

DECISION No 834 of 22 July 2009

amending and completing the Government Decision No 925/2006 for the approval of the rules of implementation of the provisions regarding the award of public procurement contracts of 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

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Under Article 108 of the Romanian Constitution, republished,

The Government of Romania hereby adopts this decision.

SOLE ARTICLE

Government Decision No 925/2006 for the approval of the rules of implementation of the provisions regarding the award of the public procurement contracts of 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 625 of 20 July 2006, with the subsequent amendments and completions, shall be amended and completed as follows:

1. In Article 2, after paragraph (3) a new paragraph (4) shall be inserted, as follows:

“(4) The contracting authority is responsible for the method of awarding the public procurement contract/framework agreement, by observing all the applicable legal provisions.”

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

“Article 3. - (1) In the application of these rules, the contracting authority, through the internal department specialized in the award of public procurement contracts, organized according to Article 304¹ of the emergency ordinance shall have the following main responsibilities:

a) Drawing up and, if applicable, updating, based on requirements submitted by other departments of the contracting authority, an annual program of public procurements as a management tool based on which the acquisition process is planned;

b) Drawing up or, if appropriate, coordinating the activity of drawing up the award documentation or, on organizing a contest for solutions, the contest documentation;

c) Accomplishing the obligations related to advertising, as provided by the emergency ordinance;

d) Applying and completing the award procedures;

e) Establishing and preserving the public procurement file.”

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

(4) The winning tenderer cannot be requested to pay taxes, commissions or fees of any kind for the payment of the advisor providing such services.”

4. In article 6, the paragraphs (1) and (2) shall be amended as follows:

“Article 6. - (1) The contracting authority shall be entitled to initiate the award procedure only after the award documentation is drawn up or, as appropriate, the contest documentation.

(2) The tenders' period of availability, referred to in the announcement/invitation and the award documentation shall be established so that it extends up to the time of concluding the contract/the framework agreement. When establishing the tenders' period of availability, the contracting authority will take into consideration the estimations regarding the period necessary for the analysis and the evaluation of tenders, the time required for the verifications related to these activities, and the legal period provided for solving the possible challenges. Notwithstanding the provisions of Article 93 paragraph (3) and assuming the implications of the provisions of Article 97 paragraph (4) item b), the contracting authority shall request

extending the tenders' period of availability and, as appropriate, the tender guarantee, under exceptional circumstances requiring such an extension."

5. Article 9 shall be amended as follows:

"Article 9. - Within the meaning of the provisions of Article 8 paragraph (1), it shall be presumed that the minimum qualification requirements are disproportionate in relationship with the nature and the complexity of the public procurement contract to be awarded, if they impose the accomplishment of certain conditions such as:

a) The amount of the values/quantities supplied, the services provided and the portfolio of works included in the contract/the contracts submitted by the economic operator as a proof of its similar experience should be greater than the amount/quantity of products/services/works that shall be provided/delivered/executed on the basis of the contract to be awarded;

b) The economic operator's value of turnover should be higher than the estimated value of the contract, multiplied by 2;

c) Proving a minimum level of the financial indicator "general liquidity" in case of awarding a contract for a period of accomplishment of less than 3 months in case of awarding a contract with successive execution, for a period higher than 3 months, but for which the payments related to services are to be made at intervals of less than 60 days after their date of accomplishment;

d) The level of the financial indicator "general liquidity" should exceed the rate of 100 %, in case of awarding a contract not falling within the category of those provided for at item c);

e) Proving a minimum level of the financial indicator "solvency" in case the economic operators submitted documents showing that they are not in any of the situations referred to in Article 181 item a) or b) of the emergency ordinance."

6. In Article 11, after paragraph (2) a new paragraph (2¹) shall be inserted, as follows:

"(2¹) Within the meaning of the provisions of paragraph (2), it shall be considered to be included within the category of adequate means any official site of a public institution or other entity authorized by law for this purpose, to the extent that the data source should contain updated information.

7. In Article 11, paragraph (4) shall be amended as follows:

"(4) In order to prove the accomplishment of the qualification criteria provided for in Article 176 of the emergency ordinance, the tenderers shall be entitled to present only a statutory declaration initially, signed by their legal representative, confirming that they accomplish the qualification requirements as requested by the award documentation. The statement shall be accompanied by an appendix in which the tenderer must state briefly and precisely the method of accomplishing the requirements, including, if requested, different values, quantities or the like."

8. In Article 11, after paragraph (4), three paragraphs shall be inserted, paragraphs (5), (6) and (7), as follows:

"(5) In case they make use of the right provided for in paragraph (4), the tenderers shall submit/fill in the adequate certificates/documents to prove/confirm the fulfillment of the qualification requirements, when they receive from the contracting authority a request in this respect, within the period provided for in the request. This period may not be less than 3 working days.

(6) The contracting authority should ensure that the tenderer whose offer is declared the winner presents, no later than the conclusion of the report of award procedure, the certificates/documents provided for in paragraph (5), which are included in the public procurement file. The public procurement file should include certificates/documents of other tenderers, provided that decisions to reject the tenders based on information from these certificates/documents were adopted during the evaluation process.

(7) The contracting authority shall not have the right to require the potential subcontractors to meet certain qualification criteria, but the human and the material resources of the

subcontractors declared shall be taken into account for their involvement in the contract to be accomplished, provided that documents relevant in this respect are submitted.”

9. After Article 11, a new article 11¹ shall be inserted as follows:

“Article 11¹. - (1) If, in accordance with the provisions of Article 186 and 190 of the emergency ordinance, the tenderer/applicant proves their economic and financial situation or the technical and/or professional capacity by presenting a support commitment from a third party, the contracting authority shall take into consideration this support when verifying the fulfilment of the minimum requirements imposed by the award documentation.

(2) In order to take into consideration the support offered, the strong commitment provided for in Article 186 paragraph (2) and in Article 190 paragraph (2) of the emergency ordinance should constitute a legal instrument to ensure the right of the contracting authority to legitimately require the accomplishment of certain obligations by the supporting person.

(3) If the third party support refers to ensuring resources that can be actually made available to tenderers – financial funds, machineries, equipment, personnel – the strong commitment presented by the tenderer/applicant should provide for such resources and emphasise that their availability shall be unconditional, depending on the needs that might occur during the accomplishment of the contract.

(4) If the third party support aims at accomplishing the minimum qualification requirements such as the similar experience reflected by the presentation of lists of products/services/works supplied/provided/executed during a previous period or the accomplishment of a minimum level of turnover in the business activity related to the object of the public procurement contract, the strong commitment presented by the applicant/tenderer should ensure the contracting authority that, should the contractor encounter difficulties during the performance of the contract, the supporting person commits itself to provide the full and lawful accomplishment of the contractual obligations through direct involvement.

(5) In the situations provided for in the paragraphs (3) and (4), the supporting party shall be liable for the damages caused to the contracting authority as a result of failure to observe the obligations mentioned in the commitment, and the latter one shall have the possibility of opening a direct action against the supporting party.

(6) The strong commitment presented by the winning tenderer is part of the public procurement contract.”

10. In Article 12, paragraph (1) shall be amended as follows:

“Article 12. - (1) During the first phase of the restricted tender, of the competitive dialogue, and of the negotiation with prior publication of a tender notice, the contracting authority shall use only the criteria prescribed by the tender notice in order to select/pre-select the applicants.

11. In Article 12, after paragraph (3) a new paragraph (4) shall be inserted, as follows:

“(4) The provisions of Article 11 paragraphs (4), (5) and (6) are not applicable to the phase of selection/pre-selection of applicants participating in the restricted tender procedure, competitive dialogue or negotiation.”

12. In Article 15, paragraph (1) shall be amended as follows:

“Article 15. - (1) The contracting authority shall not be entitled to use the qualification and selection criteria provided for in Article 176 of the Emergency Ordinance as factors in the tender evaluation.”

13. In Article 15, after paragraph (4) a new paragraph (5) shall be inserted, as follows:

“(5) If, within a procedure, the contract is split into lots, the allocation criterion used, if applicable, should be the same for all lots concerned.”

14. In Article 22, paragraph (1) shall be amended as follows:

“Article 22. - (1) After 31 December 2006, the contracting authority shall submit for publication the tender notices, the participation notices and the award notices, including the corrigenda to such notices, to the ESPP operator.”

15. Article 26 shall be amended as follows:

“Article 26. - (1) The notices sent after remediation of the errors/omissions identified according to the provisions of Article 25 shall be considered new notices and shall be subject to all transmission and verification rules provided for in this section.

(2) If, after publishing a notice, certain changes occur compared to the information already published, the contracting authority shall submit for publication a notice from the corrigendum category to the initial notice, within the terms provided for in the European Commission Regulation no. 1 564/2005, which establishes the standard format for the publication notices within the award procedures provided for in the Directives no. 17/2004/CE and 18/2004/CE.”

16. Articles 29 and 30 shall be repealed.

17. In article 31, paragraphs (2) and (3) shall be repealed.

18. In article 33, the paragraphs (1), (3), (4) and (5) shall be amended as follows:

“Article 33. - (1) The contracting authority shall open the tenders and, if appropriate, other documents submitted by the applicants, at the date, the time and the place mentioned in the participation notice. If it becomes necessary to extend the period of submitting the tenders, the contracting authority shall mention this change by means of a corrigendum to the participation notice, which must be published at least 3 days before the date initially announced for opening the tenders.

.....
(3) During the opening meeting no tender shall be rejected, except for those falling within one of the following circumstances:

a) They have been submitted after the submission date and deadline or sent to a different address other than those provided by the participation notice;

b) They are not accompanied by the participation guarantee in the amount, the form and having the availability period requested by the award documentation.

(4) The opening meeting shall be concluded by means of a minute signed by the members of the evaluation committee and the representatives of the economic operators attending the meeting, which records the method of conducting the meeting, the formal issues identified when opening the tenders, the main elements of each tender, also noting the list of documents submitted by each economic operator. The contracting authority shall submit a copy of the minute to all the economic operators participating in the award procedure, within one working day from the opening, whether or not they attended the meeting.

(5) The provisions of paragraph (4) shall not be applicable for the case provided for in Article 216 of the emergency ordinance, the actions’ traceability being ensured by default by ESPP.”

19. In article 36 paragraph (1), item b) shall be amended as follows:

“b) It was submitted by a tenderer who does not fulfil one or more of the qualification requirements established in the award documentation or has not presented, according to Article 11 paragraphs (4) and (5), relevant documents in this respect;”.

20. In article 36 paragraph (1), item b¹) shall be repealed.

21. In article 36 paragraph (1), item e) shall be amended as follows:

“e) The price, VAT excluded, not included in the financial proposal, exceeds the estimated value communicated through the participation notice/invitation and there is no possibility of making available supplementary funds for the accomplishment of the public procurement contract concerned;”.

22. In article 36 paragraph (1), after item e) a new item e¹) shall be inserted as follows:

“e¹) The price, VAT excluded, in the financial proposal, exceeds the estimated value communicated through the participation notice/invitation and, although there is a possibility of making available supplementary funds for the accomplishment of the public procurement contract concerned, at least one of the following situations are met:

- The price is more than 10 % higher than the estimated value referred to in the participation notice/invitation;

- The conclusion of the contract at the mentioned price would lead to circumventing the application of those provisions of the emergency ordinance which establish obligations of the contracting authority in relation with certain threshold values;”.

23. In article 36 paragraph (1), item f) shall be amended as follows:

“f) Following the evaluations provided for in Articles 202 and 203 of the emergency ordinance it is observed that the offer has an unusually low price for what is to be provided/delivered/executed, so that the accomplishment of the contract according to the quantity and quality parameters required by the specifications cannot be ensured.”

24. In Article 36, paragraph (2) shall be amended as follows:

“(2) The offer shall be considered not compliant in the following circumstances:

a) It does not fulfil the specification requirements properly;

b) It contains proposals to amend the contract terms established by the contracting authority in the award documentation, which are obviously disadvantageous for the latter, and the tenderers, although informed on that situation, do not accept quitting those clauses;

c) The financial proposal contains prices that are not the result of free competition and that cannot be justified;

d) Within an award procedure for which breaking-up on lots was provided, the tender is presented without making a distinction between the lots tendered, therefore making it impossible to apply the award criteria for each lot.”

25. Article 36¹ shall be amended as follows:

“Article 36 ¹ - (1) Within the meaning of Article 202 paragraph (1) of the Emergency Ordinance, the tender presents an apparently unusually low price in relation with what it is to be supplied, executed or provided when the tender price, VAT excluded, is less than 85 % of the estimated value of the contract or, if there are at least 5 tenders in the award procedure that are not under the circumstances provided for in Article 36 paragraph (1) items a) to e) and of paragraph (2), when the tender price is less than 85 % of the arithmetic average of the tenders.

(2) If, during evaluation, it is observed that there is a tender with an apparently unusually low price within the meaning of paragraph (1), the contracting authority shall carry out detailed verifications regarding the issues provided for in Article 202 paragraph (2) of the emergency ordinance.

(3) In order to accomplish the verifications provided for in paragraph (2), the contracting authority shall also request from the tenderer documents regarding, as appropriate, the prices from suppliers, the stocks of raw materials and materials, the organization and the methods used during the work process, the wage levels of the labour force, performance and costs involved by certain machinery or work equipment.

(4) If the tenderer shall fail to provide the required information or such information shall not justify the apparently unusually low price, the offer shall be subject to the provisions of Article 36 paragraph (1) item f).”

26. In Article 38, paragraph (4) shall be amended as follows:

“(4) During the final phase of organizing the electronic auction, the final ranking shall be established taking into consideration the results obtained in the repetitive tender process carried out during that phase. The refusal of an economic operator to register with the ESPP in order to participate in the final stage of the electronic auction is equivalent to withdrawing the offer, and in this case the provisions of Article 87 paragraph (1) item a) shall be applicable.”

27. Article 39 shall be amended as follows:

“Article 39. - (1) After having completed the evaluation of tenders, the evaluation committee shall draw up, in accordance with the provisions of Article 213 paragraph (2) of the emergency ordinance, a report of the award procedure, approved by the head of the contracting authority or the person appointed in this respect.

(2) The head of the contracting authority or person appointed in this respect shall take the measures necessary to inform all the tenderers about the result of their application in the

award procedure, according to the provisions of Articles 206 to 208 of the emergency ordinance.”

28. In Article 43, Paragraph 1 shall be repealed.

29. In Article 43, Paragraphs 2 and 3 shall be amended as follows:

“(2) After having completed the selection of applicants, the evaluation committee shall draw up an interim report, which shall be approved by the head of the contracting authority or the person appointed in this respect.

(3) The head of the contracting authority or the person appointed in this respect shall take the measures necessary to inform all the applicants as regards the result of the selection, according to the provisions of Articles 206 to 208 of the emergency ordinance.”

30. In Article 48, Paragraph 1 shall be repealed.

31. In Article 48, Paragraphs 2 and 3 shall be amended as follows:

“(2) After having completed the pre-selection of applicants, the evaluation committee shall draw up an interim report, which shall be approved by the head of the contracting authority or the person appointed in this respect.

(3) The head of the contracting authority or person appointed in this respect shall take the measures necessary to inform all the applicants as regards the result of the pre-selection, according to the provisions of Article 206 to 208 of the emergency ordinance.”

32. Article 50 shall be amended as follows:

“Article 50 - (1) The contracting authority shall be entitled to conduct the dialogue and the intermediate rounds, aimed at reducing the number of solutions discussed, provided that the following conditions are cumulatively met:

a) This possibility was provided for in the descriptive documentation;

b) The number of participants in the dialogue is large enough so that such a reduction should not affect the real competition.

(2) within the meaning of Paragraph 1, the contracting authority shall be entitled to organize, after, following dialogue with each of the participants, some of the issues referred to in Article 49 Paragraph 1 were clarified, intermediate rounds during which the participants in the dialogue are to submit partial technical and/or financial proposals.

(3) The contracting authority shall inform all the participants in the dialogue of the method of developing the intermediate round, and the possible applicable evaluation factors and their specific method of implementation in order to reduce the number of participants.

(4) After having completed the intermediary round of reducing the number of participants in the dialogue, the evaluation committee shall draw up an interim report, which shall be approved by the head of the contracting authority or the person appointed in this respect.

(5) The head of the contracting authority or person appointed in this respect shall take the measures necessary to inform all the participants in the dialogue as regards the result of the intermediary round, according to the provisions of Article 206 to 208 of the emergency ordinance.

(6) The next round of dialogue shall be developed only with the participants who remained in the competition after the conclusion of the intermediate round previously organized. The participants who remained in the competition, once admitted as a result of organizing an intermediate round, shall not be entitled, during the next rounds, or when submitting the final offer, to modify their commitments under the partial technical and/or financial proposals they provided only in order to improve them.”

33. In Article 52, Paragraph (2) shall be amended as follows:

“(2) The provisions of Articles 31 to 39 shall apply accordingly.”

34. After Article 53, two new Articles 53¹ and 53² shall be inserted as follows:

“Article 53¹. - During the period comprised between the date of publishing the participation notice and the deadline for submitting applications, the contracting authority shall ensure for any economic operator the possibility to obtain complete information regarding the conditions of participation in the award procedure.

Article 53². - (1) After having completed the pre-selection of applicants, the evaluation committee shall draw up an interim report, which shall be approved by the head of the contracting authority or the person appointed in this respect.

(2) The head of the contracting authority or person appointed in this respect shall take the measures necessary to inform all the applicants as regards the result of the pre-selection, according to the provisions of Article 206 to 208 of the emergency ordinance.”

35. Article 54 shall be amended as follows:

“Article 54. - (1) The contracting authority shall organize, during the second phase of the award procedure, meetings with each pre-selected applicant, within which negotiations are to be developed as regards the technical and the financial proposal.

(2) Each participant in the round of negotiations shall present, depending on the needs, the objectives and the constraints of the contracting authority, as emphasized in this descriptive documentation, a preliminary tender proposal, which shall constitute the starting point of negotiations.

(3) The purpose of the negotiations shall be the improvement of the preliminary offer and its adjustment to the specific conditions in which the future contract shall be developed. At the end of each meeting, the committee shall record the issues discussed and the matters agreed in a meeting minute, to be signed by all the participants in the negotiations.”

36. Article 56 shall be amended as follows:

“Article 56. - (1) The negotiations shall be developed until the moment when each participant in the negotiations declares that the preliminary offer presented can no longer be improved, a fact to be explicitly recorded in the meeting minute.

(2) If, during negotiations, the committee notices that no significant improvements of the preliminary offer as compared to previous meeting/rounds are registered, it shall be entitled to establish a final meeting with each applicant. During this meeting, each applicant shall present the final elements of the technical and financial proposal for which the award criteria shall be applied.”

37. In article 62, Paragraphs (2) and (3) shall be repealed.

38. In article 65, after item f), a new item g) shall be inserted as follows:

“g) It shall not be entitled to award contracts whose cumulated value is higher than a value whose exceeding would lead to circumventing the application of those provisions of the emergency ordinance which establish the obligations of the contracting authority in relation to certain value thresholds.”

39. In article 67 paragraph (1), item a) shall be amended as follows:

“a) They shall not conclude with another economic operator, during the period of the framework agreement, a contract having as object the purchase of products/services/works subject to the framework agreement, except for the following cases:

- The economic operator/operators signatory/signatories of the agreement no longer has/have the capacity to respond to the requests of the contracting authority, or

- The contracting authority is in one of the situations provided for in Article 65 item g), in the latter case without prejudice to the rules estimating the value of the public procurement contract;”.

40. In Article 69, Paragraph (5) shall be amended as follows:

“(5) During the re-tender process, the economic operators shall be entitled to amend the elements/conditions subject to restarting the tender only in order to improve them and without affecting the elements/conditions established as not amendable according to the provisions of Article 68 Paragraph (2) item a). If the possibility of adjusting the price is provided for, the enhancement of this element shall be correlated to the updated value to be obtained after applying the adjustment coefficients.”

41. In Article 70, Paragraph (2) shall be amended as follows:

“(2) If the economic operator to whom the contracting authority sends a request to conclude a subsequent contract is unable to answer this request due to own fault, the contracting

authority shall be entitled to initiate a new award procedure for acquiring the entire necessary quantity, provided that:

- a) The framework agreement is concluded only with the economic operator, or
- b) Although the framework agreement is concluded with other business operators, they are also unable to answer that request.”

42. In Article 71, Paragraphs (1) and (2) shall be amended as follows:

“Article 71. - (1) The contracting authority shall appoint, for the award of public procurement contracts, the persons responsible for evaluating the tenders, in order to set up an evaluation committee.

(2) The evaluation committee should include specialists from the field of object of the contract to be awarded and shall be appointed from the specialized internal department provided for in Article 3 Paragraph (1). The evaluation committee may also nominate members from other departments of the contracting authority or, if the final beneficiary of the contract is another contracting authority, from within that contracting authority.

43. In Article 72, Paragraph (1) shall be amended as follows:

“Article 72. - (1) The contracting authority shall appoint a person responsible for the award procedure, who shall also be the president of the evaluation committee. The president may also be member of the evaluation committee or his role may be limited only to issues related to organization and representation; in this latter case, he shall not have the right to vote. Regardless of the situation, the president of the evaluation committee shall sign the report of the award procedure.

44. In article 73, the Paragraphs (1), (2), (4) and (5) shall be amended as follows:

“Article 73. - (1) The contracting authority shall be entitled to decide, in order to support the evaluation activities, on appointing certain external experts to the evaluation committee, appointed as co-opted experts. Co-opted experts may be appointed from the beginning of the evaluation process or during this process, depending on the issues that may require their expertise.

(2) The decision on appointing the co-opted experts shall indicate their specific duties and responsibilities and shall justify the need of their participation in the evaluation process.

.....

(4) Only the members of the evaluation committee shall have the right to vote.

(5) The co-opted experts shall not have the right to vote; however, they shall draw up a specialized report on the technical, financial and legal issues on which they express their point of view, based on their expertise.”

45. In Article 76, the Paragraphs (1), (2), and (4) shall be amended as follows:

“Article 76. - (1) The work method of the evaluation committee shall be mutually agreed by its members, and the estimative timetable for the application of the procedure and the period required for the tenders’ availability shall be taken into account.

(2) The members of the evaluation committee shall be entitled to review and evaluate the documents submitted by the tenderers/applicants individually and/or in joint meetings; however any decision by the evaluation committee shall be taken with the vote of at least 2/3 of its members. The evaluation committee shall elaborate documents to formalize the decisions taken during the evaluation process.

.....

(4) If the provisions of Paragraph (2) are not be observed because of possible differences of opinion among the members of the evaluation committee, the head of the contracting authority or, if appropriate, the president of the evaluation committee shall request a review of the differences of opinion, in order to conclude the tenders evaluation phase and to establish the winning tender in due time. If the evaluation committee shall not reach an agreement, the final decision shall be taken with the vote of the majority of its members.

46. Article 77 shall be repealed.

47. In Article 79, Paragraph (2) shall be amended as follows:

“(2) If the tenderer amends by their answers the content of the technical proposal, their offer shall be considered not compliant. Amendments of the technical proposal shall be accepted provided that:

a) They can be classified as technical errors or arithmetical errors, or

b) They are corrections of certain minor technical errors and a possible price adjustment caused by such corrections would not have led to changes in ranking the tenders who applied for the award procedure; the provisions of Article 79 Paragraph (3) shall remain applicable.”

48. In Article 80, Paragraph (1) shall be amended as follows:

“Article 80. - (1) The evaluation committee shall be entitled to correct the arithmetical errors or the form errors only if agreed by the tenderer. If the tenderer does not accept correcting the errors/faults, the offer shall be considered not compliant.”

49. In Article 80, after Paragraph (2) a new Paragraph (3) shall be inserted as follows:

“(3) The form errors are the errors or omissions within a document whose correction/completion is unequivocally sustained by the meaning and the content of other information initially existing in other documents submitted by the tenderer or whose correction/completion has a role of clarification or confirmation, not likely to produce an unfair advantage compared to the other applicants in the award procedure.”

50. In Article 82, Paragraph (4) shall be amended as follows:

“(4) If the award of the public procurement contract is based on the «lowest price» criterion, the evaluation of tenders shall be made by comparing the price of each acceptable offer and by drawing up, in ascending order of such prices, the ranking on the basis of which the winning tender is established.”

51. In Article 82, after Paragraph (4) a new paragraph (5) shall be inserted, as follows:

“(5) Regardless of the criterion adopted for awarding the contract, the comparison of prices provided by the tenderers’ financial proposals shall be made at a value excluding VAT.”

52. In Article 85, item b) shall be amended as follows:

“b) the period of availability of the participation guarantee, which will be at least equal to the minimum period of availability of the offer, as requested by the award documentation.”

53. Article 86 shall be amended as follows:

“Article 86. - (1) The participation guarantee shall be constituted by means of bank transfer or a guarantee instrument issued under the law by a bank company or an insurance company, which is presented in original, in the amount and for the period provided for in the award documentation.

(2) The guarantee shall be irrevocable.

(3) The guarantee instrument must specify if the payment of the guarantee shall be made:

a) Conditionally, respectively after finding the fault of the guaranteed person, in accordance with the guaranteed contract, or

b) Unconditionally, respectively at the first request of the beneficiary, based on the statement regarding the fault of the guaranteed person.

(4) The contracting authority shall not be entitled:

a) To impose or to forbid the presentation of a guarantee instrument issued by a certain banking company or insurance company, expressly mentioned in the award documentation;

b) To limit the possibility of presenting the guarantee instruments only to those issued by banking companies or only to those issued by insurance companies;

c) To impose or to forbid the presentation of the letters of guarantee in any of the forms provided for in Paragraph (3) items a) and b) or to grant, during the evaluation process, a supplementary score to one of the forms of constituting the guarantee.

(5) Notwithstanding the provisions of Paragraph (1) and only if the award documentation provides for this possibility, the participation guarantee may also be constituted by depositing to the contracting authority’ cashier:

a) A payment order or a check file, provided that they are confirmed by the bank until the date of opening the tenders;

b) An amount in cash, if the value of the participation guarantee is low.

(6) In any situation, the proof of constituting the participation guarantee shall be submitted not later than the date and the time established for opening the tenders.”

54. In Article 88, after Paragraph (2), two new paragraphs (3) and (4) and shall be inserted, as follows:

“(3) If the contracting authority is, according to the provisions of Article 209 of the emergency ordinance, in the position of cancelling the award procedure, the participation guarantee shall be returned after the expiry of the term for submitting a challenge against this decision, but not later than 3 working days from this date.

(4) After receiving the notification provided for in Article 206 of the emergency ordinance, the tenderers whose offers are declared unsuccessful shall have the right to obtain the release of the participation guarantee before the expiry of the period provided for in Paragraph (2) or, if appropriate, in Paragraph (3), provided that they send to the contracting authority a request in this respect.”

55. In Article 90, Paragraph (1) shall be amended as follows:

“Article 90. - (1) The performance guarantee shall constitute a guarantee instrument issued under the law by a banking company or an insurance company, to become an Annex to the contract. The provisions of Article 86 Paragraphs (2) to (4) shall apply accordingly.”

56. In Article 93, after Paragraph (2) a new Paragraph (3) shall be inserted, as follows:

“(3) The contracting authority shall not be allowed, without a valid justification, to delay the adoption of a decision to complete the award procedure, to delay the conclusion of the contract/framework agreement or to take any other measures in order to create artificial circumstances to cancel the procedure. These situations shall be considered infringements of the principles provided for in Article 2 Paragraph (2) items f) and g) of the emergency ordinance and shall be penalized accordingly. The tenderer who considers himself affected by such behaviour shall have the right to request indemnities by means of legal action.”

57. Article 94 shall be amended as follows:

“Article 94. - Regardless of the moment of initiating the award procedure, the contracting authority shall verify, before concluding the contract, the compliance with the provisions on committing the expenditure from the budgets covered by the law on public finances.”

58. In Article 95, Paragraph (1) shall be amended as follows:

“Article 95. - (1) The following documents shall constitute annexes which become part of public procurement contract:

- a) the specification;
- b) the technical proposal and the financial proposal;
- c) the schedule of the contract performance;
- d) the payment schedule;
- e) the performance guarantee, if applicable;
- f) the strong commitment for support from a third party, if applicable.”

59. Article 97 shall be amended as follows:

“Article 97. - (1) The price of public procurement contract may be expressed in lei or, as appropriate, in foreign currency.

(2) During the performance of the contract, the price may be adjusted in the following situations:

a) Legislative changes were made, changes of the technical rules or administrative measures were issued by the local authorities, having as object establishing, amending or eliminating certain local taxes/duties, whose effect is reflected in the increase/decrease of the costs on which the contract price was based;

b) Certain conditions occurred on the market, following which the increase/decrease of the price indexes of the tender constituents was observed, whose effect was reflected in the increase/decrease of the costs on which the contract price was based.

(3) In order to observe the principle of transparency, the possibility of adjusting the price should be mentioned in the award documentation and in the contract to be concluded, by means of special provisions in this respect. In the case provided for in Paragraph (2) item b), the contracting authority shall also mention the specific method of adjusting the price, the indexes to be used, as well as the source of information on their trends, such as statistical bulletins or quotations of the stock exchanges. The absence, the amendment or the completion of the said information/clauses may render inapplicable the provisions regarding the possibility of adjusting the price of the public procurement contract.

(4) Adjusting the price without accomplishing the conditions provided for in Paragraph (3) shall be possible only in the following cases:

a) If circumstances which are unpredictable and independent of the will of the parties occur, other than those provided for in Paragraph (2) items a) and b); or

b) If the period of application of the award procedure is prolonged unexpectedly over the period initially foreseen and for reasons which exclude any fault of the tenderer/contractor.

(5) Regardless of the situation, the contract price can only be increased to the extent strictly necessary to cover the increase of the cost on which the contract price is based. The method of adjusting the price of the public procurement contract shall not lead in any case to altering the outcome of the award procedure, by cancelling or diminishing the competitive advantage based on which the contractor was declared the winner, following the completion of that procedure.

(6) If the period of accomplishing the contract period is extended beyond the terms established initially by the contract, for reasons which are due to fault of the contracting authority, it shall not be possible to invoke the provisions of paragraph (4); however, the economic operator shall be entitled to request penalties and/or damages.”

60. After Article 97, a new Article 97¹ shall be inserted as follows:

“Article 97¹. - (1) The contracting authority shall issue certifying documents to contain information on the accomplishment of the contractual obligations by the contractor and, if appropriate, on the possible damages, as follows:

a) for the supply contracts: within 14 days from the date of finishing the supply of products subject to that contract and, complementarily, within 14 days from the date of expiry of the warranty of the products concerned;

b) For service contracts other than the contracts for design services: within 14 days from the date of finishing to provide the services subject to that contract;

c) For the contracts for design services: within 14 days from the date of the achievement of the provision of services subject to that contract and, complementarily, within 14 days from the date of concluding the acceptance minutes after completing the designed works;

d) for the works contracts: within 14 days from the date of concluding the acceptance minutes on completing the works and, complementarily, within 14 days from the date of the conclusion of the minutes of final acceptance of the works drawn up on the expiry of the warranty period for the works concerned;

(2) The certifying documents provided for in Paragraph (1) shall be drawn up in 3 copies, and the contracting authority shall have the following duties:

a) To issue a copy for the economic operator;

b) To submit a copy to the public procurement file; and

c) To submit a copy to the National Authority for Regulating and Monitoring Public Procurement within 10 days at the latest from the expiry date of the terms provided for in Paragraph (1).

(3) If the award procedure envisages the conclusion of a framework agreement, the provisions of Paragraphs (1) and (2) shall apply by correlating them to the achievement of the services related to the framework agreement, and not to the subsequent contracts.

(4) The President of the National Authority for Regulating and Monitoring Public Procurement shall be entitled to establish, by means of orders, procedures and specific

instruments by which any person can benefit from the information contained by the certifying documents available at the level of the National Authority for Regulating and Monitoring Public Procurement, related to the economic operators participating in a certain award procedure administered by the contracting authority.

(5) The certifying documents issued by the contracting authority according to the provisions of Paragraph (1) may be subject to an appeal according to the Law No 554/2004 on administrative appeals, as subsequently amended.

(6) Refusal of the tenderer declared a winner to sign the contract/framework agreement shall be assimilated to the situation provided for in Article 181 item c ^ 1) of the emergency ordinance. In this case, the certifying documents shall be issued within 14 days from the date when the contract should have been concluded, if the tenderer would have not denied to sign it.”

61. Article 98 shall be amended as follows:

“Article 98. - (1) Within 48 days from concluding the contract/framework agreement at the latest, the contracting authority shall submit for publication, according to the provisions of Article 56 of the emergency ordinance, a notice on awarding the public procurement contract.

(2) If the award procedure is cancelled according to the provisions of Article 209 of the emergency ordinance, the contracting authority shall submit for publication, within a period of 48 days from issuing the decision of cancellation at the latest, of a specific notice in this respect. The submission for publication shall be made, as for the other types of notices, by using the applications available at www.e-licitatie.ro

(3) Provisions of Paragraph (2) shall not apply in case of cancelling a negotiation procedure without the prior publication of a participation notice.”

62. In Article 99, Paragraphs (1) and (3) shall be amended as follows:

“Article 99. - (1) The monitoring of the award of public procurement contracts is done by the National Authority for Regulating and Monitoring Public Procurement, based on the information mentioned in the participation notices and award notices, as well as on the information provided for in Article 101.

.....
(3) The requested information shall be submitted in electronic form, according to the standard form to be made available through ESPP, no later than 31 March of each year.”

63. Article 100 shall be repealed.

64. In article 101 the introductory part shall be amended as follows:

“Article 101. - The National Authority for Regulating and Monitoring Public Procurement processes the relevant information from the participation notices and the award notices, as well as other notices received from the contracting authority according to the provisions of Article 300 of the emergency ordinance, providing a database for statistic data used to:”.

65. After Article 105, a new Article 105^1 shall be inserted as follows:

“Article 105^1. - The actions brought to Court by the National Authority for Regulating and Monitoring Public Procurement, according to Article 296 ^ 1 of the emergency ordinance, are exempt from paying the stamp duty and the judiciary stamp.”

66. Article 107 shall be amended as follows:

“Article 107. - Annex No 1 forms an integral part of this decision.”

67. Annex No 2 shall be repealed.

PRIME MINISTER
EMIL BOC

Countersigned by:

The Secretary General of the Government,
Daniela Nicoleta Andreescu

The President of the National Authority
for Regulating and
Monitoring Public Procurement,
Cristina Traila

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

for the Minister of Transports
and Infrastructure,
Constantin Dascalu,
Secretary of State

Head of the Department
for European Affairs,
Vasile Puscas

for the Minister of Public Finances,
Gheorghe Gherghina,
Secretary of State

Bucharest, 22 July 2009.
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