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ORIGINAL PAPER

Resolution of the appeals formulated in the procedure of awarding the public procurement contracts and the concession contracts for public works or services

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Abstract:
The legal regime of contracts for public procurement, concession of public works or concession of services has undergone frequent changes concerning the Government Emergency Ordinance (O.U.G.) no. 34/2006 regarding the award of public procurement contracts, public works and service concession contracts. All these changes represent an expression of the state intervention in order to guarantee, at least partially, the access of all citizens to these services and to ensure control over the procedure for awarding these contracts. Any person who considers that his right or legitimate interest has been harmed by an act of the contracting authority, as a result of the violation of the provisions of the law in the field of public procurement and of the awarding of contracts for public works or services, can request – on judicial or administrative-judicial way – the annulment of the respective act, obliging the contracting authority to issue an act either within or in connection with the awarding procedure, the recognition of the claimed right or the legitimate interest. The party that considers itself injured and chooses to file an administrative-judicial appeal, has the right to address the National Council for Solving Complaints (CNSC). This council is a body endowed with administrative-judicial activity whose purpose is to solve the appeals introduced within and in relation to the procedure of awarding the public procurement contracts, the public works and service concession contracts. An important change introduced by Law no. 278/2010 is that the persons who want to file appeals in the public procurement or concession procedures can no longer choose between the CNSC and the court, but only the CNSC can receive appeals. If an appeal is addressed at the same time to the CNSC and the competent court, it is presumed that the respective person has renounced at the administrative-jurisdictional way, returning the obligation to notify the Council of the application to the competent court.

Keywords: *public procurement; concession; contract; appeal; CNSC (National Council for Solving Complaints).*

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General considerations

Pursuing the promotion of competition and non-discrimination of economic operators, ensuring the transparency and integrity of the public procurement process, ensuring the efficient use of public funds, by applying the award procedures by the contracting authorities, Government Emergency Ordinance (O.U.G.) no. 34/2006 on the award of public procurement contracts, public works concession contracts and service concession contracts establishes the common principles and rules applicable to the award of public procurement contracts and concession contracts.

Over time, the legal regime of the contracts of public procurement, public works concession or service concession has undergone frequent changes, the most recent being the O.U.G. no. 34/2010, Law no. 278/2010 on the approval of the O.U.G. no. 76/2010 amending and supplementing the O.U.G. no. 34/2006 on the award of public procurement contracts, public works concession contracts and service concession contracts, O.U.G. no. 52/2011 for the amendment of the O.U.G. no. 30/2006 on the function of verifying the procedural aspects related to the process of awarding public procurement contracts, public works concession contracts and service concession contracts and O.U.G. no. 51/2014 for the amendment and completion of O.U.G. no. 34/2006 on the award of public procurement contracts, public works concession contracts and service concession contracts. All these changes are an expression of state intervention in order to guarantee, at least in part, the access of all citizens to these services and to ensure control over the procedure for awarding these contracts.

Law no. 278/2010 on the approval of the O.U.G. no. 76/2010 amending and supplementing the O.U.G. no. 34/2006 on the award of public procurement contracts, public works concession contracts and service concession contracts redefined the "public procurement contract", categorizing it as that "commercial contract which also includes the category of the sectoral contract, as onerous contract, concluded in writing between one or more contracting authorities, on the one hand, and one or more economic operators, on the other hand, having as their object the execution of works, the provision of products or the provision of services" [Article 3 letter f) of O.U.G. no. 34/2006, modified by Law no. 278/2010]. The consequence of this change is that, being a commercial contract, the public procurement contract is governed by the rules of commercial law, going beyond the scope of administrative law.

In relation to the concession contract, we must emphasize that this is a way of managing public services which is characterized by the fact that "a public authority (grantor) entrusts an individual (citizen or company) by an agreement concluded with it to makes a public service operate at its expense and risk, remunerating itself by royalties collected from users" (Vasile, 2003: 165). According to Law no. 219/1998 on the concession regime, the concession contract is concluded between a person, called concessionaire, and another party, called the contracting authority, through which the last one transmits for a determined period, of maximum 49 years, the right and obligation to exploit a of an activity or public service, in exchange for a fee, to the concessionaire, who acts at his own risk and responsibility (Article 1 par. 2 of Law no. 219/1998). Regarding the nature of the concession contracts, Law no. 278/2010 does not make any clarification, which means that these contracts remain of an administrative nature, and the disputes regarding the conclusion and execution of these contracts can only be within the competence of the administrative contentious court.

De lege ferenda we consider that the contract for the provision of temporary employees regulated by art. 91 of the Labor Code, concluded in writing between the temporary work agent (service provider) and the user (client) should be included in the scope of public procurement contracts, more precisely in the category of supply contracts. On the basis of a contract for the provision of temporary employees, the temporary agency shall provide the user with one or more temporary workers (Țiclea, Ioan, Ținca, Barbu, Lozneanu, Cernat, Georgescu, Vlad, Gheorghiu and Peter, 2004: 268; Radu, 2015: 202-203; 208-210). Also, *de lege ferenda* we propose to change the legal nature of the public procurement contract, in the sense that this is an administrative contract and not a commercial one.

The principles to be followed in the procedure for awarding the public procurement contract are: non-discrimination and equal treatment; transparency; proportionality; mutual recognition; efficiency of use of public funds; the principle of taking responsibility.

The contracting authority has the possibility to award a public procurement contract, a public works concession contract or a service concession contract using one of the procedures listed by O.U.G. no. 34/2006 on the award of public procurement contracts, public works concession contracts and service concession contracts: open auction; restricted auction; competitive dialogue; negociation with or without prior publication of a contract notice; request for offers.

In addition to the rules of the award procedure and the obligations of the Contracting Authority, certain incompatibilities or prohibitions are provided. The doctrine stated that ”an economic operator does not have the right to participate in an award procedure both as a tenderer and as an associate tenderer or as a subcontractor of another tenderer” (Lazăr, 2009: 39), and in judicial practice it was considered that ”a tenderer may not participate, in the same procedure, both as a tenderer and as a subcontractor, otherwise the offer submitted as a tenderer will be rejected” (Alba Iulia Court of Appeal, Decision no. 891 of February 22, 2012).

The contracting authority has the obligation to specify, in the contract notice, the award criteria for that public procurement contract, which, once established, cannot be changed for the entire duration of the award procedure. Without prejudice to legislative or administrative provisions relating to the remuneration of certain services, the contracting authority may establish as a criterion for the award of the public procurement contract only one of those provided for in Article 198 of the O.U.G. no. 34/2006: the most economically advantageous offer or, exclusively, the lowest price.

Settlement of appeals

Any person who considers that a right or a legitimate interest of his has been harmed by an act of the contracting authority, as a result of the violation of the provisions of the law in the field of public procurement and the award of public works or service contracts, may request - on judicial or administrative-jurisdictional way - the annulment of the respective act, the obligation of the contracting authority to issue an act either within or in connection with the award procedure, the recognition of the claimed right or of the legitimate interest.

According to art. 255 par. 1¹ of the O.U.G. no. 34/2010, in case an appeal is formulated both before the National Council for the Settlement of Appeals (CNSC), and the court (through the agency of an action), regarding the same object, in order to ensure a good judgment, the court decides by conclusion, ex officio, meeting of cases. The

conclusion of the meeting of the cases can only be challenged at the same time as the merits of the cause. CNSC has the obligation to send the file within a maximum of 3 days from the date of communication of the conclusion, the contracting authority must inform the court about the existence of the appeal.

In the sense considered by the legislator, the notion of "injured person" designates any economic operator who has had or has a legitimate interest in the respective award procedure and who has suffered, suffers or is at risk of suffering a certain damage as a consequence of the act of the contracting authority, producer of legal effects, or as an effect of non-settlement of a request regarding the respective award procedure within the term stipulated by law.

The notion of "act of the contracting authority" means "a) any administrative act; b) failure to issue an administrative act or any other act of the contracting authority or refusal to issue it; c) any other act of the contracting authority, other than those provided in let. a) or b), which produces or may produce legal effects" (Oanță, 2015: 205).

The party that considers itself injured and chooses to file an administrative appeal, has the right to address the CNSC. This council is a body endowed with administrative-jurisdictional activity whose purpose is to resolve the disputes introduced within and in connection with the procedure for the award of public procurement contracts, public works concession contracts and service concession contracts (Oanță, 2015: 205). By setting up this body, the legislator aimed to «achieve an efficient and credible public procurement system (…), with an impact on all other areas of interest of the acquis communautaire related to the "Internal Market"», as expressly regulated by Government Decision (H.G.) no. 901/2005 on the approval of the Strategy for the reform of the public procurement system, as well as of the action plan for its implementation in the period 2005-2007.

The procedure for resolving appeals regarding the application of public procurement award procedures, regulated by the O.U.G. no. 34/2006, complies with the provisions of art. 9 of the United Nations Convention against Corruption (which instruct each State Party to "take, in accordance with the fundamental principles of its legal system, the necessary measures to establish an appropriate public procurement system based on transparency, competition and objective criteria for decision-making and which, between other things, has to be effective in preventing corruption") and take into account framework values, such as the existence of an" effective internal appeal system, including an effective appeal system, which guarantees the exercise of remedies in case of breaches of the rules or procedures according to this paragraph ". The Council is a public body endowed with the independence necessary to fulfill the administrative-jurisdictional act, not being subordinated to any central or local administrative authority or to any public institution.

Through appeals it can be requested: annulment of the administrative act issued by the contracting authority within and in connection with the award procedure; obliging the contracting authority to issue an administrative act within and in connection with the award procedure; obliging the contracting authority to take the necessary measures for the recognition of the claimed right or legitimate interest within and in connection with the award procedure.

Before addressing the competent court, the injured party shall notify the contracting authority of the alleged breach of the legal provisions on public procurement and public works or service concessions, as well as of the intention to refer the matter to

the competent court. Failure to notify shall not prevent the application from being brought before the competent court.

Upon receipt of the communication, the injured party who considers that the measures taken are sufficient to remedy the alleged infringement shall send to the contracting authority a notice of waiver of legal action or, as the case may be, a notice of waiver of the action based on that violation.

An important amendment introduced by Law no. 278/2010 on the approval of the O.U.G. no. 76/2010 amending and supplementing the O.U.G. no. 34/2006 is that the persons who want to file appeals in the public procurement or concession procedures can no longer choose between CNSC and the court, but only CNSC can receive appeals. Thus, the party cannot address, for the settlement of the same request, at the same time the National Council for the Settlement of Appeals and the competent court. Otherwise, it is presumed that the party has waived the administrative-jurisdictional route, having the obligation to notify the Council of the introduction of the application to the competent court (Oanță, 2015: 206).

The contracts will be concluded after the decision is pronounced by the CNSC, and the appellants can go to court to challenge the CNSC decision. Through these changes, the legislator aimed to combat the phenomenon of months of extension of a decision on an appeal, with negative effects on the conclusion of contracts and their execution.

Upon receipt of an appeal, the contracting authority has the right to take the remedial measures it deems necessary as a result of that appeal. Any such measures must be communicated to the appellant, to the other economic operators involved in the award procedure, as well as to CNSC or the first instance court, no later than one working day from the date of their adoption.

If the appellant considers that the measures adopted are sufficient to remedy the acts invoked as illegal, he will send to the CNSC or to the first instance court and to the contracting authority a notification of waiver of the appeal.

In case of receipt of an appeal by CNSC or by the first court, for which no waiver has been taken, the contracting authority has the right to conclude the contract only after pronouncing the CNSC decision or after pronouncing the decision in first instance, but not before expiration of waiting periods. The contract concluded with non-compliance with these provisions is struck by absolute nullity.

The procedure for solving the appeals before the National Council for Solving Complaints

CNSC is competent to resolve the appeals formulated within the award procedure, before concluding the contract, through specialized panels, constituted according to the Regulation on the organization and functioning of the Council. The procedure for solving the appeals by CNSC is carried out in compliance with the principles of legality, speed, adversariality and the right to defense.

According to (Article 270 par. 1 of the O.U.G. no. 34/2010), the appeal must be made in writing and must contain the following elements: a) the name, domicile or residence of the appellant or, for legal entities, their name, headquarters and unique registration code. In the case of legal entities, the persons who represent them and in what capacity will also be indicated; b) the name and headquarters of the contracting authority; c) the name of the object of the public procurement contract and the applied award procedure; d) the object of the appeal; e) the factual and legal motivation of the

request; f) the means of proof on which the appeal is based, as far as possible; g) the signature of the party or of the representative of the legal person.

If the Council considers that all this information is not included in the appeal, it will ask the appellant, within 5 days from the notification informing him of this situation, to complete the appeal. If the appellant does not comply with the obligation imposed by the Council, the appeal will be rejected.

In order to resolve the appeal / appeals, the contracting authority has the obligation to send to the Council, within maximum 3 working days from the expiration of the term provided by law, its point of view on it / them, accompanied by any other documents considered edifying, as well as, under the sanction of a fine, a copy of the public procurement file. The lack of the point of view of the contracting authority does not prevent the settlement of the appeal / appeals, insofar as its / their communication has been proved. The contracting authority will also notify the point of view to the appellant / appellants.

A new provision introduced by the O.U.G. no. 76/2010 is that, upon request, the appellant has access to the documents in the public procurement file submitted by the authority to the Council, except for the technical proposals of the other bidders to the award procedure, the latter can be consulted by the appellant only with written consent of those tenderers, an agreement which is annexed to the request which the appellant makes to the Council (Article 274 par. 4 of the O.U.G. no. 34/2010, amended).

In order to resolve the appeal, the Council has the right to request clarifications from the parties, to administer evidence and to request any other data / documents, insofar as they are relevant in relation to the object of the appeal. The Council also has the right to request any data necessary for the settlement of the appeal from other natural or legal persons, but this should not lead to the deadline for resolving the appeal being exceeded.

The contracting authority has the obligation to respond to any request of the Council and to send it any other documents that are relevant for the resolution of the appeal, within a period not exceeding 5 days from the date of receipt of the request, under penalty of a fine of 10,000 lei, applied to the head of the contracting authority. The Council is required to take a decision on the fine no later than the 5th day following the expiry of the period of 5 days from the date of receipt of the request. The decision of the Council on the fine, not appealed in time, constitutes an enforceable title and is executed by the competent bodies, according to the legal provisions regarding the forced execution of the fiscal receivables and with the procedure provided by these provisions.

The Council will be able to appoint an independent expert to clarify technical or financial issues. The duration of the expertise must be within the deadline provided for the settlement of appeals by the Council. The cost of the expertise will be borne by the party that made the request.

The procedure before the Council is written, and the parties will be heard only if this is considered necessary by the panel to resolve the appeal. The parties may be represented by lawyers and may make written submissions in the course of the proceedings. The parties may also request that oral submissions be made to the Council.

According to art. 276 par. 1 of the O.U.G. no. 34/2010, as amended by O.U.G. no. 76/2010, the Council has the obligation to resolve the appeal on the merits within 20 days from the date of receipt of the public procurement file from the contracting authority, respectively within 10 days in case of incidence of an exception that prevents the substantive analysis of the appeal. In duly justified cases, the time limit for resolving

the appeal may be extended once by a further 10 days. Failure to comply with the deadline for resolving the appeal constitutes a disciplinary violation and may even lead to the initiation of the evaluation procedure.

Appeals against the decisions of the National Council for Solving Complaints

The processes and requests regarding the documents of the contracting authorities issued before the conclusion of the contract, as well as the granting of compensations for the damages caused during the award procedure are solved in the first instance by the administrative and fiscal contentious section of the court where the contracting authority is located. Compensation for damages caused in the award procedure is sought only in court, or by separate action.

Compensation representing damage caused by an act of the contracting authority or as a result of the failure to resolve within the legal term a request for the award procedure, in violation of legal provisions on public procurement, may be granted only after prior annulment, according to law, of the respectively act or, as the case may be, after the revocation of the act or the taking of any other remedial measures by the contracting authority.

If compensation is requested for the repair of the damage representing expenses for the elaboration of the offer or for participation in the award procedure, the injured person must only prove the violation of the provisions of the O.U.G. no. 34/2010, as well as the fact that he would have had a real chance to win the contract, and this was compromised as a result of the respective violation.

In duly justified cases and for the prevention of imminent damage, the court may, pending the resolution of the merits of the case, order, at the request of the interested party, by reasoned decision summoning the parties, provisional measures (insofar as their negative consequences are not greater than their benefits), such as: a) suspension measures or measures meant to ensure the suspension of the award procedure, in the stage in which it is; b) other measures to ensure the cessation of the implementation of certain decisions of the contracting authority.

The court shall resolve the request for suspension or for another interim measure, taking into account the likely consequences of this measure on all categories of interests that could be harmed, including the public interest. The decision of the court may be appealed separately within 5 days of the communication. The court, admitting the request, may order the annulment in whole or in part of the act of the contracting authority, the obligation to issue the act by the contracting authority, the fulfillment of an obligation by the contracting authority, including the elimination of any discriminatory technical, economic or financial specifications from the participation announcement or invitation, from the award documentation or from other documents issued in connection with the award procedure, as well as any other measures necessary to remedy the violation of the legal provisions regarding the public procurement. The court, admitting the request, may order the annulment in whole or in part of the act of the contracting authority, the obligation to issue the act by the contracting authority, the fulfillment of an obligation by the contracting authority, including the elimination of any discriminatory technical, economic or financial specifications from the participation notice/ invitation, from the award documentation or from other documents issued in connection with the award procedure, as well as any other measures necessary to remedy the violation of the legal provisions regarding the public procurement.

The decision pronounced in the first instance can be atacked through recourse, within 5 days from the communication. The recourse is judged, as the case may be, by the administrative and fiscal contentious section of the court of appeal or by the commercial section of the court of appeal. The recourse does not suspend the execution and is judged urgently and especially. If the recourse is admitted, the court of recourse, modifying or quashing the sentence, will re-judge in all cases the dispute on the merits.

A last aspect that must be emphasized in this context is the fact that, according to art. 201 of the O.U.G. no. 34/2006, during the application of the award procedure, the contracting authority has the right to request clarifications and, as the case may be, completions of the documents submitted by tenderers / candidates to demonstrate compliance with the requirements established by the qualification and selection criteria or to demonstrate compliance of the tender with the required requirements. The contracting authority does not have the right to determine the appearance of an obvious advantage in favor of a tenderer / candidate through the requested clarifications / completions.

Thus, the legislator leaves it to the Contracting Authority whether or not to request clarifications from tenderers, instead of establishing clearly and unequivocally what the obligations are regarding the evaluation of tenders. In other words, the law contains very few elements regarding the practical way of evaluating the offers, leaving this time the possibility to complete the legal provisions through methodological norms, an aspect that has been criticized countless times. There were many cases in which, although CNSC or the court competent to resolve complaints against CNSC decisions ordered the re-evaluation of only one tender, but the Contracting Authority decided that, in addition to re-evaluating the tender, to re-evaluate the appellant's tender, for that in the first evaluation it did not focus enough on the second place offer. This ex officio re-evaluation has practically one purpose, namely to punish the tenderer who lodged an appeal against the decision of the Contracting Authority to award the contract to another tenderer. In the absence of a clear and precise regulation regarding the limits of the re-evaluation of the tenders, it remains at the discretion of the Contracting Authority when and in what way it can decide the re-evaluation of other tenders than those expressly mentioned in CNSC and / or court decisions. *De lege ferenda*, we consider that the framework law on public procurement should expressly regulate how many times and at what stage of the procedure the Contracting Authority has the possibility to re-evaluate an offer.

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