

GENERAL ASPECTS REGARDING JURISDICTIONAL ADMINISTRATIVE CONTEST REGULATED BY LAW NO. 101/2016 ON THE CONTRACTS OF PUBLIC PROCUREMENT, SECTORAL CONTRACTS AND WORK CONCESSION CONTRACTS OR SERVICES

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Abstract

In 2016, national legislation on public procurement, sector procurement and concession contracts for works and services was modified, creating a unitary and modern legal framework. For settlement of all disputes regarding these categories of contracts regulated by separate normative acts, a single regulation was adopted, namely Law no. 101/2016 on remedies and remedies in connection with the award of public procurement contracts, sectoral contracts and concession contracts for works and concessions of services, as well as for the organization and functioning of the National Council for Solving Complaints². The present paper aims to present the scope of this regulation as well as the administrative-judicial dispute settlement procedure formulated in the procedures for concluding these contracts.

Keywords: public procurement, sector procurement, concession contract, contracting authority, National Council for Solving Complaints, Law no. 101/2016.

JEL Classification: H57, K23, K41.

1. Introduction

At the EU level, in the area of appeal procedures formulated in procurement procedures, it was adopted at the end of 2007 the Directive 2007/66 / EC of the European Parliament and of the Council³ amending Council Directives 92/13/EEC⁴ and 89/665/EEC⁵ as regards the improvement of the effectiveness of review procedures in respect of the award of public contracts. The Directive set a deadline of 2 years for Member States to create a national regulatory framework to transpose the text of the Directive. Directive 2007/66/EC was adopted following the amendment of the procurement framework by adopting Directives 2014/23/EC⁶, 2014/24/EC⁷ and 2014/25/EC⁸ which have replaced previous procurement rules.

At national level, until 2016, the normative framework in the field of public procurement was represented by Government Emergency Ordinance no. 34/2006 on the award of public procurement contracts, public works concession contracts and services concession contracts⁹ and, in the field of

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² Law no. 101/2016 on remedies and remedies in connection with the award of public procurement contracts, sectoral contracts and concession contracts for works and concessions of services, as well as for the organization and functioning of the National Council for Solving Complaints, published in Monitorul Oficial Official, Part I, no. 393 of 23 May 2016.

³ Directive 2007/66/EC of the European Parliament and of the Council amending Council Directives 89/665 / EEC and 92/13 / EEC as regards the improvement of the effectiveness of review procedures in respect of the award of public contracts Official Journal of the European Union L 335/20.12.2007.

⁴ Directive 92/13/EEC on the coordination of laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, published in the Official Journal of the European Communities L 076 of 23.03.1992.

⁵ Directive 89/665/EEC on the coordination of laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply contracts and public works contracts published in the Official Journal of the European Union L 395 of 30.12.1989.

⁶ Directive 2014/23/EC of the European Parliament and of the Council on the award of concession contracts, published in the Official Journal of the European Union L 94 of 28.03.2014.

⁷ Directive 2014/24/EC of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC, published in the Official Journal of the European Union L 94 of 28.03.2014.

⁸ Directive 2014/25/EC of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

⁹ Government Emergency Ordinance no. 34/2006 on the award of public procurement contracts, public works concession contracts and service concession contracts, published in the Official Gazette Part I, no. 418 of 15.05.2006.

concession contracts, this regulation was supplemented by Law no. 178/2010 on public-private partnership¹⁰.

Following the legislative changes at the level of the European Union, in 2016, the Romanian Parliament adopted a legislative package to regulate the field of public procurement. Thus, Law no. 98/2016 on public procurement¹¹ together with the methodological norms for application, Law no. 99/2016 on sector acquisitions¹² together with the methodological norms for application, Law no. 100/2016 on concessions of works and concessions of services¹³, together with the methodological norms for application and Law no. 101/2016 on remedies and remedies in connection with the award of public procurement contracts, sectoral contracts and concession contracts for works and concessions of services, as well as for the organization and functioning of the National Council for Solving Complaints.

2. Content

By Law no. 101/2016 modified by GEO no. 107/2017¹⁴ a unitary procedure for settling the problems resulting from the application of the laws on acquisitions, namely Law no. 98/2016, Law no. 99/2016 and Law no. 100/2016. As a result, any person who considers himself or herself to be in a right or interest in an act of a contracting authority or by failing to solve an application within the legal time limit may request the annulment of the act, oblige the contracting authority to issue an act or the adoption of remedial measures, recognition of the alleged right or legitimate interest, administrative-judicial or judicial.

Participants in public procurement procedures have three categories of means to defend their rights or legitimate interests violated by an administrative act of the contracting authority: remedies, administrative-judicial proceedings and judicial proceedings.

The act of the contracting authority is an administrative act or any administrative operation that produces or is likely to produce legal effects, failure to fulfill its obligations within the legal term, refusal or omission to issue an act or to carry out a particular transaction in connection with the procedures for concluding the contracts public procurement, sector procurement or concession of works or services.

Remedies shall be adopted by the contracting authority upon prior notification to the person concerned with a view to correcting the decisions taken in the award procedure.

The administrative-judicial procedure allows the National Council for Settlement of Complaints CSCN to settle the complaints formulated by the interested parties against the administrative acts issued by the contracting authority.

The court procedure concerns the settlement by the competent courts, tribunals or courts of appeal of the following actions concerning the procedures for the award of public procurement contracts, sector acquisitions, works concession and services:

- Complaints by the person who considers himself / herself wounded against the decisions of the National Council for Solving Complaints in the administrative-judicial procedure, both for reasons of illegality and non-motivation. According to art. 29 para. 1 of the law can not change the procedural framework established before the Council within the 10 days after the communication, the quality of the parties, the cause or object of the appeal can not be changed, nor can new claims be made.

- Complaints formulated under Art. 49 para. 1 of the law of the person who is considered to be wounded by the answer given to the prior notification or who has not received any reply within

¹⁰ Law no. 178/2010 on the public-private partnership, published in the Official Gazette Part I, no. 676 of 05.10.2010.

¹¹ Law no. 98/2016 on public procurement, published in the Official Gazette, Part I, 390 of 23 May 2016.

¹² Law no. 99/2016 on sector acquisitions, published in the Official Gazette, Part I, no. 391 of May 23, 2016.

¹³ Law no. 100/2016 on concessions of works and concessions of services, published in the Official Gazette, Part I, no. 392 of May 23, 2016.

¹⁴ Government Emergency Ordinance no. 107/2017 for the modification and completion of certain normative acts with impact in the field of public procurement, published in the Official Gazette Part I, no. 1022 of 22 Dec. 2017.

the legal term, as well as any person who considers himself / herself wounded by the remedial measures adopted by the contracting authority.

- Requests made under Art. 53 of the law of the person who considers himself / herself to be wound up, in connection with the compensation for damages caused in the award procedure, as well as those concerning the execution, cancellation, nullity, termination, termination or unilateral denunciation of the contracts Compensation for the damage caused, an act of the contracting authority issued in breach of legal provisions in the field of public procurement, sectoral acquisitions or concessions or as a result of the failure to solve within a legal term a request for the award procedure may be granted only after the act has been annulled or, taking any other remedial action by the contracting authority.

- Requests made under Art. 58 of the law by any interested person having as object the finding of the absolute nullity of the contract / ancillary act concluded with the violation of the conditions stipulated by the special legislation, if: a) the contracting authority has awarded the contract without complying with the obligations related to the publication of a participation announcement, according to the provisions of the relevant legislation; b) the contracting authority seeks to obtain the execution of a work, service or product, which would place the contract in the category of contracts subject to public procurement legislation, sector procurement legislation or work concession legislation and service concessions, but the authority the contracting party concludes another type of contract, in breach of the legal tender procedure; c) the contract / addendum to the contract was concluded under conditions less favorable than those provided in the technical and / or financial proposals which constituted the winning bid; d) the qualification and selection criteria and / or the evaluation factors provided in the tender notice which formed the basis of the winning bid were not met, leading to the alteration of the outcome of the procedure, by canceling or diminishing the competitive advantages; e) the contract was concluded before the decision to settle the appeal was received by the Council or by the court or by the non-observance of the decision to solve the appeal.

Access to all three procedural means that Law no. 101/2016 provides them with the persons involved in the procedures provided by the Law no. 98/2016, Law no. 99/2016 and Law no. 100/2016 is imperative conditional upon prior notification, a request requesting the contracting authority to re-examine an act, in the sense of its revocation or modification, according to art. 6 of the law.

The person who considers himself / herself wounded by an act of the contracting authority, under the sanction of dismissing the appeal as inadmissible, has the obligation to notify the contracting authority of the request to remedy, in whole or in part, the alleged violation of the legislation on public procurement or concessions. Depending on the estimated value of the public procurement or concession procedure, the prior notification must be submitted in writing within 10 days of the day following the acknowledgment of the act of the contracting authority considered unlawful if the estimated value of the procedure is equal to or higher than the thresholds in respect of which the transmission for publication to the Official Journal of the European Union of participation notices is mandatory. If the estimated value of the procedure is less than the value thresholds in which the submission for publication to the Official Journal of the European Union is mandatory for the notices of participation, the deadline for submitting the advance notification is 5 days, starting from the day following the receipt of the notice act of the contracting authority considered unlawful.

Within 3 days from the day following the receipt of the prior notification, the contracting authority shall inform whether or not to take steps to remedy the alleged infringement, if it has a 7-day time limit for the effective implementation of the remedial measures, both to the person who notified the contracting authority and to the other economic operators involved in the award procedure by any means of communication provided by the special procurement legislation.

The legal effect of the prior notice is the suspension of the right to conclude the public procurement, sectoral acquisition or concession of works or services, the contract concluded with the violation of the legal provisions being punished by absolute nullity. If, in the same award procedure, the contracting authority purchases products, services or works broken down by lots, suspension of the right to terminate the contract concerns only the lots for which the prior notification has been given.

By way of exception to the condition of prior notification, any person who is deemed to be harmed by the remedial measures adopted by the contracting authority may lodge a complaint before the Council for Solving Complaints or the Court of Appeal, without being bound by the prior notification procedure which had come to her at the time when she addressed the contracting authorities.

3. The administrative-jurisdictional appeal

The administrative-jurisdictional appeal, provided by art. 8 and following. of the law is the procedure by which the person who is considered to be wounded by the answer received on the prior notification or who has not received any reply within the legal term or is considered vitiated by the remedial measures adopted by the contracting authority may refer the National Council for Solving Complaints requesting the annulment of the act the contracting authority, its obligation to issue an act or to take remedial measures and to recognize the claimed right or the legitimate interest.

As a result, they have the capacity to address to the National Council for Solving Complaints (NCSC) only the persons who have sent the notification to the contracting authority and: they have not received any reply within the legal deadline; either have received an answer from the contracting authority, but the response is causing them harm; or have received an answer from the contracting authority that is about to take remedies, but they are detrimental.

The authority that resolves the appeals is the National Council for Solving Complaints (NCSC), institution established by Law no. 101/2016, having jurisdictional powers.

By the appeal, the person who considers himself / herself wounded may request:

- either the cancellation of the act of the contracting authority,
- to oblige the contracting authority to issue an act or take remedial action,
- either the recognition of the claimed right or of the legitimate interest.

As in the case of prior notification, the deadline for submitting appeals differs according to the estimated value of the procurement procedure by 10 days if the estimated value of the public procurement, sector procurement or concession procedure is equal to or higher than the thresholds value in relation to which the transmission for publication to the Official Journal of the European Union of the advertising notices and 5 days is mandatory if the estimated value of the public procurement procedure, sectoral acquisition or concession procedure is equal to or lower than the value thresholds in relation to which it is obligatory to submit the tender notices for publication to the Official Journal of the European Union.

Receiving the contestation, the contracting authority may take the remedial measures it deems necessary, communicating them to the other economic operators involved in the award procedure and to the National Council for Solving Complaints at the latest one working day after the contestant's adoption. If the measures adopted are considered sufficient to remedy the allegedly unlawful acts, the contestant shall send the Council and the contracting authority a request to waive appeals. In this case, the contracting authority has the right to conclude the contract only after the communication of the Council decision on the settlement of the appeal, observing the waiting period provided for its conclusion, otherwise it is hit by absolute nullity. If, under the same award procedure, the contracting authority purchases products, services or works broken down by lot, the remedial measures taken in response to the objection raised concern only the lots for which the appeal was lodged.

The appeal filed in writing according to Art. 10 of the law must include: name and surname, domicile or residence, tax identification number of the natural person contestant or, as the case may be, for legal persons, name, headquarters, unique registration code, registration number in the Trade Register, is also the quality, the e-mail address, the phone number and the fax number. The contestant domiciled abroad indicates, with a view to the rapid communication of procedural acts and his or her domicile or residence in Romania; (b) the name and address of the contracting authority; c) the name of the object of the contract, the award procedure applied, the number and date of the announcement of participation in the SEAP; d) specification of the contested act of the contracting authority; e) subject of the appeal; f) motivation in fact and in law of the appeal; g) the means of evidence invoked

in support of the contestation; h) the signature of the natural person contestant or the representative of the legal person. The complaint must also be accompanied by the prior notification to the contracting authority and the response received.

If it is not complete, the contestant has 3 days to provide all necessary data, otherwise the sanction is to cancel the appeal.

The National Council for Solving Complaints solves the contestations regarding the procedures for awarding the contracts through specialized panels consisting of 3 members of the Council, one of whom is the full president, deciding decisions and concluding with the observance of the principles of legality, celerity, contradictory, securing the right to defense, impartiality and independence of administrative-judicial activity. If the panel finds that it is not competent, it declines its competence in favor of the competent court. The decision of declining the competence of the Council shall not be subject to any appeal, the case being immediately sent to the competent court or, where appropriate, to another competent judicial body.

The appeal shall be submitted to both the Council and the contracting authority no later than the expiration of the legal term of challenge, under the sanction of dismissal of the appeal as late, the contracting authority having the obligation to publish it in SEAP, if the award procedure is carried out in this way. Upon notification of the NCSC, within 5 working days from the date of receipt of the complaint, the contracting authority shall forward its point of view of the appeal, together with any evidence and the copy of the public, sectoral or concession file. The non-observance of the point of view has as a sanction the decree of the contracting authority from the right to propose evidence and to invoke exceptions, except for the exceptions to public order.

The Parties may request access to documents of the file to the Council by request, except for documents which economic operators declare confidential because they also include technical and / or trade secrets whose disclosure would prejudice the legitimate interests of economic operators, in particular in terms of commercial secrecy and intellectual property. Consultation of confidential documents in the offers is only allowed with the written consent of the respective bidders.

The Council has the right to request parties' wishes, to administer any evidence permitted by law and to request any data and documents, insofar as they are relevant to the subject matter of the contestation, any data necessary to resolve the contestation of the parties, as well as other natural or legal persons. The Council may also request from the contracting authority any documents that are relevant to the settlement of the appeal and must be filed within a term that may not exceed 5 working days from the date of receipt of the request under penalty of impossibility of subsequent submission by the contracting authority of the documents requested, the appeal being settled on the basis of the documents in the file.

The deadline for settling the appeal by the Council is, according to art. 24 of the law, 20 days from the date of receipt of the public procurement file, of the sectoral acquisition or of the concession, when it solves the contestation on the merits. When resolving exceptions that prevent the merits of the appeal, the term is 10 days. In duly justified cases, the deadline for resolving the appeal may be extended by 10 days, the extension being communicated to the contracting authority, the non-observance of the term for the resolution of the contestation representing a disciplinary offense punishable by law.

Although it is a procedure requiring the prompt resolution of the complaints formulated in well justified cases and for the prevention of imminent damage, the Council may at the request of the interested person have the possibility, by concluding, within 3 days from the receipt of the request, the suspension of the procedure award or application of the decisions of the contracting authority until the appeal has been resolved. The request for suspension is also communicated to the contracting authority, which is required to submit its views on the application to the Council. In addressing the suspension request, the Council must take into account the consequences of this measure on all categories of interests that may be harmed, including the public interest. The Council decides on the request for suspension by means of an order which may be appealed with a complaint to the competent court within 5 days from the communication. The Council may suspend the settlement of the appeal when the criminal action for a criminal offense has been initiated in connection with the act

challenged by the contestant or when the resolution of the appeal depends in whole or in part on the existence or non-existence of a law subject to another judgment. Suspension of the settlement of appeals takes effect until the final decision is stayed in the cause that caused the suspension, but if it is found that the party requesting the suspension does not have a diligent procedural behavior delaying the settlement of the case or if the resolution of the criminal action lasts more than one year at the time the suspension was filed, without having a solute in that case, the Council may reasonably return the suspension.

By settling the appeal, the Council first decides on procedural and substantive exceptions, and if it considers them well founded, it no longer proceeds with the substantive analysis of the case, pronouncing a decision to reject the contestation as unfounded, late, lacking interest, devoid of object, introduced by a person of no quality or by a person who is not a representative.

If no procedural or substantive exceptions have been raised or if they have been rejected, the Board shall examine the merits of the appeal, verifying the lawfulness and merits of the contested act and may: a) pronounce a decision annulling the act in whole or in part; b) obliges the contracting authority to issue an act; c) has any other measures necessary to remedy the acts affecting the awarding procedure.

When the Council has the decision to amend or remove technical specifications from the specifications or other documents issued in connection with the award procedure, the contracting authority has the obligation to cancel the award procedure if it can not take any other remedy.

When, during the settlement of the appeal, the Council considers that, besides the challenged acts of the contestant, there are other acts that violate the provisions of the legislation regarding the public acquisitions, sector acquisitions or concessions, the National Agency for Public Procurement, (NAPP) and the Court of Accounts, transmitting all relevant documents in support of the complaint, including the contracting authority.

When the Council finds that remedial measures can not be ordered to allow the legal process to continue, it will order the cancellation of the award procedure.

The Council can not decide to award the contract to a particular economic operator.

The decision by which the contestation is solved by the Council or by which it contends without solving the contestation on the merits is called decision, the other judgments pronounced by the Council are called concluding, except for the unification of the administrative-judicial practice. Decisions shall be taken by the vote of the majority of the members of the panel, the separate opinion or competition of a member of the panel being recorded in the decision as well as in minutes.

The reasoned decision shall be communicated in writing to the parties within 3 days of the pronouncement and shall be published within 5 days on the Council's website, in the official bulletin, without reference to the identification data of the parties, to the personal data, as well as to the confidential information of the economic operator. The decisions by which the Council orders the taking of remedial measures are submitted, by electronic means, to NAPP for publication in SEAP.

According to art. 28 of the law, the decision of the Council is mandatory for the parties to the case, and they may ask the Council to correct, clarify or complete the decision.

If, however, the contracting authority concludes the contract with non-compliance with the Council's decision, it is hit by absolute nullity.

Council decisions on appeals may be appealed by any party to the case, with complaints to the competent court, both for reasons of illegality and inaccuracy, within 10 days of communication. There is no way of changing the procedural framework established before the Council in the way to appeal the complaint, and the quality of the parties, the cause or the object of the appeal can not be changed, nor can new claims be made.

4. Conclusions

Adoption of a normative act, Law no. 101/2016, which regulates a unique procedure in the so sensitive field of public procurement, sector acquisitions and concession contracts for works and services, represents a major step forward, at least from the point of view of the legislative framework.

The simplicity of the procedures for concluding procurement contracts required a legal framework to guarantee the participants in these procedures, on the one hand, the legality and fairness of these procedures, but also the shortest possible times to avoid prejudicing the persons involved in the proceedings through unjustified delays.

As positive elements, we can notice the short deadlines of 3, 5 10, max. 20 days, determined in a differentiated manner, depending on the value of the purchase contract.

In order to try to guarantee to the participants in the procurement procedures the correctness of the procedure, Law no. 101/2016 introduced the mandatory advance notification procedure with the intention of permanently establishing a dialogue between the contracting authority and the stakeholders involved in the procurement procedures. The obligation of prior notification to the contracting authority of any matter relating to the procurement procedure proves the legislator's wish to try to solve these problems as quickly and efficiently as possible. Obviously, this in the case of good faith participants in procurement procedures. We can not exclude situations where, for various reasons, more or less well-founded, often bickering, the participants make prior notifications, followed by appeals to the NCSC and possibly court actions with the aim of wiping out or dodging opponents in acquisition procedure. From this point of view, the free access to these procedures, except for the court hearing, can also represent a negative element, and there is no sufficient sanction in these situations. We can not, however, presume the bad faith of the participants in the procurement procedures and minimize the important role that the procedure has to do with the access of those interested in these procedures.

Also, Law no. 101/2016 is a modern regulation that transposes the directives of the European Union directives in this field.

Bibliography

1. Directive 2007/66/EC of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC as regards the improvement of the effectiveness of review procedures in respect of the award of public contracts Official Journal of the European Union L 335/20.12.2007.
2. Directive 92/13/EEC on the coordination of laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, published in the Official Journal of the European Communities L 076 of 23.03.1992.
3. Directive 89/665/EEC on the coordination of laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply contracts and public works contracts published in the Official Journal of the European Union L 395 of 30.12.1989.
4. Directive 2014/23/EC of the European Parliament and of the Council on the award of concession contracts, published in the Official Journal of the European Union L 94 of 28.03.2014.
5. Directive 2014/24/EC of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC, published in the Official Journal of the European Union L 94 of 28.03.2014.
6. Directive 2014/25/EC of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.
7. Law no. 178/2010 on the public-private partnership, published in the Official Gazette Part I, no. 676 of 05.10.2010.
8. Law no. 98/2016 on public procurement, published in the Official Gazette, Part I, 390 of 23 May 2016.
9. Law no. 99/2016 on sector acquisitions, published in the Official Gazette, Part I, no. 391 of May 23, 2016.
10. Law no. 100/2016 on concessions of works and concessions of services, published in the Official Gazette, Part I, no. 392 of May 23, 2016.
11. Law no. 101/2016 on remedies and remedies in connection with the award of public procurement contracts, sectoral contracts and concession contracts for works and concessions of services, as well as for the organization and functioning of the National Council for Solving Complaints, published in Monitorul Oficial Official, Part I, no. 393 of 23 May 2016.
12. Government Emergency Ordinance no. 107/2017 for the modification and completion of some normative acts with impact in the field of public procurement, published in the Official Gazette part I, no. 1022 of 22 Dec. 2017.