# The Legal Procedure for Solving Complaints Filed under the Depositions of Law No. 101/2016

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**Abstract:** In the August issue (2016) of the *Acta Universitatis Danubius. Juridica* journal we have published the article in which we have analyzed issues related to administrative-jurisdictional settlement of complaints made in accordance with the Law on remedies and appeals concerning the award of public procurement and concession contracts (Law no. 101/2016). Within the current article we have analyzed some procedure issues regarding solving the requests addressed to the administrative contentious, in accordance with this law, using logical interpretation, case-study, and comparative analysis.

**Keywords:** remedies; legal proceedings; public procurement

## 1. Introduction

The Law of administrative contentious no. 554/2004 represents the general legal framework in the field of administrative contentious, but by laws with special feature can regulate specific procedures, an example is Law no. 101/2016 on remedies and appeals concerning the award of public procurement and concession contracts, the sector contracts, works concession contracts and service concession and the organization and functioning of the National Council for Solving Complaints.

In this article we propose the analysis of procedural issues concerning the processing of applications submitted to the administrative contentious court, in accordance with art. 2, par. (2) of Law no. 101/2016, which states that "any person who considers himself harmed in its right or a legitimate interest by an act of a contracting authority or failure to solve an application within the legal term can

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require its annulment, the obligation of the contracting authority to issue an act or the adoption of remedial measures, recognizing the claimed right or legitimate interest, by administrative-jurisdictional or judicial means, according to this law."

Therefore, the administrative contentious action according to Law no. 101/2016 may concern: the annulment of the act; obliging the contracting authority to issue an act or remedial measures; the recognition of the claimed right or the legitimate interest.

## 2. The Legal Procedure for Solving Complaints Filed under the Provisions of Law no. 101/2016

As we have already stated, our approach considers only the legal way regulated by the mentioned law.

For a correct analysis and study of the subject, it is necessary to clarify the concepts that we are going to use. Thus, if according to art. 2, par. (1) of the Law no. 554/2004, the injured person may be "any person holding a right or a legitimate interest, injured by a public authority through an administrative act or failure to solve an application within the legal term", art. 3, par. (1), letter f) of Law no. 101/2016 defines the injured person as being "any economic operator that fulfills cumulatively the following conditions: having or having had an interest in the awarding procedure; he suffered, or is likely to suffer the damage as a consequence of an act of the contracting authority capable of producing legal effects or as a result of solving in legal terms of a request for an awarding procedure".

The Administrative contentious Law assimilates to the injured party, "the group of individuals without legal personality, holder of subjective rights and private legitimate interests, and social organizations claiming injury by the contested administrative act is harmed a legitimate public interest or the rights and interests of legitimate individuals involved".

In the view of Law no. 101/2016, the harmful act, as it can be seen, is not identified as an administrative act, as stipulated in Law no. 554/2004, but as an act of a contracting authority. However, as stated in art. 3, par. (2) of Law no. 101/2016, the terms defined by this law shall be supplemented by the terms and expressions clarified in the law on public procurement, the legislation on the sector procurement or the legislation on works concessions and service concessions, as appropriate.

Therefore, in order to see which are the acts which can cause injury by the persons injured by the contracting authorities, we should consider the provisions of Law no. 98/2016 on Public Procurement Law no. 99/2016 procurement sector, and Law no. 100/2016 on works concessions and service concessions.[1]

### 2.1. Solving Appeals in Court

Chapter VI of Law no. 101/2016 entitled "the System of judicial remedies" includes sections on the objection formulated by the judicial path, the dispute resolution by the court and the invalidity of contracts.

On the first aspect, i.e. the appeal made by the courts, "the person who considers being the aggrieved party by the response received at the prior notification or has not received any response within the period specified in art. 6, par. (4) and any person who considers himself harmed by the remedial measures taken by the contracting authority within the meaning of art. 6, par. (11), may apply to the competent court" (art. 49, par. (1) of Law no. 101/2016).

It should be mentioned that the injured party, as defined by Law no. 101/2016, it may bring the appeal to the court, without notifying the National Council for Solving Complaints (art. 4, par. (2) of Law no. 101/2016). Also in this case the procedure of prior notification is compulsory, being applicable the provisions concerning the deadlines for appeals (Ciobanu, 2015, p. 170).

The prior notification has the nature of a preliminary complaint provided by Law no. 554/2004, which results from art. 6, par. (1) of Law no. 101/2016, which provides the sanctioning of rejecting the action as being inadmissible, in case of failure to file the prior notification.

The inadmissibility if the action in this case can be invoked both by the interested party and ex officio by the court, this being an exception to art. 193, par. (2) Code of Civil Procedure according to which "Failure to fulfill the preliminary procedure it may be invoked only by the defendant by contestation, under the sanction of forfeiture".

[1] We mention that the provisions of Law no. 101/2016 do not apply to all categories of contracts of public procurement, Law no. 98/2016 on public procurement established several exceptions (art. 29 para. (1), for example), which means that in their case, the disputes regarding the conclusion and performance of contracts does not belong to the administrative contentious. (Săraru, 2016 p. 164-165).

In the specialized literature it states that prior notification is required only in the case of litigations that have as subject the annulment of illegal acts of the contracting authority or obliging the authority to adopt remedial measures. But in the case of disputes of finding the invalidity of contracts (art. 60 of Law no. 101/2016), this procedure is no longer required, which results from the provisions referring to terms of promoting the action, flowing from the date of finding causes of the nullity of contract and not from the date of communicating the response of the contracting authority to prior notification (Trăilescu & Trăilescu, 2017, p. 7).

Although it is not explicitly stated, from the interpretation of the Law we may state that prior notification is not required in the case where the parties agree that the disputes concerning the interpretation, conclusion, execution, amendment and termination of contracts shall be settled by arbitration (art. 57 of Law No. 101/2016).

The jurisdiction to solve the cases falls specialized within specialized jurisdiction in public procurement of the court, the section of administrative and fiscal contentious, in whose area of territorial jurisdiction is the contracting authority headquarters.

The complaint lodged by the courts must contain all items listed in Art. 10 of Law no. 101/2016.

The court may order, at the request of an interested party, in duly justified cases and in order to prevent an imminent damage[1], until resolution of the case, the suspension of the award procedure, by reasoned ruling, by summoning the parties and with the reserve of establishing bail, calculated by relating it to the estimated or stated value of the contract (art. 33).

The conclusion of the court regarding the suspension can be appealed separately within five days of notification.

[1] These provisions are similar to those of the Law no. 554/2004 (art. 14 and 15). The imminent damage is defined as being "*the foreseeable or future material damage, where appropriate, predictable serious disruption of the functioning of a public authority or a public service*" (art. 2, par. (1), letter t) of Law no. 554/2004. By duly justified cases there are taken into consideration related circumstances to the facts and law, which can create serious doubt regarding the legality of the administrative act. In the recent jurisprudence, the High Court of Cassation and Justice, the Department of administrative and fiscal contentious admitted that they can constitute such circumstances: lack of competence of the administrative authority to issue administrative act; lack of legal basis; declaring unconstitutional the government order under which issued the administrative act; partial modification of the administrative act by the issuing authority; partial annulment of the administrative act by higher authority, etc. (Decision no. 491/02.2012, taken from idrept.ro).

The contract will be signed by the contracting authority only after the receipt of the decision of the settlement of the court of appeals and after expiring the legal awaiting term, i.e. 11 days and 6 days respectively, under the conditions of art. 59 of Law no. 101/2016, under the sanction of absolute nullity (art. 49 par. (7) of the Act).

The dispute is solved urgently and with priority. On this aspect, in the specialized literature it states that, notwithstanding the administrative contentious procedure regulated by Law no. 554/2004, in the case of applications that concern the judicial appeal brought by Law no. 101/2016 shall not apply in addition to the provisions of art. 200 of the Code of civil procedure, which establishes the verification procedure of the application and its corrective action (Catania, 2017, p. 396). According to the cited author, such exception is a requirement of the urgency of the procedure for solving such disputes. It should be pointed out that art. 200 of the Code of Civil Procedure do not apply if the appeal is governed by art. 51, par. (3) of Law no. 101/2016, reinforcing the requirement for solving especially and urgently the requests for such disputes. However, under the penalty of forfeiture of any right to bring evidence and invoke exceptions, the defendant is required to submit its fulfillment within 3 working days from the notification of appeal (art. 50, par. (5) of Law no. 101/2016). As you can see, the Law no longer prohibits the submission of new documents, as it is in the case of for the the procedure complaint to the competent court against the decisions of the National Council for Solving Complaints (art. 31, par. 3)

The first hearing is set not later than 20 days from the date of registration of the complaint, subsequent hearings with no more than 15 days, so that the whole procedure should not exceed 45 days from the date of referral to court. We should mention that the motivated decision is drawn up within seven days of pronouncement, it is immediately communicated to the parties concerned and it can be appealed in 10 days from notification. The jurisdiction to appeal belongs to the department of administrative contentious and fiscal court of appeal, for specialized in public procurement.

In the case of accepting the appeal, the appeal court rehear always the dispute on the merits, without sending the case to the trial court, the judgment on appeal is final. This is a special provision derogating from the procedure regulated by Law no. 554/2004 (Cătană, 2017, p. 398).

The law establishes several fees, if the appeal brought before the court (art. 56, par. (1) and / or (2) as applicable), and in the case of the appeal (50% of the fee provided for in art. 56, par. (1) and / or (2), where appropriate), being exempted from legal stamp provided for the appeals introduced by the contracting authorities.

### 2.2. Settling the Claims that have as Subject Granting Compensations

Regarding the disputes in court that concern granting compensation, the jurisdiction lies with the court in the jurisdiction of which is situated the contracting authority, the department of administrative and fiscal contentious, through specialized public procurement (art. 53, par. (1) of Law no. 101/2016).

The court may, upon request, in duly justified cases, the suspension of the contract until solving the substance of the case, the conclusion given in this case can be appealed within five days of notification.

With regard to the granting compensation, Law no. 101/2016 reflects the provisions of the Emergency Ordinance no. 34/2006 (repealed by the Public Procurement Act no. 98/2016).

The depositions of Law no. 101/2016 concerning the deadlines for preparing and communicating the decision, formulating and solving the appeal, stamp duties, etc. They are the same with the depositions referring to the procedure for solving the complaint (Ciobanu, 2015, p. 171).

Law no. 101/2016 lays down some special requirements on compensation for caused damage as follows:

- for the caused damage by an act of the contracting authority issued in a violation of the law on public procurement, the procurement sector or concessions or as a result of solving in legal terms of a request for the award procedure, the compensation may be granted only after the cancellation of the act concerned or, where appropriate after take any other remedial action by the contracting authority (art. 53 par. (5) of Law no. 101/2016);

- in the case where the compensation is sought for repairing the damages representing the costs of preparing an offer or of participating in the attribution procedure, the injured person must prove the injury to a breach of public procurement law, procurement law or sectoral legislation on concessions, and the

fact that he had a real chance of winning the contract and this has been compromised as a result of that infringement (art. 53 par. (6) of Law no. 101/2016).

Unlike other provisions of Law no. 101/2016 regarding the settlement of claims in court, disputes that concern compensation art. 54, par. (2) provides for the possibility of a counter-claim within 3 working days after notice of the summons (art. 50, par. (5).

Law no. 101/2016 takes from the Emergency Ordinance no. 34/2006 and provisions regarding the possibility that disputes concerning the interpretation, conclusion, execution, amendment and termination shall be settled by arbitration[1] (art. 57 of Law no. 101/2016 and art. 288 of the Emergency Ordinance no. 34/2006).

With regard to this provision, the literature points out that Law no. 101/2016 is not very clear, as it can be inferred if it is needed an arbitration case *ab initio* in the contract or the parties may conclude a subsequent compromise (Ciobanu, 2015, p. 171).

In the doctrine it is expressed a different point of view on the possibility of settling disputes by arbitration, namely, that in the current legislative framework the legislator's intent is to bring the procedure for settling disputes concerning the administrative contracts of civil procedure (Trăilescu & Trăilescu, 2017 , p. 164).

### 2.3. The Settlement of Requests that have as Subject a Declaration of Nullity of the Contract/the Act

Law no. 101/2016 contains provisions on the conditions under which an interested party may request the court the declaration of absolute (total or partial) nullity of the contract concluded in a breach of public procurement legislation or legislation on works and service concessions, as well as provisions for restoring parts of the previous situation.

[1] Emergency Ordinance no. 34/2006, in its original form, did not provide that disputes concerning the implementation of contracts covered by this law shall be settled by arbitration. That is why HCCJ has ruled in two decisions, namely Decision no. 3483/2010 and Decision no. 2991/2012, which established that the inclusion of an arbitration clause in public contracts is not possible, the courts with exclusive jurisdiction to settle disputes arise from such contracts. After modifying the Emergency Ordinance no. 34/2006 of Law no. 193/2013, it was provided for the establishment of an arbitration clause on the settlement of disputes by arbitration.

Thus, the total or partial absolute nullity of the contract or act and reinstating parties into their previous situation occurs in the following situations, in compliance with art. 1254, par. (3) of Law no. 287/2009, republished, as amended:

- the contract was awarded by the contracting authority in violation of requirements for publishing the participation announcement under the law on public procurement and concessions;

- the contracting authority does not comply with the law on the correct classification of contracts where it seeks to acquire a work execution of a service or product, concluding another type of contract, with the breach of legal procedure;

- the contract / addendum is concluded under less favorable conditions compared to those set out in the technical and / or financial proposals which represented the winning offer;

- failure to fulfill the qualification and selection criteria and / or evaluation factors set out in the notice which led to the declaration of the winning bid, which has the effect of altering the outcome of the procedure by canceling or reducing the competitive advantages;

- the contract was concluded before receiving the decision for settling the appeal by the Council or by the court decision or by failure to solve the appeal.

Notwithstanding, the law establishes *alternative sanctions*, in the case where the court finds, after considering all relevant aspects, that the imperative reasons of general interest require maintaining the effects of the contract[1], provided that they are effective, proportionate and dissuasive.

The law also provides a special case of cancellation, in the event of infringement of the depositions on the required awaiting legal term provided for the termination of the contract, in which case "*the court decides, after considering all relevant aspects, absolute total / partial nullity of the contract/addendum and it decides the restoration of former state of the parties or, if it is enough, it decides alternative sanctions*".

In accordance with art. 61 para. (1) of Law no. 101/2016, the jurisdiction for dispute settlement referred to in art. 58, par. (1) belongs to the court, in the district

[1] Alternative penalties provided for in art. 58 para. (3) of Law no. 101/2016: a) limitation of the effects of the contract by reducing the period of execution thereof; and / or b) applying fines to the contracting authority, from 2% to 15% of the value of the contract, the amount of which is inversely proportional to the possibility of limiting the effects of a contract, in accordance with letter a).

of the plaintiff or defendant (territorial jurisdiction), the department of administrative and fiscal contentious (substantive jurisdiction).

The remedy under the law is only the appeal which can be made within 30 days of notification of the sentence, the Department of Administrative and Fiscal Contentious of the Court of Appeal, which decides in panels specialized in public procurement. As in the case of other applications for the settlement, the appeal is solved urgently and especially in a period not exceeding 30 days from the date of referral to the competent court.

## 3. Conclusion

Finally, by establishing remedies and appeals in the field of the analysis, the legislator has considered simplifying procedures for awarding contracts of procurement and concessions clarifying aspects of prior notification, time limits for bringing actions before the courts, conditions for granting compensation or cancellation of contracts.

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