

Legal Alert

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In this issue:

Law on public-private partnership, substantial amendments

The architecture of public-private partnership is substantially amended according to the provisions enacted by Emergency Ordinance no. 104/2017 for amending and supplementing Law no. 233/2016 on public-private partnership.

The main amendments consist of:

- New definition of some concepts;
- The possibility for the public partner to finance the investments with financial resources coming from public funds other than post-accession non-reimbursable external funds or their national contribution.

General and specific terms and conditions, together with the contractual framework agreement model, approved in the field of public procurement

Through Government Decision no. 1/2018 approving general and specific conditions for certain categories of procurement contracts related to publicly funded investment objectives, as published in Official Gazette no. 26 of 11 January, 2018, the general and specific terms and conditions, together with the framework agreement model for public or sectoral procurement contracts covering either the performance of works only or both the design and performance of works, have been approved, if such:

- are related to publicly funded investment objectives, including non-reimbursable or reimbursable funds, and
- the estimated total value is equal to or greater than the threshold value provided by art. 7 par. 1 lt. a of Law no. 98/2016, respectively 24,977,096 lei.

Legislative proposal regarding the authorization of the execution of construction and demolition works

The new proposal for the law regarding the authorization of the performance of construction and demolition works aims to replace Law no. 50/1991, restructuring the law and bringing forward a series of substantial changes.

Law on public-private partnership, substantial amendments

The architecture of public-private partnership is substantially amended according to the provisions enacted by Emergency Ordinance no. 104/2017 for amending and supplementing Law no. 233/2016 on public-private partnership, published on December 28th, 2017, in Official Gazette no. 1037.

In the explanatory memorandum of the ordinance, it is provided that such enactment has been issued, among other reasons, for "*the introduction of new concepts specific to public-private partnership contracts reflecting good international practice and simplification of steps to be taken by public authorities intending to implement public-private partnership projects.*"

The main changes brought by Ordinance no. 104/2017 are:

- a series of new definitions of the following concepts have been introduced: public project, financial closure, public-private partnership contract, intervention works;
- the architecture of the public-private partnership has been substantially modified. Thus, if initially, through Law no. 233/2016, the public partner would finance the performance of the investments exclusively by way of public financial resources coming from post-accession non-reimbursable external funds and from the national contribution related to them, now, through the amendments brought by the ordinance, the public partner is allowed to finance the investments with financial resources coming from public funds other than post-accession non-reimbursable external funds or their national contribution;
- the legal effects of early termination of the public-private partnership contract by default of the private partner have been thoroughly detailed;
- the financeability concept was replaced by bankability concept, and the performance of the bankability analysis was further detailed.

Following publication of such legislative amendments, the Romanian Government envisages preparation and publication of relevant application norms, corresponding to the relevant PPP legal framework.

General and specific terms and conditions, together with the contractual framework agreement model, approved in the field of public procurement

By Government Decision no. 1/2018 approving general and specific terms and conditions for certain categories of procurement contracts related to publicly funded investment objectives, published in Official Gazette no. 26 of January 11, 2018, the general and specific terms and conditions, together with the framework agreement model for the public or sectoral procurement contracts, have been approved.

The enactment provides that these general and specific terms and conditions, together with the framework agreement model, relate to public or sectoral works contracts which have as object either the performance of works, or both the design and performance of works. Furthermore, these contracts are related to publicly funded investment objectives (including non-reimbursable or reimbursable funds).

In order for the provisions of the government decision to be deemed as applicable, the estimated value of the contracts must be equal to or exceed the threshold for which publication of a contract notice in the Official Journal of the European Union is mandatory in order to carry out the award procedure. In relation to contracts for which the estimated value is inferior to such threshold, contracting authorities or entities may decide whether to use such general and specific terms and conditions, together with the contractual framework agreement.

The government decision contains a number of relevant provisions on the allocation of risks between the contracting parties, sets out the conditions for amending or supplementing the contracts and includes a compromise clause: *"except in cases where disputes are settled amicably, in accordance with Sub-Clause 70.2 [Amicable Settlement] any dispute arising out of or in connection with this Agreement shall be settled by arbitration, in accordance with the Rules of Arbitration of the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania. The applicable law will be the one established under Clause 71 [the Law]."*

Additionally, the enactment also includes a number of transitional provisions aimed at eliminating potential uncertainties surrounding its application.

For further questions regarding the aspects mentioned in this alert, please contact us.



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Legislative proposal regarding the authorization of the execution of construction and demolition works

On Monday, 15 January 2018, the Ministry of Regional Development, Public Administration and European Funds launched a public debate on the draft legislation related to the authorization of the performance of construction and demolition works (hereinafter referred to as the "**Draft Legislation**").

As mentioned in the Substantiation Report, the Draft Legislation reconfigures the current content of Law no. 50/1991 on the authorization of the performance of construction works (hereinafter referred to as "**Law 50/1991**") and brings forward a series of important changes regarding the legislation in force, as further detailed below.

Urbanism Certificate

In relation to the urbanism certificate, the Draft Legislation takes over its content from Law no. 350/2001 regarding land planning and urbanism (hereinafter referred to as "**Law 350/2001**").

We note the fact that, in contrast to Law 350/2001, the Draft Legislation does not mention the necessity of obtaining an **opportunity permit** (in Romanian: "*aviz de oportunitate*") in case of an update/change of the urbanism documentation and corresponding regulations. It remains to be seen whether the concept of the opportunity permit will remain regulated in Law 350/2001 or if the intention of the legislator was, in fact, its elimination.

At the same time, the Draft Legislation provides the obligation of obtaining the urbanism certificate in case of **merger or dismemberment** of lands, **regardless of the number of the assets** that are the object of these operations.

Endorsements and permits necessary for the issuance of the building permit

The Draft Legislation regulates the possibility of obtaining the endorsements and the permits mentioned by the urbanism certificate (except for those regarding environmental protection) through a **unique office** (in Romanian: "*ghiseu unic*"), in the case of the territorial units where a **sole approval commission** is organized.

At the same time, the Draft Legislation provides that the institutions and economic operators empowered to issue the endorsements/ permits required through the urbanism certificate have the duty to request the **completion** of the transmitted documentation within 10 days from its reception. In the case of permits who are not conditioned by the review of the documentation by a commission, **a request for completion sent after the abovementioned term is prohibited**.

The process of **implicit approval** (in Romanian: "*aprobare tacită*") of the endorsements and permits was excluded through the proposed Legislation Draft.

The Draft Legislation brings a clarification regarding the validity of the permits/endorsements, stating that their validity is maintained throughout the investment's implementation, until the date of the signing the final reception protocol of the works.

The Draft Legislation **prohibits** the request, through the urbanism certificate, of any permits and/or endorsements that have no legal grounds in relation to the necessary works for the achievement of the envisaged constructions.

The Draft Legislation provides several exceptions from the general 15-days term for issuance of permits and endorsements, as follows: in the field of environmental protection, where the term is regulated by special legislation,

and in the field of cultural patrimony protection where there is a special 45-days term from the date when the complete documentation is submitted.

The Building/ Demolition Permit

Regarding the process for obtaining the building/demolition permit, the Draft Legislation expressly regulates the procedure for the supplementation of the documentation submitted for the issuance of the permit. Hence, the permit issuer has the obligation, within 15 working days (the present term is of 5 days) from the date of the submission of the documentation, to notify the applicant that the documentation is incomplete or requires technical clarifications or changes, any request after this term being expressly prohibited. If the applicant is notified to complete the documentation, the 30-days term for the issuance of the building/demolition permit shall be delayed with the corresponding number of days, provided that all the changes/completions are submitted within maximum 3 month from receiving the notification.

The Draft Legislation clarifies the situation of a pending **litigation** having as object the immovable asset – land and/or constructions, in which case the documentation **is sent back to the applicant** who may request the issuance of the permit only after a definitive award is issued. Thus, **the existence of a litigation prevents the issuance of a building/demolition permit**. It remains to be seen if the legislator will specify or clarify the typology of the preventing the issuance of the permits.

In case **the works are not commenced** in the validity term of the building/demolition permit, which implies the obligation to obtain a new permit, the Draft Legislation expressly mentions, in addition to the legislation in force, that the issuance of new permits/endorsements shall not be necessary for obtaining the new permit.

The Draft Legislation also clarifies that, in case the building permit's validity is extended, the tax to be paid for the prolongation – of 30% of the initial value of the permitting tax – will not be taken into account for the regularization of the tax at the completion of the construction/demolition works.

The Draft Legislation states that the documentation substantiating the issuance of the building/demolition permits does not have a public character.

The responsibilities of the public administration in issuing the permits

In case competent authority for the issuance of the building/demolition permit is the general mayor of Bucharest Municipality, the Draft Legislation mentions that the mayors of the districts of the Bucharest Municipality will only be **notified**, without being requested an **endorsement**, as opposed to the legislation in force.

The competent authority for the issuance of the building/demolition permits for connections to the urban networks or for any local intervention works to the streets that are administered by the Bucharest General Council shall be the mayors of the corresponding districts, rather than the mayor of Bucharest.

Change of the investor

A welcome addition refers to a controversial aspect in doctrine regarding the situation of change of the investor prior to the issuance of the building/demolition permit. In this situation, the Draft Legislation states that the permits and the endorsements already obtained before the change of the investor will remain valid and **will be automatically transferred** to the new investor.

The issuance of the building/demolition permit without the necessity of obtaining the complete documentation

The Draft Legislation includes new types of constructions for which the permits can be obtained without the elaboration, prior approval or endorsement of a planning documentation and/or urbanism documentation, such as the provisional constructions.

Additionally, it is provided that the building/demolition permits can be issued without having a County Landscaping Plan or a General Urbanism Plan, and without the previous elaboration, endorsement, and approval of the urbanism documentation for a series of modification, repairing, restauration, extension, rehabilitation, etc. works.

Works executed without a building/demolition permit

The provisions regarding the performance, without the prior issuance of a building/demolition permit, of works which do not modify the structural frame and/or the architectural of the constructions suffered several changes in the Draft Legislation.

In this sense, the Draft Legislation provides new types of works for which ***the building permit is not required***, such as the intervention works for the implementation of the necessary measures according to fire safety legislation, the execution of fire safety installations, for the purpose of obtaining of the fire safety permit. Moreover, several types of works from this category were modified or excluded. For example, the phrase "*provisional works for non-structural partitioning*" was changed to "*modification of removable, non-structural partition, made of lightweight materials*".

As far as the ***historical monuments*** are concerned, a series of repair and maintenance works, modifications of non-structural partitions or changes of destination can be performed without obtaining a building/demolition permit, if the works do not modify the structural frame and/or the architectural appearance of the constructions located in protected areas for historical monuments or in protected built areas, which are not qualified as historical monuments or their qualification is pending, or if such constructions do not represent valuable architectural or historical constructions, as provided in the approved urbanism documentation.

Simplified content for the permitting documentation

The Draft Legislation reintroduces the documentation with simplified content for the following types of works:

- modification works for inner partitioning;
- works for the enclosure of the existing balconies/loggias;
- works for the installation of the electronic communication networks.

Liability and sanctions

The Draft Legislation sanctions new deeds with administrative fines ranging from RON 1,000 to RON 50,000 for both investors' actions and the acts of the authorities or the public entities, as follows:

In what regards the investor:

- the failure to display the billboard of the investment;
- the failure to submit to the State Inspectorate for Constructions the P.A.C/P.A.D/P.O.E. project;
- non-payment of the fee of 0.1% of the value of the authorized works.

In what regards the public authorities:

- the unjustified refusal to issue of the building/demolition permit or the restitution without a legal ground of the documentation for the authorization for the performance of building/demolition works;
- the failure to respect the 15-days term for issuing the permits/endorsements requested through the urbanism certificate;
- the issuing of the building/demolition permits urgently/as a first urgency for other situations than the ones provided in the law;
- the issuance of the administrative deeds without requesting and obtaining the approval of the special department within the county council;

In what regards other public entities:

- the failure of the owners/administrators of the technical-urbanism networks to submit the plans with the routes of the existing networks located on the territory of the county, municipality, or the Bucharest municipality, to the public administrative authorities within 180 days.

Furthermore, the Draft Legislation mentions that in the case of constructions with a touristic destination and/or constructions build within 200 meters of the coastal line, from touristic resorts and from the localities on the Black Sea coast, placed on the lands within the public or private domain, which have been executed or demolished without permits or without following the provisions of the permits, alongside a fine, the authorities may also order **the demolition of the buildings**. It is important to mention that the demolition must be performed by the one sanctioned in a term of maximum 30 days. Otherwise, the buildings will be demolished by the public authorities without the prior issuance of a demolition permit, without the notification of the courts and on the contravening part's expense.

The finalization of the construction works

The Draft Legislation clarifies that the admission of the **reception** upon the completion of the works will be conditioned on the fulfilment of the obligation to rectify **the 0.1% quota** of the value of the authorized works.

Final and transitory provisions

The Draft Legislation provides the establishment of a national registry for constructions. This registry will be a database, which will be updated monthly and will include all the authorized public works and constructions, performed using public or private funds, with the exception of the special constructions of the institutions from the defense system, public order, and national security.

As opposed to Law 50/1991, the Draft Legislation does not mention the documents based on which the ownership right over the constructions will be registered in the land book.

For the easement and efficiency of the process of obtaining of permits, urbanism certificates, building/demolition permits, the Draft Legislation provides a series of measures and obligations for the public authorities. In this sense, the investors will be able to transmit in an electronic format, online, the documentation for the issuance of urbanism certificates, building/demolition approvals/endorsements, and permits.

As far as the time enforcement of the Draft Legislation is concerned, the urbanism certificates issued before the Draft Legislation will enter into force and the permits/endorsements obtained based on these certificates will be valid, and the authorities that issue the certificates will issue the building permits. Additionally, if the competences to issue the building/demolition permits will change according to the Draft Legislation, the competent public authority according to the Draft Legislation will issue the building permit based on the urbanism certificate already issued.

Definition

The Legislation Draft also brings new modifications in the definitions section. For the first time, the attic is defined as a functional space placed between the shingle roof and the last floor of the building, limited by the walls of the maximum free altitude stretched between 1,00 and 1,50 meters, having a net area a maximum of 60% from the net area of the last floor.

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