REMEDIES AND MEANS OF REDRESS IN PUBLIC PROCUREMENT - MILESTONES OF THE NEW LEGISLATIVE FRAMEWORK

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Abstract

Public procurement legislation currently passes through a series of fundamental changes, meant to bring a fundamental change in thinking that has governed the adoption of previous directives and to implement important elements from the jurisdiction of the European Court of Justice related to public procurement and concessions. According to the executive, the new legislation provides mechanisms that have the effect of eliminating the problems and failures encountered in implementing the currently in force legislation. This article aims to highlight some aspects of novelty in terms of administrative and judicial proceedings of litigation in this matter.

Keywords:

public administration, remedies, public procurement, new legislative framework

JEL Classification: K1, K3

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I. INTRODUCTION

Currently, the system regarding remedies on public procurement and concessions is regulated by GEO no. 34/2006 on the award of public procurement contracts, public works, concession contracts and service concession, is contained in section IV of Chapter IX of the Ordinance, entitled Settlement of disputes.

Context adoption of GEO no. 34/2006 was to fulfil commitments made by Romania in the first chapter, „Free movement of goods” and the Commission's recommendations, following the adoption of the acquis communautaire for accession to the European Union. Basically, the Emergency Ordinance implemented the old Directive regarding the coordination procedures for awarding public works, goods and services contracts, Directive 2004/18/EC of the European Parliament and of the Council of 31st of March, 2004.

At the moment, public procurement field is in full resettlement, being published the National Strategy, a crucial step regarding the reform of the Romanian public procurement, according to the executive, „because it establishes a common vision of reforming this system, a key moment where the new directives in this field, propose to Member States switching to a new paradigm, in which public procurement are the main instrument for unlocking growth at European level”. According to the Strategy, the primary law will accurately reflects the provisions of the directives, the differences consisting in the different structure of chapters and in certain unanswered provisions [1].

II. TRANSPOSITION OF THE NEW EU DIRECTIVES INTO NATIONAL LEGISLATION

February, 2014, on the award of concession contracts, Directive 2007/66/EC of the European Parliament and Council from 11\textsuperscript{th} of December, 2007, amending Council Directives 89/665/EEC and 92/13/EEC with regard to increasing the effectiveness of review procedures concerning the award of public contracts - will be achieved by promoting four different regulations in primary legislation: a distinct law regarding classical procurement, a distinct law regarding utility, a distinct law on concessions and public-private partnerships and a distinct law on remedies / appeals in procurement [2].

The latter one aims to regulate distinct legal regime of remedies and appeals, creating a stable regulatory framework, which is not influenced by changes related to award procedures or other matters covered by public procurement, sector procurement or concessions.

The enactment provides for a system of remedies and redress means uniformly applicable and valid in the award of public contracts, sector procurement, works concessions and service concessions. The scope of the law are excluded direct purchases and purchases made by any entities other than contracting authorities / entities, as defined by legislation. For these types of purchases and not available the remedies / redress system provided for by law, the rules of the common law, in other words, of Law no. 554/2004 as amended, and in the alternative, of the Code of Civil Procedure.

In the sense of Directive 2007/66 / EC, public procurement means the acquisition through a public contract, for works, products or services, by one or more contracting authorities from economic operators chosen by those contracting authorities, whether the works, products or services are intended or not a public purpose, and public procurement contracts „are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of goods or services”.

### III. THE NEW LEGISLATIVE FRAMEWORK

Romanian legislator (more correctly, the executive, the initiator of the enactment) opted for a separate law in matters of contentious procurement, the law that aims, as stated above, the remedies and appeals concerning the award of public procurement contracts, sector contracts and concession contracts and the organization and functioning of the National Council for Solving Complaints. The law also is the material basis for
compensation for damages caused in award procedures, as well as those on the execution, cancellation, termination, determination or unilateral termination of contracts.

If the separate matter of public procurement, the need to adopt the legislative package derives from the implementation of the three directives adopted at European level in 2014, it is not the situation the law on remedies and appeals, as to provide mechanisms and procedures for effective, rapid and effective referral and remedial action, the legislature implements actually the Directive from 1989 as amended by Directive 2007/66/EC, crystallizing for the first time a distinct law for public procurement disputes (the former regulation is included in a separate chapter of the Law on procurement of works, goods or services).

In what follows, we will analyse several aspects of novelty in terms of administrative and judicial proceedings of litigation in this matter. As a first observation, we note that in law sent to Parliament extends the category of acts, actions or inaction against which you can use administration-judicial ways. If the former regulation, the injured party may request the appeal, annul the act, order the contracting authority to issue an act, recognizing the claimed right or legitimate interest in the enactment analysed, under Article 2, any person aggrieved party in its right or a legitimate interest by an act of a contracting authority or failure within the statutory period of an application, request its annulment, order the contracting authority to issue an act or the adoption of remedial measures, recognizing the claimed right or legitimate interest, by administrative-judicial or judicial ways.

Regarding the cumulative conditions necessary for classification as an injured party, the legislator reproduces the previous legislature, is to be noticed only the nuance of the term (persons who consider themselves injured instead the injured party). Regarding the impeachment procedure, it requires a distinction from the previous regulation, within the meaning of provisions concerning the alternative competence of appeal, allowing the appellant the right to choose between the CNSC and the court (on the territorial and material jurisdiction, it states in Article 49, the jurisdiction to hear cases belonging to the court having territorial jurisdiction area of the contracting authority, the administrative and fiscal department) [3].

So, to resolve the complaint, the person which is considered injured addresses to either CNSC (administratively-jurisdictional way) or to the court (the legal way), and if different people lodge complaints before both jurisdictions, the contracting authority which took aware obliged to inform
the Council, with copies of the complaint. In the latter case, the court pronounces joinder appeals, operating a divestment of the Council.

The difference between the settlement the appeal by administrative-jurisdictional way and judicial way lies in the obligation to pay stamp duty for the latter way, about the amount provided for in Article 33, derogation from the common law established by GEO no. 80/2013. Assuming that the complaints made against the same act are distinct, after joining the court, no stamp duty is payable by appellant who opted for CNSC jurisdiction.

The legislature expressly regulates the duration, namely calculating the procedural deadlines, starting at the beginning of the first hour of the first day of the period and ends in the last hour of the last day, the day it was released an act was not taken within the time limit.

The novelty of legislative regulation lies mainly from the establishment of a prior mandatory procedure to go by injured parties before addressing the Council or the competent court. Non-existent procedure in the earlier legislation, it is in fact a condition for the exercise of right of action, a plea objection of that attracts inadmissibility. Emission transposed, the Directive 89/665/EEC as amended, gives to Member States the power to require persons wishing to pursue an appeal, notify the Authority of the alleged infringement and of their intention to make an appeal on condition of not being affected the suspensive deadlines under the Directive [4].

Notification is addressed to contracting authority and seeks to remedy request, all or in part of the alleged infringement. Penalties applicable to failure to observe the notification procedure is to reject the appeal as inadmissible, solution that gives expression to the principle of administrative law according to which the normative administrative acts are always revocable.

In terms of formal conditions, the notification must be made in writing and must contain information identifying the person considering himself injured, the irregularities noticed and proposed remedial measures.

Procedurally, if prior notification is related to the content of the tender documentation, published in the electronic procurement system - SEAP, the date of knowledge is the publication date of the documentation. According to para. 6 of art. 6 of Law, where proceedings are published in the electronic public procurement system, the measures adopted before the deadline for submitting requests to participate or, where appropriate, offers, are communicated within one working day after its adoption, so the person who notified the contracting authority and other economic operators
involved in the award procedure by publication in the electronic procurement system.

In procedures, whose initiation is done not by publication in SEAP, the measures adopted shall be communicated within one working day from adoption, to the person who notified the contracting authority and other economic operators involved in the award. Within three days counting from the day following receipt of the notification, the contracting authority shall respond by communicating whether or not she adopt measures to remedy the alleged violation. If the contracting authority shall respond in that it will take corrective action, it shall have a term of 7 days to their effective implementation, the term being calculated from the day following the response.

IV. CONCLUSIONS

Browsing the prior notification procedure is no longer necessary in disputes against introduced remedial measures. Although the legislature does not regulate assuming no response to the first notice, or not taking measures to remedy, we consider that in these cases except operates, the injured party addressing directly the court or CMNSC.

Referring to the resolution of the appeal by administrative-judicial way, the procedure will be the subject of another article, in which will be analysed all aspects provided by the legislature.

REFERENCES