

THE MAJOR CHANGES BROUGHT TO THE ROMANIAN PUBLIC PROCUREMENT LEGISLATION BY GOVERNMENT EMERGENCY ORDINANCE NO. 45/2018

On 4 June 2018, the Romanian Official Gazette published Government Emergency Ordinance, which had been approved since 24 May 2018 ("**GEO 45/2018**"), regarding amendments and supplements to certain laws with impact on the public procurement field. This mainly relates to the public procurement legislative package adopted in 2016, but also impacts other related procurement regulations.

Essentially, GEO 45/2018 amended and supplemented four (4) laws and two (2) government emergency ordinances as follows:

1. Law no. 98/2016 on public procurement ("**Public Procurement Law**");
2. Law no. 99/2016 on sectoral procurement ("**Sectoral Procurement Law**");
3. Law no. 100/2016 on concessions of works and concessions of services ("**Concession Law**");
4. Law no. 101/2016 on remedies and appeals in the matter of awarding public procurement contracts, sectoral contracts and concession contracts for works and concession of services, as well as for the organization and functioning of the National Council for Solving Complaints ("**Remedies Law**");
5. Government Emergency Ordinance no. 13/2015 regarding the establishment, organization and functioning of the National Agency for Public Procurement;
6. Government Emergency Ordinance no. 98/2017 on the ex-ante control function of the procurement procedure/public procurement framework agreements, sectoral framework contracts/agreements and works concession and service concession contracts.

GEO 45/2018 entered into force from the date of its publication in the Romanian Official Gazette, namely from 4 June 2018.

The reason why the Romanian Government adopted such a regulation in an emergency procedure was due to the need to improve and increase flexibility of the public procurement system. The measures taken by GEO 45/2018 are justified by the need to also improve absorption rates for European Union funds, which represents a priority public interest. The Romanian Government states that without taking such measures, there is a risk that the amount of funds allocated, (including European Union funds) will be reduced and the implementation of certain major investments projects therefore delayed.

We provide here a brief presentation of the major changes brought by GEO 45/2018 to the Public Procurement Law and the Remedies Law. We note that major amendments were made with regard to the provisions of the Remedies Law, especially on the deadlines and conduct of challenge procedures, and that such amendments should be taken into account when considering the initiation of any challenge.

➤ Amendments to the Public Procurement Law

The threshold above which it is mandatory to publish a tender and/ or assignment notice in the Official Journal of the European Union, has been updated, in order to comply with the relevant updated amounts applicable at the EU level (under Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017 amending Directive 2014/24/EU of the European Parliament and of the Council):

- i. **RON 24,977,096 (approx. EUR 5,363,805)** for works contracts;
- ii. **RON 648,288 (approx. EUR 139,219)** for products supply contracts and services contracts;
- iii. **RON 994,942 (approx. EUR 213,662)** for products supply contracts and services contracts awarded by the county council, the mayoralty, the local council, the General Council of Bucharest Municipality, as well as by the public institutions under their control;
- iv. **RON 3,376,500 (approx. EUR 725,099)**, for service contracts related to social services and other specific services.

From the entry into force of GEO 45/2018, the contracting authorities will no longer be allowed to use the lowest price awarding criteria for procedures having an estimated value over the thresholds provided above.

Another significant amendment to the Public Procurement Law refers to the way in which public procurement contracts can be modified without having to organize a new award procedure. The content of article 221 of Public Procurement Law was redrafted in order to reflect the following novelties:

- i. the reasons that make a change of the initial contractor impossible, from an economic or technical perspective have been illustrated. The provision now makes reference to requirements such as interchangeability or interoperability with existing equipment, services or installations procured during the initial award procedure
- ii. it has been clarified that the initial contractor can be replaced by a third party if the contract has been assigned to such third party within a reorganization procedure, including through merger, division, acquisition or insolvency;
- iii. amendments having a value of under 10% or 15% (for the works contracts) from the total value of the public procurement contract, can be made only if such an amendments does not affect the general character of such contract; and
- iv. the value of the amendments shall be determined based upon their net value.

It is also worth noting that the accepted value of unpaid taxes and contributions (i.e. when the bidder has unpaid taxes and contributions to the state budget but can still be qualified in a public procurement procedure) has been increased from RON 4,000 (approx. EUR 858) to RON 10,000 (approx. EUR 2,147)

After the entry into force of GEO 45/2018, only the Court of Accounts will have the power to determine and sanction those misdemeanors provided by the Public Procurement Law for non-compliance with the public procurement rules. The powers of the National Agency for Public Procurement in this regard have been eliminated.

➤ Amendments to the Remedies Law

GEO 45/2018 fully repeals the provisions regarding the mandatory prior notice procedure, whereby any bidder/participant to the public procurement procedure had first to submit to the contracting authorities the complaints they had with regard to the deeds issued within the procedure. From now on, any complaints will be submitted directly to the National Council for Solving Complaints ("CNSC") or to the courts of law by way of a challenge.

The contracting authorities will be able to take any measures to remedy the issues raised in the challenge within three (3) days from its receipt and such measures will be communicated to CNSC and to all the participants in the public procurement procedure.

Certain deadlines applicable to the procedure conducted by CNSC for settling the challenge have also been shortened, in order to obtain a faster decision.

GEO 45/2018 provides that challenges against deeds issued in the public procurement procedure can be resolved only after the appellant submits a bond of 2% from the estimated/established value of the contract. The value of the bond is capped to:

- i. RON 35,000 (approx. EUR 7,516)/ RON 88,000 (approx. EUR 18,897) for procedures having an estimated/established value under the thresholds provided by the Public Procurement Law, and updated through GEO 45/2018;
- ii. RON 220,000 (approx. EUR 47,244)/ RON 880,000 (approx. EUR 188,979), for procedures having an estimated/established value over the thresholds provided by the Public Procurement Law, and updated through GEO 45/2018.

For framework contracts, the bond is established based upon the value of the largest subsequent contract intended to be awarded.

The bond submitted together with the challenge should be returned, upon request, after the challenge is resolved through a final decision. GEO 45/2018 does not provide explicit circumstances and grounds based upon which CNSC could refuse to return the bond or when it would be possible for the contracting authority to claim payments under such bond.

We note that this bond is similar with the warranty (i.e. good conduct bond) that was requested by CNSC before 2016, based upon Article 2711 included in 2014 in the Government Emergency Ordinance no. 34/2016 (i.e. previous public procurement legislation, repealed since 2016) that was constantly challenged and even declared partially unconstitutional.

Additionally, we note that GEO 45/2018 also included clarifications regarding the measures that can be decided by CNSC when resolving the challenges and other additional measures aimed at case-law standardization.

It is certain that GEO 45/2018 aims at shortening the time for completion of public procurement procedures and limiting the challenge options which had been considered previously as one of the major obstacles to rapid completion of these procedures. However, there are serious doubts that the full exclusion of the prior notice procedure and limiting the rights of the bidders/participants to initiate a challenge by requesting a very significant bond will effectively ensure compliance of the procedures with the mandatory legal provisions.

About WOLF THEISS

Wolf Theiss is one of the leading law firms in Central, Eastern and Southeastern Europe (CEE/SEE). We have built our reputation on a combination of unrivalled local knowledge and strong international capability. We opened our first office in Vienna almost 60 years ago. Our team now brings together over 340 lawyers from a diverse range of backgrounds, working in offices in 13 countries throughout the CEE/SEE region.

For more information about our services, please contact:



Bryan W. Jardine
Partner
bryan.jardine@wolftheiss.com
T: +40 21 308 8100



Ligia Cecilia Popescu
Partner
ligia.popescu@wolftheiss.com
T: +40 21 308 8100



Andreea Zvâc
Senior Associate
andreea.zvac@wolftheiss.com
T: +40 21 308 8100

This memorandum has been prepared solely for the purpose of general information and is not a substitute for legal advice.

Therefore, WOLF THEISS accepts no responsibility if – in reliance on the information contained in this memorandum – you act, or fail to act, in any particular way.

If you would like to know more about the topics covered in this memorandum or our services in general, please get in touch with your usual WOLF THEISS contact or with:

Wolf Theiss Rechtsanwälte GmbH & Co KG
4 Vasile Alecsandri Str., The Landmark, Building A
4th floor, RO-010639 Bucharest

T: +40 21 308 81 00
F: +40 21 308 81 25
bucuresti@wolftheiss.com

www.wolftheiss.com