

Romanian Legal Update: New package of laws on public procurement and concessions enters into force in Romania (RTPR Allen&Overy)

Public procurement and concessions will be regulated by four new laws, namely (i) the public procurement law, (ii) the sectorial public procurement law, (iii) the concessions law and (iv) the law on remedies (the New Laws). The New Laws were published with the Official Gazette on 23 May 2016 and shall enter into force on 26 May 2016. The Government is expected to pass the secondary legislation within 30-60 days.

The New Laws are aimed at transposing the EU Directives 2014/24/EU on public procurement, 2014/23/EU on the award of concession contracts and 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors.

Below is a brief presentation of the most important amendments and novelties brought by the New Laws.

Exclusions from the application of the law

The New Laws exclude from their application certain specific types of contracts. Besides the contracts that have a specific nature (eg certain defence/security contracts), certain other types of agreements are also excluded, such as: (i) loans (of any type) and (ii) legal assistance within any arbitration or judicial procedure or anticipated assistance for a potential litigation within alternative forms for solving a dispute or in front of a court, under certain specific conditions.

New thresholds

New thresholds for the application of the New Laws are regulated. As a novelty, the thresholds are established in RON and can be revised by the European Commission only (in accordance with the EU Directives). The thresholds established by the European Commission are published by the National Agency for Public Procurement (ANAP) on its webpage.

- ☒ Loans are excluded from public procurement
- ☒ Clarification on possibility to have direct agreements
- ☒ Procurement contracts can be subject to arbitration

New Awarding Procedures

The New Laws regulate two new awarding procedures: (i) the innovation partnership (used for innovative solutions) and (ii) the simplified procedure (used for the contracts with a reduced value). In addition to the above two new procedures, a specific awarding procedure is regulated in respect of social services and other specific services.

Awarding Criteria

The New Laws introduce new awarding criteria and examples of assessment factors. The former legislation that provided for the “lower price” or the “most economically advantageous offer” as the awarding criteria raised various inconsistent interpretations and misuse of assessment factors. The New Laws provide that the agreement shall be awarded only to the “most economically advantageous offer” and expressly provides the awarding criteria and assessment factors that can be applied by the awarding authority. Thus, an authority can use one of the following criteria: (i) the lower price, (ii) the lower cost, (iii) the best quality-price ratio, (iv) the best quality cost-ratio. The

assessment factors provided in awarding documentation must be in line with the factors provided by the law.

European Single Procurement Document

The New Laws provide for a simplified form for participation at the awarding procedures based on a standardized self-statement by the bidders confirming that they meet the required qualification criteria. The documents supporting such statement will be presented only by the winning bidder before the awarding of the contract.

E-Certis Utilisation

The New LAWS provide for the obligation of the Romanian authorities to use the E-Certis (the Official European Union platform for certifications, supporting documents and status of the bidders) and ask for the types of certificates or forms of supporting documents that are available on such platform. For the purpose of facilitating the cross-border procedures, ANAP shall ensure that all the certificates and supporting documents that can be presented by the bidders in Romania are uploaded and updated on E-Certis .

Direct payments to sub-contractors

The New LAWS provide that the awarding authority can make payments directly to sub-contractors if such method of payment was agreed upon the signing of the agreement upon express request of the sub-contractor.

Amendments to the contract

The New LAWS provide that a contract can be amended during the course of its execution without a new awarding procedure, if such potential amendments were provided in the contract in a clear, precise and unequivocal manner. The amendments can refer to the value of the agreement or other aspects of the contract (including the change of the contractor) subject to the observance of the legal provisions. Thus, the change of the contractor can be made if, among others, (i) this option was provided in the agreement or, (ii) upon early termination of the agreement the existing contractor has assigned its contracts with sub- contractors to the awarding authority. Moreover, the New LAWS regulate that if the concession agreement provides for the option of the financiers to assign the agreement to a new operator, such new operator will have to fulfil the qualification and selection criteria provided by the awarding documentation. This clarifies the status of “direct agreements” used in project finance transactions.

Complaints within awarding procedure

A new separate mandatory complaints procedure is provided by the New LAWS, namely, the notification of the awarding authority before addressing the National Council for Solving Complaints (CNSC) or the court. The lack of fulfilment of such procedure triggers the rejection of the request made in front of CNSC and the court. The authority has to respond to any complaint within 3 days calculated since the next date of the submission of the notification. If the bidder is not satisfied with the remedies suggested by the authority or does not receive any answers, it can further challenge any act within the awarding procedure in front of the CNSC or the courts.

Arbitration

As a matter of novelty, the New Laws expressly provide that the disputes related to the interpretation, entering into, execution, amendment and termination of the public procurement and concession contracts can be subject to arbitration. Disputes related to the contract awarding procedures are subject to the jurisdiction of CNSC or the courts.

Repealing of PPP legislation

The New Laws expressly repeal the existing PPP legislation.