

EMERGENCY ORDINANCE No 143 of 28 October 2008

for amending and supplementing the Government Emergency Ordinance No 34/2006 regarding the award of the public procurement contracts, public works concession contracts and services concession contracts

ISSUER: THE GOVERNMENT

PUBLISHED IN: THE OFFICIAL GAZETTE OF ROMANIA No 805 of 2 December 2008

Whereas there is a need for adopting certain emergency measures in order to improve and ensure the flexibility of the public procurement system and considering the fact that not adopting such measures may result in a decrease of the spending degree of the allocated public funds, including the Community funds, the worst consequence in this case being represented by postponing / delaying the implementation of certain major investment projects with a social and economic impact, at national or local level, the most affected being the projects included in the Regional Operational Programme, SOP Transport and SOP Environment,

Under Article 115 paragraph (4) of the Romanian Constitution, republished,

The Government of Romania hereby adopts this emergency ordinance.

#### ARTICLE I

Emergency Government Ordinance No 34/2006 regarding the award of the public procurement contracts, public works concession contracts and services concession contracts, published in the Official Gazette of Romania, Part I, No 418 of 15 May 2006, as approved with the subsequent amendments and completions by the Law No 337/2006, with the subsequent amendments and completions, shall be amended and completed as follows:

1. In Article 9, the letters c) and c<sup>1</sup>) shall be amended as follows:

“c) The award of a works contract by an economic operator who does not have the quality of a contracting authority, if the following conditions are cumulatively met:

- The mentioned contract is directly financed / subsidized more than 50 % by a contracting authority;

- The estimated value of the mentioned contract is higher than the equivalent in ROL of EUR 5 000 000;

c<sup>1</sup>) The award of a works contract by an economic operator who does not have the quality of a contracting authority, if the following conditions are cumulatively met:

- The mentioned contract is directly financed / subsidized more than 50 % by a contracting authority;

- The estimated value of the mentioned contract is higher than the equivalent in ROL of EUR 200 000”

2. Article 10 shall be amended as follows:

“Article 10. - For the cases provided for in Article 9 items c) and c<sup>1</sup>), the contracting authority shall impose through the financing contract the enforcement of the provisions of this emergency ordinance for the award of the mentioned contracts”.

3. In Article 46, paragraph (1) shall be amended as follows:

“Article 46. - (1) Without prejudice to the possibility of the economic operators to make offers for several different lots, the candidate / tenderer shall not have the right within the same procedure:

a) To submit two or more individual and/or common applications / tenders under the penalty of excluding from the competition all the applications / tenders concerned;

b) To submit an individual / common tender and to be designated as a subcontractor within another tender, under the penalty of excluding the individual tender or, if appropriate, the one where the candidate / tenderer is associate tenderer.

4. In Article 49, after paragraph (2) two new paragraphs shall be inserted, paragraphs (2<sup>1</sup>) and (2<sup>2</sup>), as follows:

“(2<sup>1</sup>) The errors referred to in paragraph (2) are that information / those requirements from the notice for publication that are inaccurate or lead to infringements of the legislation in the field of public procurement and of the principles on which the awarding of the public procurement contract is based.

(2) Not detecting these errors during the process of evaluation shall not affect the right of the National Authority for Regulating and Monitoring Public Procurement to penalize, during the process of surveillance, the conducts referred to in Article 293.”

5. In Article 55, paragraph (2) item b) shall be amended as follows:

“b) The contracting authority belongs to one of the categories referred to in Article 8 item d) or item e) and the estimated value of the contract / framework agreement of supply or of services to be awarded / concluded is higher than the equivalent in ROL of EUR 400 000;”.

6. In Article 57, paragraph (2) item b) shall be amended as follows:

“b) The contracting authority belongs to one of the categories referred to in Article 8 item d) or item e) and the estimated value of the contract / framework agreement of supply or of services to be awarded / concluded is higher than the equivalent in ROL of EUR 400 000;”.

7. Article 80 shall be amended as follows:

“Article 80. - The contracting authority shall open the tenders at the date, the hour and the place mentioned in the contract notice, unless the obligation of delaying the term of submitting the tenders has become accessory, according to the provisions of Article 72 or following the submission of a challenge.”

8. Article 93 shall be amended as follows:

“Article 93. - The contracting authority shall open the tenders at the date, the hour and the place mentioned in the contract notice, unless the obligation of delaying the term of submitting the tenders has become accessory, according to the provisions of Article 72 or following the submission of a challenge.”

9. In Article 122, the introductory part and the third indent of item i) shall be amended as follows:

i) If the purchase of additional / supplementary services or works is necessary, even if they were not included in the initial contract, but which became necessary for accomplishing the contract due to unpredictable circumstances, and provided that the following conditions are cumulatively observed:

.....  
- The cumulated value of the contracts to be awarded and of the addenda to be concluded for supplementary works and / or services does not exceed 50 % of the value of the initial contract;”.

10. In Article 204, paragraph (1<sup>1</sup>) shall be amended as follows:

“(1<sup>1</sup>) If the contracting authority cannot conclude the contract with the tenderer, whose offer has been established as the winner, due to the fact that the tenderer concerned is in a Force Majeure situation or in the unforeseeable impossibility of executing the contract, the contracting authority shall be entitled to declare the winner the tender on the second place, provided that it exists and it can be admitted. Otherwise, the application of the procedure for the award of public procurement contract shall be cancelled.

11. After Article 210, a new Article 210<sup>1</sup> shall be inserted as follows:

“Article 210<sup>1</sup>. - Within utmost 48 days from the cancellation of the award procedure, the contracting authority shall submit to the ESPP information regarding the reasons of the cancellation.

12. In Article 213, the introductory part of paragraph (2) shall be amended as follows:

“(2) The report of the award procedure provided for in paragraph (1) item g) shall be elaborated before the conclusion of the public procurement contract / framework agreement /dynamic purchase system and shall contain at least the following elements:”.

13. In Article 241, a new paragraph (2) shall be inserted as follows:

“(2) The contracts awarded for the purpose of accomplishing the relevant activities provided for in paragraph (1) shall be considered sectorial contracts.”

14. In article 252, the introductory part of item j) shall be amended as follows:

i) If the purchase of additional / supplementary services or works is necessary, even if they were not included in the initial contract, but which became necessary for accomplishing the contract due to unpredictable circumstances, and provided that the following conditions are cumulatively observed:”.

15. In Article 263, paragraphs (2) and (5) shall be amended as follows:

“(2) The evaluation of Council’s activity and of its panels shall be accomplished by a college during the first semester of each year, and shall consider the period between 1 January and 31 December of the previous year.

.....  
(5) The evaluation procedure of the Council’s activity and of its panels is established by College regulation, to be approved by order of the President of the National Authority for Regulating and Monitoring Public Procurement and shall be published in the Official Gazette of Romania, Part I”.

16. In article 263 paragraph (3), item a) shall be amended as follows:

“a) a representative of the National Agency of Civil Servants;”.

17. In article 270 paragraph (1), the following items c<sup>1</sup>) and c<sup>2</sup>) shall be inserted after item c):

c<sup>1</sup>) the deadline of opening the tenders, if the challenge refers to acts of the contracting authority which were issued or occurred before this date;

c<sup>2</sup>) The expiry date of the period referred to in Article 205 paragraph (1), if the challenge refers to acts of the contracting authority which were issued or occurred after the deadline of opening the tenders;

18. Article 271 shall be amended as follows:

“Article 271. - (1) Under the penalty of rejecting the challenge for being late, it shall be submitted both to the Council and the contracting authority, but no later than the expiry of the terms provided for in Article 272. The tenderer shall also attach to the challenge a copy of the challenged document, if it was issued, as well as copies of the documents referred to in Article 270 paragraph (1), if available.

(2) Within one working day from receiving the challenge, the contracting authority shall notify on this issue the other applicants still involved in the award procedure. The notification must also include a copy of the mentioned challenge.

(3) All the notifications or communications of the procedural documents shall be made by means of registered letter with acknowledgement of receipt. The provisions of Article 60 paragraph (1) shall apply accordingly.

(4) In case of failure to accomplish the obligation provided for in paragraph (1), the provisions of Article 274 and those of Article 277 paragraph (1), shall not apply.”

19. In Article 272, paragraph (4) shall be amended as follows:

“(4) Notwithstanding the provisions of paragraphs (2) and (3), the challenge which refers to acts of the contracting authority which are issued or occur before the opening of the tenders may be submitted no later than one working day before the date established for submitting the tenders, provided it is also sent by fax or by electronic means.”

20. In Article 272, paragraph (5) shall be repealed.

21. Article 274 shall be amended as follows:

“Article 274. - (1) If the challenge(s) refer(s) to acts of the contracting authority which were issued or which occurred before the opening of the tenders, the contracting authority shall send to the Council, within 3 working days from the expiry date of the term provided for in Article 272 paragraph (4), its point of view on it / them, together with any other relevant documents, as well as, under the penalty of paying the fine provided for in Article 275

paragraph (3), a copy of the public procurement file. The absence of the contracting authority's point of view shall not impede the solving of the challenge(s), provided that its / their notification is proven. (2) The contracting authority shall notify its point of view to the tenderer / tenderers who submitted the challenge, within the same period provided for in paragraph (1). (3) If the challenge refers to acts of the contracting authority which were issued or which occurred after the opening of the tenders, the obligations provided for in paragraphs (1) and (2) must be accomplished within a period of 3 working days maximum from the expiry date of the terms provided for in Article 205 paragraph (1)."

22. Article 276 shall be amended as follows:

"Article 276. - (1) The Council shall solve the challenge within a period of 20 days from the date of receiving the public procurement file from the contracting authority. In duly justified cases, the period for solving the challenge may be extended with another 10 days.

(2) Failure to observe the period for solving the challenge provided for in paragraph (1) constitutes a disciplinary offence and may also lead to opening the evaluation procedure according to the provisions of Article 263 paragraph (6)."

23. After Article 276, a new article 276<sup>1</sup> shall be inserted as follows:

"Article 276<sup>1</sup>. - (1) After receiving a challenge, the contracting authority shall be entitled to adopt the remedy measures that it shall consider necessary following that challenge. Any such measures shall be notified to the tenderer who submitted the challenge, to the other economic operators still involved in the award procedure, as well as to the Council, no later than one working day from the date of their enactment.

(2) If the tenderers who submitted the challenge consider that the measures adopted are adequate to remedy the acts invoked as illegal, they will submit to the Council and the contracting authority a notification of waiving the challenge. The waiver notification shall cancel the obligations provided by Article 274 as being the contracting authority's responsibility."

24. In article 277, the paragraphs (1) and (2) shall be amended as follows:

"Article 277. - (1) The reception of a challenge by the contracting authority, for which the waiver has not been acknowledged according to the provisions of Article 276<sup>1</sup> paragraph (2) suspends of right the award procedure of public procurement until the expiry date of the term provided for in Article 280 paragraph (5). The suspension period shall start at the expiry date of the term provided for in:

a) Article 272 paragraph (4), if the challenge refers to acts of the contracting authority which were issued or which occurred before the opening of the tenders;

b) Article 205 paragraph (1), if the challenge refers to acts of the contracting authority which were issued or which occurred after the opening of the tenders.

(2) The contract concluded during the suspension period of the award procedure is null and void."

25. In Article 278, paragraphs (3) and (4) shall be amended as follows:

"(3) If the Council estimates that, besides the acts contested during the award procedure, there are also other acts that infringe the provisions of this emergency ordinance, not referred to in the challenge, than it shall notify the National Authority for Regulating and Monitoring Public Procurement, by submitting for this purpose all relevant data / documents in order to support the notice.

"(4) If the Council approves the challenge and decides on adopting a remedy measure as regards the contested document, it shall also establish the time limit for accomplishing it, which cannot be shorter than the term for seeking the review of the Council decision, as provided for in Article 280 paragraph (5)."

26. In Article 279, paragraph (3) shall be amended as follows:

"(3) The Council decision, adopted on the basis of paragraph (1), shall be justified and communicated to the parties, in written form, within a period of 3 days after it is rendered.

The decision, without its motivation, shall be published on the Council's web site, within the same period of time."

27. In Article 279, after paragraph (4) a new paragraph (5) shall be inserted, as follows:

"(5) The Council shall submit a copy of its motivated decision to the National Authority for Regulating and Monitoring Public Procurement, within the period of time provided for in paragraph (3):"

28. In Article 281, paragraph (1) shall be amended as follows:

"Article 281 - (1) The challenge shall be submitted to relevant Court or to the Council; in this latter case, the Council shall submit the file to the relevant Court within a period of 3 days maximum from the expiry date of term for applying the review."

29. In Article 296<sup>1</sup> paragraph (1) item b) shall be amended as follows:

" b) In the circumstances provided for in Article 205 paragraph (2), Article 277 paragraph (2) and Article 284 paragraph (2);".

## ARTICLE II

The Emergency Government Ordinance No 34/2006 regarding the award of the public procurement contracts, public works concession contracts and services concession contracts, published in the Official Gazette of Romania, Part I, No 418 of 15 May 2006, as approved with the subsequent amendments and completions by the Law No 337/2006, with the subsequent amendments and completions, as well as those adopted by this emergency ordinance, shall be republished, after being approved by law and the texts shall be renumbered.

PRIME MINISTER  
CĂLIN POPESCU TĂRICEANU

Countersigned by:

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The President of the National Authority  
for Regulating and  
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The Minister of Economy and Finances  
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Bucharest, 28 October 2008

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