

EMERGENCY ORDINANCE No 72 of 17 June 2009

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 426 of 23 June 2009

Whereas the Government Emergency Ordinance no. 19/2009 on measures in the field of public procurement legislation, which modifies and completes the Government Emergency Ordinance no. 34/2006, which entered into force on March 12, 2009, introduced many amendments of the legal framework on public procurement in Romania,

Taking into account the fact that, after the entry into force of the Government Emergency Ordinance no. 19/2009, a number of inconsistencies have been noticed between certain provisions of this emergency ordinance and the Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, likely to set off the procedure of infringement of the Community law by Romania, according to Article 226 of the EEC Treaty and to generate subsequently financial corrections for contracts financed by Community funds,

taking into account all of the above, and also the long period required by the parliamentary procedure, an emergency ordinance to amend the Government Emergency Ordinance no. 34/2006 regarding the award of the public procurement contracts, public works concession contracts and services concession contracts must be initiated, In order to further improve the regulatory framework of the public procurement.

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

The Government of Romania hereby adopts this emergency ordinance.

ARTICLE I

The Government Emergency 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 16, Paragraph (1) shall be amended as follows:

“Article 16. - (1) If the contracting authority awards a public procurement contract on the supply of services of the kind listed in Annex 2B, the obligation to apply this emergency ordinance is necessary only for contracts whose value is greater than the one provided for in Article 57 (2) and is limited to the provisions of Articles 35 – 38 and Article 56. Contestations regarding the procedure of awarding the services contracts of the category listed in Annex 2B are solved according to the provisions of chapter IX.”

2. In Article 77, Paragraph (2) shall be amended as follows:

“(2) In the case provided for in article 40 (2), the contracting authority has the obligation to make the awarding documentation available to the economic operator as soon as possible, in a period that shall not exceed 4 days from the date of receiving a request from the latter.”

3. Article 80 shall be amended as follows:

“Article 80. - The contracting authority shall open the tenders on 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, except

for the case where the deadline for submission of tenders was postponed after the suspension of the procedure.”

4. In Article 92, Paragraph (1) shall be amended as follows:

“Article 92. - (1) Notwithstanding the provisions of Article 91 (2), in as far as the clarifications are requested in reasonable time, the contracting authority’s answer to these requests must be sent no later than 6 days before the deadline set for submitting the tenders. In the case of accelerating the procedure of limited tender, the contracting authority’s answer must be sent no later than 4 days before the deadline set for submitting the tenders.”

5. In Article 115, Paragraph (2) shall be amended as follows:

“(2) In the case provided for in Article 40 (2), the contracting authority has the obligation to make the descriptive documentation available to the economic operator as soon as possible, in a period of time that shall not exceed 4 days from receiving a request from the latter.”

6. After Article 119, two new articles 119¹ and 119² shall be inserted as follows:

“Article 119¹. - (1) Any selected candidate has the right to require clarifications regarding the descriptive documentation.

(2) The contracting authority has the obligation to answer, clearly, completely and without ambiguities, as soon as possible, to any of the required clarification, in a period of time which shall not exceed, as a rule, 3 working days after receiving such a request from the economic operator.

(3) The contacting authority has the obligation to send the answers – accompanied by the respective questions – to all the selected candidates, taking the necessary measures not to disclose the identity of the person who requested those clarifications.

Article 119². - (1) Without prejudice to the provisions of Article 119¹ (2), in as far as the clarifications are requested in due time, the contracting authority’s answer to these requests must be sent no later than 6 days before the deadline set for beginning negotiations. In the case of accelerating the negotiation procedure, the contracting authority’s answer must be sent no later than 4 days before the deadline set for beginning negotiations.

(2) If the economic operator did not submit the request for clarification in due time, thus making the contracting authority unable to meet the deadline stipulated in paragraph (1), the latter is still obligated to answer the request for clarification, to the extent that the period required for the development and transmission makes it possible for the economic operators to receive this response before the deadline for starting negotiations.”

7. In article 122 point (e), the last sentence shall be amended as follows:

“As a general rule, the duration of such contracts, and also the duration of the renewed contracts can not exceed 3 years;”.

8. In Article 182, Paragraph (2) shall be amended as follows:

“(2) If the contracting authority has doubts concerning the personal situation of the candidates/tenderers, it has the right to request information directly from the competent authorities which issue documents as those provided for in Paragraph (1). As regards the cases mentioned in Article 180, in accordance with the domestic legislation of the State where the candidates or the tenderers are established, these requests are only related to natural and legal persons, including, where appropriate, company directors or any person with powers of representation, decision or control as regards the candidate or the tenderer.”

9. In Article 188, Paragraph (2) point (b) shall be amended as follows:

“h) information regarding the part of the contract which the economic operator may intend to subcontract;”

10. In Article 188 Paragraph (3), point (g) shall be amended as follows:

“g) information regarding the part of the contract which the economic operator may intend to subcontract.”

11. In Article 190, Paragraph (2) shall be amended as follows:

“(2) If the tenderer/candidate demonstrates its technical and professional capacity, invoking also the support offered, in accordance with the provisions of Paragraph (1), by another entity, he has the obligation to prove the support he benefits from, as a rule, by presenting an authenticated firm engagement by which the person confirms the fact that he will make available for the tenderer/candidate the invoked technical and professional resources. The entity that ensures the technical and professional support must not be in the situation that determines the exclusion from the award procedure, according to the provisions of Article 180.”

12. Article 205 shall be amended as follows:

“Article 205. - (1) The contracts/framework agreements that fall within the scope of the present emergency ordinance can be concluded only after the fulfilment of the terms of:

a) 11 days from the transmission date of the communication regarding the result of implementing the procedure, in the case when the estimated value, according to the provisions of article 23 and those of Chapter II Section 2 of the respective contract is bigger or equal than the thresholds provided by article 55 (2).

b) 6 days from the transmission date of the communication regarding the result of implementing the procedure, in the case when the estimated value, according to the provisions of article 23 and those of Chapter II Section 2 of the respective contract is equal or smaller than the value thresholds provided by article 55 (2).

(2) The contracts/framework agreements which fall within the scope of this Emergency Ordinance, concluded before the fulfilment of the time limits laid down in Paragraph (1), are invalid.”

(3) The observance of the deadlines provided for in paragraph (1) is optional in the following cases:

(a) when the present Emergency Ordinance does not stipulate the obligation of publishing an announcement or an invitation to tender;

b) when the contract/framework agreement is to be concluded with an economic operator which used to be the single tenderer to the respective awarding procedure and there are no other economic operators involved in the award procedure;

c) when a contract subsequent to a framework agreement is awarded or following the use of a dynamic procurement system.”

13. In article 209, a new paragraph (1¹) shall be inserted after paragraph (1), as follows:

“(1¹) The provisions of Paragraph (1) can not affect the obligation of the contracting authority to cancel a tender procedure following a Court ruling or a decision of the National Council for Resolution of Contestations in this regard.”

14. In Article 213 Paragraph (1), point o) shall be amended as follows:

“o) the activity report and, if necessary, the progress notes and the advisory opinion issued in accordance with the legal provisions concerning the verification function of the procedural aspects related to the process of awarding public procurement contracts, if applicable;”.

15. In Article 223, Paragraph (2) shall be amended as follows:

“(2) The publication in the Official Journal of the European Union is mandatory for the concession of public works contract, in the situations in which its estimated value is higher than the LEI equivalency of 5,000,000 EUR.”

16. In Article 227, Paragraph (1) shall be amended as follows:

“Article 227. - (1) If the concessionaire does not have the capacity of contracting authority, according to the provisions of Article 8 points (a) – (c), he still has the obligation, when awarding a work or service contract to a third party to publish a contract notice in the Official Journal of The European Union, in the ESPP and in the Official Gazette of Romania, Part VI – Public procurement, in all situations in which the estimated value of the contract, that will be awarded is higher than the LEI equivalency of EUR 5,000,000, except for the cases provided for in Article 122. Defining the estimated value of the contract is subject to the rules stipulated in Article 23 and in Chapter II Section 2.”

17. In Article 255, after Paragraph (1), three new paragraphs shall be inserted, paragraphs (1¹) to (1³), as follows:

“(1¹) If, on the same subject, both a contestation before the National Council for Resolution of Contestations, and an action before the Court have been instituted, for a sound judgment, the latter can decide the connection of cases, at the request of the parties or ex officio, by conclusion. The conclusion can only be contested together with the substance.

(1²) National Council for Resolution of Contestations will send the file within 3 days from the notification of the conclusion provided for in Paragraph (1¹).

(1³) For the purposes laid down in Paragraph (1¹), the contracting authority will inform the Court about the existence of the contestation provided for in the same Paragraph.”

18. In Article 255, the introductory part of Paragraph (2) and point (a) shall be amended as follows:

“(2) Within the meaning of Paragraph (1), aggrieved party means any economic operator who:

(a) has or used to have a lawful interest related to the award procedure;”.

19. In Article 255, after Paragraph (3) a new Paragraph (4) shall be inserted, as follows:

“(4) Any reference, throughout this chapter, to the application of the award procedure includes all cases mentioned in Article 9, as well as any other contracts or procedures which fall within the scope of the provisions of this emergency ordinance.”

20. Article 256 shall be amended as follows:

“Article 256. - (1) For the purpose of solving the contestations using the administrative-judicial approach, the aggrieved party has the right to address The National Council for Resolution of Contestations, in accordance with the provisions of articles 256² and 270-271.

(2) Notwithstanding the provisions of Paragraph (1), the litigations regarding the award procedures for services and/or works related to transport infrastructure of national interest, as it is defined by the legislation in force, are under the exclusive jurisdiction of the Court of Appeal in Bucharest.”

21. Article 256¹ shall be amended as follows:

“Article 256¹. - (1) Before applying to the competent Court, the aggrieved party notifies the contracting authority on the alleged violation of the legal provisions on public procurement and on the intention to bring the matter to the competent Court. The provisions of Article 205 and 256² shall remain applicable.

(2) The absence of the notification provided for in Paragraph (1) does not impede the lodging of the request before the competent Court.

(3) The notification provided for in Paragraph (1) does not have as an effect the suspension de jure of the award procedure. After receiving the notification, the contracting authority may adopt any measures it considers necessary to remedy the alleged violation, including the suspension of the award procedure or the revocation of a document issued within the procedure.

(4) The measures adopted under Paragraph (3) shall be communicated within one working day both to the person who notified the contracting authority and to the other economic operators involved in the award procedure.

(5) The aggrieved party who notified the contracting authority, according to the provisions of paragraph (1) may immediately bring the matter before the competent Court, without having to wait for the communication of the measures taken by the contracting authority under Paragraph (3).

(6) The aggrieved party who, receiving the communication provided for in Paragraph (4), considers that the measures taken are sufficient to remedy the alleged violation, shall send a notice of waiver of the right to institute legal proceedings or, where appropriate, waiver to judge the action concerning that violation.

(7) The provisions of Paragraph (1) – (6) shall apply accordingly, in the case provided for in Article 256 Paragraph (1).”

22. In Article 256², Paragraph (1) shall be amended as follows:

“Article 256². - (1) The aggrieved party can bring the matter before the National Council for Resolution of Contestations or, where appropriate, the competent Court with a view to annulling the document and/or to acknowledge the alleged right or the lawful interest, within:

a) 10 days starting with the day following its acknowledgment, in the terms of this emergency ordinance, about an act of the contracting authority considered unlawful, if the value of the contract to be awarded, estimated in accordance with the provisions of Article 23 and those of Chapter II Section 2 is higher than the value thresholds provided for in Article 55 (2);

(a) 5 days starting with the day following its acknowledgment, in terms of this emergency ordinance, about an act of the contracting authority considered unlawful, if the contract value to be awarded, estimated in accordance with the provisions of Article 23 and those of Chapter II Section 2 is equal to or smaller than the value thresholds provided for in Article 55 (2).”

23. In Article 263, the Paragraphs (2), (3), and (5) shall be amended as follows:

“(2) The activity of the Council shall be evaluated monthly by a commission.

(3) The commission provided for in Paragraph (2) is made up of 5 members, as follows:

(a) a representative of the National Authority for Regulating and Monitoring Public Procurement;

b) 2 representatives of the Romanian Parliament, one Senator and one Deputy, designated by the two Chambers of the Parliament;

(c) a representative of the National Agency of Civil Servants;

(d) a representative of the Competition Council.

.....
(5) The evaluation procedure of the Council’s activity and of its President aims exclusively at the administrative and organizational activity and is established by order of the Secretary General of Government, published in the Official Gazette of Romania, part I.”

24. In Article 277, Paragraph (3) shall be amended as follows:

“(3) In case the Council and the contracting authority receive a contestation, for which it has not been taken waiver according to the provisions of Paragraph (2), the contracting authority does not have the right to conclude the contract until the expiry date of the deadline provided for in Article 281 (1) if the interested party did not lodge a complaint before the

competent Court. If the expiry of the deadline provided for in Article 281 (1) is prior to the expiry of the deadlines provided for in Article 205 (1) and in Article 206 (3), including when these deadlines refer to the cases provided for in Article 287¹² (1) and in Article 287¹³ point (a), the contracting authority has the right to conclude the contract only after the fulfilment of the respective waiting deadlines. If the Council's decision has been contested with by complaint, the provisions of Article 287⁷ and 287⁸ shall apply accordingly.”

25. In Article 285, Paragraph (3) shall be amended as follows:

“(3) If the Court admits the complaint, modifies the decision of the Council and finds out that the act of the contracting authority has infringed the provisions of the public procurement legislation and the contract has been concluded before ruling, thus infringing the provisions of Article 277 (3), the provisions of Article 287¹⁰ (1) point (b) Paragraphs (2), (3), (4), (5) and (6) or, if appropriate, of Article 287¹¹ shall apply accordingly.”

26. Article 286 shall be amended as follows:

“Article 286. - (1) Processes and requests for documents of the contracting authorities, providing compensation for damages in the award procedure, as well as those on the execution, the nullity, cancellation, resolution, termination or unilateral withdrawal of public procurement contracts are solved in the first instance by the Department of administrative and fiscal litigation of the Court in the jurisdiction of which the contracting authority is situated, except for the litigations relating to the tender procedures for service and/or works related to transport infrastructure of national interest, which is solved at first instance by the Court of Appeal in Bucharest.

(2) Disputes regarding the conduct of award procedures that fall within the scope of this emergency ordinance, as well as those regarding the rights and obligations under these emergency procedures are solved immediately and with priority, under the provisions of Articles 720² – 720⁷ and Article 720⁹ of the Code of Civil Procedure, which apply accordingly.”

27. In Article 287⁸, Paragraph (2) shall be amended as follows:

“(2) If the decision through which the Court solved the case is communicated before the expiry of the deadlines provided for in Article 205 (1) and in Article 206 (3), including when these deadlines concern the cases provided for in Article 287¹² (1) and in Article 287¹³ point (a), the contracting authority has the right to conclude the contract only after reaching the respective deadlines.”

28. Article 287¹⁰ shall be amended as follows:

“Article 287¹⁰. - (1) The Court ascertains the nullity of the contract in the following cases:

(a) the contracting authority awarded the contract without complying with the obligations concerning the publication of a notice/invitation to tender under this emergency ordinance;

(b) the infringement of the provisions of Article 205 (1), Article 206 (3), Article 277 (3) or those of Article 287⁸ (1) and (2), if this infringement has deprived the economic operator concerned of the opportunity to institute a legal remedy before the conclusion of the contract, if this infringement is combined with the infringement of other provisions on public procurement, if this latter infringement has affected the chances of the economic operator concerned to get the contract;

(c) the contracting authority did not observe the provisions of Article 150 or those of Articles 158 – 160.

(2) Notwithstanding the provisions of Paragraph (1), if the Court considers, after examining all relevant aspects, that overriding reasons of general interest impose the maintaining of the effects of the contract, it will order, instead, alternative sanctions, as follows:

(a) the limitation of the effects of the contract, through the reduction of its execution deadline; and/or

b) the application of a fine to the contracting authority, between 2% and 15% of the value of the contract object, its amount being inversely proportional with the possibility of limiting the effects of the contract, according to the provisions of point (a).

(3) When applying the alternative sanctions provided for in Paragraph (2), the Court will keep in view that they are effective, proportionate and dissuasive.

(4) Compensation is not an adequate alternative sanction within the meaning of Paragraph (2).

(5) The economic interests related to the capacity of the contract to produce effects can be kept in view as an overriding reason only if, in exceptional circumstances, the absence of effects would lead to disproportionate consequences. The economic interests in direct connection with the contract, such as costs arising from delays in the execution of the contract, costs resulting from the launch of a new award procedure, costs resulting from changing the economic operator who will carry out the contract or costs of legal obligations arising from the lack of effects of the contract, do not constitute overriding reasons of general interest.

(6) In all the cases in which the sanction of nullity provided for in Paragraph (1) can not have retroactive effect, because the elimination of executed contractual obligations is impossible, the Court will apply, in addition, the sanction provided for in Paragraph (2) (b).”

29. The Article 287¹¹ shall be amended as follows:

“Article 287¹¹. - In case of an infringement of the provisions of Article 205 (1), Article 206 (3), Article 277 (3) or those of Article 287⁸ (1) and (2), which is not subject to Article 287¹⁰ (1) (b), the Court may decide, after considering all relevant aspects, whether it will ascertain the nullity of the contract or it is enough to order alternative sanctions such as those provided for in Article 287¹⁰ (2).”

30. In Article 287¹², Paragraph (1) shall be amended as follows:

“Article 287¹². - (1) The provisions of Article 287¹⁰ (1) (a) do not apply when the contracting authority, considering that it is covered by one of the cases provided for in this emergency ordinance in which it has the right not to submit for publication a notice/invitation to tender, proceeded as follows:

a) voluntarily published in ESPP and in the Official Journal of the European Union a notice in order to ensure transparency, expressing its intention to conclude the contract. The notice for ensuring transparency must contain the following information: the name and the contact details of the contracting authority, the description of the contract object, a justification of the contracting authority’s decision to award the contract without prior publication in ESPP and in the Official Journal of the European Union of a tender notice, the name and the contact details of the economic operator in whose favour an awarding decision was taken and, if the case may be, any other information deemed useful by the contracting authority;

b) concluded the contract observing, by its own initiative, the provisions of Article 205 (1) the terms beginning, in this case, from the publication date of the notice provided for in point (a).”

31. Article 287¹³ shall be amended as follows:

“Article 287¹³. - The provisions of Article 287¹⁰ (1) (c) do not apply when the contracting authority, considering that it observed the provisions of Article 150 or, as the case may be, of Articles 158 – 160, proceeded as follows:

a) communicated to the involved tenderers the decision to award the contract, subject to the provisions of Article 206 (1) and (2) and those of Article 207, subject to the provisions of Article 208; and

b) concluded the contract observing, by its own initiative, the provisions of Article 205 (1) and those of Article 206 (3) the terms beginning, in this case, from the date of transmission of the notice provided for in point (a).”

32. Article 287¹⁴ shall be amended as follows:

“Article 287¹⁴. - (1) The declaration of the nullity of the contract, in the conditions provided for in Article 287¹⁰ (1), can be required by a separate action within:

(a) 30 days at most starting with the day following:

- the publication of the notice of the contract award, in accordance with the provisions of Article 47 (2), Articles 48, 50 and 56, provided that the notice contains a justification for the decision of the contracting authority to award the contract without prior publication of a notice of invitation to tender in the Official Journal of the European Union; or

- the informing by the contracting authority of the interested tenderers and candidates about the conclusion of the contract, provided that the information is accompanied by a summary of the relevant reasons set out in Article 207, subject to the provisions of Article 208. This option applies also in the cases provided for in Article 205 (3) (c).

b) 6 months at most starting with the day following the conclusion of the contract, in the cases in which the conditions provided for in point (a) have not been observed.

(2) The request submitted after the expiry of the time limits provided for in Paragraph (1) is solved according to the provisions of Article 287¹¹.”

33. Article 287¹⁷ shall be amended as follows:

“Article 287¹⁷. - (1) The requests submitted, under the provisions of this emergency ordinance, to the Courts, having as an object the contracts falling within its scope, as well as those for compensating the damages are charged, according to the value, as follows:

(a) up to the value of 40,000 LEI inclusively - 1% of this value;

b) between 40,001 LEI and 400,000 LEI inclusively - 400 LEI + 0.1% of what exceeds 40,001 LEI;

c) between 400,001 LEI and 4,000,000 LEI inclusively - 760 LEI + 0.01% of what exceeds 400,001 LEI;

d) between 4,000,001 LEI and 40,000,000 LEI inclusively - 1,120 LEI + 0.001% of what exceeds 4,000,001 LEI;

e) between 40,000,001 LEI and 400,000,000 LEI inclusively - 1,480 LEI + 0.0001% of what exceeds 40,000,001 LEI;

f) between 400,000,001 LEI and 4,000,000,000 LEI inclusively - 1,840 LEI + 0.00001% of what exceeds 400,000,001 LEI;

g) over 4,000,000,000 LEI – 2,200 LEI.

(2) Requests concerning the cancellation of the non-patrimonial legal act, for compelling the authority to issue a non-patrimonial legal act, for the recognition of the claimed right and other such requests which cannot be rated in money are charged with 4 LEI.

(3) The provisions of Article 14 of Law No 146/1997 on judicial stamp duties, with the subsequent amendments and completions, remain applicable.”

34. In Article 293, point (j) shall be amended as follows:

“j) the use of other criteria for awarding the public procurement contract than the ones provided for in Article 198, including the use of qualification and selection criteria as factors in the evaluation of tenders;”.

35. In Article 295, Paragraph (2) shall be amended as follows:

“(2) The enforcement of the sanction of the contraventional fine shall reach the status of limitation in a term of 24 months from the date when the infringement was committed.”

36. In article 296¹, point (a) shall be amended as follows:
“(a) the contracting authority is in one of the cases referred to in Article 287¹⁰ (1);”.

ARTICLE II

The Government Emergency 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, approved with amendments and completions by Law No 337/2006, with the subsequent amendments and completions, as well as with those adopted by this emergency ordinance, shall be republished in the Official Gazette of Romania, Part I, after its approval by law and the texts shall be renumbered.

PRIME MINISTER
EMIL BOC

Countersigned by:

The Secretary General of the Government,
Daniela Nicoleta Andreescu

Head of the Department for European Affairs,
Vasile Pușcaș

Vice Prime-Minister
The Minister of Administration and Interior,
Dan Nica

The President of the National Authority
for Regulating and Monitoring
Public Procurement,
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The Minister of Public Finances,
Gheorghe Pogea

The Minister
of Transports and Infrastructure,
Radu Mircea Berceanu

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