

Overview of the Romanian main legislation on awarding contracts for concession of services¹

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1. Applicable legal provisions

The applicable and reviewed legal provisions are:

- Government Emergency Ordinance no. 34/2006, on the awarding of public procurement contracts, public works concession and service concession contracts (Official Gazette no. 418/15.05.2006 ("GEO 34/2006"));
- Government Decision no. 925/2006, on the methodological norms for application of GEO 34/2006, published in the Official Gazette nr.625/20.07.2006, as amended and supplemented ("GD 925/2006");
- Order no. 155/2006, approving the guidelines for the award of public acquisition contracts, published in the Official Gazette no. 894/02.11.2006;
- Government Decision no. 71/2007, approving the Norms for the implementation of provisions relating to the award of public works concession and services concession contracts provided by GEO 34/2006 regarding the award of public procurement contracts, public works concession and services concession contracts, published in the Official Gazette nr.98/08.02.2007 ("GD 71/2007");
- Order no. 26/2007, approving the Regulation on supervision of the award of public procurement contracts published in the Official nr.102/09.02.2007;
- Regulation of the European Parliament and the Council no. 2195/2002, on the Common procurement vocabulary (CPV).

2. Legal analysis

The necessary documentation, steps and the procedure for awarding contracts for concession services. "Services" may be subject to completion of service concession contracts with contracting authorities concerned.

¹ This article does not represent, and cannot be considered as, a legal opinion rendered within a client-attorney relationship. As well, this article took into consideration the contents of GEO 34/2006 as they were in force at the date it was prepared (end of 2007) and therefore some of the information contained herein might not be up to date. For updated information and an attorney-client assistance please contact us.

The service concession contract represents the contract with pecuniary interest concluded in writing, according to which the contractor in return for services rendered, as concessionaire, receives from the contracting authority, as a conceder, the right to exploit services on a fixed term or this right is accompanied by payment of a predetermined amount of money.

2.1 Service concession contract

2.2 2.1.1 Regulation. The duration of the concession. Services that may be subject to the concession.

The services concession contract is covered by GEO 34/2006 and is differentiated from public acquisition contracts; it involves a contractual relationship through which the contractor, as the concessionaire, receives the right to exploit services, taking therefore most of the risks involved with their exploitation.

For each allocation of each concession contract, the authority is obliged to appoint a staff of coordination and supervision, consisting of specialists that can add their own external experts (depending on the needs) that will substantiate the decision to award the contract, develop the award documentation and determine the contract award procedure.

Duration of the concession of services is assumed through an administrative act by the head of the contracting authority and must be arranged so as: not to restrict the competition, to provide a minimum service of profit from exploitation and to ensure a reasonable level of prices which will be borne by the final users. It can be seen that legal rules do not indicate a fixed period of the concession; the contract shall be concluded for the period determined according to the rules above. The concession contract for services may refer to the provision of one or more "services" as such are mentioned in Appendices 2A and 2B to GEO 34/2006.

2.1.2 Principles. Award procedures.

According to applicable legal provisions, the contracting authority, in its relationship with the economic operators interested in the award of concession services, must meet a set of principles, as follows: non-discrimination, equal treatment, mutual recognition, transparency, proportionality, efficiency of funds and public accountability.

2.1.3 Grounding of the concession decision.

The concession decision is taken after the preparation by the coordinating and supervision staff of the authority of a background study which shall be approved by a decision, or order of the contracting authority and which will take into account the relevant elements for the decision of concessions : technical feasibility, economic and financial or environmental issues, social and institutional project.

The background study should define and quantify project risks and their distribution options between the parties and also demonstrate that:

- the project is feasible;
- meets the demands and policy of the public authority;
- there have been considered several options of the project;

- concession is more advantageous than the version of awarding a public procurement contract;
- the project has financial support.

2.1.4 Estimating the value of the concession contract.

Prior to initiating the procedure for awarding the concession contract, the contracting authority is required to determine the estimated contract value, valid at the time of dispatch of the notice or invitation. Estimating the value of the contract involves calculating and summing all amounts payable for carrying out the contract, excluding VAT, as well as any possible increases or supplements to the contract value, to the extent that the last ones can be anticipated, including prizes or premiums that may be granted to the candidates or bidders.

Method of estimation of the concession contract for services varies compared to its length, in those situations where there cannot be anticipated the total cost of services but it is possible to estimate an average monthly fee, as follows:

- value is calculated considering the duration of the contract, if the duration is determined and does not exceed 4 years;
- value is calculated by multiplying the monthly value of 48, if time cannot be established or exceeds four years.

For situations where the contracting authority seeks to award a contract to be renewed within a given period, the estimation will be based on:

- total value of all contracts awarded in the last 12 months for similar services, adjusted, if possible, with predictable changes that may occur in the next 12 months, or
- total estimated value of all contracts which are anticipated to be awarded in the next 12 months from receiving the services, for similar services.

2.1.5 Preparation of documentation for awarding the concession.

The coordination and supervision staff appointed by the contracting authority shall prepare the award documentation in compliance with the elaboration rules described further on. The award documentation prepared by the contracting authority must provide full, fair and explicit information to bidders or candidates and include all the requirements, criteria or information needed.

The minimum provisions that must be included in the documentation are the following:

- general information on the contracting authority respectively address, phone, fax, e-mail, contacts, media, etc.;
- deadlines and formalities for participation in tender;
- minimum qualification requirements and documents to prove them, if such criteria are required;
- specifications or descriptive documentation (for competitive dialogue or negotiation);
- the elaboration procedure and presentation of technical and financial proposal;
- criteria of awarding applied to the winning offer;
- ways of appeal and how to use them;
- mandatory contractual terms.

In addition to the minimum provisions above, the authority may include others it values to be necessary.

Specifications representing the technical requirements, the prescriptions and characteristics of the service must be, compulsorily, defined and included in the tender book and will be stipulated taking into account the specific needs of the concession contract and of the contracting authority.

The GEO 34/2006 contains exhaustive list of technical features that may be included in the specification, requirements that relate to the quality, environmental impact, reliability, terminology, symbols, testing and any other requirements that may be described by the the contracting authority based on various legislative particular deeds and other general or specific regulations. GEO 34/2006 prohibits that, through technical specifications, the competition is in anyway restricted, by introducing unjustified obstacles so that equal access to award procedure be limited. Also, it is prohibited favoring or eliminating operators by defining technical specifications to indicate a specific origin, source, a particular process or other similar criteria.

The tender book for service concession contract shall provide the following points:

- long-term, medium and short project goals;
- the operating mode and the concessionaire's investments, with completion dates, if applicable;
- description of activities, technical and quality conditions;
- special conditions imposed by the nature of the services, if any;
- proposal for distribution of project risks;
- the conceder's option regarding the legal form of the concessionaire (SRL, SA, etc), if applicable;
- financial and insurance clauses;
- option to create a project company , if applicable;
- legal regime of the assets used by the concessionaire, if applicable, and
- securities to be provided.

2.1.6 Publicity of the procedure. Publication procedure.

Awarding the concession contract is based on the principles described in section 2.1.2 above, takes place in conditions of transparency and it is initiated by the publication of a tender announcement, to be prepared and sent by the contracting authority, through electronic means, to the web portal www.e-licitatie.ro, administered by the operator of the Electronic Public Acquisition System (hereinafter "SEAP").

The announcement regarding the award procedure of the concession contract is published also in the Official Gazette of Romania - Part VI and, if necessary, in the Official Journal of the European Community (if the contract value to be awarded is higher than the RON equivalent of EUR 5,000,000).

For situations in which the estimated value of the concession contract is more than 5 million Euro, the tender announcement to be published (also) in the Official Journal of the European Union shall include:

- the contracting authority data (its name, address, fax number and e mail),
- the place of rendering the services,
- object of concession (nature and size of services to be rendered),
- the deadline for applications,
- the address for the bids' submission,
- the the language or languages in which they must be written,
- the conditions that the candidates must meet (personal, technical and financial),
- contract award criteria,
- the minimum percentage of the services that can be sub-contracted to third parties (if applicable), -date of submission for publication of the announcement,
- the competent authority for settling the appeals and mediation (depending on the case, the name and address), time of submitting the appeal, and any other information considered relevant by the contracting authority.

If the estimated value of the concession contract to be awarded is less than the equivalent in RON of EUR 5 million, the announcement shall be published with SEAP and the Official Gazette of Romania and shall include at least the information provided in Annex 2 to GD 71/2007. The economic operators must have sufficient time to elaborate the bids, the minimum time between submission for publication of the tender announcement and the application submission deadline being of 52 days, with the possibility of being reduced by 7 days in the case of transmission of the announcement in electronic format for publication in the Official Journal of the European Union. Also, the contracting authority has the obligation to set the date limit for submission of tenders taking into consideration the time required to verify the announcement by the National Authority for Settlement and Monitoring Public Procurement ("ANRMAP").

Moreover, the contracting authority is obliged to extend the period for submission of applications where this cannot be elaborated until after visiting the the location or after on-site consultation of the documents annexed to the tender book and if the authority cannot submit documentation or response to any clarification requested by the operators in terms established by GEO 34/2006.

Before publication, ANRMAP will check the announcement submitted for publication with SEAP and, within two working days is obliged to either issue the publication clearance to the SEAP operator or to reject publication if errors exist or omissions with the information to the contracting authority of the decision and the way to remedy.

In case ANRMAP issues its clearance for publication, SEAP operator shall upload the announcement to www.e-licitatie.ro within no more than two business days, and shall send the announcement for publication with EU's Official Journal (if contract value exceeds 5 million Euro) in one business day. Announcements may not be published in SEAP or transmitted to the Official Journal of the European Union, as appropriate, without first obtaining the publication clearance of ANRMAP.

Following the publication in SEAP, within one working day after such publication, the contracting authority will send the announcement to the *Autonomous Regie "Official Gazette"*, also to be published in the Official Gazette of Romania, Part VI, the announcement not being able to contain other information than the one published in the Official Journal of the

European Union. The announcement, called “national announcement”, shall indicate the date of the transmission to the Official Journal of the European Union.

2.1.7 Rules to avoid conflict of interest

The contracting authority shall take the measures required to avoid conflicts of interest and / or unfair competition. GEO 34/2006 provides the possibility for individuals who participated in the elaboration of the awarding documentation to be bidders or subcontractors only if the involvement in the documentation preparation is not likely to distort competition. It is prohibited to persons who participated directly in the process of verification and evaluation of applications or tenders to be candidates, bidders or subcontractors.

In the process of verification and evaluation of applications or offers the following people are not allowed to be involved:

- those who own social parts, parts of interest, shares of the subscribed capital of one of the bidders, candidates or subcontractors, or persons that are part of the board of directors, management or supervisory body of one of them;
- husband, wife, relative or affinity, including up to fourth degree, with people who are part of the board of directors, management or supervisory body of one of the bidders or candidates;
- those that are found that may have an interest likely to affect their impartiality in the process of verification or evaluation of applications or tenders.

Members of the evaluation commission or co-opted experts who find themselves in a situation of incompatibility should immediately request replacement.

Authority is obliged to check all complaints about incompatibility situations and take appropriate measures to avoid or remedy conflicts of interest. Also, the concessionaire is not entitled to engage, for the purpose of fulfilling the contract, persons involved in the verification or evaluation of applications or tenders, for a period of at least 12 months after signing the contract.

2.1.8 Application of procedures for awarding the concession contract and evaluation of tenders

2.1.8.1 Criteria for qualification and selection

Qualification and selection criteria regarding the candidates and bidders must be indicated by the contracting authority in the tender announcement and must be detailed in the award documentation.

Qualification and selection criteria that can be taken into consideration are exclusively regulated and refer to the personal situation of the candidate or bidder, its capacity to perform the professional activity, its economic and financial status, professional and technical capacity, quality standards and environmental protection standards.

2.1.8.1.1 Personal situation

Bidders or candidates who, in the last 5 years, have been convicted by final court decision for corruption, fraud and / or money laundering and participation in activities of a criminal organization are excluded from award procedure.

Those who are under bankruptcy or liquidation, those who run businesses conducted by a judicial administrator, who have their businesses suspended or subject to a commitment with creditors, or those who are subject of a legal procedure for declaring in one of these situations, can also be excluded from the award procedure.

There can be also excluded those who were convicted in the past three years for a crime affecting professional ethics or for professional misconduct, and those who present false information or don't present them in connection with their personal situation, economic and financial situation, their ability to exercise professional activity, their technical capacity, and those who have not paid taxes and contributions to the general consolidated budget .

2.1.8.1.2 Capacity to perform the professional activity

In order to prove the ability to exercise professional activity there may be requested by the contracting authority submission of documents indicating the form of registration and certification or professional affiliation of the bidder or candidate.

2.1.8.1.3 Economic and financial situation

In those cases where the contracting authority requires as selection criteria or qualification the economic and financial situation, the authority must specify the information and documentation that can prove the fulfillment of this criterion, documentation which may include balance sheets or extracts from balance sheets, bank statements or insurance of professional risk and statements on total turnover or turnover in the area that will be the subject of the concession contract. If the operator is found in an impossible goal to provide the documents requested, the authority may take into account other documents that fairly describe its financial and economic situation.

At the same time, GEO 34/2006 provides the possibility of sustaining an operator's capacity by another person who must, usually, have completed a strong commitment by which agrees to provide the operator the necessary financial resources, with the condition that the person who supports the operator is not to be found in one of the cases concerning the personal situation that excludes him from the award procedure - cases listed above.

If the offer is submitted in common by several operators, the economic and financial situation is going to be valued by considering the resources of all group members.

2.1.8.1.4 Technical and / or professional capacity

The information required to the economic operators for certifying their ability must be included by the contracting authority in the award procedure documentation, in the case in which the technical and / or professional capacity is criteria for awarding the concession.

The authority may request, through the documentation prepared for the award, the following :

- list of the primary services provided in the last three years indicating the amount,
- timing and beneficiaries, services confirmed by certificates issued or countersigned documents by the beneficiaries or through the operator's declaration;
- the operator's statement on technical equipment used as well as on quality assurance measures;
- statement of average annual manpower and of the management over the past 3 years;

- information on education, training and qualification of personnel;
- information on specialized technical staff employed or who will participate, especially to ensure quality control;
- information on environmental protection measures, as appropriate;
- information on equipment, facilities and technical equipment that can be used in performing the contract;
- information on the proportion that will be assigned to subcontractors for performance of the contract, and their specialization.

Similar to the criteria relating to the economic and financial situation, for the criteria discussed in this section it is provided the possibility of sustaining the capacity of the operator by another person that must, usually, have completed a firm commitment through which is committed to provide the technical and professional resources necessary.

The additional condition in this hypothesis is that the person who supports the operator not to find himself in a case concerning the personal situation that excludes him from the award procedure. The resemblance with the criterion of economic and financial situation is found also through the possibility of appreciating an offer made in common by a group of operators in relation to all technical and professional resources available to the group

The criteria analyzed is appreciated compared to the experience, skills and efficiency of the bidder and the documents that attest its fulfillment can be asked only to the extent that the information is relevant for the contract and depending on the specific volume and complexity of services.

2.1.8.2 Criteria for award

The criteria of awarding the concession contract of services should be provided in the tender announcement and detailed through the award documentation and may relate as appropriate, to:

- the price paid by end users;
- the level of annuity;
- degree of risk-sharing by the concessionaire;
- financing and development plans;
- the quality, technical and functional level of technical solutions proposed;
- way of ensuring the environmental protection;
- way for managing the social problems;
- term for performance of investments;
- duration of the concession.

In all cases, the authority cannot, in establishing the criteria for the award, to impose criteria unrelated to the nature and scope of the concession contract of service or without a real and obvious advantage brought to the authority or beneficiaries, so that the outcome of the procedure is not distorted by the weight established for each criteria. The weight of each criteria used to award should reflect accurately the the valoric amount of financial benefits or the technical / functional importance of the solutions proposed.

2.1.8.3 Application of award procedures

Unlike public procurement contracts, in the case of the concession the procedures that can be used are limited to open auction (bid), restricted auction and competitive dialogue; negotiation can be used with prior publication of an announcement only if, after the application of the open procedure, restrictive auction, or competitive dialogue, there were not made any offers or none was admissible.

2.1.8.3.1 The open auction

Open auction usually takes place in one stage and is initiated by submitting for publication a tender announcement in the above described conditions. Upon publication of the announcement, the operators may request clarifications regarding the documentation and the competent authorities should respond clearly, completely and unambiguously as soon as possible, usually within 3 working days but not later than 6 days before the deadline for submission of the offers. Responses will be sent to all operators who have obtained the award documentation, but keeping secret the identity of the operator who requested clarification.

The open auction session must take place at the date, time and place mentioned in the announcement, any bidder having the right to attend the opening of the bids. Bids cannot be rejected in open session unless they have been submitted after the date and time designated or at another address or do not come with the guarantee of participation required by the award documentation

According to GD 925/2006, the opening session ends with a protocol signed by members of the evaluation commission, by the experts co-opted in the committee and the representatives of economic operators, and will be communicated to all participating operators. Decisions relating to qualification or tender evaluation is adopted by the evaluation committee at a future meeting. If, through the award documentation, there have been provided the qualification criteria discussed in Section 2.1.8.1 above, the evaluation committee will check their fulfillment for each bidder.

The Commission will observe whether the technical proposal meets the minimum requirements and specifications included in the tender book and will track the financial proposal to be within the funds that can be paid under the future services contract.

The winning offer can only be determined between the eligible offers (those who are not unacceptable or non-compliant) and only on the basis of the award criteria established by the tender announcement and documentation prepared by the authority.

GD 925/2006 states that the offers are unacceptable if they:

- were submitted after the date and time established for submission or to another address or do not come with the guarantee of participation required by the award documentation;
- were submitted by bidders that do not meet the minimum qualification criteria;
- were submitted by bidders who, in the last two years, for reasons imputable to them, have not fulfilled their obligations or fulfilled such improperly, thus producing, or being about to produce, prejudices to beneficiaries;
- the price within the financial proposal exceeds the amount of funds that can be made available for performance of the contract;
- present an unusually low price compared to what will be provided;

- do not comply with the occupational safety regulations and mandatory working conditions, or
- present a different version of the tender book, which cannot be considered as in the announcement of participation was not specified explicitly the possibility to submit alternative offers, or the offer does not meet the minimum requirements of the specifications.

As for non-compliance, GD 925/2006 provides that there are non-compliant those bids which do not meet the specifications of the workbook, contain provisions clearly disadvantageous to the contracting authority or contain prices that cannot be justified and are not the result of free competition. Open procedure ends with the Commission developing a report of the award procedure which will be submitted to the head of authority in order to conclude the contract. The Authority will inform within maximum of 3 working days all bidders on the auction outcome.

2.1.8.3.2 The limited auction

Limited auction takes place, usually, in two stages, respectively the evaluation of tenders and the selection of candidates, and is initiated by sending a tender announcement. Submission of applications for the first phase of the auction is open to any economic operator, the contracting authority has the right to limit the number of candidates only if there is a sufficient number of available candidates that can be selected depending only on the technical and economic-financial capacity.

If the authority intends to limit the number of candidates, it must be specified their number in the participation notice without the number to be less than 5 candidates. Also, the notice must mention the selection criteria and the applicable rules. Selected candidates must be at least in equal number to the number indicated in the announcement; otherwise the authority has the right to cancel the auction or to continue with candidates who meet the required conditions, if the number of candidates ensures genuine competition.

The first stage ends with the selection of candidates, the evaluation committee following to elaborate a interim report to be submitted for approval to the head of authority. Subsequently to the approval, the authority shall inform all candidates of the decision taken and the the reasons on which it is based.

For the second stage of the auction, the authority shall simultaneously send to all candidates selected after the first stage, the award documentation, or, if it is directly accessible in the SEAP, will notify applicants on how to access it, and shall send invitations that shall include at least references to the announcement published, the deadline for submission of bids, the address to which they are submitted, the language or languages in which offers are developed, opening date of tenders, if necessary, additional documents to verify the statements or completing documents submitted in the first stage in order to demonstrate the technical and economic-financial capacity of the candidates.

Inviting operators who have not met the selection criteria or have not applied in the first stage is not allowed. Legal regulations do not allow candidates selected to associate in order to submit a joint offer and the authority is not allowed to accept such an offer. In the case of contracts whose estimated value is greater than the equivalent in RON of 125,000 Euro, the invitation to participate must be sent at least 40 days before the deadline for submission of tenders.

The term can be reduced from 40 to 35 days if the authority: publishes in SEAP complete award documentation, ensures direct and unconditional access of the operators to it, and the Internet address where the documentation is available was indicated in the announcement.

For contracts whose estimated value is less than, or equal to, the equivalent in RON of 125,000 Euro the invitation to participate must be sent at least 22 days before the deadline for submission of tenders, the duration can also be reduced by five days if the authority: publishes in SEAP complete award documentation, ensures direct and unconditional access to the operators, and the Internet address to which the available documentation was indicated in the notice, such as for contracts above the threshold of 125,000 Euro.

The procedure can be accelerated in emergency situations which claim shorter terms than those above, but not less than 12 days. GEO 34/2006 provides for operators to seek clarifications, procedures and deadlines in which the contracting authority shall be held to respond the same as for open auction, as outlined above. The second stage of the tender procedure is held according to the presented section 2.1.8.3.1 on open tender.

2.1.8.3.3 The competitive dialogue

The competitive dialogue procedure involves three steps, respectively pre-selection of candidates, dialogue with shortlisted candidates to identify the solutions that can meet the needs of the contracting authority and under which the final tenders will be developed and the final and last stage, the evaluation of final bids.

Award through competitive dialogue may be conducted only if the contract is considered to be extremely complex and the procedures of open or limited auction would not allow the award of the concession contract.

The extremely complex situations are those in which the contracting authority is unable to define the technical specifications able to satisfy its needs and requirements or cannot establish the financial costs and/or the legal framework of the project.

2.1.8.3.4 Negotiations with the advanced publication of a participation announcement.

GEO 34/2006 provides for three cases in which the the award procedure may be applied, namely:

- in exceptional circumstances, strongly motivated, when the nature of services, or risks associated with provision of such services do not allow an estimation of contract price;
- when services to be awarded, especially the financial services or intellectual ones, are necessary in such a way that specifications of a tender book cannot be drawn with the precision required by the award through open or limited auction;
- when upon the application of open auction, limited auction or competitive dialogue there haven't been any offers, or there were submitted only unacceptable or irregular offers and the initial procedures were canceled, and the requirements stipulated in the award documentation are not substantially modified.

Throughout this analysis we will treat further the last of the above cases.

Before the initiation of the negotiation procedure, the coordinating and supervision collective of the contracting authority will verify whether or not it is incidental this case of triggering this procedure as shown above, and the outcome of the verification will be recorded in an explanatory note through which it is explained the proposal for initiation of negotiation.

Publication of the announcement is not required where the authority invites in the negotiations only and all bidders who submitted bids in the initial auction procedure (open or limited) or competitive dialogue according to formal rules contained in the tender documentation and have met the qualification and selection criteria and in previous proceedings.

The general rule is however that the negotiation is initiated by publishing a participation notice which informs the interested economic operators about the opportunity to submit applications. Applications may be submitted by any economic operator but the authorities can make a pre-selection depending on the criteria concerning the technical and the economic and financial candidates, criteria to be included in the participation announcement.

Also, the authority must indicate in the notice the minimum number of candidates which cannot be less than 3 and, if appropriate, the maximum number of candidates to be pre-selected. Selected candidates must be at least equal in number to the number indicated in the notice, otherwise the authority has the right to cancel the auction or to continue with candidates who meet the required conditions, if the number of candidates is able to ensure genuine competition.

In the second stage of the negotiation the authority shall send simultaneous invitations to all pre-selected candidates, that must indicate at least the published notice, the address the negotiations are to take place and date of their initiation, negotiation language or languages, award criterion used to determine the winning bid and any additional documents necessary to verify the statements and documents submitted in the first stage by the operators, for proving their technical, economic and financial capacities.

During negotiations, candidates should be treated equally and without discrimination, without bringing benefits by providing discriminating information from the authority, to which being not allowed to disclose the bids or other confidential information of the candidates, without their consent.

The starting point of negotiations with the individual participants is the preliminary offer each of the bidders must present. Once the evaluation will end, the valuation commission will prepare a record of the meeting, containing issues discussed and matters agreed.

Without the enumeration to be limited, GD 71/2006 establishes that during negotiations the evaluation committee must discuss and clarify some essential elements, such as:

- technical responsibilities, financial and legal of the parties;
- the distribution of risks and benefits between the conceder and the concessionaire;
- possible modification, revision or adaptation of the studies in relation with the performance conditions proposed by the participants in the award procedure;
- performance standards, facilities and equipment used in performing the contract;
- how to perform control and tracking mechanisms of cost, quality and safety services, relationships with third parties and other specific requirements;
- alternative arrangements for early termination of the concession or situations of insolvency or liquidation of the concessionaire;
- establishing the assets to be restituted to the contracting authority (provided free of charge to the concessionaire under administration, in order to achieve the objectives of the concession and returning of such when the contract has been terminated) and the assets to be retained by the concessionaire (which remain the property of the concessionaire at the contract termination);
- general terms of contract that will be concluded;
- workforce dedicated to performing the contract;
- conflict resolution mechanisms.

Negotiations are held with each pre-selected participant in part up to identifying and establishing, on the basis of award, the most economically advantageous proposals.

In case the authority specified in the descriptive documentation, there may be successive rounds of negotiations in order to reduce the number of proposals for successive bids on the basis of the criteria established.

Negotiations continue until each participant declares that its preliminary offer cannot be improved more to the benefit of the contracting authority. The Commission may establish a final meeting with each participant, if it finds that there were no substantial improvements of the preliminary offer, meeting in which each participant has the obligation to provide the final elements of the technical and financial proposals. The authority has to request the candidate who submitted the most advantageous offer to confirm the result of negotiations by submitting a final offer through which it cannot modify the elements set out in the negotiation process.

2.1.8.4 Evaluation of the offers

For the assessment of the bids submitted for the concession, the authority shall designate a total of at least 5 people that form the evaluation committee and also reserve members who could replace in case the person to be replaced cannot fulfill his duties from objective reasons.

In the same time, the authority shall appoint the committee's chairman, among its members. Also, the commission chairman may propose to the management of the authority hiring external experts in the committee, who shall not have voting rights but shall prepare reports, in order to facilitate the commission in taking decisions.

The evaluation committee has the following attributions:

- opens offers and other documents that accompany such and checks the fulfillment of qualification criteria;
- makes a selection or pre-selection of the candidates, if any;
- makes dialogue with the operators (in case of competitive dialogue procedure);
- makes negotiation with the operators (in case of negotiated procedure);
- verifies compliance of the minimum requirements with the the technical proposals submitted;
- checks financial proposals;
- determines the admissible bids (i.e. those that have been submitted to the address provided by the deadline and with the guarantee of participation, meet the requirements specifications, were submitted by bidders who meet the minimum qualification requirements; do not contain proposals disadvantageous for the contractual authority; financial proposals are realistic and do not involve sharing the risk of exploitation a majority by the contracting authority). May be deemed inadmissible also an offer which is submitted by an operator who, in the last two years and for reasons attributable to it, has not met or fulfilled its obligations, thus causing serious harm to beneficiaries;
- establishes the criteria for the award winning offer;
- proposes to cancel the procedure for the situations described in section 2.1.10;
- prepares a report of the award procedure.

At the committee's meetings there are allowed to participate only its members, except when the tender opening session starts, when they may accept participation of economic operators too. Members should be impartial, not be in conflict of interests and keep confidentiality, in this sense being forced to make a statement on their own responsibility before taking over the duties in the evaluation process. Decisions of the evaluation committee are taken with the vote of at least two-thirds of its members, members who disagree having the obligation to develop an individual written notice containing their point of view.

2.1.9 The participation guarantee

Tender documentation shall specify a fixed amount which is the guarantee of participation and cannot exceed 2% of the estimated contract value, and shall also mention the date up to which such guarantee must be submitted and the period of its validity.

Guarantee is provided in the form of an original bank letter of guarantee, which can be issued by any bank; the guarantee can be retained by the contracting authority if the operator withdraws its offer during the validity period of such offer, or refuses the conclusion of the contract in the tender validity period, when he was declared winner. The guarantee shall be returned to the successful bidder no later than in 3 working days after signing the contract, or within 3 working days of the expiry date of the preliminary offer, to the bidder which has not been declared winner.

2.1.10 Informing candidates and bidders

The Authority shall communicate in writing no later than in 3 working days, to all candidates or bidders, of the outcome of the procedure, respectively the award of the concession contract or cancellation of the award procedure and any subsequent initiation of a new procedure, and the communication shall be transmitted by fax or by electronic means.

The winner must be informed of the acceptance of the offer; consequently, the contracting authority shall communicate to those rejected the concrete reasons for rejecting them, as well as detailed arguments in this respect, sustaining the decision to reject the respective offer.

If the presented offer was acceptable, compliant and appropriate, but it was not a winner, there will be given the features and advantages of the winning bid and the name of the successful bidder. The authority may not communicate some of these information if the disclosure would result in a failure or may be an obstacle to a legal provision, if it is contrary to public interest, would prejudice the legitimate interests of economic operators, or if they harm competition.

2.1.11 Cancellation of the contract award procedure

GEO 34/2006 regulates the possibility of cancellation of the contract award procedure, in cases where a satisfactory level of competition was not achieved, or where only unacceptable, inappropriate, improper offers have been submitted, or such offers cannot be compared due to uneven approach to technical and / or financial solutions.

The procedure can also be canceled in the situation of: (1) serious violations of the existing laws applicable to the award procedure, or (2) when it is impossible to conclude the services contract, however for each situation being necessary the cumulative existence of two conditions: (1) the existence of errors or omissions in the tender documents or procedure, able to violate the principles underlying the award procedure (regulated by GEO 34/2006) and (2)

the contracting authority must be unable to take corrective actions without breaking the same principles.

Cancellation must be brought to the knowledge of all participants in the tender, in writing, within 3 days of such decision was taken.

2.1.12 Conclusion of the concession contract of service

The Authority shall invite the winning bidder to sign the contract, upon expiry of a 15-day period after communication of the outcome of the procedure, for contracts whose values are greater than, or equal to, the equivalent in RON of 40,000 Euro, and in 7 days of transmitting the same communication, for contracts below the value of 40,000 Euro. The sanction for concluding the contract before the expiration of these terms is the absolute nullity. The communication shall be made in writing and shall be sent by fax or electronic means, otherwise the terms shall be increased with 3 days.

The terms of concession contract must be clear, refer to the rights and obligations of each party and not be contrary to the essential specifications from the tender book or to the commitments assumed by the concessionaire through its offer. The tender book and the offer of the concessionaire form an integral part of the concession contract, the contract terms not being able to contravene with the essential requirements of the tender book or offer commitments. The concessionaire will acquire the right to provide the services under contract with the obligation to ensure efficient performance, under continuous and permanent regime, according to the requirements imposed by the contracting authority.

Most of the risks of exploitation connected to the concession contract for services must be taken by the concessionaire, through risk of exploitation being understood the availability risk (failure of meeting performance parameters and quality of service, determined and clearly measurable, for the entire duration the contract) and market risk (disuse by the final users of services provided to them). The conceder will have in this case a financial contribution during the execution of the contract and may assume other additional commitments.

The distribution of risk throughout the contract period must be clearly established, without being allowed in the course the execution the re-distribution to the conceder of the biggest parts of the risks.

If, according to the contract, the exploitation risk will be fully assumed by the concessionaire, the contracting authority shall not be obliged to pay any amount and shall be entitled to receive a fixed annuity or a percentage of income collected from the final beneficiaries.

The G.D. 71/2007 contains provisions relating to other clauses to be included in the concession contract, namely:

- the performance and quality of service level, along with the indicators for verification of compliance with agreed obligations;
- the conceder's right to verify compliance or quality performance levels, and relevant documents relating to it;
- presentation by the concessionaire of regular reports on the achievement of agreed parameters.

The dispute resolution mechanisms and the competent courts to settle such disputes must also be established, the parties being able to submit resolution of their eventual disputes to arbitral courts, as an alternative to judicial, state courts.

At the same time, the concession contract should also describe the termination events, as follows:

- duration expiration;
- unilateral termination by either party, for serious misconduct of the other, with payment of compensation by the defaulting party. In this case, there must be provided procedures to address the lack of conformities, including delay penalties until remedy of such non-conformities;
- unilateral termination by the contracting authority, with payment of a just and prior compensation, if the local or national interest so requires;
- waiver of contract by the concessionaire, if the concessionaire was unable to continue the contract due to force majeure or fortuitous cases, without payment of compensation.

After signing of the concession services contract, the procedure ends with the obligation of the authority to send to SEAP, within 48 days, information on the identity of the winning bidder, the contract services and charges the authority will receive, and as appropriate, the financial contribution which will be paid by the authority.