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**PUBLIC PROCUREMENTS
& PUBLIC WORKS AND
SERVICES CONCESSIONS**

**Emergency Governance Ordinance no. 34
of 2006 (“EGO no. 34/2006”)**

Starting with June 30, 2006, new rules on public procurement shall enter into force, reflecting the incorporation by the Romanian legislation of (i) the Directive no. 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, (ii) the Directive no. 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, (iii) the Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts and (iv) the Council Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

**The scope of services to fall under the
procurement regime has been extended**

In case of acquisition of hotel and restaurants services, rail and water transport services, supporting and auxiliary transport services, legal services, outplacement and other supply services, health and social services for a value exceeding EUR 125,000

or EUR 420,000 depending on the contracting authority, the new public procurement procedure becomes applicable. However, the contracting authority will only be held to prepare technical specifications for the procured services and ensure that the awarding notice is published with the official gazette.

**The Competitive Dialogue and the
Negotiation with a sole candidate**

EGO no. 34/2006 introduces a new awarding method named *the competitive dialogue*. Concurrently, the new enactment eliminates the option of awarding a contract based on negotiations with a sole candidate/source, without conducting in prior a competitive procedure.

The contracting authority may consider using the Competitive dialogue procedure provided that the contract following to be awarded is particularly complex and by conducting an open and unrestricted auction procedure the authority may not be in the position to award of the contract.

A contract is considered being particularly complex in case the contracting authority objectively cannot define the technical specifications for satisfying its needs and/or determine the financial/legal solutions.

The procedure is public; anyone interested having the right to participate. However, as a pre-requisite, the procedure implies a selection stage, within which only the technical, economic and financial capacities of the candidates are assessed.

As a matter of principle, EGO no. 34/2006 does not expressly provide the right of the contracting authority to award the contracts upon negotiation with a sole candidate.

Although the series of events and circumstances under which, in accordance with the former legislation, the contracting authority would have been entitled to negotiate only with one candidate are also provided in the EGO no. 34/2006, based on the new enactment the contracting authority has the obligation to invite to negotiations, in almost all cases, more than one candidate, thus ensuring competitive conditions for the procurement process.

Concession Contracts Regime

EGO no. 34/2006 has also amended the concession contract regime, having also repealed the Law no. 219/1998 on concession as well as the related conflicting secondary legislation.

As a rule, EGO no. 34/2006 applies only to the awarding of concession contracts having as object services and works. By exception, the enactment shall also apply in relation to assets, in case the authority intends to contract such assets in conjunction or subsequent to certain public services or works. Adversely, incidence of the new law shall not fall due in case of contracts for works or services which being strategic are classified or for the case special security measures are needed for contract's performance, different international agreements, etc.

Concession contracts regime shall be technically a mixed one, including certain rules typically applying to public procurement contracts (e.g. estimate of the contract value, publishing the participation and awarding announcements, etc.), but mainly depending on secondary legislation still to be issued by the Romanian Government, based on the proposals of the new National Regulatory and Monitoring Authority of Public Procurements (e.g. procedures, modalities of take-over and hand-over as well as re-transfer of works and assets, etc.)

There are two types of concession contracts regulated by EGO no. 34/2006, as defined by reference to standard public procurement contracts of works and services. Supplementary, in case of concession contracts, in exchange of the right granted by the contracted authority to the concessionaire to exploit the services or the works, it shall pay a royalty.

Apart from regulating the concession contracts, EGO 34/2006 introduces the concept of "sectorial contracts", as public procurement contracts awarded in view of performing certain relevant activities in the public utility sectors: water, energy, transport and postal.

The Concession Procedure and National Regulatory and Monitoring Authority of Public Procurements

Following methods and procedures may apply in case of concession contract (as for all public procurement contracts): (i) the open tender, (ii) the restricted tender, (iii) the competitive dialogue, (iv) the direct

negotiations; (v) the request for proposals and (vi) the contest of solutions.

Furthermore, as an element of novelty, the concessionaire of public works is expressly granted the right to subsequently procure works from third parties. In case the awarding concessionaire itself is a contracting authority and the contract to be subsequently awarded is a public procurement contract for works, the rules of public procurement procedure shall apply.

In terms of dispute resolution, the newly introduced National Regulatory and Monitoring Authority of Public Procurements shall settle - through its specialized body named National Council - any challenge regarding the concession contracts awarding procedure.

ALTERNATIVE DISPUTE RESOLUTION

As an alternative dispute resolution process, the mediation regulated under the new enactment 192/2006 may apply to both individuals and legal entities which are willing to obtain, on amicable terms, an equally convenient, efficient and lasting solution to their conflict. Mediation may be used in private, commercial and even in criminal law or as alternative to any other proceeding, including, for example, conflicts in the field of consumer protection. Only genuine personal rights, as well as the all rights which cannot be transferred on contract basis cannot make the subject of mediation.

The status of the mediator

Any individual, holding university degree, having followed mediation programs and

being a member of the Mediation Council, which is the relevant professional organization, may act as a mediator. The list of the authorized mediators is published and updated with the Official Gazette of Romania. Mediators may act as individual practitioners, in partnerships or within a non-governmental organization.

The mediation proceedings and effects

Conclusion of a mediation contract by all the parties involved (including the mediator) is a precondition for the proceedings to start. It is aimed for such contract to also include terms and conditions to govern effects of the resolutions issued as a result of the mediation. In any circumstances, such resolutions shall be reflected into a separate agreement, which may be if the need be submitted also to a regular court as a settlement of the dispute.

Statutory limitations in relation to regular court proceedings are suspended for as long there is a mediation process ongoing [i.e. from the date of signing the mediation contract until de completion of mediation].

NON BANKING FINANCIAL INSTITUTIONS

The secondary legislation regarding the non-banking financial institutions - the NBFIs - has been completed with the Norm no. 6/2006 on the criteria for the NBFIs' registration with the Special Registry, passed by the National Bank of Romania - NBR, as of May 18th, 2006.

Criteria for registration with the Special Registry

Registration of an NBFIs with the Special Registry is subject to following prerequisites being achieved, as these need to be maintained during three consecutive quarterly reporting periods, namely:

- the level of combined own funds and borrowed funds as reflected on balance sheet is of at least RON 50,000,000;
- the level of the combined financing granted and of the related undertakings, registered on balance sheet is of at least RON 25,000,000;

The NBFIs incorporated in prior shall be registered with the Special Registry based on the standard form reports to be submitted with NBR together with the documentation required for notification, provided however that the above registration criteria are met.

ELECTRONIC COMMERCE

Recently entered into force, the Law no. 121/2006 has completed and modified the provisions of the Law no. 356/2006 on electronic commerce, aligning the latter with the stipulations of the Directive no. 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

Regulated Professional Activity

The new regulation replaces the term "liberal professions" used in the definition of the commercial communication by

"regulated professions". The regulated professional activity is defined as the professional activity for which, the access or exercise in Romania is conditional, directly or indirectly, upon the procurement of a document attesting the level of the professional formation.

Coordinated Legislation

The legal requirements on goods and their delivery, as well as on services which are not performed by electronic means are not object of the coordinated legislation.

The Service Providers' Obligations

The service providers have to, temporary or permanently, interrupt the transmission into a communication network or stop hosting the information provided by a recipient of the relevant service, the access to a communication network or the performance of any other information society services, if such measures are required by a public authority. The public authority may act, either ex officio, or based on third party legitimate complaint.

INSURANCE

Law no. 32/2000 on insurance companies and insurance's supervision has been amended, mainly with a view (i) to consolidate the supervision powers of the Insurance Supervision Commission ("ISC"), (ii) to extend the applicability of permitting and licensing requirements to entities acting in the insurance market and (iii) to set a new

indemnification Fund in relation to car accidents and injuries.

Supervision attributions of ISC have been strengthened

Structure of ISC Council expands, number of seats being increased from 5 to 7. ISC shall have one president and 2 vice-presidents.

For future, acquisitions of significant shareholdings and withdrawals from insurance companies or adjustments of such significant shareholdings require the prior approval of ISC.

ISC is also vested with prior approval powers on the eligibility of an entity or person for holding directly or indirectly a participation in a Romanian insurance or re-insurance company, in the context of incorporation of such companies.

Apart from the registration with the Actuaries Register and starting with January 1st 2007, the actuaries should also obtain the ISC authorization for the assessment by means of statistic methods of the insurance risk and for the calculation of different

insurance indices. Specific secondary legislation with respect to insurers' authorization is yet to be adopted.

COMPANY LAW

Registered office for companies in the same location

Two or more companies may have the same registered office only if the building at the relevant address has independent partitioned space or rooms allowing each company to carry out its activity in at least one room and if at least one of their shareholders is the owner of the relevant building or if at least one person is shareholder in each of the companies having the same registered office. These clarifications have been introduced through the newly adopted amendment to the Company Law - Law no. 164 of May 18, 2006.