

SUBCONTRACTING

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Abstract

Subcontracting represents the facility granted by law to tenderers to fulfill part of the obligations that are assumed by the public procurement contract or a part of the project, through a third party called “subcontractor”, if the offer will be declared as winner by the contracting authority. In practice, on the one hand, it is noted the tendency of the contracting authorities to meet the subcontractors, which is justified by the desire of the contracting authorities to protect their own interests and which corresponds to a higher degree of transparency; subcontracting is to be recommended to the contracting authorities when the public procurement is carried out on their own establishment or on establishments which they have under surveillance. On the other hand, it is also noted the tendency of the tenderers and subcontractors to circumvent this transparency and to disguise subcontracting in the form of relative simulations of various types, precisely so as not to inform the contracting authorities and so that the tenderers obtain certain benefits. In this respect, some doctrinal opinions, some cases of jurisprudence and comparative law references are relevant. In the light of those mentioned above, we have expressed some proposals de lege ferenda.

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JEL Classification: K12, K23

1. “Subcontracting” in Romanian legislation

In the **Romanian legislation**, in accordance with the provisions of art. 3 para. (1) z) yy) of **Law no. 98/2016** on public procurement, in force, **the subcontractor** is defined as “*any economic operator who is not part of a public procurement contract and who executes and/or supplies certain parts or elements of works or construction or performs activities that are part of the object of the public procurement contract, being accountable to the contractor for the organization and development of all the necessary steps for this purpose*”. art. 221 (1), d) iii).

According to the provisions of art. 219 of Law no. 98/2016, „(1) *The contracting authority shall require the contractor, at the latest at the beginning of the execution of the contract, to indicate the names, contact details and legal representatives of the subcontractors involved in the execution of the public procurement contract, to the extent that this information is known at that specific time. (2) The contractor has the obligation to notify the contracting authority of any changes in the information provided in par. (1) during the public procurement contract. (3) The contractor has the right to involve new subcontractors, during the execution of the public procurement contract, provided that their nomination does not represent a substantial modification of the public procurement contract, under the conditions of art. 221. (4) In the situation provided in par. (3), the contractor shall transmit to the contracting authority the information provided in par. (1) and shall obtain the agreement of the contracting authority regarding any new subcontractors subsequently involved in the execution of the contract. (5) When the replacement or introduction of new subcontractors takes place after the award of the contract, they shall send the certificates and other documents necessary to verify the non-existence of situations of exclusion and the resources/capabilities corresponding to their part of involvement in the contract to be performed.*”

In the **previous regulation contained in the Government Emergency Ordinance no. 34/2006** on the award of public procurement contracts, public works concession contracts and service concession contracts in art. 45 it is stated that “(1) Without diminishing the responsibility regarding the way of fulfilling the future public procurement contract, the tenderer has the right to include in the technical proposal the possibility to subcontract a part of the respective contract.

(2). *If the contracting authority so requests, the tenderer has the obligation to specify the*

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part(s) of the contract to be subcontracted and the recognition data of the proposed subcontractors.”

Also, according to art. 188 para. (2) i) of the emergency ordinance *“In case of applying a procedure for awarding a service contract, in order to verify the technical and/or professional capacity of tenderers/candidates, the contracting authority has the right to request them, depending on the specifics, volume and complexity of the services to be provided and only to the extent that this information is relevant for the performance of the contract, the following... information on the part of the contract which the economic operator may intend to subcontract.”*

Last but not least, according to art. 188 para. (3) g) of the same normative act *“In case of applying a procedure for awarding a works contract, in order to verify the technical and/or professional capacity of the tenderers/candidates, the contracting authority has the right to request them, depending on the specifics, volume and complexity of the works to be executed and only to the extent that this information is relevant for the performance of the contract, the following... information on the part of the contract which the economic operator may intend to subcontract.”*

2. “Subcontracting” in community law and jurisprudence

The European Union law plays a very important role in regulating public procurement contracts and, implicitly, in regulating subcontracting conditions. In this respect, the Directive 2014/24/EU of 26 February 2014 on public procurement is relevant, which in Article 72 provides guidance on the act of subcontracting. Important provisions include paragraph 6 (b), according to which *“contracting authorities may verify, on their own initiative or at the request of Member States, whether there are grounds for excluding subcontractors”*³.

At the same time, through Directive no. 2014/24/EU of the European Parliament and of the Council, the Community legislator imposed a number of obligations on Member States regarding subcontractors; by Community act, the Member States are required to regulate at internal level:

- a mechanism for contracting authorities to be able to pay directly to subcontractors the part of the contract executed by them.
- the obligation of subcontractors to comply with the community and national regulations regarding the environment, the social field and labor relations.
- the procedure for the transparency and verification of subcontractors declared by the tenderer, so that the cases of exclusion and the rules on the avoidance of conflicts of interest applicable to tenderers also extend to the level of subcontractors.⁴

In the light of the above, the jurisprudence of the Court of Justice of the European Communities has also concluded in one case that both the purpose and the text of community normative acts show that a tenderer cannot be excluded from the public procurement procedure solely on the ground that he/she intends to use resources he/she does not own and that belong to one or more companies.⁵

3. Doctrinal opinions on “subcontracting”

In relation to these regulations, it can be concluded that the Romanian state has largely complied with the obligations imposed by the Community law, transposing the directions established by the directive at the legislative level. In the current regulation, which is recognized as bringing more transparency to the old regulation, it has been found that contracting authorities and economic operators have a number of obligations regarding subcontractors, as follows:

- the obligation of contracting authorities to request through the award documentation that the tenderer indicate the part(s) of the contract he/she intends to subcontract, as well as the identification

³ See <https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32014L0024&from=DE> – the Directive 2014/24/EU of the European Parliament and of the Council; the document was last accessed on 07.09.2020.

⁴ See <https://cursdegovernare.ro/get-away-fraud-prin-subcontractare.html>, last accessed on 07.09.2020.

⁵ See <http://www.forumachiziti.ro/node/907>; cause C-176/98 Holst Italia, available on <https://eur-lex.europa.eu/legal-content/RO/TXT/?qid=1564470698031&uri=CELEX:61998CJ0176>; the document was last accessed on 07.09.2020.

data of the subcontractors, if these are known at the time of submission of the tender.

- the obligation of subcontractors to comply with the same obligations as tenderers, in the field of environment, the social field and labor relations, established by the legislation adopted at European Union level, the national legislation or other mandatory rules.

- obligations to avoid conflicts of interest by declared subcontractors.

- the obligation of contracting authorities to validate situations of exclusion including the ones at the level of subcontractors suggested by the tenderer.

- the obligation of subcontractors to complete the distinct European procurement document separately, if their resources are taken into account to meet the qualification and selection criteria.⁶

Also, compared to the above, at first glance, the legal status of subcontractors seems quite clearly regulated, permissive in some way for attempts of fraud or at least difficult for such attempts, as it would force the initiators to create sophisticated schemes.

In reality, however, this is not quite the case. A careful analysis of these provisions reveals the “*alternatives*” left by the law for the leakage of funds in connection with the subcontracted works/services. Among these, only three such “*alternatives*” have been identified in the doctrine so far:

- lack of legal differentiation between suppliers and subcontractors.

- the possibility to declare subcontractors later (often at the suggestion of decision-makers within the contracting authorities).

- transparency does not operate at the level of the whole chain of subcontractors.⁷

It was also found that directing illegally obtained funds through subcontracting is a form of systemic fraud, the impact of which could be limited if there was a desire to make the whole chain of suppliers/subcontractors transparent, by forcing the main contractor to disclose them and applying legal requirements to them, targeting the main contractors (exclusion, conflict of interest).⁸

4. Relevant Romanian jurisprudence on “subcontracting”

In the sense of the above, in practice, we highlight two cases investigated by the National Anticorruption Directorate – Territorial Service Tg. Mureș, with incidence in the field:

I. A first case concerned a public procurement procedure carried out in 2011, following which the *Contractual Agreement no. ... between C. as beneficiary and SC C.E., as contractor, having as object the execution of the work “Parc...”*⁹

In the execution of this contract, the contractor **C.E.** did not contribute only in their own name, but in the name of an association, because in the same year 2011 (one day before the conclusion of the above-mentioned contractual agreement) the *Association Agreement to participate in the procedure for the award of the public procurement contract* was authenticated, which the company **C.E.**, as *association leader*, concluded with two associates, *SC M.I.* and *SC K.E.* respectively.

Contrary to the provisions of the association agreement (which provided that “subcontracting

⁶ See <https://cursdeguvernare.ro/get-away-fraud-prin-subcontractare.html>; the document was last accessed on 07.09.2020.

⁷ *Ibidem.*

⁸ *Ibidem.*

⁹ The case file was submitted through indictment no. 40/P/2013 of 14.12.2015 - unpublished, to the Court of Law of Mureș County, for carrying out the procedure in the preliminary chamber and for the trial; the case is currently pending. The following defendants were prosecuted in the indictment: **O.R.** for committing the *crime of undue influence* provided by art. 6 of Law no. 78/2000 - amended with reference to art. 291 of the Penal Code, with the application of art. 308 of the Penal Code and of art. 5 para. (1) of the Penal Code; **B.R.**, for committing offenses of *buying influence*, provided by art. 6 of Law no. 78/2000 - amended with reference to art. 292 of the Penal Code, with the application of art. 308 of the Penal Code and of art. 5 para. (1) Penal Code, **complicity in money laundering in continuous form (2 definite deeds)**, provided by art. 48 Penal Code ref. to in art. 29 para. (1) b) of Law no. 656/2002, with app. art. 35 paragraph (1) and art. 5 paragraph (1) of the Penal Code, with the application of art. 38 para. (1) Penal Code and art. 5 para. (1) Penal Code; **P.V.**, for committing the crimes of **complicity in traffic of influence**, provided by art. 48 ref. to in art. 6 of Law no. 78/2000 - amended with reference to art. 291 of the Penal Code, with the application of art. 308 of the Penal Code and art. 5 paragraph (1) Penal Code, **false in documents under private signature in continuous form (2 definite deeds)**, provided by art. 322 Penal Code, with applic. of art. 35 para. (1) and art. 5 para. (1) Penal Code, **money laundering in continuous form (2 definite deeds)**, provided by art. 29 para. (1) b) of Law no. 656/2002, with app. of art. 35 para. (1) and art. 5 para. (1) Penal Code, with the application of art. 38 para. (1) Penal Code and art. 5 para. (1) Penal Code.

can only be carried out with the unanimous consent of the parties”) and despite all notifications received from the site manager and the two signatory associates of the Association Agreement (SC M.I. and SC K.E.), the reality would prove that the company **C.E.** subsequently concluded with **SC C.B. an effective and disguised subcontracting**, precisely to give an appearance of legality to the relationship between the latter companies.

The co-optation of the company **C.B.** and the subcontracting by the company **C.E.** in its favor of some parts of the execution of the works that constitute the object of the contractual agreement no. ... /2011 was accomplished following the “*influence*” exercised by the defendants **O.R.** and **P.V.** on the representatives of **C.** and the contractor **C.E.**, as well as on the company associated with the latter, SC K.E.

In order to give legitimacy to subcontracting, the company **C.E.** concluded several contracts and carried out numerous correspondences on the subject of subcontracting, disguised in the conclusion of several apparent contracts.

On the occasion of the home search carried out at the social headquarters of **SC C.B.**, the following contracts and documents were identified:

- a) Management contract f.n. of ... 2011, concluded between the company **C.E.**, called “company” and the company **C.B.**, as site manager,
- b) Framework contract for renting means of work/machines/equipment no. ... 2011, in which the company **C. B.** has the quality of locator or owner and the company **C.E.** as inhabitant or tenant,
- c) Contract for the supply of construction materials without number and date, concluded between **SC C.B.**, as supplier and the company **C.E.**, as acquirer,
- d) Subcontract no. ... 2011, concluded between the company **C.E.**, as a contractor, and the company **C.B.**, as a nominated subcontractor,

All these arguments lead us to the conclusion that, in fact, there was a “disguised” subcontracting of the company **C.B.** for execution works at “Parc...”, materialized in the subcontract no. ... / concluded with the company **C.E.** (last of the 4 mentioned above) and “masked” by the conclusion of the three “formal” and “apparent” contracts between these two companies (the first three contracts out of the 4 mentioned above).

II. The second case concerned the “Rehabilitation...” Project, the financial funds being provided by the POR 2007-2013 - “Axis 1...” Major Area of Intervention 1.2 “Investment Support...”, SMIS code: 48844.¹⁰

For the award of works contracts, **the contracting authority T.**, as beneficiary, initiated in SEAP the tender procedure by publishing the invitation to participate no. ... / 2014.

Following the evaluation of the submitted offers, the offer submitted by the **defendant SC A.F.** was declared **the winner**.

As a result, two separate works contracts were concluded between the **contracting authority T.** and the **successful tenderer, the defendant SC A.F.:**

- works contract no. 18/2015 worth ... lei.
- works contract no. 19/2015 worth ... lei.

Shortly after concluding the works contracts, the defendant company proceeded to the effective subcontracting of the works that formed the object of the contracts, by concluding some

¹⁰ The case file was submitted through indictment no. 134/P/2015 of 12.12.2017- unpublished, to the Court of Law of Mureş County, for carrying out the procedure in the preliminary chamber and for trial; the case is currently pending. The following defendants were prosecuted in the indictment: **S.C. AF S.R.L.** for committing crimes of **fraud in a continuous form** provided and punished by art. 244 para.2 Penal Code with the application of art.35 para.1 Penal Code (**four definite deeds**), **improper participation in the use or presentation in bad faith of false, inaccurate or incomplete documents or statements, if the deed results in unfairly obtaining funds from the general budget of the European Union in a continuous form**, provided and punished by art.52 para.3 Penal Code ref. to in art. 18¹ of Law no.78/2000, amended by Law no.187/2012 with the application of art.35 para.1 Penal Code (**two definite deeds**), **with apply art. 38 (1) Penal Code**; **A.G.** for committing crimes of **complicity in fraud in a continuous form**, provided and punished by art. 48 Penal Code ref. to in art. 244 para. 2 of Penal Code with the application of art. 35 para. 1 of Penal Code (**four definite deeds**), **improper participation in the use or presentation in bad faith of false, inaccurate or incomplete documents or statements, if the deed results in unfairly obtaining funds from the general budget of the European Union in a continuous form**, provided and punished by art.52 para.3 Penal Code ref. to in art. 18¹ of Law no.78/2000, amended by Law no.187/2012 with the application of art.35 para.1 Penal Code (**two definite deeds**), **with apply art. 38 (1) Penal Code**.

alleged service contracts for the accomplishment of the “**Rehabilitation**” works...

Thus, the defendant concluded during 2015 a number of 18 service contracts with several companies and individual enterprises. From the analysis of the content of these contracts generically called “service contracts” it results that in reality the subcontracting of the works included in the contracts no. 18 and 19 concluded by the defendant SC A.F. with T. Through these contracts the executor of the works transferred works included in the contracts no. 18/2015 and 19/2015 to different economic operators.

Consequently, the alleged “*service contracts*”, according to their economic content, were, however, included in the category of subcontracting contracts.

5. “Subcontracting” in comparative law

The field of public procurement in the German state is based on the principles of equality, transparency and non-discrimination, with the aim of ensuring fair competition. To serve this purpose, the “Wettbewerbsregister” trade register was launched in 2017, an instrument through which any contracting authority can verify whether a company has committed relevant offenses in connection with tendering procedures, with public procurement contracts respectively, concluded following mentioned procedures¹¹. This measure applies to both contracting and subcontracting, being an effective measure in the fight against corruption in public procurement. The measure was developed following the above-mentioned European directives.

Subcontracting is regulated, inter alia, in the following articles: § 36 VgV, § 26 UVgO, § 8 EU Abs. 2 Nr. 2 VOB/A, § 8 Abs. 2 Nr. 2 VOB/A, imposing obligations on both contractors and subcontractors (“*Subunternehmer*” or “*Nachunternehmer*”).

The rules in **Austrian law** are similar, as they provide, inter alia, that both the subcontracting intention and the subcontractors should be explicitly presented in the tendering phase, and that the subcontractors must demonstrate that they have the necessary resources to perform their part¹², as stipulated in art. 46 para. 3 no. 6 VgV (*Vergabeverordnung*)¹³.

The Austrian law has also developed a set of laws called the “Bundesvergabegesetz”, abbreviated BvergG 2018, which regulates the contracting and subcontracting process, especially for contracts related to the field of public law.¹⁴

It is provided thus, according to art. 98 para. 1, that “the subcontracting of the entire contract is prohibited, but it may be entirely subcontracted in parts, as long as the authorities are informed about the subcontractors and their responsibilities”. According to paragraph 3, however, “subcontracting is possible only if the subcontractors can perform the specific work.” At the same time, according to article 363 of the BVerG, “every change of the subcontractor must be notified to the tenderer.”

In order to prevent abuse, both the German and the Austrian doctrine have developed the concept of “*Generalunternehmerhaftung*”, translated as “*general corporate responsibility*”, whereby the contractor is ultimately responsible for the contract, regardless of the number of subcontractors or the inability to perform the contract.¹⁵ This law aims to introduce the term of contractor liability in the field of construction to ensure the payment of workers and concerns both the public and private spheres. However, in addition to these provisions, the law provides for the extension of the company’s general responsibility on the subcontracting rules of the “Bundesvergabegesetz” or the contractual obligations of the contracting authority.¹⁶

¹¹ See <https://www.bmwi.de/Redaktion/DE/Dossier/oeffentliche-auftraege-und-vergabe.html>; the document was last accessed on 07.09.2020.

¹² See <https://www.vergabe24.de/vergaberecht/vergabelexikon/unterauftrag/>; the document was last accessed on 07.09.2020.

¹³ See <https://www.vergabe24.de/blog/unterauftraege-nach-neuem-vergaberecht/>; the document was last accessed on 07.09.2020.

¹⁴ See www.bundesvergabegesetz.at/oesterreichisches_recht/; the document was last accessed on 07.09.2020.

¹⁵ See www.unger-rechtsanwaelte.at/aktuelles/detail/article/neues_lohn_und_sozialdumping_bekaempfungsgesetz_in_begutachtung.html the document was last accessed on 07.09.2020.

¹⁶ *Ibidem*.

6. Conclusions and suggestions *de lege ferenda*

In conclusion, situations such as the above, encountered in Romanian legislation and jurisprudence, are likely to affect the regulations and principles underlying both the award of public procurement contracts and their execution, generating negative consequences, of which we mention the following:

- they distort the offer of tender participants,
- they violate the principles of the efficiency of public funds allocated for this purpose and the quality of the provided works/services,
- they generate litigations brought to courts,
- they cause accidents at work or contribute to the increase of “the undeclared work”,
- they lead to a lack of assumption of a possible responsibility and a non-involvement on the part of the contractor who “subcontracts his/her works/services”,
- they lead to a lack of assumption of a potential responsibility and a non-involvement on the part of the contractor who “subcontracts his/her works/services”,
- there is the possibility of violating the rules to avoid conflicts of interest,
- as regards the public procurement procedure, the lack of the possibility for the participants to contest and attack, more precisely to know the contractor’s offer, namely the work/service/subcontracting contracts concluded by the contractor.

In the light of the arguments presented above and taking into account the legislative models of comparative law mentioned and last but not least, in order to prevent the occurrence of illegalities such as the above, *we suggest de lege ferenda* the prohibition of subcontracting disguised in the form of service contracts, works or otherwise, so that tenderers in public procurement procedures declare to the contracting authorities until the completion of those procedures and even during the performance of the contracts any intention to conclude such contracts, for which it is imperative to request the agreement of the contracting authority in writing and prior to the introduction of the “Subcontractor”.

It is also necessary that this “*subcontracting*” meets the quality requirements as in the case of executed contracts concluded between the contracting authority and the contractor.

Last but not least, we consider it necessary to introduce in the public procurement legislation certain regulations by which the amounts improperly acquired can be imputed to the tenderer declared the winner of the public procurement procedure, including the ones resulted from “disguised subcontracting” and based on non-compliance with certain legal obligations and assumed by contract.

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