



public procurement - legal changes published in August 2021

Government Emergency Ordinance no. 3/2021 amending and supplementing certain normative acts in the field of public procurement was published in the Official Gazette of Romania, Part I, no. 821 dated August 27, 2021, entering in force on August 30, 2021.

The Emergency Ordinance no. 3/2021 (hereinafter referred to as "**G.E.O 3/2021**" or the "**Emergency Ordinance**") amended a series of primary normative acts in the field of public and sectoral procurement (as well as concessions), as we will indicate below.

Law no. 98/2016

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

- the definition of subcontractor / sub-entrepreneur has been changed; thus, it is defined as any economic operator that is not part of a public procurement contract and that performs certain parts or elements of the works / services, being responsible in front of the contractor for the organization and development of all the necessary steps for this purpose; it is also specified that making available for use of a machinery or the supply of materials/goods under a public procurement contract is not considered to represent a subcontracting operation;
- among the elements that the contracting authority requires the tenderer/candidate to specify in the tender, there are the categories of services/works in the contract that it intends to subcontract, as well as the percentage or value corresponding to the activities indicated in the tender as being carried out by subcontractors;
- the economic operator declared as the winner has no longer the obligation of presenting tax certificates for all secondary offices / working units; the obligation was replaced by a statement on its own responsibility regarding the fulfillment of the obligation to pay taxes, fees or contributions due to the general consolidated budget;
- the period within which the contracting authority has the obligation to make public the decision of cancelling the procedure for awarding the public procurement contract/framework agreement, accompanied by the justification for the cancellation of the award procedure, has been reduced from 3 days to 1 day after the cancellation decision is taken;
- the term within which the contracting authority is obliged to annul an act/to issue an act/to adopt the necessary measures to restore legality as a result of a decision issued by the National Council for Solving Complaints/court has been reduced from 20 working days to 10 working days from the date of its communication;
- it has been established that, for procedures with several lots, in duly justified cases and with the approval of the head of the contracting authority, the term for drawing up the report of the procedure may be extended only once, with a term not exceeding 50 working days;
- a clarification was introduced in case of application of a contravention sanction to the contracting authority, namely that it may order the adoption of measures against the person/persons involved in the concession process that was the subject of the contravention, only if the courts find that they have fulfilled or omitted the fulfilment, with guilt, consisting of serious fault, of any act or fact in connection with the exercise, under the law, of their duties.

Law no. 99/2016

The amendments brought by G.E.O. 3/2021 to Law **no. 99/2016** on sectoral procurement are mainly the same as those made to Law no. 98/2016 and briefly indicated above.



Law no. 101/2016

Law no. 101/2016 on remedies and complaints in the field of award of public procurement contracts, sectoral contracts and concession of works and services contracts, as well as for the organization and functioning of the National Council for Solving Complaints was amended and supplemented as follows:

- in the case of an administrative-judicial complaint, it has been established that the contracting authority has the obligation to conclude the contract with the successful tenderer, after the pronouncement of a solution to maintain the result of the award procedure by the National Council for Solving Complaints, even if the appeal against that decision was lodged against that decision and the case has not been definitively resolved and, in any event, only after the expiry of the legal waiting period provided for in Article 59 para.(1);
- in the case of a judicial claim, it has been established that the contracting authority has the obligation to conclude the contract with the successful tenderer after the pronouncement of a solution to maintain the result of the award procedure by the court, even if the decision has been appealed and the case has not been definitively resolved and, in any event, only after the expiry of the legal waiting period provided for in Article 59 para. (1); the decision of the court of first instance is enforceable and it is not possible to order the suspension of its enforcement;
- with regard to the second appeal, it is mentioned that the failure to submit the statement of defense within the time limit entails the forfeiture of the right to invoke exceptions other than those of public order (previously the sanction of the impossibility to propose further evidence was provided; no new evidence can be submitted in addition to that administrated in front of the first court);
- the maximum threshold of the bail to be paid in the case of lodging a complaint by administrative-judicial means has been modified in the event that the estimated value of the contract is equal or higher than the thresholds provided in Article 7 para. (1) of Law no. 98/2016; in this case, the bail is 2% of the estimated value of the contract, but not more than Lei 220,000 for the complaints submitted at the stage up to the deadline for submission of requests for participation / bids, respectively not more than Lei 2,000,000 (the previous threshold was Lei 880,000) for the complaints submitted at the stage after the deadline for submission of requests for participation / bids.

Government Emergency Ordinance no. 98/2017

Government Ordinance no. 3/2021 brings a series of amendments to the Government Emergency Ordinance no. 98/2017 on the function of ex ante control of the process of awarding contracts / framework agreements for public procurement, of contracts / framework sectoral agreements and of contracts for works concession and service concession ("**O.U.G. 98/2017**"), and among the most important we mention:

- it is established that the contracting authority may decide to publish the contract notice / simplified contract notice / concession notice / competition notice, with or without remedying the deviations found by ANAP through the conditional clearance for conformity issued as a result of the ex-ante control exercised, the clearance for conformity issued being published automatically by SEAP;
- it is mentioned that the clearances for conformity issued by ANAP can be challenged only together with the administrative acts of the contracting authority in relation to which they were issued, based on the provisions of Law no. 101/2016.

Final provisions

O.U.G. 3/2021 also establishes that Laws no. 98/2016, no. 99/2016, no. 101/2016 and G.E.O no. 98/2017 will be republished the Official Gazette of Romania, Part I, and the texts will be re-numbered.