

# CONCESSION OF PUBLIC PROPERTY GOODS

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## Abstract

*The state has the quality of grantor for the public property of the state, being represented, in this sense, by ministries or other specialized bodies of the central public administration. by the president of the county council, and the commune, city or municipality, as the case may be, has the quality of grantor for the public property of the commune, city or municipality, being represented, in this sense, by the mayor of the commune, city or municipality, respectively by the mayor general of Bucharest.*

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**JEL classification:** K0, K1

According to art. 302 of the Administrative Code, the goods in the public domain, which are provided by law or which by their nature can be exploited in order to collect natural, civil or industrial fruits and products may be the subject of the concession. They can be granted by the state or by the administrative-territorial units on the basis of a concession contract for public property.

A public property concession contract is a contract concluded in writing by which a public authority, called a concessionaire, transfers, for a specified period, to a person, called a concessionaire, who acts at his own risk and responsibility, the right and obligation to exploit a good public property in exchange for a royalty.

The state has the quality of grantor for the public property of the state, being represented, in this sense, by ministries or other specialized bodies of the central public administration. by the president of the county council, and the commune, city or municipality, as the case may be, has the quality of grantor for the public property of the commune, city or municipality, being represented, in this sense, by the mayor of the commune, city or municipality, respectively by the mayor general of Bucharest.

Sub-concession is prohibited. Publicly owned real estate is registered in the land register prior to the conclusion of the public property concession contract, and non-compliance with these provisions entails the absolute nullity of the public property concession contract.

The public property concession contract is concluded in accordance with Romanian law, regardless of the nationality or citizenship of the concessionaire, for a period not exceeding 49 years, starting from the date of its signing and may be extended by agreement of will concluded in writing, provided that the total duration does not exceed 49 years. By special laws, concessions with a duration of more than 49 years can be established.

The royalty obtained by concession is constituted income to the state budget or to the local budgets, as the case may be.

The royalty obtained by concession, from activities of exploitation of the surface resources of the state, is constituted income as follows:

- a) 40% to the local budget of the county on whose territory the exploitation activity exists;
- b) 40% to the local budget of the commune, of the city or of the municipality, as the case may be, on the territory of which there is exploitation activity;
- c) 20% to the state budget.

The royalty obtained by concession, from activities of exploitation of the surface resources of the administrative-territorial units, is constituted income to the budget of the granting administrative-territorial unit.

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The method of calculation and payment of the royalty is established by the line ministries or by other specialized bodies of the central public administration or by the local public administration authorities, according to the legal provisions.

When initiating the procedures for determining the calculation of the fee, the line ministries, other specialized bodies of the central public administration or the local public administration authorities, as the case may be, will take into account the following criteria:

- a) the proportionality of the royalty with the benefits obtained from the exploitation of the good by the concessionaire;
- b) the market value of the good that is the object of the concession;
- c) correlation of the royalty with the duration of the concession.

According to art. 308 of the Administrative Code, the concession takes place at the initiative of the grantor or as a result of a proposal adopted by him. Any interested person may submit a concession proposal to the grantor.

The concession proposal is made in writing, includes the identification data of the person concerned, the firm and serious manifestation of the concession intention, the object of the concession, the business plan and must be substantiated from an economic, financial, social and environmental point of view.

The concession initiative must be based on an opportunity study which shall include, in particular, the following elements:

- a) description and identification of the property to be leased;
- b) economic, financial, social and environmental reasons, which justify the concession;
- c) the minimum level of the royalty;
- d) the procedure used for awarding the public property concession contract and justifying the choice of procedure;
- e) the estimated duration of the concession;
- f) the foreseeable deadlines for the accomplishment of the concession procedure;
- g) the obligatory approval of the National Administration of State Reserves and Special Issues and of the General Staff regarding the classification of the object of the concession in the infrastructure of the national defense system, as the case may be;
- h) the obligatory approval of the administration structure / custodian of the protected natural area, in case the object of the concession is goods located inside a protected natural area, respectively of the territorial authority for environmental protection competent, if the protected natural area has no structure administration / custodian.

The grantor is obliged, within 30 days from the adoption of the concession proposal formulated by the interested party, to proceed to the elaboration of the opportunity study. In cases where the public authority does not have the organizational and technical capacity to develop this study, it may call on the services of specialized consultants.

To the extent that, after drawing up the opportunity study, it is found that the exploitation of the property to be granted necessarily involves the execution of works and / or services, the grantor has the obligation to, depending on the purpose and activities carried out, to qualify the nature of the contract according to the legislation on public procurement or works concessions and service concessions, as the case may be. For this purpose, the grantor may request the opinion of the competent authority in the field. The opportunity study is approved by the grantor, by order, decision or decision, as the case may be.

After the elaboration of the opportunity study and based on it, the grantor elaborates the specifications of the concession. This new document must include at least the following elements:

- a) general information on the object of the concession, ie the description and identification of the property to be concessioned, the destination of the goods subject to the concession, the conditions of operation of the concession and the economic, financial, social and environmental objectives pursued by the concessionaire of the goods that are the object of the concession.

b) general conditions of the concession, ie the regime of the own goods, respectively the goods used by the concessionaire in the development of the concession, the environmental obligations, the obligation to ensure the operation in continuity and permanence regime, etc.

c) the validity conditions that the offers must meet;

d) clauses regarding the termination of the public property concession contract.

The principles underlying the award of public property concession contracts are:

a) transparency - making available to all interested parties the information regarding the application of the procedure for awarding the public property concession contract;

b) equal treatment - the application, in a non-discriminatory manner, by the public authority, of the criteria for awarding the public property concession contract;

c) proportionality - any measure established by the public authority must be necessary and appropriate to the nature of the contract;

d) non-discrimination - the application by the public authority of the same rules, regardless of the nationality of the participants in the procedure for awarding the public property concession contract, according to the conditions provided in the agreements and conventions to which Romania is a party;

e) free competition - ensuring by the public authority the conditions for any participant in the award procedure to have the right to become a concessionaire under the law, international conventions and agreements to which Romania is a party.

The grantor has the obligation to award the public property concession contract by applying the tendering procedure and to ensure the protection of that information communicated to him by natural or legal persons in a confidential manner, insofar as, objectively, the disclosure of the information in question. it would harm the legitimate interests of those persons, including trade secrets and intellectual property.

The award documentation shall be drawn up by the awardee, who shall specify in the award documentation any requirements, criteria, rules and other information necessary to ensure that the tenderer is fully, correctly and explicitly informed of the application of the award procedure. attribution.

The grantor has the right to impose in the award documentation, insofar as they are compatible with the object of the contract, special conditions for fulfilling the contract which aims to obtain social effects or in connection with environmental protection and the promotion of sustainable development.

The interested person has the right to submit a request to participate in the procedure for awarding the public property concession contract.

The grantor has the right to opt for one of the following ways of obtaining the award documentation by the persons concerned:

a) ensuring direct, unrestricted and full access, by electronic means, to the content of the award documentation;

b) making available to the person concerned who has submitted a request to that effect a copy of the award documentation, on paper and / or on magnetic media.

The grantor has the right to set a price for obtaining the award documentation, provided that this price does not exceed the cost of multiplying the documentation, to which may be added, where appropriate, the cost of its transmission.

The award documentation must include at least the following elements:

a) general information on the grantor, such as: name, personal numerical code / tax identification code / other form of registration, address / registered office, contact details, contact person;

b) instructions regarding the organization and development of the concession procedure;

c) the specifications;

d) instructions regarding the elaboration and presentation of the offers;

- e) detailed and complete information on the award criteria applied to establish the winning bid, as well as their weight;
- f) instructions on how to use remedies;
- g) information regarding the mandatory contractual clauses.

The auction is initiated by the publication of a tender notice by the grantor in the Official Gazette of Romania, Part VI, in a daily newspaper of national circulation and in one of local circulation, on its website or through other media or channels. public electronic communications.

The tender notice shall be drawn up after approval of the award documentation by the grantor and shall include at least the following elements:

- a) general information regarding the grantor, such as: name, fiscal identification code, address, contact details, contact person;
- b) general information on the object of the concession, in particular the description and identification of the property to be concessioned;
- c) information on the award documentation: the manner or ways in which the persons concerned may take possession of a copy of the award documentation attribution; the name and contact details of the service / department within the grantor, from which a copy of the attribution; the cost and conditions of payment for obtaining the award documentation, where applicable; deadline for requesting clarifications;
- d) information on tenders: deadline for submission of tenders; the address to which tenders must be submitted; the number of copies in which each tender must be submitted;
- e) the date and place at which the public opening meeting of the tenders will take place;
- f) the court competent in resolving disputes and the deadlines for notifying the court;
- g) the date of transmission of the tender notice to the competent institutions, for publication.

The tender notice is sent for publication at least 20 calendar days before the deadline for submission of tenders. The interested party has the right to request and obtain the award documentation.

The tender procedure may be carried out only if at least two valid tenders have been submitted following the publication of the tender notice, and if at least two valid tenders have not been submitted following the publication of the tender notice, the grantor is obliged to cancel the procedure. and to hold a new tender, in which case the procedure shall be valid if at least one valid tender has been submitted.

As an exception, public property may be granted by direct assignment to national companies, national companies or companies subordinated, under the authority or coordination of the state, which were established by reorganization of autonomous utilities and whose main object of activity is management, maintenance, repair and development of those assets, but only until the completion of their privatization.

The bidder has the obligation to elaborate the bid in accordance with the provisions of the award documentation, in Romanian. Tenders shall be submitted at the grantor's premises or at the place specified in the notice of invitation to tender, in two sealed envelopes, one outer and one inner, which shall be recorded by grantor, in the order of their receipt, in the Offers register, specifying the date and time.

The tender will be submitted in a number of copies established by the grantor and provided in the tender notice. Each copy of the tender must be signed by the tenderer. Each participant can submit only one offer.

The interested party has the obligation to submit the offer to the address and by the deadline for submission, set out in the notice of procedure. The risks related to the transmission of the offer, including force majeure, are borne by the person concerned. The content of the tenders must remain confidential until the date set for their opening, the grantor will only become aware of the content of those tenders after that date.

The criteria for awarding the public property concession contract are the following:

- a) the highest level of the royalty;
- b) the economic-financial capacity of the bidders;
- c) environmental protection;
- d) specific conditions imposed by the nature of the leased property.

The weight of each criterion is established in the award documentation and must be proportionate to its importance assessed from the point of view of ensuring a rational and economically efficient use / exploitation of the leased asset. The weight of each of the criteria is up to 40%, and their sum must not exceed 100%.

The grantor has the obligation to establish the winning bid based on the award criterion / criteria specified in the award documentation. During the application of the award procedure, the grantor has the right to request clarifications and, where appropriate, completions of the documents submitted by tenderers to demonstrate the compliance of the tender with the required requirements. The request for clarifications is proposed by the evaluation committee and is sent by the grantor to the bidders within 3 working days from the receipt of the proposal of the evaluation committee.

Sealed envelopes shall be handed over to the evaluation committee on the day fixed for their opening, provided for in the tender notice. Following the opening of the external envelopes in open court, the evaluation committee shall remove the tenders which do not contain all the required documents and data.

After analyzing the contents of the outer envelope, the secretary of the evaluation committee shall draw up the minutes specifying the result of the analysis. The opening of the inner envelopes is done only after the signing of the minutes by all the members of the evaluation commission and by the bidders.

Following the evaluation of the tenders by the evaluation committee, on the basis of the validity criteria, its secretary shall draw up a report mentioning the valid tenders, the tenders that do not meet the validity criteria and the reasons for excluding the latter from the award procedure. The minutes shall be signed by all members of the evaluation committee.

On the basis of the minutes meeting the conditions, the evaluation committee shall draw up, within one working day, a report which it shall send to the grantor. Within 3 working days of receiving the report of the evaluation committee, the grantor shall inform, in writing, with acknowledgment of receipt, the tenderers whose tenders have been excluded, indicating the reasons for the exclusion.

If there are equal scores between the first ranked bidders, their tie will be made according to the score obtained for the award criterion which has the highest weight, and in case of further tie, the tie will be made according to the score obtained for the award criterion which has the highest weight after it.

Based on the evaluation of the bids, the secretary of the evaluation commission draws up the minutes that must be signed by all the members of the commission.

The grantor has the obligation to conclude the public property concession contract with the bidder whose bid was established as the winner and to send for publication in the Official Gazette of Romania, Part VI, a notice of award of the concession contract of public property, within 20 calendar days from the completion of the procedure for awarding the contract for the concession of public property.

### **Bibliography**

1. The administrative code of 03.07.2019. Effective July 5, 2019.

The consolidation of June 6, 2021 is based on the publication in the Official Gazette, Part I no. 555 of July 5, 2019. Includes the amendments brought by the following acts: GEO 63/2019; GEO 1/2020; GEO 44/2020; GEO 61/2020; DCZ 240/2020; L 84/2020; GEO 164/2020; GEO 226/2020; GEO 4/2021. The last amendment on March 5, 2021.