

public procurement - legal changes published in February 2020

Government Emergency Ordinance no. 23/2020 for amending and supplementing certain normative acts with an impact on the public procurement system was published in the Official Gazette of Romania, Part I, no. 106 of February 12, 2020, coming into force on the same date.

Emergency Ordinance no. 23/2020 (hereinafter referred to as “**GEO 23/2020**” or “**Emergency Ordinance**”) has modified a number of primary normative acts in the field of public and sectoral procurement (as well as concessions), in order to implement urgent measures to lead to the simplification, improvement and flexibility of the public procurement system, as well as the increase of the absorption of European funds and the unblocking of the public procurement procedures.

Law no. 98/2016

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

- as a novelty, it is expressly provided that the information indicated by the economic operators as confidential must be accompanied by the evidence conferring this nature; otherwise the obligation of the contracting authority not to disclose the information indicated by the economic operators as confidential is no longer applicable;
- it clarifies the alternative nature of the two cases of exclusion provided by art. 165 of Law no. 98/2016 for breach of the obligations regarding the payment of fees, taxes or contributions to the general consolidated budget; in addition, the first exclusion case is supplemented in the sense that an economic operator is excluded from the award procedure also when the court decision or administrative decision establishing the violation of the obligations regarding the payment of fees, taxes or contributions to the general consolidated budget has definitive and compulsory nature and in accordance with the law of the Member State of the contracting authority, not only with that of the state in which the respective economic operator is established;
- The Emergency Ordinance introduces the obligation of the contracting authorities to offer the possibility of bidders/applicants who participated in the preparation of the award procedure to show that their involvement in its preparation cannot distort competition, before excluding them from the award procedure;
- additions are made in relation to the measures adopted by the economic operators who are in one of the exclusion situations provided by art. 164 and 167 of Law 98/2016 to prove their credibility; thus, these measures presented by the economic operators for proving their credibility will be evaluated by the contracting authority taking into account the particular gravity and circumstances of the offence or irregularity considered; in the event that the measures presented are considered insufficient by the contracting authority, it has the obligation to send the economic operator an explanation of the reasons that led to the decision to exclude it from the award procedure.
- clear deadlines are set in which the contracting authority has the obligation to prepare the report of the procedure (the exceptions are strictly indicated), namely:

- (a) 60 working days, for open tender, restricted tender, partnership for innovation, competition for solutions and award procedure applicable to social services and other specific services;
 - (b) 20 working days for the negotiation procedure without prior publication and for the simplified procedure;
 - (c) 100 working days for competitive negotiation and competitive dialogue procedures.
- it defines the notion of a substantial change of a public procurement contract/framework agreement within the meaning of art. 221 par. (1) let. e) of Law 98/2016, as the amendment by which the contract/framework agreement presents characteristics that differ substantially from those contained in the initially signed document; the four conditions regulated from the beginning by Law 98/2016 for the verification of the substantial nature of a change remain applicable.

Law no. 99/2016

The changes made by EGO 23/2020 to **Law no. 99/2016** regarding sectoral procurement are in principle the same as those brought to Law no. 98/2016 and indicated briefly above, and in addition it provides the introduction of a new category of sectoral contracts of legal services for the award of which Law 99/2016 does not apply, namely those that have as their scope the services of certification and authentication of documents, which are provided by public notaries, in accordance with the legal provisions.

In relation to the obligation of the contracting entity to justify in the report of the procedure the measures taken to ensure that the participation of a bidder/applicant in the award procedure is not likely to distort the competition, this is necessary in case said bidder/applicant has submitted opinions, suggestions or recommendations to the contracting entity in connection with the preparation of the award procedure, within the consultations provided in art. 148 of Law 99/2016 or in any other way, including as part of consulting services, or otherwise participated in the preparation of the award procedure.

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 services concession contracts, as well as for the organization and operation of the National Council for Solving Complaints, is amended and supplemented as follows:

- the concept of act of the contracting authority is clarified, in the sense that it does not concern the direct procurement;
- it reintroduces the specification of the clear date from which the period for filing complaints against the award documentation starts, i.e. the date of publication of the award documentation in the SEAP;
- it corrects the errors in the legal texts applicable to the procedures whose initiation is not carried out by publication in the SEAP, which continued to refer to the abrogated articles regarding the prior notice; thus, both the remedial measures adopted by the contracting authority as a result of an appeal, as well as the complaint are communicated to the complainant and to the other economic operators interested/ involved in

the procedure, within no more than one working day from the date of their adoption/receipt, by any means of communication provided by the legislation in the field;

- it provides the obligation of the contracting authority to publish the complaint in full in the SEAP, 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 economic operators to notify the parties of the case regarding the formulation of a request for voluntary intervention is introduced; in the previous regulation it was stipulated that the request for intervention submitted to the NCSC would be communicated to the other parties 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 deadlines for solving the complaints by the NCSC are no longer set in calendar days, but in working days, and the deadline for resolving the complaint by way of objection has been extended: NCSC will solve the complaint on the merits within 15 working days from the date of receipt of the public/sectoral procurement/concession file, and within 10 working days in the case of the incidence of an objection that prevents the analysis on the merits of the complaint;
- novelty elements are brought regarding the complaint filed judicially, as follows:
 - (a) similar to the administrative-jurisdictional complaint, the contracting authority is required to publish the complaint in the SEAP, within one working day of its receipt; in the case of award procedures whose initiation is not made by publishing in SEAP, the contracting authority has the obligation to communicate the complaint to the other economic operators interested/involved in the procedure, within one working day from the date of its receipt;
 - (b) the formulation of a request for voluntary intervention is subject to the same conditions as those provided in the case of the administrative-jurisdictional complaint (the other parties must be notified);
 - (c) the access to the case file submitted to the court, following the formulation of a complaint, will be made under the same conditions as the access to the file submitted to the NCSC;
 - (d) the deadline for filing the appeal against the court decision by which the judicial complaint is solved was correlated with the deadline for filing the complaint against the NCSC decision; therefore, the appeal can also be filed within 10 working days from the communication of the decision, instead of 10 calendar days (as provided in the previous regulation);
 - (e) unlike the administrative-jurisdictional complaints, the judicial ones are taxed according to the rules provided for court litigations, and the appeal is charged with 50% of this tax (the contracting authorities that file the appeal are exempted of stamp duty); the security for the judicial complaints is eliminated.

- a series of extremely important changes regarding the settlement of disputes in court are introduced:
 - (a) the decision issued in the case of litigation regarding the award of compensation for the damages caused during the award procedure, as well as those regarding the cancellation or nullity of the contracts can be challenged by **second appeal** within 10 working days from communication, before the administrative and fiscal litigation department of the court of appeals;
 - (b) instead, the decision issued in the case of trials and claims arising from the performance of the administrative contracts can be **appealed** within 10 days from communication, to the hierarchically superior court; the appeal is resolved urgently and with priority, within a term that will not exceed 30 working days from the date of legal referral to the court;
 - (c) 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;
 - (d) in relation to the method of taxation of the claims submitted to the court, they shall be charged as follows:
 - 2% of the estimated contract value, but no more than Lei (RON) 100.000.000;
 - if the award procedure is organized in lots, the stamp fees refer to the estimated value of each disputed lot;
 - in the case of a procedure for awarding a framework agreement, the amount of the court fee refers to double the estimated value of the largest subsequent contract that is intended to be awarded on the basis of the framework agreement;
 - the appeal/second appeal is charged with 50% of the fees provided above, and the second appeals submitted by the contracting authorities are exempted from the judicial stamp duty.
- Regarding the security for submitting the complaint:
 - (a) EGO 23/2020 eliminates the security for judicial complaints, in conjunction with the imposition of a stamp duty for these complaints;
 - (b) in relation to the practice of the NCSC which allows the subsequent establishment of the security, it is established that it may be constituted within a maximum of 3 working days from the date of the complaint submitted with the NCSC;
 - (c) regarding the amount of the security:
 - the concept of established value of the contract is replaced by that of the value of the bid declared successful;

- the ratio of the 2% percentage from the estimated value of the contract and the maximum limits related to it are maintained, however, the following ways of establishing the amount of the security also become applicable:
 - (i) 2% of the value of the bid declared successful in the report of the procedure, if it is lower than the value thresholds provided for the publication of the contract notice in JOUE, but not more than Lei (RON) 88.000;
 - (ii) 2% of the value of the bid declared successful in the report of the procedure, if it is equal to or higher than the value thresholds provided for the publication of the contract notice in JOUE, but not more than Lei (RON) 880.000.
- in the case of an award procedure divided in lots, the provisions of par. (1) of art. 61¹ refer to the estimated value of each disputed lot;
- if the procedure for awarding the framework agreement is organized in lots, the provisions of par. (1) of art. 61¹ refers to double the estimated value of the largest subsequent contract that is intended to be awarded based on the respective framework agreement for each disputed lot.
- (d) on the method of returning the securities receipt notices, EGO 23/2020 provides the following:
 - the security is returned to the person who submitted it, no earlier than 30 days from the date when the NCSC decision becomes final;
 - the security is not returned to the one who submitted it to the extent that the contracting authority proves that it has filed a court claim against it for the payment of the compensation due within the 30-day deadline from the date when the NCSC decision becomes final.

EGO no. 98/2017

EGO 23/2020 brings a series of changes to the Government Emergency Ordinance no. 98/2017 regarding the ex ante control function of the process of awarding the public procurement contracts/framework agreements, the sectoral contracts/framework agreements and the works and service concession contracts ("**GEO 98/2017**"), and among the most important we mention:

- it is no longer provided that the ex ante control exerted by NAPP is performed at the request of the contracting authority, but that it aims to verify compliance 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 modifies aspects entailed by the ex ante quality and regularity control, such as checking compliance with the legal provisions in the field of public/sectoral procurement, concessions of services or works or of the award documentation, together with the contracting strategy and other documents accompany it, of the errata type notice, as well as of the contracting authority's response proposals to the requests for clarifications made by the economic operators and any additional information published by it in relation to the respective award documentation, except for the substantiation study provided in art. 229 of Law no. 98/2016;

- it is established that any of the award procedures regulated by Law no. 98/2016, by Law no. 99/2016 and by Law no. 100/2016 are subject to ex ante control, with certain exceptions expressly indicated;
- it is expressly established that, in carrying out the ex ante control activity within the stage provided in art. 6 paragraph (2) a) from EGO 98/2017, NAPP carries out quality and regularity only once; also, from the scope of the documents that can be subject to quality and regularity control, the following were eliminated: the tender book, the descriptive documentation, the contractual clauses, the contract notice, the simplified contract notice, the competition notice;
- it eliminates references to unconditional compliance notice;
- as a novelty, it is stipulated that the contracting authority may decide to publish the contract notice/the simplified contract notice/the concession notice/the competition notice, with or without remedying the irregularities found by NAPP by the conditional compliance notice issued as a result of the ex ante control, having the obligation to publish the issued compliance notice;
- it outlines the possibility of the contracting authority to decide on the continuation of the award procedure with or without remedying the irregularities found by NAPP by the conditional compliance notice, having the obligation to publish the final compliance notice once the report of the procedure is published, namely on the day of transmitting communications regarding the outcome of the procedure.

Transitional provisions

The award procedures in progress on the date of entry into force of EGO 23/2020 shall remain subject to the legislation in force at the time of their initiation ("*award procedure in progress*" meaning any procedure for which a contract notice or, as the case may be, a simplified contract notice has been issued before the entry into force of GEO 23/2020).

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 EGO 23/2020 continues to be judged under the conditions and according to the procedure provided by the law in force on the date when they were started.