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Procedures and Appeals Regarding the Public Procurement Contracts – Romanian Law

[Procedury i środki odwoławcze dotyczące zamówień publicznych – prawo rumuńskie]

Abstract

Public procurement, as the engine of a developing society, requires a series of jurisdictional procedures. These procedures are not just theoretical but have practical implications, guaranteeing compliance with the principles and rules of conducting the administrative procedures for awarding contracts and their development in accordance with the legal provisions.

Romania has transposed Directive no. 665/89, making a distinction between the jurisdictional procedures in which the documents drawn up in the phase prior to the conclusion of the contract, directly related to the administrative award procedure and those aimed at the execution of contracts, their nullity, resolution, termination, which can be completed after the completion of the award procedure during the contract.

Regardless of the situation, however, Romanian law gives concrete effects to the principle of celerity, which it protects through express rules that enshrine short terms for the procedure, for formulating some documents, for attacking the decision, although sometimes the same procedural provisions seem to affect this principle.

The paper aims to present these provisions, interpreted especially in the light of celerity and the requirements of the supranational regulation, which are imposed in the internal procedures, including through the jurisprudence of the Court of Luxemburg.

Keywords: public procurement, jurisdictional procedure, judicial procedure, control of contracting authority documents, procedural rules.

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A Brief Presentation of the Evolution of Romanian Regulation

Romania embraced the rigors of European rules in public procurement even before its accession to the European Union through Emergency Ordinance no. 34 of 2006,[1] which provided both substantive and procedural law rules to ensure the smooth running of public procurement procedures.

In this sense, it followed the observance of the established principles in this field, such as non-discrimination, equal treatment, transparency, proportionality, efficient use of public funds, and responsibility (art. 2 paragraph 2).

Also, the regulation's purpose was directly related to promoting competition between economic operators, equal treatment and non-discrimination of economic operators, transparency and integrity of the public procurement process, and efficient use of public funds through the application of the awarding procedures by the contracting authorities (art. 2 paragraph 1).

The legislator paid special attention to the jurisdictional and judicial procedures necessary to ensure the possibility of correcting possible deviations from the rules and from the behaviour imposed by the law. In this sense, he regulated specific procedures within the jurisdiction of the courts and other forums with jurisdictional powers, in this case, the National Council for the Resolution of Appeals (NCRA).

The mentioned emergency ordinance that entered into force on 30.06.2006[2] transposed several directives that were to be applied to Romania as well: Directive no. 2004/18/EC on the coordination of procedures for awarding works, supply, and service contracts[3]; Directive no. 2004/17/EC on the coordination of procurement procedures applied by entities operating in the water, energy, transport, and postal services sectors;[4] Directive no. 1989/665/EEC on the coordination of laws, regulations and administrative provisions relating to the application of appeal procedures in the matter of awarding supply and works contracts;[5] Directive no. 1992/13/EEC on the coordination of laws, regulations and administrative provisions relating to the application of Community rules for procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.[6]

For reasons of permanent adaptation to the new European requirements, this normative act, supple and clarifying to a certain extent, has been amended consecutively, on several occasions, both in terms of the rules regarding

[1] Concerning the awarding of public service contracts, public works concession contracts and service concession contracts, published in the Romanian Official Gazette, no. 418 of 2006, May 15.
[2] Art. 307 para. 1 of GEO no. 34 of 2006.
[3] Published in OJ L 134, 2004, Apr. 30, pp. 114–240.
[4] Published in the Official Journal of the European Communities (OJCE) no. L134 of 2004, Apr. 30.
[5] Published in the Official Journal of the European Communities (OJCE) no. L395 of 1989, Dec. 30.
[6] Published in the Official Journal of the European Communities (OJCE) no. L76 of 1992, March 23.

the awarding procedures of the public procurement contract but also regarding the procedural provisions applicable before the courts or jurisdictional forums before which the censure of some documents drawn up in the award procedure could be requested, and was later repealed.

This last legislative measure was justified by the fact that Ordinance no. 34/2006 included both substantive and procedural norms,[7] which, on the European model, was considered lacking in efficiency and organization in the context where European directives were provided in this sense at the community level.

That is why, after the entry into force of Directive 2014/24/EU of the European Parliament and of the Council of February 26, 2014, on public procurement and repealing Directive 2004/18/EC,[8] it was considered necessary to adopt separate regulations in Romania, on the one hand in the matter of the actual award procedure and, on the other hand, regarding the jurisdictional procedures necessary to challenge the documents drawn up in such procedures.

Thus, they were adopted separately: Law no. 98 of 2016 on public procurement 8, Law no. 99 of 2016 regarding sectoral acquisitions[9], Law no. 100 of 2016 regarding works concessions and service concessions,[10] and Law no. 101 of 2016 on remedies and appeals in the matter of awarding public procurement contracts, sectoral contracts and works concession and service concession contracts, as well as for the organization and operation of the National Council for the Resolution of Appeals.[11] Each of these was separately based on European Directives no. 2014/24 and no. 2014/23, respectively 665/1989 and 92/13/CEE.

What is of interest in the present study, however, is only the second norm indicated (Law no. 101 of 2016), which provides for appeals within specific procedures and which, in turn, was not exempt from frequent changes, did not benefit from stability, but was subjected to some sometimes unjustified legislative processes, which were likely to upset both the concrete activity of awarding public procurement contracts and also the courts which, at least at the level of aspects related to the competence to resolve such disputes, have encountered problems that determined the prolongation of the procedures, a totally undesirable aspect in accordance with the spirit and provisions of the supranational regulations.[12]

[7] Chapter IX.
[8] Published in the Official Journal JO L 94, 2014, March 28, pp. 65–242.
[9] Published in the Romanian Official Gazette, no. 390 of 2016, May 23.
[10] Published in the Romanian Official Gazette, no. 392 of 2016, May 23.
[11] Published in the Romanian Official Gazette, no. 393 of 2016, May 23.
[12] By Decision no. 11 of 2023 (Official Gazette, Part I no. 753 of 2023, Aug. 18), the High Court of Cassation and Justice (HCCJ) admitted the appeal in the interest of the law filed by the Management Board of the Cluj Court of Appeal and ruled that in the interpretation and application of the provisions of art. 53 para. (1) and para. (11) from Law no. 101 of 2016 and art. Paragraph V. (3) of Law no. 208 of 2022, the substantive competence to resolve disputes regarding the execution of public procurement contracts registered in the courts after the entry into force of the amendments to Law no. 101 of 2016 by Law no. 208 of 2022, respectively after 10.09.2022, belongs to the administrative and fiscal litigation section of the court.

How the Romanian Legislator Saw the Transposition of Directive 89/665 EEC

Directive no. 89/665 on the coordination of the laws, regulations, and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, aimed at the need to regulate in each member state the efficient and fast means of appeal in cases of violation of European legislation in the field of public procurement but also of domestic law regulations regarding the implementation of this legislation.[13]

That is why it was required that in any member state, it is possible to challenge the decisions of the contracting authorities through effective procedures and characterized by an effective speed. This would allow the annulment of the illegal decisions of the contracting authorities[14] and, as the case may be, cover the damages of the persons affected by these decisions.[15]

Directive no. 92/13/CEE, which coordinated the laws, regulations, and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport, and telecommunications sectors 14, pursued a similar aim.

It is not possible to establish a uniformity of the regulations of the EU member states in this field; otherwise, the specifics of each determine the adoption of distinct rules in conditions where the European legislator did not intend to obtain the same procedural regulation but to achieve the goal imposed by the directive.

As the member states are each open to procedures that are integrated into their own procedural system, Romania has also provided several actions that are compatible with its constitutional provisions and that are coherently completed with the common law in the matter, respectively the Romanian Code of Civil Procedure[16] but which also satisfy the European requirements regarding efficient and fast procedures.[17]

By Decision no. 40 of 2020 (Official Gazette, Part I no. 683 of 2020, July 31) HCCJ ruled in the clarification procedure of joint legal issues that in the interpretation and application of art. 55 para. (3) related to art. 53 para. (11) of Law no. 101 of 2016 the Decision pronounced in the first instance in the processes and requests arising from the execution of administrative contracts is appealed within 10 days from the communication to the hierarchically superior court – the section or panel specialized in disputes with professionals, according to the procedure provided by Law no. 101 of 2016.

[13] Preamble to the Directive.

[14] M. I. Niculeasa, Public Procurement Legislation. Comments and explanations, 2nd ed., CH Beck Publishing House, Bucharest, 2009, p. 640.

[15] C. Bovis, Access to Justice and Remedies in Public Procurement, European Procurement & Public Private Partnership, 'Law Review' 2012, 3, pp. 200 and 201.

[16] Law no. 134 of 2010, republished in the Official Monitor of Romania part I, no. 247 of 2015, Apr. 10 in force from 15.03.2013, is subject to important changes along the way.

[17] C. Bovis, The Priorities of EU Public Procurement Regulation, 'ERA Forum' 2020, 21, pp. 283–297 https://doi.org/10.1007/s12027-020-00608-8, p. 288.

It was provided, on the one hand, a council with jurisdictional powers (NCRA), which is not part of the court system but which behaves like a court of law, applying procedures similar to those provided for in common law, and on the other hand, the principle of free access to justice was maintained, those interested in contesting the documents of the contracting authorities drawn up in the awarding procedures having the opportunity to address the courts directly, being part of the judicial system, the jurisdictional path before the NCRA being optional, left at the disposal and choice of those interested in filing an appeal.

Thus, the jurisdictional procedures provided by Law no. 101 of 2016 include the appeal filed before the National Council for the Resolution of Appeals, the action for contesting the documents drawn up in the procedure for awarding the public procurement contract directly before the courts, and, actions regarding the granting of compensation for the reparation of damages caused during the award procedure, as well as actions regarding the cancellation or nullity of administrative-public procurement contracts.

The distinction that is easily made between these types of actions is given by the moment in which the public procurement procedure is located.[18] Thus, during the award procedure, the person who considers himself injured within the meaning of the provisions of art. 3 paragraph 1 letter f of Law no. 101 of 2016[19] has the possibility to choose the promotion of an administrative appeal before the NCRA, respectively the judicial way before the court in order to challenge an act of the contracting authority or to request its binding when issuing an act, when adopting a remedial measure or for recognizing the right claimed or the legitimate interest damaged in the award procedure. After the award procedure is completed, during the contract, the injured party can apply to the court to request compensation for the damage caused by the documents drawn up during the procedure, to request the execution of the contract, its nullity or cancellation if it was concluded in violation the conditions required by the legislation on public procurement.

Procedure Before the NCRA

Law no. 101 of 2016 allows a person who considers himself harmed in his right or legitimate interest by an act of a contracting authority or by not resolving a request within the legal term to request the cancellation of the act,

[18] C. Bovis, *The Priorities*..., p. 287.

[19] Person who considers himself injured – any economic operator who cumulatively fulfils the following conditions: (i) has or had an interest in connection with an award procedure; and (ii) has suffered, is suffering or is at risk of suffering damage as a consequence of an act of the contracting authority, likely to produce legal effects, or as a result of the non-resolution within the legal term of a request regarding an award procedure.

notify the NCRA to obtain a decision obliging the contracting authority to issue an act or to adopt remedial measures, or recognize the claimed right or legitimate interest.

The economic operator who has or had an interest concerning an award procedure and, at the same time, has suffered, is suffering, or is at risk of suffering damage as a consequence of an act of the contracting authority is likely to produce legal effects, is considered an injured person, or as a result of the non-resolution within the legal term of a request regarding an award procedure.[20]

The interest about an award procedure is linked by law to its completion; it is justified only if the person in question has not yet been definitively excluded from the said procedure.[21]

The National Council for the Resolution of Appeals is a jurisdictional forum that brings together specialists in the legal, economic, or technical field with a certain seniority imposed by law, which denotes the need for experience in the field and applies the principle of independence from the parties.

The law requires Board members to be in good standing, at least half of the members to have a law degree and 10 years of experience in the legal field, and the other members to demonstrate at least 3 years of public procurement experience.[22] The members are civil servants with special status (advisors for the resolution of appeals in the field of public procurement), assimilated from the point of view of the salary of the public function of competition advisor, and they enjoy stability. Incompatibilities, prohibitions and situations that may cause a conflict of interests are also provided for, which council members are obliged to avoid by refraining from participating in a certain procedure.

In order to notify the Council, the interested person must comply with the deadline imposed by law: 10 days if the estimated value of the public / sectoral procurement or concession procedure is equal to or greater than the value thresholds in relation to which submission for publication to the Official Journal is mandatory of the European Union of tenders, respectively 7 days, when the estimated value of the procurement procedure is lower than the value thresholds above.

For the term to run, the date of taking cognizance is relevant, which can be the date of communication or the date of publication of the contested act. However, it is necessary that the person could have taken cognizance of it, and the lack of transparency or publication is likely to affect this possibility.

The deadline must be strictly respected. The sanction provided by law is the rejection of the appeal as late, not only when it was not submitted to the

[20] Art. 3 letter f of L. no. 101 of 2016.
[21] No appeal against that act can be formulated, it being exhausted or not being exercised.
[22] Art. 44 and 45 of L. no. 101 of 2016.

Council within the deadline but also when it was not communicated to the contracting authority before the expiration of the legal appeal deadline.

As the appeal is submitted to the Council but is also communicated to the contracting authority, it can adopt the necessary remedial measures to avoid the continuation of the appeal procedure, measures which are communicated both to the appellant and to the other economic operators involved in the award procedure, as well as to the Council.

For the admissibility of the referral to the Council, a deposit must be paid within a maximum of 5 days from the date of referral to the Council. Its amount varies[23] in relation to the estimated value of the contract and the value thresholds provided for the need to publish a notice of participation in conjunction with the phase of the procedure (for appeals submitted in the stage up to the deadline for submitting requests for participation / offers / projects respectively in the stage after this deadline).

The application itself must include the elements of an ordinary summons application but also specific elements imposed by the speed of the procedure in this field. Unlike common law requests for which the Code of Civil Procedure provides for the possibility of indicating the electronic data necessary for rapid communication with the jurisdictional authority, in the present case, the law is imperative in the sense that it establishes the obligation of the person notifying the council to indicate the electronic mail address, the number telephone and fax number, as the case may be, to which any procedural document can be communicated.[24] When the appellant lives abroad, he is required to indicate the chosen domicile or residence in Romania where the communications regarding the resolution of the appeal will be sent to him.

A distinction is made between the challenged act of the contracting authority (which must be mentioned) and the object of the appeal, which may

[23] From 35,000 lei to 2 million lei – Art. 61 ind. 1 of Law no. 101 of 2016.

[24] "The circumstance that, in the case of transmission of the procedural documents by fax or e-mail, the date and time of their submission are not certified in the classic way of registering and attesting this operation in the case of their submission in a place other than the court's headquarters – by the postal services or courier or by the administration of the place of detention, respectively by the military unit – but are those certified by the court's fax or computer, cannot constitute an argument justifying the removal from application of the legal presumption established by art. 183 para. (1) of the Civil Procedure Code. Thus, the provisions of art. 183 para. (1) and (3) of the Code of Civil Procedure do not make any distinction between the proof of the «filing» of procedural documents within the term through an electronic means of communication, represented by the memory of these means of communication and attestation of the date and time of their filing to the post office, the courier service, the administration of the place of detention or the military unit, carried out by these services or institutions.

Both in the case of fax and in the case of electronic mail, the transmission operations are stored in the memory of these devices in the court's equipment, thus ensuring the accurate reflection of both the transmission operations and the date and time at which they took place and, through therefore, determining them with certainty (...)."

Decission no. 313 of 2023, Apr. 4 Court of appeal Timișoara, cod RJ 23e4d6555 (https://www.rejust.ro/juris/23e4d6555).

be related to the measures that the interested party claims in opposition to the authority.

All the elements expressly mentioned in the law are mandatory. In the absence of them, the council requests the completion of the appeal within a very short period of 3 days, which, if not respected, determines the nullity of the application.

The appeal is resolved by a panel of three members of the Council, of whom at least one is a law graduate with at least nine years of experience in the legal field.[25] The panel is appointed randomly.

The principles of legality, speed, adversarial, ensuring the right to defense, impartiality, and independence of the administrative-jurisdictional activity, and good faith in the use of the procedural instruments provided by the law are applied in the procedure. This requires the parties to expose the factual situation to which the claims refer and their defense fairly and completely without misrepresenting or omitting information known to them.[26]

For adversarial reasons but also for speed, the procedural documents must be sent either by post, fax, or electronic means,[27] with confirmation of receipt,[28] the electronic means being only a possibility as opposed to the procedure before the Council. The parties are required to carry out private communication with each other without waiting for official communication from the Council, which is not provided.

The same principle requires that the request be communicated to the contracting authority so that it knows the position expressed by that participant,

[25] Art. 13 para. 1 of Law no. 101 of 2016.

[26] Art.15 of Law no. 101 of 2016.

[27] "The Court considers that the appellant's criticisms are unfounded according to which the communication of the sentence pronounced by the Court had to be carried out according to the general rules provided by art. 154 para. (1) and (2) Civil Procedure Code, respectively through a procedural agent, in a sealed envelope, with proof of delivery, provided that the appellant previously indicated to the court the appropriate data in order to communicate the procedural documents in electronic format, in accordance with the provisions Art. 154 para. (6) and (61) of the Civil Procedure Code, within the two collaboration agreements mentioned above. The interpretation of these procedural provisions in the manner proposed by the appellant cannot be accepted, since the text of art. 154 para. (6) C.pr.civ provides, for the communication of procedural documents in electronic format, only the requirement «if the party has indicated to the court the appropriate data for this purpose», without providing the condition that electronic correspondence data should be indicated in each case in part, under the conditions in which, before the litigation, an agreement was concluded between the party public institution and the court regarding the method of communication of procedural documents in electronic format." Decision no. 19 of 2024, Sept. 18 Court of appeal Ploiești, cod RJ 72526458d (https://www.rejust.ro/juris/72526458d).

[28] Decision no. 1569 of 2021, Dec. 14 Court of appeal Ploiești, cod RJ 3452e99g9 (https://www.rejust.ro/juris/3452e99g9): "the case was communicated to the court by electronic means on 14.06.2021, 10.06 p.m., and the fact that it was registered at the Court on 15.06.2021 is due to the fact that the expedition took place after the court's working hours, i.e. after 4:00 p.m. The registration at the court on 15.06.2021 proves, as long as there is no confirmation of the impossibility of sending, that the appeal was received at the court on the date of transmission, that is, 14.06.2021, so within the 10-day period, but being after schedule time, registered on 15.06.2021." Decision no. 774 of 2021, July 6 Court of appeal Alba Iulia, cod RJ g7965857 (https://www.rejust.ro/juris/g7965857).

possibly to take remedial measures but also to formulate a point of view or objection to the extent that it fails to remedy the deficiencies reported or believes that they are not real.

The authority must also send to the Council a copy of the public procurement, sectoral procurement, or concession file, respectively, proof of the submission of the point of view to the appellant, and any documents considered edifying, except the data published in Electronic System for Public Procurement (ESPP).

The adversarial nature is not exaggerated, being mitigated by the availability. If the contracting authority does not understand to formulate a point of view, the settlement of the appeal continues, and the authority loses the right to propose more evidence and invoke exceptions apart from those of public order.

As the procedure before the Council is written, the parties are heard only if the panel considers this necessary for resolving the appeal. Still, the parties may request to submit conclusions orally before the Council. Lawyers or legal advisers may represent them and may submit written submissions during the proceedings.

Access to the documents of the file that is created before the council is made similar to the access to the data of the file pending before the court, the provisions of the civil procedure code being applicable, but if an economic agent invokes and proves that certain data are confidential, including technical or commercial secrets and the disclosure it would harm their legitimate interests, access may be limited, the consultation of documents marked or indicated as confidential being allowed only with the written consent of the respective bidders.[29]

The same idea of adversarially determines the possibility for the Council to request clarifications from the parties, to administer any means of evidence permitted by law, and to request any data and documents insofar as they are relevant in relation to the object of the appeal, such data can be requested and from other natural or legal persons.

In turn, the contracting authority must respond to any request of the Council and send it any documents relevant to the resolution of the appeal within a short period (maximum 3 days), which, if not respected, determines the resolution of the appeal only based on the documents already submitted to the file.

Celerity is guaranteed by the fact that the law requires the Council to resolve the appeal on the merits within 20 days from the date of receipt of the public procurement, sectoral procurement, or concession file, respectively, within 10 days in the event of an exception that prevents the analysis on the merits of the appeal. Indeed, in thoroughly justified cases, the deadline for

[29] Art. 19 of Law no. 101 of 2016.

resolving the appeal can be extended by 10 days. Still, for the culpable failure to comply with the deadline for resolving the appeal, the possibility of incurring the disciplinary liability of the panel members is foreseen.

The Council can order the suspension of the award procedure or the appeal resolution procedure. In the first case, the need to prevent imminent damage is considered, and in the second case, provisions similar to those in common law are applied, which allow waiting for a civil or criminal solution from another cause if this would essentially influence the outcome in the procedure before the Council.[30]

From the perspective of the solutions that the Council can pronounce, it is required to analyse the legality and validity of the contested act and: annul it in whole or in part; to compel the contracting authority to issue an act / adopt the necessary measures to restore legality, with a clear and precise indication of the operations to be carried out by the contracting authority; cancel the award procedure, in the situation where it is not possible to remedy the challenged act.[31]

It is also possible to order, upon request, the modification / elimination of some technical specifications from the specifications or from other documents issued in connection with the award procedure, and if the Council considers that, apart from the acts attacked by the appellant, there are other acts that violate the provisions of the legislation in the field of public procurement, sectoral procurement or concessions, as the case may be, and which was not referred to in the appeal, notifies both the National Agency for Public Procurement and the Court of Accounts and transmits in this regard all the relevant data and / or documents in support of the notification, as well as the contracting authority.

If it admits the appeal but finds that no remedial measures can be ordered to allow the legal continuation of the award procedure, the Council orders its cancellation.

In the other situation, the Council can reject the appeal as unfounded, late, without interest, without object, introduced by a person without standing or by a person who does not have the capacity of representative, as well as on any other procedural or substantive exception that prevents the substantive resolution of the appeal or may take note of the waiver of the appeal.

The Council cannot decide to award the contract to a specific economic operator, except in the case where it has been designated by the contracting

[30] Art. 25 para. 1 of Law no. 101 of 2016: a) in the situation where this depends in whole or in part on the existence or non-existence of a right that is the subject of another judgment; b) when the criminal action was initiated for a crime committed in connection with the act challenged by the appellant.

[31] Art. 26 para. 10 ind. 1 of L. no. 101 of 2016: In the situation where the appeal concerns the result of the award procedure and the re-evaluation of the offers is ordered, the Council will clearly and precisely indicate the limits of the re-evaluation, respectively the identity of the offers that are the subject of the re-evaluation, the stage/stages of the award procedure concerned/subject to re-evaluation and the concrete measures that the contracting authority will adopt in the re-evaluation.

authority or its quality as the winning tenderer results from the information contained in the complaint resolution file.

The decision by which the appeal is resolved must be clearly and unequivocally motivated and adopted with a majority vote of the panel members. A minute signed by the panel members is drawn up. In the case of a separate or competing opinion of a panel member, this is recorded in the issued decision as well as per minute.

Similar to a court decision, the Council's decision includes three parts (the practice, the considerations, and the disposition), indicating whether it is subject to an appeal and is communicated in writing to the parties within 3 days of the pronouncement, being also published on the internet of the Council, within the official bulletin, without the identification data of the parties, the personal data and the information that the economic operator specifies and proves as confidential. The decision is published by the contracting authority in ESPP under the same conditions for protecting confidential or personal data.

Procedure Before the Courts

The judicial procedure is regulated on several levels, considering, on the one hand, the hypothesis in which the council is notified and, on the other hand, the case where the judicial path is followed directly. For the first case, the law regulates the complaint against the decision of the NCRA, while in the case of direct referral to the court of law, it is possible to request the censure of some documents drawn up by the contracting authority in the procurement procedure, the abolition, execution, termination of the procurement contracts, including invoking assumptions of special nullities, for each of which the law regulates a separate procedure.

If the procedure before the council was followed, its decision, as a jurisdictional act, can be challenged further before the courts after a specific procedure, in which a deadline for formulating the complaint, the competent court, and specific rules to ensure speed are clearly provided the procedure before the court and types of solutions that it can pronounce.

Competence is assigned by law to a higher court in the structure of the judicial system, in this case, the court of appeal within the jurisdiction of which the headquarters of the contracting authority is located, except in the case of procedures for awarding services and / or works related to the transport infrastructure of national interest, for which competent is the Bucharest Court of Appeal, Administrative and Fiscal Litigation Section.

For clarity, the complaint is formulated in writing, with the mandatory mention of the name of the contract's object, the applied award procedure, the identification of the participation announcement from the ESPP, specifying the challenged act of the contracting authority, and the object of the complaint, being required to justify in fact and in law the request, and indicating the evidence on which it is based.

To ensure full adversarial, to avoid affecting the right to defense, and to ensure the limits of the initial vesting of the jurisdictional forum, the law does not allow the formulation of other reasons in the complaint against the acts of the contracting authority than those contained in the appeal addressed to the Council, nor the indication of other new evidence compared to those that were submitted in the appeal.

For the sake of celerity, the applicant is compelled to communicate the complaint to the opposing party and to send a copy to the NCRA, which submits to the court the file on which the decision was based, within 3 days of the latest from the receipt of the complaint.

The communication is private between the parties; the court does not have the obligation provided in the common law to communicate the complaint submitted to it, as it must be accompanied or followed by the submission of proof of communication by the owner to the opponent. This measure is provided under the penalty of rejection of the complaint as late if the petitioner does not submit proof of communication to the court by the first court term.

In turn, the respondent, who is obliged to make a response, must also communicate it to the court and the petitioner within 5 days of the petitioner's communication of the complaint.

Also, for celerity, the complaint is resolved urgently and especially within a term that must not exceed 45 days from the date of legal notification to the court; the first court term can be a maximum of 20 days from the date of registration of the complaint, and subsequent terms of a maximum of 15 days.[32] Also, the ruling can be postponed for a period of 5 days, and the motivation of the decision is drawn up within 7 days of the ruling. It is immediately communicated to the parties concerned, a copy being sent to NAPP within 15 days from the date of writing, for publication in the Electronic System of Public Procurements (ESPP).[33]

If the court admits the complaint, it orders either: annulment in whole or in part of the act of the contracting authority, either obliging the contracting authority to issue an act / adopt the necessary measures to restore legality with a clear and precise indication of the operations to be carried out by the contracting authority; or the fulfilments of an obligation by the contracting authority, including the removal of any discriminatory technical, economic

[32] Art. 32 par. 4 and 5 of L. no. 101 of 2016.
[33] Art. 35 of L. no. 101 of 2016.

or financial specifications from the notice of participation, from the award documentation or from other documents issued in connection with the award procedure; or even the cancellation of the award procedure, in the situation where it is not possible to remedy the challenged act.

If the court finds that the NCRA's decision is the consequence of admitting a procedural exception, admitting the complaint, it annuls the respective decision and remands the case for trial on the merits, considering the reasons that led to the annulment of the decision.

Similarly, if the Council analyzed only part of the reasons invoked in the appeal, and the court considers that the complaint against the Council's decision is well-founded, at the retrial on the merits analyzing the reasons for appeal that were not the object of the Council's analysis.

It is observed in this situation that although the regulation declares the need to ensure a quick resolution, the legislator provides for a two-step procedure for the assumption of the admission of the complaint, respectively with the setting of a later term for retrial, which may be likely to affect the mentioned principle. Thus, it is stated that in order to comply with the principles of orality, adversariality and the right to defence, the substantive resolution of the case following the admission of the complaint is done by the court at a separate term, which is established after the ruling on the complaint,[34] which reveals the legislator's intention to give priority to the other principles applicable in the procedure, discounting speed.

Analysing the merits of the appeal is essential for applying the supranational rules in this matter[35] since the jurisprudence of the Luxembourg court clearly shows that if a tenderer is excluded from a tender procedure and brings before a court an action that seeks to demonstrate the irregularity of this proceeding, the merits of this action must be examined by this court.

It is important to state that, as a rule, the law does not allow the court to decide the award of the contract to a certain economic operator, this attribute belonging to the contracting authority. Still, if the authority has appointed a winner or this results from the information contained in the appeal resolution file, the court may retain this as the winner.

If he chooses not to notify the NCRA but directly to the court for the resolution of the appeal by judicial means, the person who considers himself injured can address the court in whose territorial jurisdiction the seat of the contracting authority is located, the section for administrative and fiscal litigation.

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[34] Art. 34 para. 2 and 4 of the same law.

[35] C. Lycourgos, Notable Judgements of the Court of Justice of the European Union in the Field of Public Procurement (March 2021–March 2022), 'ERA Forum' 2022, 23, pp. 221–235, https://doi.org/10.1007/s12027-022-00715-8, p. 234.

This is a quick procedure, which must be completed within a maximum period of 45 days from the date of the legal notice to the court; subsequent trial periods cannot exceed 15 days.

Celerity is also evident from the obligation established under the penalty of rejecting the appeal as late in submitting it both to the competent court and to the contracting authority no later than the expiry of the legal term for appeal.

Contradiction is ensured by establishing the obligation to communicate the appeal through ESPP, and in the case of award procedures whose initiation is not carried out by publication in ESPP, the contracting authority must also communicate the appeal to the other economic operators interested / involved in the procedure, within one day from the date of its receipt, through any means of communication provided by the legislation on public procurement.

Quickly, within 5 days of receiving the appeal sent by the appellant, the authority sends a copy of the public procurement file unless the award documentation is available and can be downloaded directly from ESPP.

The defendant is obliged to submit the objection within 5 days of the court communicating the appeal and to communicate it to the plaintiff within the same term. The plaintiff is obliged to submit an answer within 3 days of the defendant communicating the objection.

The decision is pronounced immediately, except in the case where it is ordered to postpone the pronouncement for 5 days. It is drawn up within 7 days of the pronouncement and immediately communicated to the parties in question. It can be challenged with an appeal within 10 days of communication.

The legislator has expressly shown this time that the contracting authority has the obligation to conclude the contract with the bidder declared the winner after the ruling of a decision to maintain the result of the award procedure by the court, even if the said decision was appealed and the case was not resolved in definitely. In other words, for the quick completion of the procurement procedure, it is not necessary to wait for the completion of the appeal procedure, the decision of the first court being enforceable, and it is not possible to suspend its execution.

Unlike the complaint, which is exempt from stamp duty, the appeal submitted to the competent court is taxed with 2% of the estimated value of the contract, but not more than 100,000,000 lei and the appeal against the decision to resolve the appeal is taxed with 50% of the above fee.

The third category of litigation concerns the lawsuits and claims regarding the granting of compensation for the reparation of damages caused during the award procedure, as well as those regarding the execution, cancellation, nullity, resolution, termination or unilateral denunciation of contracts that are resolved in the first instance, emergency and in particular, by the administrative and fiscal litigation section of the court in whose jurisdiction the

contracting authority is located or in whose jurisdiction the claimant has its registered office / domicile, or by the court at the place of conclusion of the contract if a unit belonging to the contracting authority.

Speed is required here as well, with the litigation having to be completed before the same level of jurisdiction within 45 days.

Also, for the sake of celerity and because an administrative litigation procedure is being discussed, the law eliminates the preliminary procedure. It establishes a maximum term for the referral to the court.

Thus, the term is 1 year from the birth of the right for the actions regarding the granting of compensation for the reparation of damages caused in the award procedure, respectively 3 years from the birth of the right for the actions regarding the execution, cancellation, nullity of the contracts, unless by special laws provide for other limitation periods for the material right to action related to the breached legal or contractual obligations. Regarding the actions arising from the resolution, termination, unilateral denunciation, or early termination of public procurement contracts, the term for filing the action is 30 days from the birth of the right if no other statutes of limitation for the material right are provided for by special laws to the action related to the breached legal or contractual obligations.[36]

Here, too, the court can postpone the ruling for 5 days, must draw up the decision within 7 days of the ruling, and immediately communicate it to the parties concerned.

The communications are carried out similarly to the procedure provided above regarding the direct notification of the administrative litigation court with a request to cancel an act drawn up in the contract award procedure.

For reasons that cannot be explained in legal logic, given that all these actions are resolved by the administrative litigation court according to the rules applicable to this special matter, the law distinguishes, on the one hand, between the judgment pronounced in the case of disputes and requests regarding the granting compensations for the reparation of damages caused in the awarding procedure of those regarding the execution, cancellation, nullity, resolution, termination or unilateral denunciation of administrative contracts and those regarding the ascertaining documents issued by the contracting authority / entity, relating to the execution of the contract.

In the first case, the sentence can be challenged by appeal, within 10 days from the communication, to the administrative and fiscal litigation section of the court of appeal, which judges in a panel specialized in public procurement, and in the second case, the decision can only be appealed with appeal (recourse), within 10 days from the communication, both being resolved ur-

[36] Art. 53 para. 8 and 9 of Law no. 101 of 2016.

gently and especially within a term that cannot exceed 30 days from the date of the legal notice to the court.

Apart from the fact that different appeals are provided in the same matter of administrative law, related to the same type of contracts, the law does not specify in the first case whether the appealed decision is final or subject to appeal to clearly know the appeals that can take place in the case, the possibility of exercising a second appeal against the appeal decision remains questionable. In contrast, in the hypothesis of the ascertaining document only the appeal is provided for, within which the pronounced decision is final, no longer being able to be contested with another appeal for reformation.

Regarding compensations, the legislator brings a series of clarifications that impose substantive conditions for the exercise of legal action, these being related to the way in which the contracting authority or other participant acted.

Compensation can be determined by damage caused either by an act of the contracting authority issued in violation of the legal provisions in the matter of public procurement or because of the non-resolution within the legal term of a request regarding the said award procedure. In both cases, to file a claim for compensation, it is necessary to first order the cancellation of the respective act or the taking of any other remedial measures by the contracting authority.

The damage can be particularized in relation to the type of act drawn up in the administrative award procedure, such as the case of the one represented by the expenses necessary for preparing the offer and participating in the award procedure. Still, in this case, related to the beginning of the procedure, to formulate a request for compensation, the injured person must prove the damage, the violation of the provisions of the public procurement legislation, as well as the fact that he would have had a real chance to win the contract, and this was compromised because of that violation.

Regarding the contract's nullity, the law pays special attention to situations of (absolute) nullity[37] that appear as obvious violations in relation to

[37] 1. The contracting authority awarded the contract without complying with the obligations related to the publication of a tender notice, according to the provisions of the legislation on public procurement, the legislation on sectoral procurement or the legislation on works concessions and service concessions; 2. When the contracting authority aims to acquire the execution of a work, a service or a product, which would place the respective contract in the category of contracts subject to the legislation on public procurement, the legislation on sectoral procurement or the legislation on works concessions and service concessions, but the authority the contractor concludes another type of contract, with non-compliance with the legal award procedure; 3. The contract/additional act to it was concluded under less favorable conditions than those provided for in the technical and/or financial proposals that constituted the declared winning offer; 4. Failure to comply with the qualification and selection criteria and/or the assessment factors provided for in the tender notice that were the basis for the declaration of the winning bid, leading to the alteration of the result of the procedure by canceling or reducing the competitive advantages; 5. The contract was concluded before the receipt of the decision to resolve the appeal by the Council or the court or with non-compliance with the decision to resolve the appeal. 6. The contracting authority awarded the contract following an award procedure

the rules governing the award procedure. For these situations, the legislator also enshrines a procedure characterized by speed, which also has other particularities attracted precisely by the specifics of the invalidity grounds in question.

Here the action can be exercised both by an interested person within the meaning of the law and by National Agency for Public Procurement (NAPP).

Special, very short terms are provided for notifying the court to invoke the absolute nullity of the contract for the above hypotheses. Celerity is also present here in that an action can be introduced within 30 days from the date of publication of the notice of award of the contract but no more than 6 months from this date.

If the contract award announcement does not include the motivation for which the respective act was drawn up, then the term runs from the date on which the participants were informed in a relevant way regarding these considerations that determined the award.

These disputes are resolved urgently and primarily by the administrative and fiscal litigation section of the court in whose jurisdiction the seat of the plaintiff or defendant is located.

The court sentence can only be appealed with an appeal within 10 days from the date of communication to the administrative and fiscal litigation section of the court of appeal, which judges in a panel specialized in public procurement. The appeal is resolved urgently and especially in a maximum period of 30 days from the date of legal notification to the court.

Conclusions

In general, the internal regulation respects the European rules in the matter of public procurement procedures, regardless of their field.

During the application of these regulations and the transposition of the directives, there was also a series of failures determined by the legislator's indecision regarding the competent court or even the procedure to be followed. Still, in most cases, transparency, adversarial, the right to defense, and celerity were respected.

The way in which the Romanian legislator understood to comply with the purpose provided in the Directive is likely to favour the interested person to attack the documents drawn up in the award procedure or request compensation or to request the censure of the contract or its execution.

that was the subject of ex ante control and in which National Agency for Public Procurement (NAPP) issued a conditionally compliant opinion, and the contracting authority carried out and completed the award procedure without remedying the deviations found by NAPP.

Still, it can also determine an extension in time of jurisdictional procedures, which is not beneficial for the fluency and efficiency of procurement procedures.

Also, electronification is revealed in jurisdictional procedures through the method of communication, transmission of documents and procedural acts, which certainly reduces the time required for the procedure to be carried out in compliance with the principles of adversariality and the right to defense.

Abstrakt

Zamówienia publiczne – jako motor rozwijającego się społeczeństwa – wymagają stosowania szeregu procedur jurysdykcyjnych. Procedury te nie są tylko teoretyczne, ale mają praktyczne implikacje, gwarantując zgodność z zasadami i regułami prowadzenia postępowań administracyjnych oraz ich rozwój oparty na przepisach prawa.

Rumunia dokonała transpozycji dyrektywy nr 665/89, wprowadzając rozróżnienie między procedurami jurysdykcyjnymi, w których dokumenty sporządzane są na etapie poprzedzającym zawarcie umowy, bezpośrednio związanymi z administracyjną procedurą udzielania zamówień, a procedurami mającymi na celu wykonanie umów, ich unieważnienie, rozstrzygnięcie, rozwiązanie, które mogą zostać sfinalizowane po zakończeniu procedury udzielania zamówień w trakcie trwania umowy.

Niezależnie jednak od sytuacji prawo rumuńskie nadaje konkretne skutki zasadzie szybkości, którą chroni poprzez wyraźne przepisy przewidujące krótkie terminy na przeprowadzenie procedury, sformułowanie niektórych dokumentów, zaskarżenie decyzji, chociaż czasami te same przepisy proceduralne wydają się wpływać na tę zasadę.

Artykuł ma na celu przedstawienie tych przepisów, interpretowanych w szczególności w świetle szybkości i wymogów rozporządzenia ponadnarodowego, które są narzucane w procedurach wewnętrznych, w tym przez orzecznictwo Trybunału Luksemburskiego.

Słowa kluczowe: zamówienia publiczne, procedury jurysdykcyjne, postępowanie sądowe, kontrola dokumentów zamawiającego, przepisy proceduralne.

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