

# The Brief

November 2011

## Romania

### Developments of the legal framework on PPP and Public Procurement

The Romanian legal framework on public-private partnerships underwent significant changes in October 2011, with important amendments being brought to both the PPP Act No. 178/2010 (amended as of 17 October 2011 further to the entry into force of Government Emergency Ordinance No. 86/2011) and to the Norms for the implementation thereof (amended as of 20 October 2011 further to the entry into force of Government Decision No. 1000/2011).

The legal framework applicable to public procurement has also been completed and amended within the past weeks.

#### I. Important amendments to the Romanian PPP legal framework

The amendments brought to the PPP legal framework in October 2011 mostly aim at rendering the procedures for the award of a PPP contract compliant with the European Union Directives on public procurement.

Among the important amendments to the PPP regulations, the following should be noted:

- contracts awarded for the purposes of carrying out relevant activities in public utility sectors: gas, heat and electricity, water, transport, postal services, exploration and extraction of oil, gas, coal and other solid fuels, ports and airports are expressly included among the PPP contracts;
- detailed provisions on the qualification and selection criteria including: the types of criteria that may be used by the contracting authority (personal situation; suitability to pursue the professional activity; economic and financial standing; technical and/or professional ability; quality standards; environmental management standards), and the types of documents that the contracting authority is entitled to request from potential investors in order to prove compliance with such criteria;



Gide Loyrette Nouel

#### Algiers

Tel. +213 (0)21 23 94 94  
gln.algiers@gide.com

#### Beijing

Tel. +86 10 6597 4511  
gln.beijing@gide.com

#### Brussels

Tel. +32 (0)2 231 11 40  
gln.brussels@gide.com

#### Bucharest

Tel. +40 21 223 03 10  
gln.bucharest@gide.com

#### Budapest

Tel. +36 1 411 74 00  
gln.budapest@gide.com

#### Casablanca

Tel. +212 (0)5 22 27 46 28  
gln.casablanca@gide.com

#### Hanoi

Tel. +84 4 3946 2350  
gln.hanoi@gide.com

#### Ho Chi Minh City

Tel. +84 8 3823 8599  
gln.hcmc@gide.com

#### Hong Kong

Tel. +852 2536 9110  
gln.hongkong@gide.com

#### Istanbul

Tel. +90 212 385 04 00  
gln.istanbul@gide.com

#### Kyiv

Tel. +380 44 206 0980  
gln.kyiv@gide.com

#### London

Tel. +44 (0)20 7382 5500  
gln.london@gide.com

#### Moscow

Tel. +7 495 258 31 00  
gln.moscow@gide.com

#### New York

Tel. +1 212 403 6700  
gln.newyork@gide.com

#### Paris

Tel. +33 (0)1 40 75 60 00  
info@gide.com

#### Saint Petersburg

Tel. +7 812 303 6900  
gln.saintpetersburg@gide.com

#### Shanghai

Tel. +86 21 5306 8899  
gln.shanghai@gide.com

#### Tunis

Tel. +216 71 891 993  
gln.tunis@gide.com

#### Warsaw

Tel. +48 (0)22 344 00 00  
gln.warsaw@gide.com



- provisions on subcontracting: right for the contracting authority to ask potential investors, without prejudice to the question of the private investor's liability, to indicate in the offer any share of the contract they intend to subcontract to third parties, as well as any proposed subcontractors; contracts entered into with the subcontractors indicated in the offer must be submitted to the contracting authority upon execution of the PPP contract and must be attached thereto; the replacement of subcontractors indicated in the offer throughout the performance of the PPP contract is allowed only subject to the approval of the contracting authority and to the replacement not resulting in any modification of the initial technical or financial offer;
- possibility of submitting variants (alternative offers) if expressly allowed in the contract notice;
- detailed provisions on technical specifications including: definitions of certain technical specifications, rules to be complied with by contracting authorities when establishing technical specifications;
- the price of the PPP contract may be modified throughout the performance of the contract only in limitative circumstances expressly provided by the PPP Norms;
- detailed rules on the publishing and content of notices of award of PPP contracts;
- the possibility for the public partner to resort to a negotiated procedure without having published a contract notice only in exceptional circumstances;
- enhancement of the role of the Central Unit for the Coordination of Public Private Partnership.

No provisions have been enacted as regards lenders' step-in rights or Government financial support for PPPs.

## II. New texts in the public procurement legal framework

The Romanian legal framework on public procurement has been amended and supplemented with new legal texts:

- **Government Decision No. 1045/2011** amends Government Decision No. 925/2006 approving the Norms on Public Procurement, by providing for specific rules applicable to performance bonds set up by retention of the relevant amounts from the amounts due by the contracting authority, where the contracting authority is a public authority, a public institution or a company whose share capital is fully owned by the State or where the State is the majority shareholder.

In such cases, contractors are under an obligation to open with the State Treasury an account at the disposal of the contracting authority.

- **Order No. 509/2011 on drafting of qualification and selection criteria issued by the National Authority Regulating and Monitoring Public Procurement (NARMPP)** provides contracting authorities with guidance for establishing such criteria in view of avoiding that the minimum qualification and selection requirements result in restricting the participation of undertakings in the award procedures or in infringing the proportionality principle.

Among the provisions of Order No. 509/2011 we note: the distinction between the qualification and selection criteria and the evaluation factors, rules for establishing the qualification and selection criteria and the documents to be submitted by the bidders/candidates, guidance for assessing compliance in case of a group of undertakings or in case of subcontracting, examples of restrictive and non-restrictive wording for the qualification and selection criteria.

- **NARMPP Order No. 553/2011 on the interpretation of Article 243 of Government Emergency Ordinance No. 34/2006 on the award of public procurement contracts, public works concession contracts and services concession contracts** details the principle that entities carrying on activities qualified as relevant activities are under an obligation to comply with the public procurement procedures only when acquiring goods/works/services that are to be used, either directly or indirectly, for the purposes of carrying on the relevant activity in a public utility sector; examples are also provided.



### Gide Loyrette Nouel

10-12 Strada Maior Sontu  
Sector 1 - Bucharest  
Romania  
Tel. +40 21 223 03 10  
Fax +40 21 223 03 42  
E-mail: [gln.bucharest@gide.com](mailto:gln.bucharest@gide.com)

#### Contacts

**Bruno Leroy** ■ [bruno.leroy@gide.com](mailto:bruno.leroy@gide.com)

**Andreea Toma** ■ [toma@gide.com](mailto:toma@gide.com)

For further information: [www.gide.com](http://www.gide.com)



Gide Loyrette Nouel

You can also find this Brief and other newsletters on our website in the News/Publications section.