



The Administrative-Jurisdictional Procedure for Solving Complaints Filed under the Provisions of the Law on Remedies and Appeals concerning the Award of Public Procurement and Concession Contracts

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Abstract: In this study, whose overall objective was built on a very topical issue, that of remedies and appeal procedures concerning the award of public procurement contracts, the sector contracts, works concession and service concession contracts, we intend to analyze the aspects relating to prior notification, period for bringing a complaint by administrative-jurisdictional way, its resolutions, solutions that the National Council for solving complaints can give the appeal against the decisions of this structure-organism independent with administrative – jurisdictional activity, so as in a future article to have as analysis subject the matters that concern the remedies of the judicial system. In the study we used content analysis and descriptive documentary research of the documents relevant to this matter.

Keywords: public procurement; remedial measures; administrative and judicial procedure; prior notification; appeal

1. Introduction

After several debates, in May this year it was adopted the legislative package on public procurement in Romania. From this package it belongs also Law no. 101/2016 101/2016 on remedies and appeals concerning the award of public procurement contracts, the sector contracts, works concession contracts and service concession, and for the organization and functioning of the National Council for Solving Complaints. The law implements two European directives, namely Directive 89/665/EEC of 21 December 1989 on the coordination of laws, regulations and administrative provisions relating to enforcement proceedings for the appeal against the award of contracts of public procurement of products and public works, and

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Directive 92/13/EEC of the Council of 25 February 1992 on coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the public procurement procedures of entities operating activities in the water, energy, transport and telecommunication sectors. Law no. 101/2016 clarifies issues on: remedies; appeal and procedures to solve them by administrative-judicial or judicial means, concerning the award of public procurement contracts, the sector contracts, works concession contracts and service concession; organization and functioning of the National Council for Solving Complaints; providing compensation for the damages caused during the awarding procedure; execution, cancellation, resolution, termination or unilateral termination of contracts. It is the first time that it has been adopted a distinct legislative act in remedies and appeals, thus being in accordance with the national law with the amendments from 2014 of the two mentioned directives¹ (Ciobanu, 2015, p. 165).

2. The Analysis of Administrative Judicial Procedure

2.1. The Prior Notification

According to art. 2, par. (1) of Law no. 101/2016, filed on the structure of art. 1 of the Law no. 554/2004 on administrative contentious, *“Any person who considers himself harmed in his right or a legitimate interest by an act of a contracting authority or by failure of solving an application within the statutory period can request its annulment, obliging the contracting authority to issue an act or the adoption of remedial measure, recognizing the claimed right or legitimate interest, by administrative-judicial or judicial means.”*

By injured person it is understood, according to Law. 101/2016, any economic operator which fulfills cumulatively all conditions: it has or had an interest in the award procedure; it has suffered, or it is likely to suffer a prejudice as a result of an act of the contracting authority, capable of producing legal effects, either as a result of non-solving in legal terms of a request on an the award procedure.

It should be specified also that the act of the contracting authority regards *“any administrative act issued in connection with a procedure for awarding a contract, any administrative operation that produces or may produce legal effects, failure of*

¹ See Title IV of Directive 2014/23/EU of the European Parliament and of the Council of February 26, 2014 regarding the award of concession, entitled “Amendments to Directives 89/665/EEC and 92/13/EEC”.

fulfilling an obligation under legislation within the statutory period, omission or refusal to issue an act or perform a certain operation, in connection with or in the award procedure” (definition given by art. 3 letter a) of Law no. 101/2016).

It may be noted that, contrary to the provisions of Law no. 554/2004, under which an administrative operation cannot be the object of an action in the administrative contentious, the legality of which shall be verified once the review of the legality of the contested administrative act Law no 101/2016 extends the documents which may be contested, introducing the possibility of verifying the legality of the administrative operations which produce or may produce legal effects, and also the unachieved administrative operations within the awarding procedure.

In accordance with art. 1, par. (4) of Directive 89/665/EEC, Law no. 101/2016 introduces the compulsoriness of going through an administrative procedure, *called prior notification*, addressed to the contracting authority, before the notification of the National Council for Solving Complaints or the court.

Therefore, the administrative and judicial procedure for solving complaints are addressed to the Council begins, under the penalty of rejection of the appeal as being inadmissible, it can be invoked ex-officio by *the prior notification* of the injured person, of the contracting authority requiring remediation or revocation or amendment of all or in part of the alleged violation of the legislation on public procurement and concessions.

Therefore the formulation of the prior notification is a mandatory step prior notification (art. 6, par. (10) of Law no. 101/2016), as opposed to the specific legislation in the field repealed by Law no. 98/2016 on public procurement.

However, in accordance with art. 6, par. (11) any person who considers of being the injured party of the remedial measures established by the contracting authority may submit a complaint to the Board or the court without the procedure of prior notification.

In the specialized literature it was expressed the view that, by setting the compulsory nature of prior notification in case of notifying the Council it is canceled the benefit provided by art. 21, par. (4) of the Constitution¹, since it replaces an optional judicial administrative procedure with mandatory administrative proceedings (Deleanu, 2013).

¹ The administrative special jurisdictions are optional and free.

As noted in another paper, according to art. 21, par. (4) of the Constitution, the optional nature of administrative jurisdictions allows for the one entitled to choose between administrative-judicial body (the CNSC in this context) and the court. If it has opted for administrative-judicial way, it must be pursued to the end, then, based on art. 21 of the Constitution concerning the right of access to justice, it may address the competent court (Apostol Tofan, 2015, p. 116).

By the provisions of art. 21, par. (4) of the Constitution it was considered to stop the administration abuses and to restrict the right of access to justice, as shown in the literature (Rîciu, 2009, p. 195).

The deadline for submitting the notification varies, depending on the estimated value of public procurement procedure or concession (art. 6, par. (1) a) and b) of Law no. 101/2016). Thus, if one considers the value of the procurement procedure or concession is equal to or greater than the thresholds in relation to the compulsory submission for publication to the Official Journal of the European Union of the participation notices, according to the specific legislation, the notification period is of 10 days calculated from the day of acknowledging the act of the contracting authority considered to be unlawful.

If it is estimated that the value of public procurement procedure or concession is less than the thresholds in relation to the compulsory submission for publication to the Official Journal of the European Union of the participation notices, according to relevant regulations, the deadline for notifying the contracting authority is of 5 days from the day where the injured party acknowledges the act of the contracting authority.

Law no. 101/2016 does not establish, as it does the Law no. 554/2004 on administrative contentious, the legal nature of formulating the terms of prior notification. Considering the provisions of art. 6, par. (1) and 68 of Law no. 101/2016, but that is not resulted from the content of the law on stopping or withholding the terms of notifications, we consider the two terms (10 and 5 days) as being the limitation periods.

The prior notification must meet certain requirements established by the law: to be in writing; to contain the data identifying the person who considers of being the injured party; the notified irregularities; the mediation measures which considers of being necessary to be taken (art. 6, par. (2) of Law no.101/2016).

An important aspect within this proceeding regards the date acknowledging it. The law clarifies this aspect as well, stating that when the prior notification envisages the content of awarding documentation, documentation published in the electronic system of procurement (SEAP), it shall be deemed to be the date of acknowledge as the date when it was published in the awarding documentation.

Upon notification, the contracting authority is obliged within 3 days, which is calculated from the day following receipt of the prior notification to inform the injured person on adopting or not the remedial measures relating to matters that concern the alleged violations. It has under the law 7 days for the implementation of corrective measures, in the case where it sends a response that it will adopt remedial measures; the term is calculated from the day following the response.

The response shall be submitted within a day of its adoption, to both the person who notified the contracting authority and other economic operators involved in the awarding procedure by publishing in SEAP, in the case of the measures taken in accordance with paragraph (5) before the deadline for submitting the requests to participate or, where appropriate, of the offers (art. 6, par. (6) of Law no. 101/2016).

The measures adopted in accordance with the mentioned article 6, par. (5) there will be announced by any means of communication established by the legislation in force in this area¹, within one working day after its adoption, the person who notified the contracting authority and other economic operators involved in the awarding procedure, in the case of the procedures on whose initiation procedures is not done by the publication in SEAP.

According to art. 7 of Law no. 101/2016, the effect of the formulation of the prior notification by the injured person is of suspending the right to conclude the contract.

This applies in accordance with art. 7, par. (2) so that the suspension of the right of concluding the contract cannot be terminated before the expiry of a term of at least 10 days, when it is estimated that the value of public procurement procedure, sector or concession procurement, is equal to or greater than the thresholds value in relation to the compulsory submission for publication in the Official Journal of the European Union of the participation notices, according to specific legislation.

¹ Means of communication provided by the legislation on public procurement sector, sector procurement legislation or the legislation on concessions for works and services: electronic means of communication; postal services; fax; a combination of the latter two, under certain conditions established by the methodological norms for implementing the legislation on public procurement, the legislation on sector procurement or the legislation on concessions for works and services.

In the case where it is estimated that the value of public procurement procedure, sector procurement or concession is less than the thresholds in relation to the compulsory submission for publication by the Official Journal of the European Union of the participation notices, suspension of the right for terminating the contract which cannot be terminated before the expiration of a term of at least 5 days.

The contract concluded in violation of these provisions is null and void.

Both terms are calculated according to the response provided by the contracting authority of remedial measures, being distinguished three situations (art. 7, para. (3) of Law no. 101/2016).

In the first case, if the answer of the contracting authority is negative, in the sense that it will not modify or revoke the issued documents, the two terms are calculated from the day following the acknowledgment of the response of the contracting authority.

In case of the silence of the contracting authority, by failing to reply, the time is calculated from the day following the expiry date provided for in art. 6, par. (4).

Finally, where the contracting authority shall inform on adopting the remedial measures, and the periods shall be calculated from the day following the expiry of the term provided for in art. 6, par. (5).

2.2. The Resolution of the Complaint Formulated by Administrative-Jurisdictional Means

A person who considers of being the injured party due to the prior notification or in the case where the contracting authority has not made any reply within the deadline set by the law (6 par. 4), it may notify the National Council for Solving Complaints by which it will require: the cancellation of the act of the contracting authority; obliging the contracting authority to issue an act or to adopt remedial measures; recognition of the claimed right or legitimate interest.

The council may be seized also by any person who considers of being the injured party of the remedial action taken by the contracting authority. The deadline for notification differs; it depends on the estimated value of public procurement procedure, acquisition or concession sector. If this value is equal to or greater than the thresholds in relation to the compulsory submission for publication to the Official Journal of the European Union of the participation notices, under the legislation in the field, the notification term is of 10 days. In the case where it is estimated that the value of public procurement procedure, procurement sector or concession is less than

the thresholds in relation to the compulsory submission for publication to the Official Journal of the European Union of the participation notices, the notification term is of 5 days. The time limits shall be calculated as described above for the wording of prior notification, art. 8 par. (2) having the same content with art. 7, par. (3).

The appeal shall be in writing and it shall contain all the information listed in art. 10 of Law no. 101/2016.¹

The appellant must prove the prior notification to the contracting authority, enclosing the following documents: copy of the response of the contracting authority, if any; proof of submission of the appeal to the contracting authority; copy of the contested act; available evidence means.

In accordance with art. 16, par. (1), the appeal regards both the contracting authority and the Council in the legal term for appeal, under the sanction of rejecting it as being tardily.

The contracting authority shall, within one day of receipt, to publish the appeal in SEAP, in compliance with personal data of the contestant.

It must also submit to the Council and the opponent, *ex officio*, within 5 working days of the receipt of the complaint, his view on the contested issues. The non-communication of the point of view does not preclude the Council to solve the complaint, if there was proof of its sending to the contracting authority, but it results in forfeiture thereof of their right to bring evidence and to invoke exceptions, besides those presented by the public order, unless the law provides otherwise.

On the receipt of the complaint, the contracting authority will undertake the measures to revise, amend, if it will appreciate that it is necessary, so that these can be transmitted to the injured person, to the economic operators involved in the awarding procedure and the Council. The appellant may withdraw the complaint, if he considers that the measures taken by the contracting authority is sufficient and if he

¹ The appeal shall contain: name, residence and tax identification code of the applicant physical or, where appropriate, legal entity, name, address, unique registration code, registration number with the trade register, persons representing them and in what capacity. It indicates the e-mail address, telephone and fax number, as applicable, to which it can be communicated any procedural act. The contestant living abroad indicates, for promptness also an address or residence in Romania where they will be provided the communications concerning the reviewing procedures; name and address of the contracting authority; name of the subject of the contract, the applied awarding procedure, if applicable, number and date of notice of SEAP; specifying the contested act of the contracting authority; under appeal; factual and legal arguments in the appeal; the evidence on which the appeal is sustained, as far as possible; the signature of the applicant of the physical entity or the legal entity representative.

clarifies the disputed aspects. The waiver request is sent to the contracting authority and to the Council.

The contract will end only after informing the Council's Decision concerning the solving of the complaint, respecting the waiting time set for closure.

According to art. 12, par. (1) the Council has the power to settle disputes through specialized completes.

The council may decline, by decision, by the competent court or another competent body with judicial activity for the disputes which do not fall within its competence for settlement. The law states that the decision declining jurisdiction is not subject to further appeal (art. 12, par. (2) of Law no. 101/2016).

In the determination of appeals it shall apply the principles of legality, celerity, adversarial proceedings, ensuring the right to defense, impartiality and independence of the judicial administrative activity.

In accordance with art. 22 of the law, the person concerned, in duly justified cases and to prevent an imminent damage, it may request a suspension of the awarding procedure or implementation of any decision taken by the contracting authority until the dispute is solved. In this case, the Council may decide, within three days of receiving the request, by termination, the measure of suspending the awarding procedure, taking into account the consequences of such measures on the categories of interests which may be harmed, especially the public interest.

However, it is stated that the provisions of art. 33 are not applicable, which means that the person concerned is exempted from the prior obligation to bail.

The council conclusion can be appealed to the competent court referred to in art. 32, para. (1) or the court of appeal, the administrative contentious and fiscal department in whose jurisdiction the contracting authority is situated, separately, within 5 days of notification.

The complaint is decided on the merits by the Council within 20 days of receipt of the case of public procurement, the sector or concession or, where appropriate, within 10 days when invoking an exception that prevents the analysis of the complaint.

The deadline for settling the complaint may be extended by 10 days in duly justified cases, the decision to extend the contracting authority (art. 24 of the Law).

In art. 25 the law establishes two cases to suspend the settlement of the complaint, which may be imposed by the Council in concluding: in the case where the settlement procedure depends in whole or in part by the existence or absence of a right that belongs to another judgment; where it was placed the criminal action for an offense committed in connection with the concerned act.

The suspension of the procedure for settling the appeal has a effect the interruption of the period for settling the term of the law.

The Council is obliged to reason clearly, unequivocally, the adopted decisions and rulings.¹

In accordance with art. 26 par. (2) of the Law, after examining the legality and merits of the contested measure, the Council can deliver these solutions: canceling in whole or in part by the decision the act; obliges the contracting authority to issue an act; it decides any other measure necessary to remedy the acts affecting the awarding procedure.

In case of the admission of the complaint, the Council states also the term that the remedial measures imposed have to be carried out by the contracting authority, which term will be shorter than the exercise of the appeal against the decision of the Council.

As it appears from the text of the law, the Council may not decide to award the contract to a particular economic operator, this decision will be taken by the contracting authority, but it may provide, in case of the admission of the appeal, the canceling of the awarding procedure if it finds that it cannot be arranged the remedial measures to allow the legal continuation of the awarding procedure.

¹ The judgment by which the complaint is solved by the Council or by which it disinvests without solving the dispute is called Decision. All other judgments of the Council are called conclusions, except for those of unification of the judicial administrative practice (art. 27, para. (1) and (2) of Law no. 101/2016). The Council Decision includes: introduction, showing the file number, date, name, residence and tax identification code of an applicant natural person or, where appropriate, legal entities, name, registered their unique code registration, registration number in the trade register, persons representing them mentioning their quality, the process during which it is issued the contested act; the reasoning, showing under appeal and allegations in brief of the parties, the outline of the facts by the Council based on evidence, the pleas of fact and law on which it is based solution, showing both the reasons for which there were upheld and those for which the applications of the parties were rejected; the device, showing the name, surname or, where appropriate, name the parties, the outcome of all applications and the amount deducted for the settlement of the granted costs, the appeal (art. 27, par. (5) of Law no. 101/2016).

Also, the Board may decide, upon request, submitted before the decision for settling the complaint, on the payment of costs incurred for the solving the complaint, obliging the requiring party to pay them.

Within 3 days of their reasoned decision of the Council it shall be communicated in writing to the parties and it shall be published within five days of its pronouncement on the website of the Council, in the official bulletin, respecting the personal data, as the information which the economic operator may specify in his offer as being confidential in pursuant to art. 19, para. (1) is classified or protected by an intellectual property right. The Council decision is compulsory for the parties, the concluded contract with the non-compliance of that decision being null and void.

The appeal against the Council's decisions are administrative-jurisdictional acts, it is the complaint that can be made by either party to the case, on grounds of illegality, and groundlessness, within 10 days from notice.

In this case, the contracting authority shall recognize the right to suspend the fulfillment of the Council decision and / or the awarding procedure pending until the submission by the court of the judgment settling the complaint.¹

The complaint is filed with the competent court, which is the court of appeal, the administrative and fiscal department in whose jurisdiction the contracting authority is situated.

In the case of the submission of the complaint against the decision of the Council on the procedures for awarding services and / or infrastructure related to the transport of national interest, the competent court is the Bucharest Court of Appeal, the Administrative and Fiscal Division.

As regards the legal nature of the complaint against the decision of the Council, this is a devolutive appeal, as it results also from the provisions of art. 29, para. (2) of the Act.

The complaint against the decision of the Council is charged 50% of the stamp duties established by the law in art. 56, par. (1) and/or (2) as applicable. If the awarding procedure is organized in batches, the stamp duties relating to the estimated value of each disputed lot.

¹ Art. 28 para. (5) of Law no. 101/2016.

But the complaints submitted by the contracting authorities are exempted from judiciary stamp fees.

It should be specified that in the formulation of complaints, as the Council is not party to the proceedings.

Compared to the previous regulation (art. 281, par. (1) of the Emergency Ordinance no. 34/2006¹), under the new law, this remedy may be used only by the parties to the proceedings before the Council, not being possible to change the previous processual framework (Ciobanu, 2015, p. 169). Also, it cannot be changed the quality of the parties, the cause or subject of the appeal, nor it can formulate new claims.

In the case of admission of the complaint, the court has amended the Council's decision and, where applicable: the annulment of all or part of the act of the contracting authority; its compliance at the issuing of the act; the fulfillment of an obligation by the contracting authority, including the elimination of any discriminatory technical, economic or financial documentation of the participation notification, from the awarding documentation or other documents issued in connection with the awarding procedure; any other measure necessary to remedy the abuse of legal provisions on public procurement, sector procurement or concessions (art. 34, par. (1) of the Law).

The court of appeal ruling the complaint as being final.

3. Conclusion

Law no. 101/2016 is the first distinct legal document in the domain of remedies and appeals, by adopting it, putting it in line with the changes to the national law in 2014 of the two directives which they transpose. The Law clarifies, unlike previous legislation, several issues regarding: the scope of remedies and appeals (administrative judicial procedure and judicial proceedings); the compulsoriness of formulating prior notification; automatic suspension of the right of the contracting authority to conclude the contract in case of a notification; the solutions that the National Council for Solving Complaints can give; the requirement for a bail by the

¹ The Council decisions concerning the solving of the complaints can be appealed by the contracting authority and/or by any injured person within the meaning of art. 255, par. (2) with the complaint to court under art. 283, par. (1) within 10 days of communication, both on grounds of illegality and even groundlessness.

person requesting the competent court to suspend the awarding procedure or performance of the contract pending resolution of the complaint etc.

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