CELERITY IN THE JUDICIAL PROCEEDINGS CONCERNING THE AWARD OF PUBLIC PROCUREMENT CONTRACTS

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Abstract

The recent Government Emergency Ordinance (GEO) no. 114/2020 was adopted in order to ensure a flexible system of the award of public supply and public works contracts, being necessary to avoid the risk of decreasing the use of European and local founds and also the delay of implementing important projects with a large social and economic impact at the national level. The litigations in the field of the award of public supply and public works contracts represent an important cause for the delay in implementing such projects. There for the legislator chose to enforce few changes in order to ensure the jurisdictional proceedings in the respect of the main principles of contradictory and right to defense but also to encourage the use of the modern technologies and the private communications between parties. For the proper application of the law is necessary to find out if such measures are able to achieve the above purpose, also taking into account which are the realities of the systems applying these proceedings.

Keywords: *judicial proceedings, public procurement contracts, administrative law, celerity.*

JEL Classification: K23, K41

1. Presentation

The field of public procurement has always required careful regulation, both in terms of the rules to be followed for carrying out the contract award procedure and in terms of administrative or jurisdictional procedures regarding the award[2] and execution of the public procurement contract.

Given the need to transpose European directives internally, since 2006[3] the subject of public procurement has been regulated in the light of supranational provisions, internal rules being adapted and amended consecutively[4] in order to comply with the obligations assumed upon accession to the

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[2] M. I. Niculeasa, *Legislaţia achiziţiilor publice, Comentarii şi explicaţii*, 2nd ed, Ed. CH Beck, Bucharest, 2009, p. 647.

[3] Government Emergency Ordinance (GEO) no. 34/2006 on the award of public procurement contracts, public works concession contracts and service concession contracts (Official Gazette, Part I no. 418 of 15.05.2006) repealed GEO no. 60/2001 on public procurement (Official Gazette Part I No. 241 of 11 May 2001) and transposed: Directive No. 2004/18/EC on the coordination of procedures for the award of works, supply and service contracts, Directive no. 2004/17/EC on the coordination of procurement procedures applied by entities operating in the water, energy, transport and postal services sectors, published in the Official Journal of the European Union (OJEU) no. L134 of April 30, 2004, except for art. 41 (3), art. 49 (3) - (5) and art. 53, (by Government decision), Directive 1989/665/EEC on the coordination of laws, regulations and administrative provisions relating to the application of appeal procedures concerning the award of supply and works contracts, published in the Official Journal of the European Communities (OJEC) no. L395 of 30 December 1989, and Directive 1992/13/EEC on the coordination of laws, regulations and administrative provisions relating to the application of Community rules on procurement procedures for entities operating in the water, energy, transport and telecommunications sectors, published in the Official Journal of the European Communities European Commission (OJEC) no. L76 of March 23, 1992, except for art. 9 - 11, which are transposed by Government decision.

[4] Law no. 98/2016 on public procurement (Official Gazette Part I, no. 390/23.05.2016) repealed O.U.G. no. 34/2006 and transposes provisions of Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC, published in the Official Journal of the European Union (OJEU), series L, no. 94 of March 28, 2014. Law no. 99/2016 on sectoral procurement (Official Gazette Part I, no. 391/23.05.2016) transposes provisions of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the sectors water, energy, transport and postal services and repealing Directive 2004/17 /EC, published in the Official Journal of the European Union, L series, no. 94 of March 28, 2014. Law no. 100/2016 on works concessions and service concessions (Official Gazette Part I, no. 392/23.05.2016) transposes provisions of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, published in the Official Journal of the European Union, L series, no. 94 of March 28, 2014. Law no. 101/2016 on remedies and remedies for the award of public procurement contracts, sectoral contracts and works and service concession contracts, as well as for the organization and functioning of the National Council for Solving Complaints (Official Gazette Part I, No. 393/23.05.2016) transposes Council Directive 89/665/EEC of 21 December 1989 on the coordination of laws, regulations and administrative provisions relating to the application of procedures relating to appeals against the award of products and public works contracts, published in the Official Journal of the European Communities, L series, no. 395 of 30 December 1989, as subsequently amended and supplemented, and Council Directive 92/13/EEC of 25 February 1992 on the coordination of laws, regulations and administrative provisions relating to the application of Community rules on public procurement procedures of entities carries out activities in the water, energy, transport and telecommunications sectors, published in the Official Journal of the European Communities, series L, no. 76 of March 23, 1992, as subsequently amended and supplemented.

European Union.

The current regulations, more detailed and clearer than those found in the Government Emergency Ordinance (GEO) no. 34/2006, was in turn subjected to a series of amendments, the last being given by the GEO no. 114/2020 regarding the modification and completion of some normative acts with impact in the field of public procurement[5]. This normative act was adopted, after the legislator tried another amendment, by GEO no. 23/2020[6], however, declared unconstitutional for extrinsic defects, between the two normative acts there are important similarities.

It is not the place here to comment on the nature of the normative act amending, among others, Law no. 101/2016, in the context in which the legislator chose the same method and previously preferring the adoption of emergency ordinances that he justified on various grounds to intervene in this matter, but it is certain that at present, compared to the economic and social situation produced by the COVID-19 pandemic, the situation is different.

The legislator is concerned with attracting European funds, the projects financed from them being essential for the country's economy, so that the adoption of the normative act was justified by the restrictions imposed to limit the spread of coronavirus, which produce a negative impact on the implementation of contracts, especially those of infrastructure works.

With regard to judicial proceedings, the legislator, considering that he has set out certain issues regarding the settlement deadlines and the specialized panels in the field of public procurement, makes changes regarding some rules of judicial proceedings, regarding the imposition of communication of procedural documents by the parties, the use of electronic means of transmitting information, the way in which the case is settled by the court invested with the appeal.

2. Legal means capable of ensuring the speed of proceedings

At Union level, it has previously been found that the judicial procedures instituted by the Member States are distinct, which does not ensure the efficiency of procurement procedures and the insufficiency of procedural channels established in some Member States is likely to discourage competitors in the Community from in which the contracting authority is based. In order to remedy this situation, Directive no. 665 of 1989 on the Coordination of Laws, Regulations and Administrative Provisions on the Application of Recourse Procedures[7] to the Award of Public Procurement Contracts and Public Works Contracts[8], requiring Member States to establish appropriate procedures for the annulment of decisions taken unlawfully by to the contracting authorities[9] but also the compensation of the persons affected by these acts or measures.

The jurisdictional procedures provided by Law no. 101/2016 refer to: the appeal filed before the National Council for Solving Appeals; the judicial route for contesting the acts drawn up in the procedure for awarding the public procurement contract[10] and, as a rule, after this procedure, for: resolving the processes and requests regarding the granting of compensations for the damages caused within the award procedure[11], as well as those the nullity of the contracts, respectively of those deriving from the execution of the administrative contracts.

During the award procedure, the person who considers himself harmed within the meaning of

[5] Published in the Official Gazette no. 614 of July 13, 2020.
[6] For the modification and completion of some normative acts with impact on the public procurement system, published in the Official Gazette no. 106 of 12 February 2020.
[7] The meaning of the procedural route available to interested parties to allege irregularities in the award procedure shall be taken into account.
[8] Published in the Official Journal of the European Communities No. L 395 of 30 December 1989, p. 33 - 35.
[9] M. I. Niculeasa, *op. cit.* (2009), p. 640.
[10] O. Puie, *Tratat teoretic şi practic de contencios administrativ*, vol. II, Ed. Universul Juridic, Bucharest, 2016, pp. 565-567; C.-S. Săraru, *Contenciosul administrativ român*, Ed. C.H. Beck, Bucharest, 2019, p. 406-408.
[11] C. Bovis, *Access to Justice and Remedies in Public Procurement*, „European Procurement & Public Private Partnership Law Review", 3/2012, pp. 200-201.

the provisions of art. 3 paragraph 1 letter f) of Law no. 101/2016[12] has the possibility to choose the promotion of an administrative appeal before the CNSC, respectively the judicial process before the court to challenge an act of the contracting authority or to request its obligation when issuing an act, when adopting a remedial measure or for recognizing the claimed right or the legitimate interest harmed in the award procedure.

After the completion of this award procedure, usually during the performance of the contract, the person concerned may apply to the court either to seek compensation for the damage caused by the documents drawn up in the procedure, or to demand the execution of the contract, its nullity or cancellation if it was concluded in violation of the conditions required by public procurement law.

Being judicial proceedings, including those before the Council, they must respect the fundamental principles of civil procedure, in particular the right of defense and adversarial[13] proceedings, respectively the independence of the body applying and coordinating the procedure, which at the same time ensures established in the field of public procurement.

At the same time, such procedures must be carried out quickly in order to ensure compliance with the relevant Community provisions[14], given that competition in public procurement requires the guarantee of concrete effects, which can be ensured through internal procedural means, which must thus be efficient and rapid.

As no hierarchy can be established between the essential principles of civil procedure, which guarantee compliance with European rules in the field, and the principle of speed, established by the same provision[15], none of which can be considered more important, the courts and the Council must pursue a coherent to take all these fundamental rules together.

However, speed can be affected, on the one hand, even by the applicable legal provisions and, on the other hand, by the attitude of the courts, partially determined by the realities of the system or the attitude of the parties involved in the procedure, which would be achieving a definitive result.

As tools used in the special law to ensure speed in judicial proceedings can be retained: the regulation derogating from the common law regarding procedural deadlines[16], the establishment of the obligation to resolve the case of urgency and especially[17], setting deadlines for completion of proceedings[18], setting longer deadlines reduced than in the common law for the hypothesis of

[12] Injured person - any economic operator who cumulatively meets the following conditions: (i) has or has had an interest in an award procedure; and (ii) has suffered, suffers or is at risk of injury as a consequence of an act of the contracting authority which is likely to produce legal effects or as a result of the failure to resolve a request for an award procedure within the legal time limit.

[13] I. Leş, *Noul Cod de procedură civilă, Comentarii pe articole*, 2nd ed., Ed. CH Beck, Bucharest, 2015, pp. 27-28, 31-32.

[14] V. Terzea, *Achiziţii publice, Jurisprudenţa Curţii de Justiţie a Uniunii Europene*, Ed. Universul Juridic, Bucharest, 2016, pp.558-567.

[15] Directive no. 89/665 - Preamble.

[16] Art. 5 of Law no. 101/2016 shows that the procedural deadlines established by this law, expressed in days, start to run from the beginning of the first hour of the first day of the deadline and end at the expiration of the last hour of the last day of the deadline and the day during which a procedural act is not taken into account in the calculation of the term. Also, if the last day of a term expressed other than in hours is a non-working day, the term ends at the expiration of the last hour of the next working day.

[17] According to art. 51 par. 1-2 of Law no. 101/2016, the processes and requests regarding the granting of compensations for the reparation of the damages caused within the award procedure, as well as those regarding the cancellation or nullity of the contracts are solved in the first instance, urgently and especially. Similarly, it is provided for the settlement of the requests deriving from the execution of the administrative contracts and for the requests for ascertaining the absolute nullity of the contract on the reasons mentioned in art. 58 of the Law. See also S. Stănilă, C. Roşu, *Soluționarea litigiilor în materie de atribuire a contractelor de achiziție publică, a contractelor sectoriale, a contractelor de concesiune de lucrări şi concesiune de servicii de către instanța de judecată*, „Dreptul" no. 11/2016, p. 15.

[18] Article 24 para. 1 of Law no. 101/2016 - (1) The Council solves on the merits the appeal within 20 days from the date of receipt, under the conditions of art. 18 para. (2), of the file of the public procurement, of the sectorial procurement or of the concession, respectively within 10 days in the situation of the incidence of an exception that prevents the substantive analysis of the appeal. Article 32 para. 4 and 5 of the law - The complaint is resolved urgently and especially, within a period that will not exceed 45 days from the date of legal notification of the court (...) The first trial term is a maximum of 20 days from the date of registration of the complaint, and the subsequent terms may not exceed 15 days. Article 49 para. 2 final thesis of the law - the appeal is resolved urgently and especially, within a period that will not exceed 45 days from the date of legal notification of the court. The provision is repeated in art. 50 para. 4 of the law - the subsequent trial terms cannot be longer than 15 days, and the duration of the entire procedure cannot exceed 45 days from the date of notifying the court. At the same time, art. 51 paragraph 4 of the law refers to the application of art. 2-6 and art. 54 refers to art. 50. Article 55 para. 3-4 of the law - the appeal is solved urgently and especially, within a term that will not exceed 30 days from the date of the legal notification of the court.

postponement of the pronouncement, for the drafting of the decision[19], for the exercise of the appeal[20].

In order to eliminate the possibility of prolonging the procedure, the new normative act imposed the communication of procedural acts by the parties involved without waiting for this communication to be made by the body of jurisdiction[21], provided for the use of electronic means of transmitting information[22], completed the rules for resolving the case concerning the obligation of the court invested in the appeal to resolve the merits of the dispute, without being able to send for retrial, even if by the contested decision the case was resolved by admitting an exception[23].

To these are added the measures that the court may order pursuant to art. 241 of the Code of Civil Procedure, also applying pecuniary sanctions according to art. 187 of the Code of Civil Procedure to the persons who determine the postponement of the trial or the impediment in any way of the exercise of the attributions specific to those involved in the procedure.

Mainly, all these provisions are in themselves capable of ensuring the celerity pursued by the legislator, simplifying procedures, reducing procedural deadlines, using fast communication and transmission techniques, eliminating the possibility of delaying the resolution of cases, forcing the court to complete the procedure within a certain period, obviously measures that ensure the celerity.

In this context, the main obstacle in achieving this goal is revealed in the concrete way in which such rules are applied in practice.

Thus, the manner of communication of procedural documents between the parties and the elimination of the intervention of the court in some situations for the transmission of procedural documents is likely to facilitate the activity of the court but also to streamline the procedure, being known that the intervention of this body of civil procedure that requires a series of formalities, in the matter of communication of documents (use of the envelope with the mention "For justice to be handed over with priority", elaboration of the proof of communication, of the minutes and of the notification). When the law requires the parties to make communications of the complaint or the documents on which it is based, to the adverse parties, it does not establish forms that they must apply and in no case does it refer to the provisions of art. 153 et seq. of the Code of Civil Procedure, thus lacking a proof of communication similar to that prepared by the court, as a consequence of the fulfillment of the communication procedure by its agent or by the postal agent. The law stipulates that all procedural documents are sent either by mail, fax or electronic means, with acknowledgment of receipt. In such cases, a postal or forwarded communication in any of the simplified forms

[19] Article 27 para. 8 of the Law no. 101/2016 - The motivated decision (of CNSC) is communicated in writing to the parties, within 3 days from the pronouncement. Art. 35 of the law - (1) In justified cases, if the court does not take the decision immediately, it may order the postponement of the pronouncement for a term of 5 days. (3) The reasoned decision shall be drafted within 7 days from the pronouncement and shall be communicated immediately to the parties concerned. The same provisions are found in art. 51 paragraphs 1-2 of the law.

[20] Article 51 para. 3 of Law no. 101/2016 - The decision can be appealed, within 10 days from the communication. Article 55 para. 3-4 of the law - The decision pronounced in the case of litigations provided in art. 53 para. (1) may be appealed, within 10 days from the communication and the one from art. 53 para. 1 ind.1 with appeal within the same term.

[21] Article 16 para. 2 of Law no. 101/2016 - Within one day from the receipt of the appeal, the contracting authority has the obligation to publish it in SEAP. Article 18 para. 1 and 2 of the law - Within 5 days from the date of receipt of the appeal, the contracting authority has the obligation to submit to the Council and the appellant, ex officio, its point of view on the appeal. The contracted authority has the obligation to transmit to the Council, within the term provided in para. (1), a copy of the file of the public procurement, of the sectorial procurement or of the concession, as well as the proof of the submission of the point of view to the appellant and any documents considered edifying. Article 30 para. 4 of the law - For the rapid transmission to the competent court of the file that was the basis for pronouncing the decision of the Council, the person who filed a complaint before the court sends a copy of that complaint to the Council. Art. 31 of the law - (1) The party formulating the complaint is obliged to communicate, within the term provided in art. 29, a copy of it, as well as of the proving documents and to the other party involved in the contestation procedure before the Council, submitting the proof of communication before the court until the first trial term, under the sanction of rejecting the complaint as late. (2) The counterclaim is mandatory. The respondent is obliged to communicate to the court and to the petitioner the objection within 5 days from the communication of the complaint by the petitioner. Failure to file the objection in time entails the forfeiture of the right to propose further evidence and to invoke exceptions other than those of public policy.

[22] Article 16 para. 5 and art. 50 para. (4) of Law no. 101/2016 stipulate that all procedural documents are sent either by mail, or by fax, or by electronic means, with acknowledgment of receipt.

[23] Article 34 para. 3-4 of Law no. 101/2016 - The court, notified with a complaint against a decision by which the Council resolved the appeal by resolving a procedural exception, admitting the complaint, annuls the decision and retains the case for trial on the merits, taking into account of the reasons that led to the annulment of the decision. Article 51 para. 5 of the law - In case of admitting the appeal, the court of appeal re-judges, in all cases, the dispute on the merits. Similarly, art. 55 para. 5 of the law in case of recourse and appeal in the matter of litigations regarding compensations, annulment, nullity, execution of contracts.

certifying receipt by the opposing party of the communication made shall suffice.

Indeed, art. 68 of Law no. 101/2016 shows that this is completed with the norms of the Code of Civil Procedure, but compliance cannot concern the forms provided by the code in charge of the court, which sends a procedural act, even if it is a court procedure, as these forms are applicable when the interested party requests that the communication procedure be carried out at his expense and not when the law imposes such an obligation[24] on the party.

Compliance is also made to the extent of compatibility, or, if the legislator had sought to impose the same formalities as those in the Code of Civil Procedure, would not have provided the obligation to communicate the documents even by the party, who must submit to the court a proof of communication until the set deadline, which excludes the contact with the court in a preliminary phase in order to be handed the documents to be communicated and the proof forms. Thus, in the event of a complaint against the CNSC decision, the law established the sanction of rejecting the complaint as late if the party filing the complaint does not submit until the first trial the proof of communication of the complaint to the other parties involved in the appeal procedure before the Council, so it cannot be claimed to use the forms imposed by the code.

Regarding the use of electronic means of transmitting information, so useful in the period that the world affected by the COVID 19 pandemic is going through, this represents only a possibility conferred by art. 16 para. 5 and art. 50 para. 4 of Law no. 101/2016, which shows that all procedural documents are sent either by mail, or by fax, or by electronic means. The latter presuppose first the identification of the transmitter in the electronic environment and then the confirmation of the receipt by the recipient of the procedural documents thus communicated, which opens the application of the provisions of Law no. 455/2001 regarding the electronic signature.

Sending communications to public authorities in electronic format, without other formalities, does not apply to the courts according to art. 1 para. 2 of the GEO no. 38/2020 on the use of documents in electronic form at the level of public authorities and institutions[25].

Therefore, in the event of communication with the court in the electronic environment, the party will have to justify its identity and electronically sign the documents sent, art. 148 para. 2 Code of Civil Procedure providing the possibility to formulate the request and in electronic form, which implies compliance with the special rules, mentioned above, a simple e-mail in which is attached a scanned or photocopied document, failing to meet legal requirements.

Also, for summoning the parties, the court has the possibility to use the means of remote transmission by telephone, telegraph, fax, e-mail, when the parties have indicated such means, the act performed as proof of communication having the value of an authentic document[26]. In the case of fax or e-mail, the communication must be accompanied by the extended electronic signature of the court, and the proof of communication is given by the message received from the system used that the document reached the addressee according to the data provided by it[27]. If the party is notified by telephone, the proof of communication is represented by the report drawn up by the clerk showing the manner of notification and its object - telephone note. Such means of communication appear easier than the speed with which they are met, but this advantage does not mean that in reality this procedure of notifying the parties or other participants is frequently used, the courts relying rather on the usual summons procedure.

Compliance with the deadlines provided by law for the completion of proceedings, such as 45 days from the date of legal notification of the court in judicial proceedings regarding the award procedure or execution of contracts or 30 days from the date of notification of the court to resolve the appeal or of the appeal, it turns out to be difficult on the background of a large volume of cases pending before the courts, even if art. 241 para. 1 Code of Civil Procedure provides that for the

[24] Article 154 para. 5 Code of Civil Procedure.
[25] Published in the Official Gazette no. 289 of April 7, 2020. This emergency ordinance does not apply to the public authorities provided in the Romanian Constitution, republished, in Title III, Chapters I, II and VI (judicial authority). The authorities to which the rule applies are obliged to make their own portals or those made available by third parties or will use e-mail to receive electronic documents.
[26] Article 154 para. 6, art. 241 para. 3 and art. 164 para. 4 Code of Civil Procedure.
[27] Article 154 para. 6 and 6 ind.1, art. 163 para. 11 ind.1 Code of Civil Procedure.

investigation of the trial, the judge sets short deadlines, even from one day to the next.

Nor can the argument concerning the complexity of some of the proceedings before the courts, which cannot be settled quickly, as complex evidence leading to a conclusion to assist the court, be rejected.

However, in the matter of the complaint filed against the CNSC decision, it should be noted that the legislator intervened through the GEO no. 114/2020, pursuing the observance of the principles of orality, adversariality and the right to defense, but adopting a legislative solution that may affect the celerity. Thus, if the court finds that the CNSC has resolved the appeal by incorrectly resolving a procedural exception, it is obliged to annul the respective decision first, pronouncing a decision in this respect, after which, for the trial on the merits, it sets a separate term, later pronouncing the solution regarding the complaint on the CNSC decision on the exception. In this way, the procedure is mandatory in two stages, the court not being able to give the floor to the parties at the same time both on the complaint concerning the criticisms brought against the CNSC decision and, alternatively, on the merits of the dispute to clarify all issues at once, in the event of admitting the complaint, which automatically determines the extension of the respective procedure.

3. Conclusions

The permanent adaptation of the normative act that regulates the jurisdictional procedures in the field of public procurement, with the new realities, is necessary and welcome, all the more so as the specific speed in this matter is ensured, but it must be received effectively by the recipients in proceedings or courts, in order to apply the new rules in a coherent, constructive and effective manner, in order to avoid interpreting them in the letter and not in their spirit.

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