romania




November 2014

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Straight forward.

Content

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Foreword

Dear Reader,

We started this project because we understand the importance of public procurement projects in the development of your organization. Also, we are aware of the constant pressure added by the current economic environment and the fierce competition you face every day. In this context, we aim to present a comprehensive overview of the public procurement legislation in Romania that can offer you a straightforward direction in this maze of legislation and bureaucracy.

The guide was drafted by the public procurement team within VASS Lawyers, based on our extensive experience in this field. However, please note that the guide was not intended to provide legal assistance, but rather basic information and knowledge for anyone interested in tendering for public procurement contracts in Romania.

Considering the fact that public procurement legislation is constantly changing, I underline the fact that the guide is based on the legislation in force on 24th of November 2014. The guide will be revised and updated on our website – www.vasslawyers.eu and on our public procurement blog – www.avocat-achizitii-publice.ro – where you can access new information about this field.

Sincerely yours,

Iulia Vass
Managing Partner VASS Lawyers

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1. Legal and institutional framework

1.1. Relevant legislation

As a European Union Member State, Romania started to transpose the European directives into its national law in 2006. Thus, all the regulatory acts should be in accordance with the Treaty on European Union, with the Treaty on the Functioning of the European Union, as well as with the directives on public procurement.

The truth is that Romania has a complex and unstable legislation on public procurement. There are many pieces of law having changed successively in the last couple of years in order not only to comply with the European Union norms, but also to remedy deficiencies in the system. Hence the essential prerequisite for tendering for public procurement contracts in Romania is to possess good knowledge of the legislation in force at the time the contract is awarded.

1.1.1. International Agreements

When adhering to the EU, Romania not only became part of the GPA being, thus, bound by this agreement, but also transposed Directive 2009/81/EC, Directive 2004/18/EC, Directive 2004/17/EC and Directive 89/665/EEC, that became the very basis of PPL.

In early 2014, Directive 2014/24/EU, Directive 2014/23/EU and Directive 2014/25/EU were published in the Official Journal of the European Union and shall be transposed by all Member States, including Romania, until April 18, 2016.

The European treaties and the Commission regulations, such as Commission Regulation (EU) no. 1251/2011 of 30 November 2011 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the award procedures, are directly applicable.

1.1.2. National normative acts

The core of the public procurement legislation is the Government Emergency Ordinance no. 34/2006 on the awarding of public procurement contracts, works concession contracts and services concession contracts, with subsequent amendments ("**GEO no. 34/2006**").

This ordinance represents the general legal framework for the public procurement field as it provides the fundamental principles governing public procurement procedures, namely: **non-discrimination, equal treatment, transparency, mutual recognition, proportionality, efficient use of funds and accountability**. These principles are of paramount importance for the interpretation and application of the public procurement legislation („**PPL**"), as they create a general framework for the award of public procurement contracts. Moreover, any situation for which there is no express regulation shall be interpreted through these principles.

Nonetheless, PPL also includes other **relevant regulatory acts**, as well as **secondary legislation**, which contains special provisions and which is highly important for creating the institutional and legal context to conduct the procedures and to award the contracts in fair competition conditions (e.g. Government Decision no. 925/2006 on the approval of the Application Norms of GEO no. 34/2006, Government Decision no. 71/2007 on the approval of the Application Norms of the provisions referring to the awarding of the public works concession contracts and of services concession contracts, as provided in GEO no. 34/2006, Government Emergency Ordinance no. 30/2006 on the verification of the procedural aspects concerning the awarding of public procurement contracts, of public works concession contracts and public services concession contracts, Government Decision no. 921/2011 on the approval of the Application Norms of GEO no. 30/2006).

These pieces of legislation are also supplemented by a **tertiary legislation** consisting in several orders adopted by the president of the National Authority for Regulating and Monitoring of Public Procurement with regard to the interpretation and application of certain legal provisions of GEO no. 34/2006.

1.1.3. Special rules in specific sectors and other laws relevant for PPL

Romanian legislation comprises several normative acts providing for specific rules in specific sectors or areas, such as:

- **defence procurement -** GEO no. 114/2011 for defence procurement, applies to the award of public procurement contracts which refer to the supply of military products and/or of sensitive products, to works, products and services directly related to the aforementioned products and to works and services specific for military purposes or sensitive works and services;
- **technical specifications** - the technical specifications are subject to specific legal provisions relevant for the scope of the contract (e.g. constructions legislation, utilities legislation, energy legislation); for example, GD no. 1405/2010 for infrastructure projects, establishes the applicability of the general contract conditions of the International Federation of Consulting Engineers ("FIDIC"); FIDIC special conditions were subsequently approved through orders issued by the Ministry of Transport;
- **transportation -** the transportation domain is subject to regulations such as GEO no. 40/2011 with regard to procurement of road transport vehicles or Order of the president of the National Authority for Regulating and Monitoring of Public Procurement no. 129/2013 on the tender documentation for aerial transport services;
- **European funds -** a significant number of procedures are carried out by economic operators who have accessed European funds, so the specific legislation, i.e. GEO no. 66/2011 and GD no. 875/2011 with regard to projects financed from European funds, is thus, applicable.

Last but not least, both contracting authorities and tenderers are bound by specific normative acts such as Competition Law no. 21/1996, Law no. 161/2003 on certain measures to ensure transparency in the exercise of public dignities, public functions and business environment, as well as the prevention and punishment of corruption.

1.1.4. Changing legislation

GEO no. 34/2006 has been recently amended, namely in June 2014, by GEO no. 51/2014. One of the most dramatic changes envisages the obligation of the claimant to constitute a **good conduct guarantee** for the entire period between the date the claim/complaint is filed and the date on which the decision of the National Council for Solving Complaints /the court becomes definitive. The amount of this guarantee is considerably higher than the value retained from the participation guarantee under the old provisions, thus discouraging tenderers from filing claims against the acts of the contracting authorities.

Further amendments of GD no. 925/2006 as a consequence of the changes brought to GEO no. 34/2006 and the lack of correlation between the two normative acts are also expected.

In the long term, in light of the new public procurement European directives, a fundamental change of the public procurement rules will be most probably initiated.

1.2. Relevant institutions in the public procurement field

1.2.1. National Council for Solving Complaints

The **National Council for Solving Complaints** (**"NCSC"** or **"Council"**) is an independent organism with administrative and judicial activity. The NCSC has jurisdiction regarding the settlement of the complaints filed during the

award procedures of public procurement contracts, before the contract is concluded. The Council has 11 chambers and the complaints submitted by economic operators are each solved by a chamber composed of three members of the Council, of whom at least the chairman has a legal background.

1.2.2. National Authority for Regulating and Monitoring of Public Procurement

The **National Authority for Regulating and Monitoring of Public Procurement** (**"NARMPP"**) is an institution subordinated to the Government, who has a fundamental role regarding the promotion and implementation of public procurement policy. The NARMPP has responsibilities such as: ensuring a coherent and harmonized legal framework with the European legislation in the field of public procurement; providing a permanent communication channel with the structures of the European Commission, with the corresponding public institutions in the Member States of the EU and national public bodies and providing an appropriate framework to implement the legislation in the field of public procurement.

1.2.3. The Unit for Coordination and Verification of Public Procurement

The **Unit for Coordination and Verification of Public Procurement** (**"UCVPP"**) is a specialized structure, without legal personality, within the Ministry of Finance, which follows the stages of the procedures of awarding public procurement contracts in order to prevent and correct violations of the relevant legislation. During the verification, UCVPP observers are entitled to consult the NARMPP. The opinions issued by the NARMPP in that regard represent the official interpretation of the law on public procurement and will be implemented accordingly by the UCVPP observers.

In general, it can be stated that while the NARMPP is responsible for the ex post control, the UCVPP conducts the ex ante control of public procurement procedures.

1.2.4. Electronic System for Public Procurement

The **Electronic System for Public Procurement** (**"ESPP"**) is an online platform designed to provide technical facilities regarding the organization of public procurement procedures, both to the contracting authorities and economic operators. Also, the ESPP has a major role in assuring the transparency of public procurement procedures.

The EPPS is operated and managed by the Digital Agenda Agency of Romania, a specialized public institution of the central public administration, with legal personality, subordinated to the Ministry of Communications and Information Society.

1.2.5. Department of Infrastructure Projects, Foreign Investment, Public-Private Partnership and Export Promotion

The **Department of Infrastructure Projects, Foreign Investment, Public-Private Partnership and Export Promotion** functions as a specialized body of the central public administration, with legal personality, within the working apparatus of the Government.

Firstly, in January 2013, the Department for Infrastructure Projects and Foreign Investments was created in order to ensure the coordination of uniform application of Government policy at a central and local level in the area of stimulating, promoting and implementing foreign investments and public-private partnerships.

In June 2014, its name was changed to the Department for Infrastructure Projects, Foreign Investments, Public-Private Partnership and Promotion of Exports.

The department ensures the coordination of infrastructure projects of national interest, the preparation, execution and implementation of infrastructure projects and also the consistent application of the Government policy regarding stimulating, promoting and implementing foreign investments and public-private partnerships.

2. Application of PPL

When talking about the application of PPL, we must consider the public or private entities and the contracts covered by this law.

2.1. Contracting Authorities

The contracting authorities acting as purchasers under GEO no. 34/2006 are as follows:

(i) any central, regional, or local state body – public authority or institution;

(ii) any entity, other than those mentioned above, with legal personality, which was founded in order to satisfy general needs of no commercial or industrial nature, and which complies with at least one of the following conditions: it is mostly financed by a contracting authority as defined under paragraph (i) or by other public body; it is subordinated or controlled by a contracting authority as defined under paragraph (i) or by another public body; the majority of its board of directors or the members of its management or supervisory bodies are nominated by one of the entities mentioned under paragraph (i) or by another public body;

(iii) any association of one or several contracting authorities as defined under paragraphs (i), (ii), (iv) or (v);

(iv) any public enterprise which performs one or several activities in the utilities sectors (water, energy, transportation, postal services or other relevant activities), when it awards public procurement contracts or it concludes framework agreements for the performance of such activities; and

(v) any entity, other than those provided under paragraphs (i)-(iv), performing one or several activities in the utilities sectors, based on a special or exclusive right, granted by a competent authority, when it awards public procurement contracts or concludes framework agreements in order to perform those activities.

The provisions of GEO no. 34/2006 also apply to private entities acting as purchasers when they award services/works contracts that are directly financed for more than 50% by a contracting authority and the estimated value of the contract is equal to or above 207,000 Euro for services contracts and 5,186,000 Euro for works contracts.

2.2. Contracts covered

Romanian legislation provides several financial thresholds for determining individual contract coverage. As a consequence, contracting authorities must publish a contract notice/award notice in the Official Journal of the European Union ("**OJEU**") in the following cases:

- if the contracting authority is one of those provided under paragraphs (i)-(iii) of point 2.1 mentioned above and the estimated value of the supply or services contract is equal to or above 134,000 Euro;
- if the contracting authority is one of those provided under paragraphs (iv)-(v) of point 2.1 mentioned above and the estimated value of the supply or services contract is equal to or above 414,000 Euro; and
- if the estimated value of the works contract is equal to or above 5,186,000 Euro.

Moreover, when a contracting authority awards a public procurement contract for services included in Appendix no. 2B (e.g. transport services, legal services), the obligation to partially comply with the provisions of GEO no. 34/2006 applies only for contracts which have values equal to or higher than the values mentioned above.

A simplified procedure, call for tenders, is applied for contracts with an estimated value below the above mentioned thresholds but which exceeds 30,000 EUR for supply and services contracts, respectively of 100,000 EUR for works contracts. For these procedures the contract invitations are published only in the ESPP.

2.3. Estimating the contract value

According to GEO no. 34/2006, the contracting authority does not have the right to subdivide a public procurement contract in several separate contracts of lower value, nor to use calculation methods leading to a sub-evaluation of the estimated contract value, for the purpose of avoiding the application of those legal provisions which stipulate obligations for the contracting authority dependent upon certain thresholds.

The rules on the estimation of the contract value follow the same reasoning and impose for each type of contract the adding up of all amounts payable for the performance of the respective contract, without VAT, taking into consideration any form of options and any possible supplements or increases of the contract's value. The same applies for services, supplies or works contracts awarded by lots, the estimated value of the contract resulting from adding up the value of all lots.

2.4. Exclusions and exemptions

According to G.E.O no. 34/2006, certain public contracts are excluded *de jure* from the scope of the ordinance.

2.4.1. Exclusions based on the subject of the contract

Exempli gratia, the PPL shall not apply to the following public procurement contracts:

- contracts having as subject the provision of services included in Appendix no. 2B to GEO no. 34/2006, with an estimated value below the thresholds for publication of award notices in OJEU;
- contracts included in the category of state secret information, as well as contracts requiring the imposition of special security measures in order to protect national interests;
- contracts awarded by structures of the contracting authorities operating on other states' territory if the estimated value of the contract is lower than the thresholds provided for the application of the call for tenders procedure (134.000 Euro for the supply contract, 134.000 Euro for the services contract and 5.186.000 Euro for the works contract);
- contracts having as subject the purchase or lease, by any financial means, of lands, existing buildings, other real estate or rights over such real estate;
- contracts regarding the purchase, development, production or co-production of programmes designed for broadcasting, by radio-broadcasting or television institutions;
- contracts regarding the provision of arbitration and conciliation services;
- contracts regarding the provision of financial services related to the issuance, purchase, sale or transfer of equity or other financial instruments, especially operations of the contracting authority performed for the purpose of attracting financial and/or capital resources, as well as the provision of services by central banks;
- contracts regarding the employment of work force, namely the conclusion of employment contracts;
- contracts regarding the provision of research-development services entirely paid by the contracting authority and the results of which are not destined, exclusively, to the contracting authority for its own benefit; and
- contracts awarded as a consequence of: (i) an international agreement concluded in compliance with the provisions of the EU Treaty with one or more states not members of the EU and which has as subject the supply of goods, provision of services or performance of works destined for the implementation or exploitation of a project in common with the signatory states, and only if

the respective agreement establishes a specific procedure for the award of such contract; (ii) an international agreement regarding the stationing of troups and only if the respective agreement establishes a specific procedure for the award of such contract; (iii) the application of a procedure specific to certain international bodies and institutions; and (iv) the application of a specific procedure provided by the European community law, in the context of programmes and projects of territorial cooperation.

2.4.2. In-House Arrangements

The carrying out of a project within a public-public partnership is governed by the rules applicable to the public procurement field. The public-public partnership is defined by the PPL as a joint implementation of a project by two or more national and/or international public entities.

However, GEO no. 34/2006 does not apply to services contracts awarded to another contracting authority or to an association of contracting authorities, if they benefit from an exclusive right for the provision of the respective services, according to the law or other published normative acts, insofar as such legal provisions are compatible with the EU Treaty.

Specific rules in this regard are provided by the PPL in the field of utilities contracts. Thus, GEO no. 34/2006 does not apply to the award of public utilities contracts:

- by a contracting authority to one of its affiliated companies;
- by an association of several contracting authorities, formed solely for the purpose of carrying out a relevant activity, to a company affiliated to one of the respective contracting authorities;
- by an association of several contracting authorities, formed solely for the purpose of carrying out a relevant activity, to one of the respective contracting authorities; and
- by a contracting authority to an association of contracting authorities of which itself is part and was formed solely for the purpose of carrying out a relevant activity.

3. Tendering for public procurement contracts

In terms of the Romanian PPL, the award procedure consists of the steps to be taken by the contracting authority and by tenderers, in order to reach a common ground and conclude the public procurement contract.

In order to take part in the award procedures, several steps are required, as follows:

- identifying the contract notice or invitation on the ESPP;
- downloading the award documentation from the ESPP;
- checking the compliance with the qualification citeria and identifying possible partners, subcontractors and third parties for technical/financial support;
- requesting for clarifications from the contracting authority, if the case;
- preparing the tender – the bid bond, the qualification documents, the technical and the financial tenders, possible objections to the contract – and wrapping it as required in the award documentation;
- submitting the tender at the contracting authority's headquarters, within the set deadline and participating at the opening session;
- transmitting the clarifications in response to the requests for clarification sent by the contracting authority, if the case;
- receiving the communication on the award procedure result;
- signing the public procurement contract, if the case.

Each of the steps mentioned above may contain numerous traps for the bidders – the smallest mistake in form or in content can lead to elimination from the tendering procedure. This is why it is extremely important to comply with all the requirements in the contract notice/invitation, in the award documentation as well as in the potential clarifications sent/posted in the ESPP by the contracting authority.

3.1. Award procedures

GEO no. 34/2006 provides for the following award procedures:

- **open procedure**, within which any interested economic operator has the right to submit a tender; this procedure is carried out in one stage;
- **restricted procedure**, within which any economic operator is entitled to submit an application, but only selected applicants are allowed to submit a tender; this procedure is carried out in two stages: selection of applicants and evaluation of tenders;
- **competitive dialogue**, within which any economic operator is entitled to submit an application and the contracting authority conducts a dialogue with the admitted applicants in order to identify one or more solutions that can meet its requirements; once a solution is identified, the selected applicants prepare the final tender on the basis of that solution; this procedure is carried out in three stages: pre-selection of applicants, dialogue and evaluation of final tenders;
- **negotiated procedure**, within which the contracting authority carries out consultations with the selected applicants and negotiates the contract terms, including the price, with one or several tenderers; the negotiated procedure can be carried out with or without prior publication of a contract notice; the negotiated procedure with prior publication of a contract notice is carried out in two stages: pre-selection of applicants and negotiation;
- **call for tenders**, namely the simplified procedure applicable for the award of contracts below EU thresholds and above

direct purchases thresholds, whereby the contracting authority requests tenders from several economic operators; this procedure is carried out in one stage; and

- **design contest**, namely a special procedure through which the contracting authority purchases, mainly in the fields of city and country planning, architecture or data processing a plan or a project by selecting it through a jury, based on competitive criteria, with or without awards.

As a general rule, contracting authorities shall apply the open or restricted procedure. Only in specific circumstances, expressly provided by the law, the contracting authorities may award public contracts by means of other award procedures.

Contracting authorities may also purchase directly goods, services or works under the condition that the estimated value of each such purchase is below a certain threshold. Thus, the estimated value of the purchase does not have to exceed 30.000 Euro for every products or services purchase or 100.000 Euro for every works purchase.

In addition to the above mentioned, GEO no. 34/2006 provides for three special procedures for the award of a public procurement contract:

- **the framework agreement** – the written agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the essential elements/terms governing the public contracts to be awarded during a given period, in particular with regard to price and, where appropriate, to quantities;

- **the dynamic purchasing system** – the contracting authority has the right to use a dynamic purchasing system only through the ESPP and only for the purchase of everyday consumer products, the general features of which, available on the market, meet the needs of the contracting authority; and

- **the electronic auction** - the repetitive process performed after a complete evaluation of the tenders, in which the tenderers have the possibility, exclusively through electronic means, to reduce the prices presented and/or to improve other elements of the tender; the final evaluation must be performed automatically through the electronic means used.

3.2. Contract notices and invitations

The national concrete access to the ESPP is made through a website, www.e-licitatie.ro. Both contract notices and invitations are published on this platform.

For the contract notices that are to be published into the OJEU, the access of the interested economic operators is ensured through another website, http://ted.europa.eu.

3.3. Publicity timescales

The Romanian PPL provides several timescales for different steps depending on the specific procedure.

Thus, the law stipulates certain minimum timescales between the publishing of the contract notice on the ESPP and, if the case, on the OJEU and the deadline for submission of tenders/applications/projects:

- **for open procedure –** 52 days or 20 days, depending on the estimated value of the contract, i.e. if the value of the contract is equal to or above the EU thresholds, the timescale is of 52 days, while if the value of the contract is under the EU thresholds, the timescale is of 20 days.

- **for restricted procedure –** 37 days or 10 days, depending on the estimated value of the contract and established through the above described algorithm;

- **for competitive dialogue –** 37 days or 20 days depending on the estimated value of the

contract and established through the above described algorithm;

- **negotiated procedure with prior publication of a contract notice –** 37 days or 10 days, depending on the estimated value of the contract and established through the above described algorithm;
- **call for tenders –** 10 days; and
- **design contest** – 52 days.

Most of the above timescales can be further diminished under certain conditions, such as the full online publication of the tender documentation.

Other timescales regard the publishing of the award notice within 48 days from the award of the public procurement contract or the selection of the winning tender within 25 days from the date of the opening of tenders.

3.4. Clarifications on the tender documentation

Any interested economic operator has the right to request clarifications on the tender documentation. The contracting authority is obliged to respond, clearly, fully and without ambiguity, as soon as possible, but not later than three working days since the receipt of such a request to any such clarification requirement.

Without revealing the identity of the economic operator, the contracting authority must publish the clarifications in the ESPP, being fully accessible to all economic operators.

If the clarifications are required in due time, the response of the contracting authority to such requests must be published/submitted no later than six days before the deadline for submitting the tenders. Otherwise, the contracting authority only answers the clarification if it is possible that the economic operators receive the answer before the deadline for submitting the tenders and the answer does not modify the information already published, the tender is not affected and an erratum is not necessary.

Faulty publication of clarifications because of late request or because of their necessity might even lead to the annulment of the procedure.

3.5. Guarantees

When participating in a public procurement procedure two types of guarantees (bonds) must be considered:

- **the participation guarantee (bid bond)** - the participation guarantee must be presented in order to protect the contracting authority against the risk of the possible inappropriate behaviour of economic operators; the bid bond value shall not exceed 2% of the estimated value of the public procurement contract or of the framework agreement and the validity period must be at least equal to the validity of the tender; in any case, the bid bond must be presented not later than the moment of tenders' opening; the participation guarantee is to be returned by the contracting authority if no incident that might lead to its retention (e.g. the economic operator to whom the contract was awarded refuses its conclusion) to the unsuccessful tenderers, as well as to the successful tenderer;
- **the good performance guarantee** - the good performance guarantee shall be constituted only by the contractor upon the contract award, with the purpose of guaranteeing the quantitative, qualitative and timely fulfilment of the contract; the total amount is not to exceed 10% of the contract price, VAT not included.

3.6. Opening sessions

Bids opening sessions are organized for all award procedures. For the procedures in two stages – restricted procedure, competitive dialogue and negotiated procedure – an applications opening session is also held. At the end of the opening sessions a minutes is concluded, within which the representatives of economic operators may mention their observations, if the case.

Economic operators are entitled to participate to the bids opening sessions organized when conducting an open procedure, a restricted procedure, a call for tenders as well as a competitive dialogue. The applications opening sessions may be carried out without the presence of economic operators. However, in practice, contracting authorities hold opening sessions. Economic operators are, thus, entitled to participate to such sessions when expressly allowed by contracting authorities. The same applies in the case of both bids and applications opening sessions within the negotiated procedure.

If the procedure is organized entirely online, no opening session is held.

3.7. Evaluation of tenders

The PPL provides the rules regarding the appointment of the persons in charge for evaluation of the tenders, their obligations and the rules for conducting the evaluation.

3.7.1 Rules regarding the evaluation committee

According to the PPL, when awarding a public procurement contract, the contracting authority has the obligation to appoint the persons in charge with the evaluation of tenders. These persons form the evaluation committee. The committee must include specialists in the field of the subject of the contract that are members of the public procurement department within the contracting authority. Also, in order to support the evaluation activities, the contracting authority may appoint co-opted external experts.

During the award process, the members of the evaluation committee and the co-opted experts must follow certain rules. Thus, they have a confidentiality obligation with regard to the contents of the tenders and any other information submitted by the tenderers, the disclosure of which might prejudice their intellectual property or commercial secrets, as well as the obligation to not be in a conflict of interest situation.

In order to ensure compliance with these rules, before undertaking their responsibilities, both the evaluation committee and the co-opted experts are required to sign a statement on own liability, stipulating their observance of the confidentiality obligation and the absence of a conflict of interest situation.

3.7.2 Rules regarding the evaluation of tenders

During the evaluation process, the evaluation committee establishes the clarifications and subsequent supplements, whether formal or confirmatory, necessary for the evaluation of every tender and the period of time granted for the transmission of such clarifications. If the tenderer does not transmit the required clarifications within the period of time established by the evaluation committee or if the clarifications submitted are not conclusive, the tender shall be considered non-conformant.

Equally important, the evaluation committee has the right to correct any arithmetic errors and formal flaws (irregularities) only with the tenderer's approval. If the tenderer does not accept the correction of these errors/flaws, the tender will be considered non-conformant.

The evaluation committee must reject unacceptable and non-conformant tenders.

Within 25 days as of the date of the opening of tenders, the evaluation committee has the obligation to establish the successful tender. This deadline may be extended only once, in duly justified cases, bringing along the obligation for the contracting authority to inform the concerned economic operators within maximum two days since the expiry of the initial deadline.

After the evaluation of tenders is completed, the evaluation committee drafts the award procedure report, which shall be signed by all its members, including the president. The report must be transmitted to the head of the contracting authority for approval. The communication of the procedure's result is drawn and based on this report.

3.8. Excluding/short-listing tenderers

A tender might be excluded for unacceptability (e.g. for not complying with qualification/selection criteria, abnormally low price, etc.) or as non-conformant (e.g. for not meeting the technical specifications).

3.8.1. Unacceptable tenders

According to GEO no. 34/2006, contracting authorities have the right to apply qualification and selection criteria with regard to: personal situation of the applicant/tenderer, suitability to pursue the professional activity, economic and financial standing, technical and/or professional ability, quality assurance standards and environmental management standards.

Contracting authorities may establish minimum levels for the above mentioned criteria and may request supporting documents. Tenders not fulfilling the qualification criteria shall be rejected as unacceptable.

Moreover, contracting authorities are obliged to exclude from the procedure any tenderer/applicant who, within the last 5 years, has been the subject of a conviction by final judgment which the contracting authority is aware of, for participation in a criminal organisation, corruption, fraud and/or money laundering.

The Romanian PPL also provides the obligation for contracting authorities to reject tenders as unacceptable for the following reasons:

- the tender was submitted after the deadline for submission or at another address than that stipulated in the contract notice;
- the tender is not accompanied by the participation guarantee in the amount, form and for the validity period requested in the tender documentation;
- the tender submitted is a variant that cannot be taken into consideration because either the possibility to submit variants is not stipulated explicitly in the contract notice or the variant does not meet the minimum requirements stipulated in the technical specifications;
- the tender does not respect the mandatory regulation regarding specific employment protection and working conditions;
- the price, excluding VAT, exceeds the estimated value established in the contract notice/invitation and there are no available additional funds or, although additional funds are available, the price exceeds the estimated value of the contract by more than 10% or the conclusion of the contract for that price would lead to eluding those legal provisions establishing obligations for the contracting authority in relation to certain thresholds; and
- the tender has an abnormally low price as compared with what has to be supplied, executed or provided, so that the performance of the contract to the qualitative and quantitative parameters requested within the technical specifications cannot be ensured; and
- the tender is submitted in violation of the legal provisions regarding the conflict of interests on the date of tenders' submission.

3.8.2. Non-conformant tenders

A tender shall be rejected as non-conformant if:

- it does not meet the requirements of the technical specifications;
- it contains proposals for amendment of contract clauses that are obviously disadvantageous for the contracting authority and, although the tenderer is informed with regard to the respective situation, it does not accept to waive those clauses;
- it contains prices as part of the financial proposal that are not a result of free competition and that cannot be justified; or

- within a public procurement procedure in which the contract is awarded by lots, the tender is submitted without the distinction on the tendered lots, thus making it impossible to apply the award criterion for each lot.

Within restricted procedures, negotiated procedures with prior publication of a contract notice and competitive dialogue, the contracting authority shall select/preselect the applicants in accordance with the criteria and rules mentioned in the contract notice. Contracting authorities are also bound to mention in the contract notice the minimum and maximum number of applicants intended to be selected.

3.8.3. Alternative tenders

The contracting authorities have the right to allow tenderers to submit alternative tenders only if the award criterion is "the most economically advantageous tender".

In such a case, the contract notice must state explicitly whether it is allowed to submit alternative tenders or if this possibility is prohibited. When alternative tenders are allowed, the technical specifications have to specify the minimum requirements that the tenders must comply with. The alternative tenders that do not meet these minimum requirements shall not be taken into consideration by the contracting authority.

3.9. Awarding the contract

Contracting authorities have the obligation to specify within the contract notice and tender documentation the award criteria, which, once established, cannot be changed throughout the entire procedure.

The criteria for awarding a public procurement contract can be **either the most economically advantageous tender** or exclusively **the lowest price**.

If the public contract is awarded through competitive dialogue, the award criteria can be only the most economically advantageous tender.

The **most economically advantageous tender** criteria has to be applied in compliance with strict rules, such as:

- the contracting authority has the obligation to state, clearly and in detail, in the contract notice/invitation, as well as in the tender documentation, the evaluation factors with their relative weights or, under certain conditions, the decreasing order of their importance;
- the successful tender is the tender with the highest score resulting from the application of the evaluation factors;
- tender evaluation factors may be, together with the price: quality, technical or functional characteristics, environmental characteristics, running costs, cost/effectiveness ratio, after-sale services and technical assistance, delivery or performance term, other elements considered significant for the evaluation of tenders;
- the qualification criteria cannot be used as evaluation factors; and
- the tender documentation shall specify the calculation algorithm or methodology of scoring concrete benefits resulting from the technical and financial proposals submitted by the tenderers.

When **the lowest price** criterion is applied, the winning tender is the admissible tender with the lowest price.

3.10. Informing tenderers

Contracting authorities have the obligation to inform all economic operators involved in the award procedure of the decisions regarding the result of the selection or the award procedure, in writing, not later than **3 working days as of their issuance.**

The communication through which the above information is transmitted has to be sent by mail, fax or electronic means.

Within this communication, the contracting authorities have to inform the unsuccessful tenderers/applicants of the deadline for filing a claim, as well as of the reasons that led to the decision, as follows:

- to each rejected applicant, the reasons which led to the rejection decision;
- to each rejected tender, the grounds on which the tender was considered unacceptable and/or non-conformant; and
- to any admissible but unsuccessful tenderer, the characteristics and relative advantages of the winning tender(s) in relation to its tender, as well as the name of the successful tenderer.

The contracting authority is entitled not to disclose the above information if the disclosure would:

- lead to failure in application of a legal provision;
- impede the application of a legal provision;
- be contrary to public interest;
- prejudice the legitimate commercial interests of the economic operators; or
- prejudice fair competition.

3.11. Annulment of the procedure

Contracting authorities must annul the procedure in certain cases (e.g. only unacceptable or non-conformant tenders were submitted, no tender was submitted or serious infringements of the PPL affect the procedure, the conclusion of the contract is impossible), whilst certain situations only give the right to annul the procedure (e.g. following the decision of the Council/competent court all technical specifications were removed). The annulment decision must be thoroughly justified and all participants must be informed with regard to such a decision.

Nevertheless, the contracting authority may not arbitrary annul the procedure, the annulment decision being as well subject to judiciary or administrative-judiciary control.

Even more, if such situations occur, even the interested economic operators may request the Council/court the annulment of the procedure.

4. Remedies and enforcement

PPL provides for the following remedies against the acts issued by contracting authorities during award procedures: claim against the act itself (in Romanian "contestatie"); and complaint against the NCSC's decision (in Romanian "plangere").

Also, the law provides for means of recovering damages, annul wrongfully concluded contracts and even to pecuniary sanction the contracting authorities.

4.1. Remedies during the award procedure

Claims can be filed in front of the NCSC. Recent amendments of the PPL also admit implicitly the possibility for the claimant to address directly the court, without further detailing any specific conditions in this regard.

According to recently introduced provisions in the PPL, both the claim and the complaint have to be accompanied, under the sanction of rejection, by the proof that a good conduct guarantee was constituted. The amount of the guarantee is of 1% of the estimated value of the contract and limited to a maximum of 100.000 Euro. If the claim is dismissed or withdrawn by the claimant, the contracting authority will retain the good conduct guarantee.

The number of claims filed afore the NCSC has increased significantly between 2006 and 2010, so that, in 2010, 8,070 claims were filed. However, in 2011, 2012 and 2013 the number of claims decreased considerably.

The diminution of the number of claims was especially due to the legislative change regarding the retention of an amount of the participation guarantee whenever the claim was rejected by the NCSC, as well as the *ex ante* control by NARMMP of the tender documentation.

Approximately 34% of the claims filed before the NCSC in 2013 were ruled in favour of the economic operators.

In light of the recent amendments of the PPL regarding the good conduct guarantee, a serious decrease in the number of claims is also expected for 2014.

4.1.1. Claims

The claim can be filed afore the NCSC within **10 days or 5 days** from the day following the acknowledgment of an act of the contracting authority deemed illegal. The deadline for filing claims depends on the estimated value of the contract. If the claim regards the tender documentation published in the ESPP, the date of acknowledgment is the date the tender documentation was published. If the contract is divided by lots, the deadlines are calculated accordingly for each lot.

The claim does not suspend *de jure* the award procedure. The NCSC may nevertheless decide on the suspension of the procedure, upon request, if certain conditions are met. Furthermore, the contract concluded before the Council rules on the claim is null and void.

The procedure in front of the NCSC is mainly written, but oral hearings can be held should the panel deem it necessary.

The NCSC has the obligation to rule upon the claim within 20 days from the receipt of the public procurement file from the contracting authority or within 10 days in case an exception occurs, which prevents an analysis of the claim on the merits. However, in duly justified cases, the initial term can be extended only once with 10 days.

In general, claims are ruled upon within 3 to 6 weeks as of the date the claim is filed, depending on its complexity.

As regards the enforcement of the NCSC's decisions, the decision through which the Council annuls entirely or partially the appealed act is mandatory for the contracting authority. Failure

to comply with the Council's decision within the time limit established by the NCSC leads to the following sanctions:

- the manager of the unit which has not made all necessary arrangements for carrying out the Council's decision or the liable person might pay a fine amounting from 20.000 Lei to 40.000 Lei; and
- failure to execute the Council's decision after the date it becomes final, is sanctioned by the NARMPP with a fine between 40.000 Lei and 80.000 Lei.

4.1.2. Mitigation measures

Before addressing the NCSC, the aggrieved person may **notify the contracting authority** regarding the alleged infringement of the PPL and its intention to address the NCSC. The notification does not suspend *de jure* the award procedure. After receiving such notification, the contracting authority may take any action considered necessary in order to remedy the alleged infringement, such as the suspension of the award procedure or the revocation of an act issued during that procedure.

Furthermore, even after receiving a claim, the contracting authority has the right to take mitigation measures, following that claim. Any such measure must be communicated to the claimant, to the other economic operators involved in the award procedure as well as to the Council, no later than one working day from the date when the measure was adopted.

4.1.3. Complaints

Within 10 days as of the date of its communication, the NCSC's decision can be further appealed at the court of appeal where the public authority is headquartered.

The complaint does not suspend the execution of the decision. Thus, the public procurement contract can be concluded even before the court of appeal rules on the complaint. However, in duly justified cases the performance of the contract can be suspended by the court. The complaint shall be ruled upon by a panel of three judges, in an urgent manner, within a maximum of two hearings.

Complaints filed against the NCSC's decisions afore the competent courts of appeal are ruled upon within an average timescale of 1-2 months. The decision of the court of appeal is **final**.

4.2. Damages

Claims regarding compensations for damages caused during the award procedure may be filed separately afore the tribunal from the headquarters of the contracting authority, within the general prescription term of 3 years.

The interested person may seek compensations for the damages caused by the contracting authority under the following conditions:

- if the damages were caused by an act of the contracting authority or are a result of not solving within the legal term a request regarding the award procedure, the damages may be granted only after the act was annulled or revoked or remedies were adopted by the contracting authority; and
- if the damages are represented by the expenses undergone for preparing the tender or participating in the procedure, the aggrieved party must not only prove the breach of the provisions of GEO no. 34/2006, but also that the chance to win the contract was real and was lost because of the respective breach.

4.3. Contract remedies

Claims with regard to the performance, nullity, annulment, resolution, rescission or unilateral termination of public contracts are settled in first instance by the tribunal in the jurisdiction of which the contracting authority is headquartered.

The PPL expressly provides for the absolute or relative nullity of public procurement contracts in the following cases:

- the contracts are concluded before the waiting periods of 11 or 6 days (depending on the estimated value of the contract) as of the date of transmission of the communication on the procedure result;
- the contracts are concluded before the NCSC communicates its ruling upon the claim, when a claim was filed against the award procedure;
- the contracts are concluded in breach of the NCSC's decision; and
- the contractor employs in order to fulfil the public contract, natural or legal persons involved in the process of verification/evaluation of applications/tenders, within a period of 12 months from the conclusion of the contract.

After the conclusion of the contract any interested person may file a claim for the annulment of the contract before the competent court. The court declares the contract null and void in the following cases:

- the contracting authority awarded the contract in breach of its obligations related to the publication of a contract notice/participation invitation;
- the provisions on the waiting terms for the conclusion of the contract or on the conclusion of the contract in case a claim is filed were violated, if this breach deprived the interested economic operator of the opportunity to submit an appeal before the conclusion of the contract, in case such breach is combined with the violation of other PPL provisions, if the latter affected the chances of the interested economic operator to obtain the contract;
- if the contracting authority breaches certain legal provisions on framework agreements or the dynamic purchasing system; and
- other hypothesis provided by the law.

However, if the court believes that, in the above mentioned situations, imperative reasons of general interest require keeping the effects of the contract, it shall order, instead, **alternative sanctions**, as follows:

- limitation of the effects of the contract, by reducing its execution period; and/or
- the application of a fine to the contracting authority of 2% - 15% of the value of the contract.

The decision of the court may be appealed within 5 days as of its communication.

4.4. Sanctions applied by the NARMPP

The NARMPP has also a supervising function in the public procurement field. Thus, the NARMPP ascertains the contraventions and enforces the sanctions provided by GEO no. 34/2006. The sanctions consist in fines applied to contracting authorities that range from 2.000 lei to 100.000 lei, depending on the gravity of the contravention. These amounts entirely become income to the state budget.

Not only that the NARMPP can initiate the *ex post control ex officio*, but any person has the right to notify the authority with regard to the infringement of the PPL.

The application of sanctions by the NARMPP is prescribed within 36 months from the date of the offence.

5. Changes during and after a procedure

Changing the documentation, the tenders or the contract provisions is a sensitive matter. Hence, in light of of the principle of transparency and equal treatment, the PPL imposes certain restrictions.

5.1. Changes during a procedure

The PPL provides for certain rules regarding changes of the **tender documentation** during the award procedure, such as:

- the award criterion and the evaluation factors mentioned in the contract notice and in the tender documentation must not be changed during the procedure;
- no amendment and/or completion of the qualification and selection criteria specified in the contract notice and in the tender documentation can be operated, except for amendments ruled by the NCSC's decision;
- when the extension of the deadline for submission of tenders is necessary, an erratum to the contract notice has to be published at least 3 days before the initially established deadline;
- if the tender documentation is published in the ESPP, the contracting authority must publish any amendments to it by creating a new electronic file with direct and unrestricted access, similar to the initial file; and
- the tenderer may submit, within the tenders, proposals to amend the contract clauses from the tender documentation, but if the proposals are obviously disadvantageous for the contracting authority and the tenderer does not waive these amendments, even though asked to, the tender will be considered non-conformant.

Certainly, the contracting authorities may amend the tender documentation, within the limits imposed by the PPL, exclusively before the tenders' submission deadline.

The general rule is that **no changes are permitted to tenders already submitted, prior to the award of the contract.** The contracting authority, through its evaluation committee, establishes only the formal clarifications and completions necessary for the evaluation of each tender. Should the tenderer amend its technical or financial proposal by means of clarifications, the tender shall be rejected as non-conformant.

The PPL provides, however, for the following exceptions:

- as regards the technical proposal – irregularities, arithmetical errors or corrections of certain minor technical errors as long as a possible price adjustment caused by such corrections would not have led to changes in the ranking of the tenderers; and
- as regards the financial proposal – arithmetical errors.

Both irregularities and arithmetical errors are defined under the PPL:

- **irregularities** are represented by those errors or omissions in a document the correction/completion of which is asserted clearly by the meaning and contents of other information initially existing in the documents submitted by the tenderer or the correction/completion of which has a clarification or confirmation purpose, not likely to determine an unfair advantage in comparison with the other participants to the award procedure;
- **the arithmetical errors** are to be revised as follows: if there is a discrepancy between the price/unit and the total price, the price/unit shall be taken into consideration and the total price shall be revised accordingly; if there is a discrepancy between letters and numbers, the value expressed in letters shall be taken into consideration and the value expressed in numbers shall be revised accordingly.

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Equally, changes of the tender are not permitted after the award of the contract. Both the financial and technical tenders are appendices to the contract and, thus, part of the contract.

The **changes in the membership of bidding consortia** are not regulated specifically by the PPL. Therefore, such changes are governed by the general principles of public procurement as well as the CJEU case law related to the amendment of public procurement contracts. According to the case law, if the change represents a substantial amendment of the contract that objectively creates an unlawful competition environment and determines the contracting authority to offer its contractual partner a preferential treatment in the prejudice of other eventual services providers, the organisation of a new award procedure is justified.

5.2. Post contract changes

Post-contract signature changes to a public procurement contract are permitted, to the extent that they do not represent a substantial amendment of the contract, in accordance with the CJEU case law.

Even though the PPL does not expressly regulate the amendments of the public procurement contract, specific provisions are relevant for the performance of the public procurement contract.

Thus, according to GEO no. 34/2006, in a public procurement contract only the **assignment of receivables** arising from that contract is allowed. The obligations arising from the contract remain in charge of the contracting parties as stipulated and initially undertaken.

Moreover, the **replacement of the subcontractors** nominated in the tender during the performance of the contract is allowed provided that two cumulative conditions are met:

- the contracting authority expresses its approval in this regard; and
- the replacement of the subcontractors does not lead to the amendment of the initial technical or financial proposal.

Detailed rules are also established for **the adjustment of the contract price**. The PPL expressly regulates the situations in which the price can be adjusted when this possibility was mentioned within the tender documentation, as well as in the contract. There are also two exceptional cases in which the price can be adjusted even if no such mention was made in the documentation:

- unforeseeable circumstances independent from the will of the parties occur; and
- the procedure is prolonged unpredictably over the initially estimated period for reasons entirely independent of the will of the tenderer/contractor.

The legal provisions regarding the negotiated procedure without prior publication of a contract notice are also relevant for contract amendments. GEO no. 34/2006 provides strict conditions to be met cumulatively for the purchase of works and services not included in the initial contract in the following situations:

- when, due to unforeseen circumstances, the additional works/services have become necessary for the fulfilment of the contract in question; or
- when the option to purchase similar services/works was mentioned in the contract notice.

Last, but not least, it is important to underline that any amendment of the public procurement contract shall not lead to the infringement of the public procurement principles of transparency, non-discrimination and equal treatment.

6. Public private partnerships

Concessions and institutional public private partnerships ("PPPs") present certain similarities in terms of award procedures and execution of the contracts. Nevertheless, there are important differences between the contractual PPP (e.g. concessions agreement) and the institutional PPP that involves the participation of public and private partners in a joint venture entity (e.g. company).

6.1. Concessions

The Romanian PPL provides special rules with regard to concession contracts. Thus, these contracts are regulated under a **specific chapter in GEO no. 34/2006** and the applicable rules are detailed by a separate Government Decision.

The services/works concession contract is defined as a contract similar to the public services/works contract, except for the fact that in consideration of the services/works provided/executed, the contractor receives from the contracting authority either solely the right to exploit the services, or this right together with the payment of an amount previously established.

Although governed by specific rules, the concession contracts and public procurement contracts are regulated by several common provisions including, but not limited to: fundamental principles; estimation rules; settlement of claims filed during procedures; publishing of contract notices in the ESPP and, if it is necessary, in the OJEU, as well as, optionally, in the Romanian Official Gazette, and the award procedures (except for the call for tenders).

6.2. Institutional PPPs

Law no. 178/2010 is the legislative act establishing public-private partnership in Romania and resulted from an increasingly intense need of such a contractual formula. Although PPPs have been regulated since 2010, the absence of informatics support in ESPP blocked the start of such projects. According to the implementing rules of Law no. 178/2010, any other means of publication of the selection notice or the attached document outside the ESPP is not allowed. The ESPP only added this function in January 2013, hence making it possible to publish selection and award notices for PPP contracts. However, no selection notice was published in the ESPP, no PPP project being thus initiated under the current PPP legislation. Moreover, a new legislation on PPPs is envisaged by the authorities.

According to the legislation in force, a PPP is "an economic mechanism of association between two partners, the public authority and the private investor in order to achieve, through a PPP project, a public good or a public service".

When a conclusion of the PPP contract is reached, both the private investor and the public partner are required to comply with the fundamental principles of the PPP, namely: non-discrimination, equal treatment, transparency, proportionality, efficient use of funds and accountability assumption. Subsequent to the contract's conclusion, the proceedings for the establishment of the project company, as a joint-venture company regulated by Law no. 31/1990 are initiated, having the private and public partners as shareholders.

Both private and public partners have to contribute to the share capital of the project company. The contribution of the private partner to the foundation of the project company consists of the necessary financing for the fulfilment of the PPP project. The project is implemented entirely or partly by own financial means, the private partner having the liberty to attract sponsors, investors or financial entities. The project company's main scope of business is the operation and management of all the stages for the performance of the PPP contract by taking over the obligations from the contracting parties. Finally, the project company has the obligation to transfer to the public partner the asset achieved by fulfilling the project, free of charge, in a good state, exploitable and free of any charges or obligations.

7. Who we are

Public procurement is our passion and we have invested in it more than eight years of work. During this time, we supported major projects, with a high level of complexity and values exceeding 400 million Euros. Now, we are relying on an extended experience and a 360° perspective on the public procurement process.

Thus, we rapidly gained the appreciation of local and international forums for our legal competencies:

- **2009** - we are recommended by Global Law Experts, the guide of world's top lawyers, for the Public Procurement field in Romania;
- **2010** and **2011** – Corporate Intl Magazine awards us the title „Public Procurement Law Firm of the Year";
- **2012** - two international forums, ACQ Country Awards and Corporate Intl Magazine, together with AvocatNet, the leader of legal Romanian magazines, awards us the distinction „Public Procurement Law Firm of the Year";
- **2013** – Legal 500, Corporate Intl Magazine and AvocatNet recommends us as a top law firm in the field of public procurement and public-private partnerships in Romania;
- **2014** - Legal 500 ranks us as a first tier law firm for PPP and procurement in Romania: *"the dynamic and exceptional team, which is lauded for its vast knowledge and friendly approach, is fast becoming a major contender on high-profile mandates. It recently advised an international construction company on a tender for a 250 million Euros project financed by the EBRD".*

8. How can we help

We offer support for the entire public procurement process, starting with the organization of award procedures, drafting offers, participation in procedures and up to drafting claims and complaints, in accordance with the national legislation or the procedures of the European Bank for Reconstruction and Development.

Moreover, we proactively answer the market needs for information. Through dedicated blogs on public procurement, **www.avocatachizitii-publice.ro**, and on public-private partnerships, **www.ppp-romania.eu**, we offer practical ideas, interesting tips and relevant news: legislation modifications, studies, books, magazines, opinions, articles on the subject.

8.1. Services for economic operators

- General legal consultancy on the interpretation and enforcement of the public procurement and PPP legislation;
- Identifying business opportunities in the Electronic System of Public Procurement and in the Official Journal of the European Union;
- Analyzing tender documentation and identifying possible breaches of the national or European legal provisions;
- Drafting requests for clarification;
- Drafting challenges and complaints in accordance with the public procurement and PPP legislation;
- Legal assistance and representation before the National Council for Solving Legal Disputes and the competent courts with regard to public procurement litigations;
- Legal assistance in relation to the preparation of tender documents and the drawing up of technical and financial tenders;

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- Drafting consortium and/or subcontracting agreements, as well as legal assistance for the negotiation, conclusion and execution of these agreements;
- Drafting proposals for revising the public procurement contracts proposed by the contracting authorities within the tender documentation;
- Legal assistance/representation during tender opening sessions;
- Legal assistance on the use of electronic means for public procurement;
- Legal assistance on the negotiation, conclusion and execution of public procurement and PPP contracts.

8.2. Services for contracting authorities

- General legal assistance regarding the interpretation and the enforcement of public procurement and public-private partnership legislation;
- Legal assistance in setting the award procedure of public procurement and public-private partnerships contracts;
- Drafting and/or reviewing the award documentation, in accordance with national and European legislation;
- Drafting prior information notices, contract notices and/or contract award notices;
- Drafting the answers to the requests for clarification transmitted by bidders;
- Giving support during the opening sessions of the tenders;
- Offering legal assistance and support regarding the examination of the eligibility of tenderers;
- Drafting requests for clarification in relation to the tenders submitted;
- Legal assistance and representation before the National Council for Solving Legal Disputes and the competent courts with regard to public procurement litigations;
- Legal assistance for the negotiation, conclusion and execution of public procurement and public-private partnership contracts.

Public Procurement & Public Private Partnerships

Legal Guide - Romania

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Edition coordinated by
VASS Lawyers