

public procurement - legal changes published in July 2020

Decision of the Constitutional Court no. 221/2020 regarding the admission of the exception of unconstitutionality of the Government Emergency Ordinance no. 23/2020 for the amendment and completion of some normative acts with impact on the public procurement system was published in the Official Gazette of Romania, Part I, no. 594 of July 7, 2020.

On February 26, 2020, the Ombudsman notified the Constitutional Court with the exception of the unconstitutionality of the provisions of art. IV point 26 of the Government Emergency Ordinance no. 23/2020 for the amendment and completion of some normative acts with impact on the public procurement system ("G.E.O. no. 23/2020"). In support of the exception, it was stated that, in addition to provisions likely to "improve and make the public procurement system more flexible", the G.E.O. no. 23/2020 includes both norms regarding the functioning of the courts - art. IV points 18-24, by establishing some terms, procedures and measures that may be ordered by the courts - as well as norms that establish a new disciplinary violation, aspects that obviously belong to the status and obligations of the judge. Therefore, in the procedure of adopting the G.E.O. no. 23/2020, which includes provisions regarding the disciplinary liability of judges, as well as regarding the judicial organization, it was necessary to request the opinion of the Superior Council of Magistracy; the lack of its request has as a consequence the disregard of the constitutional norms contained in art. 1 para. (5) and art. 134 para. (4).

The Constitutional Court found that not requesting the legal opinion of the Superior Council of Magistracy is a violation of art. 1 para. (5) and art. 133 para. (1) of the Constitution, which constitutes, implicitly, a violation of art. 1 para. (3) on the rule of law.

The Court also raised the issue of violation of art. 79 para. (1) of the Constitution, regarding the opinion of the Legislative Council that was to accompany the normative act, including the criticized text. From this point of view, it was noted that the obligation to request the opinion of the Legislative Council has a constitutional nature and its scope is not limited to normative acts covering a certain area of regulation (see the opinion of the Superior Council of Magistracy), but regarding the normative act as a whole, which means that the violation of art. 1 para. (3) and (5), as well as of art. 79 para. (1) of the Constitution refers to the emergency ordinance, as a whole.

For these reasons, the Constitutional Court admitted the objection of unconstitutionality raised by the Ombudsman and found that the G.E.O. no. 23/2020 for the amendment and completion of some normative acts with impact on the public procurement system is unconstitutional, as a whole.

It should be mentioned that there is a separate opinion formulated by 2 of the judges, according to which the exception of unconstitutionality could be admitted only with regard to the provisions of art. IV point 26 of the G.E.O. no. 23/2020, with which the Constitutional Court was explicitly invested, and the unconstitutionality could target only those provisions, punctual, contextual and circumstantial, and not the normative act as a whole.

Government Emergency Ordinance no. 114/2020 on amending and supplementing some normative acts with impact in the field of public procurement was published in the Official Gazette of Romania, Part I, no. 614 of July 13, 2020, entering into force on the same date.

The Emergency Ordinance no. 114/2020 (hereinafter referred to as “**G.E.O. 114/2020**” or the “**Emergency Ordinance**”) amended a series of primary normative acts in the field of public and sectoral procurement (as well as concessions), in order to implement urgent measures leading to to simplify, improve and make more flexible the public procurement system.

Through the G.E.O. no. 114/2020, the Government Emergency Ordinance no. 23/2020 for the amendment and completion of some normative acts with impact on the public procurement system, published in the Official Gazette of Romania, Part I, no. 106 of 12 February 2020, was repealed.

Law no. 98/2016

The new Emergency Ordinance brings a series of amendments to the Law no. 98/2016 on public procurement, as follows::

- it is established that the contracting authority has the obligation not to disclose the information from the technical proposal, the elements of the financial proposal and/ or substantiation/ price/ cost justifications sent by the economic operators indicated and proved by them as confidential as they are: personal data , technical or trade secrets or are protected by an intellectual property right; the confidentiality applies only to data / information indicated and proven to be personal data, technical or trade secrets or are protected by an intellectual property right;
- it is expressly stated that the information indicated by the economic operators as confidential must be accompanied by the proof that gives them the character of confidentiality, proof that becomes annexed to the offer; otherwise, the obligation of the contracting authority not to disclose the information indicated by the economic operators as confidential shall cease to exist;
- a number of clarifications are provided regarding the award procedure applicable to social services and other specific services;
- the concept of “*IT mechanism for simplified procedures*” is introduced, designating the technical facility implemented in SEAP for carrying out the simplified procedures;
- it is clarified the alternative character of the two cases of exclusion provided by art. 165 of Law no. 98/2016 for breach of obligations regarding the payment of taxes, fees or contributions to the general consolidated budget;
- the obligation of the contracting authorities to offer the possibility to the candidates/ bidders who participated in the preparation of the award procedure to demonstrate that their involvement in its preparation cannot distort the competition, before being excluded from the award procedure;
- additions are made in connection with the measures adopted by the economic operators who are in one of the situations of exclusion provided by art. 164 and 167 of Law 98/2016 to prove their credibility; thus, these measures presented by economic operators to demonstrate credibility will be assessed by the contracting authority taking into account the seriousness and particular circumstances of the offense or offense in question; if the measures submitted are considered insufficient by the contracting authority, it shall provide the economic operator with a statement of the reasons which led to the decision to exclude him from the award procedure;
- it is established that, if the contracting authority cannot conclude the contract/ framework agreement with the bidder whose tender has been established as the winner, due to the fact that the bidder in question is in

a situation of force majeure or fortuitous impossibility to execute the contract/ framework agreement, the contracting authority has the obligation to declare the next ranked bid the winner, provided that it exists and is admissible;

- clear deadlines are stipulated in which the contracting authority has the obligation to prepare the report of the procedure (exceptions are strictly indicated), namely:
 - a) 60 working days from the deadline for submission of tenders/ initial tenders/ projects, for open tender procedures, restricted tender, innovation partnership, solution competition and award procedure applicable to social and other specific services;
 - b) 20 working days from the deadline for submission of tenders, for the negotiated procedure without prior publication and for the simplified procedure;
 - c) 100 working days is the deadline for submission of tenders for competitive negotiation and competitive dialogue procedures.
- it is stipulated that the contracting authorities must publish in the dedicated section of SEAP all the amendments of the public procurement contracts/ framework agreements, so that the final duration and price at their finalization or termination to result.

Law no. 99/2016

The changes brought by G.E.O. 114/2020 to the **Law no. 99/2016** on sectoral procurement are, in principle, the same as those brought to the Law no. 98/2016 and indicated briefly above, clarifications being provided regarding the substantial amendment of a contract or framework agreement.

Law no. 101/2016

Law no. 101/2016 on remedies and means of appeals 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 has been amended and supplemented as follows:

- the concept of act of the contracting authority has been clarified, in the sense that it does not concern the direct procurement;
- the term in which the person injured by an act of the contracting authority may file a complaint to the National Council for Solving Complaints (NCSC) has been modified in case the estimated value of the public/ sectoral procurement or concession procedure is lower than the value thresholds in relation to which it is mandatory to send for publication to the Official Journal of the European Union the notices of participation: **7 days** from the day following the notification of the act of the contracting authority considered illegal (the previous term was 5 days);
- it is mentioned that, in case the complaint concerns the content of the award documentation, published in the Electronic Public Procurement System (SEAP), the date of acknowledgment is the date of publication of the award documentation;
- it provides the obligation of the contracting authority to publish the complaint in full in the SEAP in one day following its receipt, eliminating the restriction of not publishing the information that the economic operator specifies as being confidential, classified or protected by an intellectual property right;

- the obligation of the economic operators to communicate the request for voluntary intervention submitted in the case both to the NCSC and to the contracting authority and to the complainant/ complainants is introduced, no later than the expiration of the legal term for its submission; the previous regulation provided that the request for intervention submitted to the NCSC was to be communicated to the other parties to the case, within two days of receipt;
- it is established that the economic operators have a double obligation regarding the confidential documents in the bids, so that the access to them will be restricted by the NCSC to the other parties of the case: to declare and prove the confidentiality of the respective documents;
- the term in which NCSC solves the complaint has been extended: 20 days (the previous term was 15 days) from the date of receiving the file of the public procurement, of the sectorial procurement or of the concession; also, the deadline for resolving the complaint by way of exception was extended: 10 days (the previous deadline was 5 days);
- it is provided that the decisions of the NCSC regarding the settlement of the complaint may be challenged by the contracting authority and/ or by any person harmed by the measures ordered with a complaint to the competent court, both for reasons of illegality and lack of grounds, within 10 days from the communication for the parties of the case, respectively from the date of being informed by other injured persons (in the previous regulation the term was 10 working days);
- it is mentioned that the complaint formulated against the decision issued by NCSC is exempted from the payment of any judicial stamp duty;
- it is mentioned that, insofar as NCSC solved the complaint by resolving a procedural exception or analyzed only a part of the reasons invoked in the complaint, the settlement on the merits of the case as a result of admitting the complaint is made by the court at a separate time, which is established after the solution regarding the complaint; in other words, in the two situations mentioned above, the complaint will be solved "in two steps";
- novelty elements are brought regarding the complaint filed judicially, namely:
 - a) similar to the administrative-jurisdictional complaint, the obligation of the contracting authority to publish the complaint in SEAP is provided, within one day from its receipt; in the case of award procedures whose initiation is not carried out by publication in the SEAP, the contracting authority has the obligation to communicate the complaint to the other economic operators interested/ involved in the procedure, within one day from the date of its receipt;
 - b) it is introduced the provision according to which the complaints formulated in the stage up to the deadline for submitting the requests to participate/ offers/ projects are jointed; at the same time, the complaints formulated in the stage after the deadline for submitting the participation requests/ offers/ projects are also jointed;
 - c) the complaints filed judicially are charged 2% of the estimated value of the contract, but not more than Lei 100,000,000; if the award procedure is organized in lots, the stamp duties shall relate to the estimated value of each disputed lot;
 - d) the appeal filed against the decision to settle the complaint is charged with 50% of the fee provided above (the contracting authorities that file the appeal are exempted from the judicial stamp duty);
- a number of extremely important changes are introduced with regard to the settlement of disputes in court;

- a) it is established that the disputes and requests regarding the granting of compensations for the damages caused within the award procedure, as well as those regarding the annulment or nullity of the contracts are solved in the first instance, urgently and especially, by the administrative and fiscal contentious section of the tribunal in whose district the registered seat of the contracting authority is situated or in the district in which the claimant has its registered seat/ domicile, by means of panels specialized in public procurement;
 - b) instead, the disputes and requests arising from the execution of administrative contracts are solved in the first instance, urgently and especially, by the civil section of the tribunal in the district where the contracting authority has its registered seat or in the district where the claimant has its registered seat/ domicile;
 - c) the decision issued in the case of litigations regarding the granting of compensations for the damages caused within the award procedure, as well as those regarding the annulment or nullity of the contracts can be challenged by **second appeal** within 10 days from its communication, before the administrative and fiscal contentious section of the court of appeals;
 - d) the decision issued in the case of litigations and claims arising from the performance of the administrative contracts can be **appealed** within 10 days from its communication to the hierarchically superior court; the appeal is resolved urgently and with priority, within a term that will not exceed 30 days from the date of legal referral to the court;
 - e) the remedies provided above produce a stay of enforcement and are judged urgently and with priority, and in case of admitting the appeal/second appeal, the court shall, in all cases, re-judge the dispute on its merits; in order to comply with the principles of orality, adversarial proceedings and the right of defense, the court shall decide the merits of the case after admitting the complaint at a different hearing term, which shall be determined after the ruling on the complaint on the exception;
 - f) in connection with the modality of taxing the requests submitted to the court, they are taxed as follows:
 1. 2% of the value of the request, but not more than Lei 100,000,000;
 2. the requests not valued in money are charged with Lei 450;
 3. the second appeal/ appeal is charged with 50% of the fees provided above, and the appeals filed by the contracting authorities are exempted from the judicial stamp duty.
- the waiting period for the conclusion of the contract has been increased if the estimated value of the public procurement or concession procedure is lower than the value thresholds in relation to which it is mandatory to send for publication to the Official Journal of the European Union: 8 days (the previous term was 6 days) starting with the day following the moment of sending the contract award decision to the interested bidders/ candidates, by any means of communication provided by the public procurement legislation, the sectoral procurement legislation or the works concessions and concessions legislation of services;
 - with regard to the bond required for the submission of the complaint:
 - a) G.E.O. no. 114/2020 eliminates the bond for the complaint filed judicially;
 - b) related to the NCSC practice that allows the subsequent constitution of the bond, it is established that it can be constituted in maximum 5 days from the date of the NCSC notification in this respect;
 - c) as regards of the amount of the bond:

1. the concept of fixed value of the contract is replaced by the concept of estimated value of the contract;
 2. the bond is established as follows:
 - i. 2% of the estimated value of the contract, if it is lower than the value thresholds provided for the publication of the notice of participation in the JOUE, but not more than Lei 35,000 for the complaints submitted in the stage up to the deadline for submission of requests to participate/ offers/ projects, respectively not more than Lei 88,000 for the complaints submitted in the stage after the deadline for submitting the requests to participate/offers / projects;
 - ii. 2% of the estimated value of the contract, if it is equal to or higher than the value thresholds provided for the publication of the notice of participation in the JOUE, but not more than Lei 220,000 for the complaints filed in the stage up to the deadline submission of requests to participate/ offers/ projects, respectively not more than Lei 880,000 for the complaints submitted in the stage after the deadline for submission of requests to participate/ offers/ projects;
 3. in the case of a procedure for awarding the framework agreement, the provisions of para. (1) of art. 611 refers to twice the estimated value of the largest subsequent contract to be awarded under the respective framework agreement;
 4. in the case of an award procedure divided into lots, the provisions of para. (1) of art. 611 refers to the estimated value of each contested lot.
- d) in connection with the manner of restitution of the receipts for the establishment of the bonds, G.E.O. no. 114/2020 provides the following:
1. the bond shall be returned to the person who filed it, not earlier than 30 days from the date of the final decision of the NCSC;
 2. the bond shall not be returned to the person who filed it to the extent that the contracting authority proves that it has filed a claim for the payment of the due compensation until the expiry of the 30-day period from the date of the final decision of NCSC;
 3. the request for restitution is submitted to NCSC and to the contracting authority, after the expiration of the term of 30 days; the bond shall be returned immediately if the contracting authority expressly declares that it does not seek to oblige the complainant who provided the bond for damages caused as a result of filing of the complaint; within 2 days from the date of the request of the complainant or of NCSC, the contracting authority has the obligation to send the answer;
 4. NCSC, as the case may be, decides on the request for restitution of the bond within 5 days, through a decision subject to complaint to the competent court within 5 days from the communication (the complaint is suspensive of execution).

G.E.O. no. 98/2017

G.E.O. no. 114/2020 also brings a series of amendments to the Government Emergency Ordinance no. 98/2017 on the ex ante control function of the process of awarding public procurement contracts/ framework agreements, sectoral contracts/ framework agreements and works concession and service concession contracts (“**G.E.O. 98/2017**”), and among the most important we mention:

- it is established that the ex ante control exercised by the National Agency for Public Procurement (NAPP) aims at verifying the conformity with the applicable legal provisions in the field of public/ sectoral procurement/ concessions, from the point of view of regularity and quality, based on checklists;
- it is mentioned that the contracting authority selected for the ex ante control will be notified before the start of the control activity, through SEAP, within 2 working days from the upload of the award documentation in SEAP/ transmission of the notification on the intention to amend the contract or to negotiate without prior publication;
- as a novelty, it is provided that the contracting authority may decide to publish the participation notice/ simplified participation notice/ concession notice/ competition notice, with or without remedying the deviations found by NAPP by the conditional notice issued as a result of the ex ante control, having the obligation to publish the notice as issued;
- it is outlined the possibility for the contracting authority to decide to continue the award procedure with or without remedying the deviations found by NAPP by the conditional notice, the contracting authority having the obligation to publish the final notice with the publication of the interim report/ procedure report, respectively on the day of transmission on the result of the selection/ result of the procedure;
- it is provided that, if the contracting authority has objections regarding the findings and/ or remedial measures ordered, identified by NAPP as a result of the ex ante control activity of the award process, the conciliation procedure may be initiated.

Transitional provisions

The award procedures in progress on the date of entry into force of the G.E.O. 114/2020 remain subject to the legislation in force at the date of their initiation ("*award procedure in progress*" means any procedure for which a simplified notice of participation, an invitation to tender or, as the case may be, a concession notice, has been issued before the date of entry into force of G.E.O. 114/2020).

The complaints, trials and requests that are pending before the National Council for Solving Complaints or as the case may be, before the courts, on the date of entry into force of G.E.O. 114/2020 continue to be solutioned in accordance with the procedure provided for by the legislation in force on the date on which they were initiated.

The term for exercising the means of appeal is subject to the law in force at the time when the appeal was filed by administrative-jurisdictional or judicial means.

Law no. 148/2020 for the amendment of Law no. 98/2016 on public procurement was published in the Official Gazette of Romania, Part I, no. 658 of July 24, 2020, entering into force on July 27, 2020.

The Law includes the following amendments to the Law no. 98/2016:

- it is provided that the contracting authority has the right to request, and the economic operator has the obligation to communicate the identification data of the holders/ beneficiaries of the bearer shares, in case the form of organization of the bidder - economic operator tenderer/ candidate, third party supporter or subcontractor to the procedure is a joint stock company, with share capital represented by bearer shares;

- in addition, it is established that the legal representative of the economic operator submits a statement on its own responsibility regarding the holders/ real beneficiaries of the bearer shares, under the sanctions provided by art. 326 of the Criminal Code;
- non-compliance with the above mentioned obligations represents situations potentially generating conflict of interests, within the meaning of art. 59 of Law no. 98/2016;
- moreover, the contracting authority is obliged to exclude from the award procedure any economic operator, organized as a joint stock company, whose share capital is represented by bearer shares and which does not prove the identity of the holders/ beneficiaries of the bearer shares.

Decision of the High Court of Cassation and Justice no. 40/2020 regarding the referral that forms the object of the File no. 696/1/2020 is legally constituted according to the provisions of art. 520 para. (8) of the Code of Civil Procedure and of art. 37 of the Regulation on the organization and administrative functioning of the High Court of Cassation and Justice was published in the Official Gazette of Romania, Part I, no. 683 of July 31, 2020, being applicable from the same date.

The High Court of Cassation and Justice was seised by three panels of the Bucharest Court of Appeals, the Galati Court of Appeals and the Constanța Court of Appeals, which are responsible for resolving the second appeal and the appeal in litigations whose settlement procedure is the special one, provided by the provisions of Law no. 101/2016 on remedies and means of appeal for the award of public procurement contracts, sectoral contracts and works concession and service concession contracts ("**Law no. 101/2016**"), and one of the issues that needs to be resolved concerns the very nature of the appeal incidental in such disputes.

The High Court admitted the 3 related referrals and decided that, in the interpretation and application of art. 55 para. (3) and art. 53 para. (1¹) of Law no. 101/2016 (in the form in force prior to the amendment by the Government Emergency Ordinance no. 23/2020 for amending and supplementing some normative acts with impact on the public procurement system): the decision pronounced in the first instance in the litigations and requests arising from the execution of administrative contracts can be appealed within 10 days from the communication to the hierarchically superior court - the section or panel specialized in litigation with professionals, according to the procedure provided by the Law no. 101/2016.

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