

Cover article: "Will the Awarding of Public Procurement Contracts Improve?"

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While public procurements are an increasingly financial source for private business operators in the context of the economic crisis, we are providing you with a brief analysis of the main amendments introduced on this matter by Emergency Ordinance no. 76/2010, for the amendment of Emergency Ordinance 34/2006 on the awarding of public procurement contracts, contracts for the concession of public works and contracts for the concession of services (an article published in Saptamana Financiara on August 27, 2010).

Legislative Retrospective

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WILL THE AWARDING OF PUBLIC PROCUREMENT CONTRACTS IMPROVE?

Public procurements are an increasingly financial source for private business operators in the context of the economic crisis. In response to the need to take urgent measures in this sector, on June 30, 2010, the Government passed Emergency Ordinance no. 76/2010, by means of which it amended Emergency Ordinance 34/2006 on the awarding of public procurement contracts, contracts for the concession of public works and contracts for the concession of services.

The most important amendments of the new emergency ordinance are those referring to: the conclusion of the public procurement contract in the event that the awarding of the same (or an action preceding the awarding) is contested under the law by one of the participants in the procedure; those referring to the possibility for the contracting authority to annul the tender and those regarding the "sanctioning" of the losing objectors in front of the National Council for the Settlement of Claims (CNSC).

CONCLUSION OF THE PUBLIC PROCUREMENT CONTRACT

The issue regarding the time when the public procurement contract may be concluded has been long disputed in the various meetings organized by the representatives of the Romanian business environment with the representatives of the National Authority for the Regulation and Monitoring of Public Procurement (ANRMAR) and those of the Ministry of Public Finances. The solution brought by the new provisions seeks to avoid the blocking of the contract's conclusion, even if there are objections with respect to the awarding by the contracting authority, which was the effect obtained under the previous legislation.

In conditions of procrastination of the case files' resolution in court by means of the exercise of ordinary and extraordinary remedies at law by offerors who are interested to prevent the conclusion of the contract in any way whatsoever for reasons that are more or less grounded and real, under the previous legislation, many authorities were forced to wait for the final and irrevocable settlement of the litigation for a long time, thus missing out on economic opportunities, as well as on bank financing opportunities, which in some cases meant the failure of the project that represented the object of the public procurement contract. Last, but not least, it exposed the contracting authorities to sanctions from the European bodies, for the failure to comply with the terms assumed under Romania's commitments upon its accession to the EU.

The new provision allows the contracting authorities to conclude the public procurement contract immediately after the claim's settlement by the CNSC or by the competent court invested with the settlement in first instance of a legal action for the annulment of an administrative act.

Thus, after the passing of the waiting periods of 11 and 6 days, respectively, depending upon the value of the public procurement contract, as of the date of transmission of the communication regarding the result of the procedure's implementing, the contracting authority may conclude the public

procurement contract with the winner of the procedure, and the contract's performance is not prevented by the exercise of an objection against the CNSC decision or of a second appeal against the decision of the court of first instance.

SUSPENSION OF THE CONTRACT'S PERFORMANCE

By way of the second appeal, the objector may request the court of law to adopt a measure of suspension of the contract's performance. In assessing the need to adopt the measure of suspension of the public procurement contract's performance, the court of law shall have a sovereign right to decide, however it must take into account the consequences of such measure upon all categories of interests which may be trespassed against, but especially upon the public interest.

THE CONTRACTING AUTHORITY'S RIGHT TO ANNUL THE TENDER

The legislator also makes an amendment of the normative act that shall allow the contracting authority to annul a public procurement procedure, at its own discretion, if pursuant to a claim/action, the CNSC or the court of law should decide to eliminate certain technical, economic or financial specifications from the participation announcement/invitation, the award documentation or from other documents issued with respect to the awarding procedure.

In consideration of the limitation imposed by the law upon the CNSC and the courts of law, namely to only censor the legality and the reliability of the administrative deeds issued by a contracting authority with respect to a public procurement procedure, this newly granted right shall consolidate the power granted to the contracting authorities, to exclusively establish their requirements of the award documentation and the winner of the public procurement contract.

IT IS ONLY THE GROUNDED CLAIMS THAT SHALL BE FREE OF CHARGE

The persons who consider that one of their rights or legitimate interests have been harmed by a deed of the contracting authority, by the infringement of the provisions relevant to the public procurement field, may request the annulment of such deed, the coercing of the contracting authority to issue a deed, the acknowledgment of the claimed right or of the legitimate interest by way of administrative/jurisdictional methods or in court. Such persons shall have an option right in contesting said deed: either to appear, free of charge, before the CNSC, or to pay the judicial stamp and the judicial stamp fee, appearing before the court of law. The judicial stamp fee for the claims that are not appraisable in cash is moderate, namely RON 4.

In the light of the new regulations, your right of access to the CNSC for the settlement of claims is free of charge only if you are in the right, meaning if you filed a grounded claim, within the legal term, which claim is admitted by the CNSC. Otherwise, if the CNSC should reject the claim, the contracting authority shall be obligated to withhold from the objector's participation guarantee an amount set out in accordance with the value of the contract, starting from 1% of the contract's value, for those the value of which is up to RON 420,000 and culminating with over RON 20,000 for those the value of which exceeds RON 4.200.000.001.

competition - legislative retrospective

Competition Council Order no. 385/2010 for the implementing of the Regulation on statutory mergers, a regulation which is mandatory for the Competition Council, for enterprises (individuals or legal entities) and enterprise associations, of Romanian or foreign nationality, as well as for the authorities and the institutions of the central or local public administration, seeking an unitary and transparent implementing of the provisions of Law no. 21/1996 on competition, as republished, with its subsequent amendments and additions.

Competition Council Order no. 386/2010 for the implementing of the Instructions on the concepts of statutory merger, involved enterprise, full operation and turnover. The purpose of said Instructions is to offer guidelines with respect to the jurisdictional aspects provided for under Law no. 21/1996 on competition, thus allowing enterprises to more easily establish, prior to any contact with the Competition Council, whether, and to what extent, their operations are subject to the control of the competition authority. The instructions address the concepts of statutory merger, full operation joint venture, involved enterprises and turnover calculation, according to the provisions of the Competition Council.

Competition Council Order no. 387/2010 for the implementing of the Instructions on the restrictions directly related to, and necessary for, the implementing of statutory mergers. The Instructions offer guidelines with respect to the interpretation of the notion of restrictions directly related to, and necessary for, the implementing of statutory mergers, for the purpose of offering judicial security to the enterprises involved in a statutory merger. The offered guidelines set out the assessment principles, in order to know whether, and to what extent, the types of agreements that are the most frequent are considered to be auxiliary restrictions. The Instructions regulate the assessment of auxiliary restrictions, while bringing in a principle of self-assessment of such restrictions, according to which the competition authority is not obligated to proceed to an individual review of the same. The involved enterprises must assess whether, and to what extent, the agreements to which they are parties may be considered auxiliary to a statutory merger. For such cases that generate uncertainty and are not regulated by the Instructions, the enterprises may request that the Competition Council should expressly assess the auxiliary character of the existing restrictions.

Competition Council Order no. 388/2010 for the implementing of the Instructions regarding the defining of the relevant market. The purpose of the Instructions is to explain the manner in which the Competition Council uses the concepts of relevant product market and relevant geographical market in applying the legislation pertaining to the competition field. The Instructions represent recommendations and their purpose is to offer instruments that are useful in the activity of implementing the competition legislation.

Competition Council Order no. 400/2010 for the implementing of the Instructions given for the implementing of the provisions if art. 32 of competition Law no. 21/1996, as republished, with its subsequent amendments and additions, with respect to the

competition - legislative retrospective

calculation of the fee for the authorization of statutory mergers. The Instructions seek to regulate certain procedural clarifications, necessary for the calculation of the authorization fee provided for under art. 32 of the competition Law.

All of the aforementioned Orders of the Competition Council were published in Official Gazette no. 553 of August 5, 2010.

dispute resolution - legislative restrospective

Government Ordinance no. 75/2010 for the amendment and supplementing of the Competition Law, published in the Official Gazette no. 459 of 2010, provides among others that a decision ruled by the Competition Council can be suspended by the Bucharest Court of Appeals only providing a bail is paid in amount of 30% of the fine set forth by the objected decision, which measure will speed up the legal files initiated against the sanctions applied by the competition regulator. Also, while under the previous legislation the Competition Council was allowed to apply fines only to economic entities, it can now decide for fines between RON 5,000 and RON 40,000 to be applied to central and local public authorities for failure to provide the requested information and documents, or for providing inaccurate or incomplete information. The legal deed stipulates that in case economic entities confess to committing unfair competition actions, such confession represents mitigating circumstances leading to the diminishment of the fine by 10 to 25 percent of the basic fine level.

energy- legislative retrospective

Law 220/2008 on setting up the system for the promotion of energy production from renewable sources has been once again amended, by Government Ordinance no. 29/2010 published in the Official Gazette, Part 1, no. 616 of August 31, 2010 (GO 29/2010).

The most important amendments introduced by the said legal deed are the introduction of two new chapters regarding:

- Administrative procedures with regard to the issuance of licensing documents;
- Certification systems for plumbers and informing campaigns.

The ordinance sets forth that the public authorities in charge with issuing authorizations, licenses, permits or certificates for electric power production plants, for electric power transport and distribution grids or for heating/cooling grids using renewable energy sources and in the processes for transforming biomass into bio-fuels or other energetic products are under the obligation of issuing such documents based on specific procedures designed in compliance with the proportionality principle and in consideration of the particular structure of that renewable energy source sector.

The regulations established by such procedures should be objective, transparent and proportional, they should not discriminate between applicants and should consider the particularities of each of the technologies using renewable energy sources.

For the plants of an installed power under 1 MW and for the plants for distributed generation of renewable energy sources, simplified procedures shall be put in place.

Also, the following concepts have been defined by the GO 29/2010:

- “gross final energy consume” – the consume of energetic products supplied for energetic purposes to industries, transportation, house use, services, including public services, agriculture, forestry and fishery, including electric power and thermal energy consume in the electric power and thermal energy generation sector, as well as the losses of electric power and thermal energy along distribution and transport;
- “renewable energy related obligation” – the promotion system which either imposes energy producers to include in their production a certain share of energy obtained from renewable sources, or imposes energy suppliers to include in energy distribution a certain share of renewable energy, or which imposes energy consumers to include in their consume a certain share of renewable energy. The systems in which such prerequisites can be met by using green certificates are included in the said definition.

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