

## public procurement - legal changes published in April 2019

### **Decision of the Constitutional Court of Romania no. 738/2018 regarding the admissibility of the objection of unconstitutionality of the provisions of art. 167 par.**

**(4) of the Law no. 98/2016 on public procurement** was published in the Official Gazette of Romania, Part I, no. 260 of April 4, 2019, being applicable from the same date.

The Constitutional Court was notified with the objection of the unconstitutionality of the provisions of art. 167 par. (1) let. c) and par. (4) and art. 164 of Law no. 98/2016 on public procurement, by arguing that the legal provisions criticized violate the principle of the presumption of innocence and the principle of equality before the law, as it prevents the participation of some economic operators in public procurement procedures. Thus, a sanction is applied to a person only because they are subject to a judicial investigation procedure in connection with committing certain deeds, without the court having issued a final conviction for committing an offense.

In its analysis of the objection, the Court mentioned that the sanction of the exclusion of an economic operator from the award procedure occurs when the contracting authority establishes that it has been convicted by a final judgment of a court for one of the offenses listed strictly and restrictively by art. 164 par. (1) of the Law no. 98/2016. Also, according to art. 167 par. (1) let. (c) of the law, the contracting authority, in the light of a decision of a court or administrative authority, excludes from the award procedure of the public procurement contract/framework agreement any economic operator who has committed a serious professional misconduct questioning its integrity.

Conversely, the Court has established that in the case of art. 167 par. (4) of the Law no. 98/2016 which extends the scope of situations in which an economic operator is excluded from the public procurement procedure when it is the subject of an ongoing investigation for committing offenses under art. 164 of the Law, the contracting authority has the task of determining whether the economic operator committed a serious professional misconduct in relation to the alleged offense, thus substituting a competent court or administrative authority, because, under art. 167 par. (1) of the Law, proof of serious professional misconduct is made by any appropriate means of evidence, such as a decision of a court or administrative authority. Thus, according to the legal provision criticized, the contracting authority has a broad margin of appreciation regarding the conditions for committing a suspected offense and the integrity and reputation of the economic operator determined by reference to the circumstances of the criminal offense, and may decide on these elements before its guilt have been determined by a court of law.

Therefore, if a court did not pronounce a final judgment for the conviction of the economic operator for committing an offense, the Constitutional Court decided that the contracting authority restricts their participation in the procurement procedure by violating the presumption of innocence, thus disregarding art. 23 par. (11) of the Constitution.

For these reasons, the Constitutional Court upheld the objection of unconstitutionality raised by Polaris M Holding Ltd. from Constanta in Case no. 583/54/2017 before the Craiova Court of Appeal - Administrative and fiscal litigation division, and decided that the provisions of art. 167 par. (4) of the Law no. 98/2016 on public procurement are unconstitutional.

**Instruction of the National Agency for Public Procurement no. 1/2019 amending the Instruction of the President of the National Agency for Public Procurement no. 2/2018 regarding the price adjustment of a public/sectoral procurement contract** was published in the Official Gazette of Romania, Part I, no. 296 of 17 April 2019, applicable from the same date.

The Instruction amends the Instruction of the President of the National Agency for Public Procurement no. 2/2018 regarding the price adjustment of the public/sector procurement contract, published in the Official Gazette of Romania, Part I, no. 32 of January 11, 2019, as follows:

- Art. 4 par. (4) is amended, underlining that "*the lack of the details provided under par. (1) determines the inapplicability of the possibility of adjustment by revision of the price of the public/sector procurement contract*";
- Par. (2) and (5) of art. 4, which referred to the procedures and contracts in progress and how to approach the possibility of price adjustment are repealed;
- Art. 5 is amended, establishing that if the adjustment by revision is of the type of an adjustment quotient and it has a sub-unitary value, the price of the contracts will not be adjusted by revision;
- Art. 6 is amended, providing that the price will be adjusted by updating the cost/price elements that have undergone changes whenever an unforeseeable event occurs at any time during the contract performance period (the old regulation provided for the period of the award procedure and/or the contract performance period); in addition, it is underlined that the price update of the public/sectoral procurement contract will be performed during the contract's validity period whenever an unforeseeable event occurs, irrespective of the duration of the contract (the old regulation stipulated that the adjustment was made upon signing of the contract);

- Art. 7 par. (2) is amended, relating to cases that are assimilated to unforeseeable events, which cause the price of the contract to be adjusted;
- Art. 9 par. (4) establishes that the contracting authority/entity may use both the review of prices in the procurement contract and their updating (the old regulation provided that both the adjustment of the prices in the procurement contract and their updating could be used concurrently because the proposed option only takes into account the difference in overall price evolution);
- Par. (2), (3), (5) and (6) of art. 9, art. 10 and art. 11, which provided a calculation formula for price adjustment and how it could be applied in unforeseeable events are repealed.