Prior Notice - Condition of Admissibility for Formulating an Appeal

Florentina Dragan[1]

Abstract: The transposition of the new Community directives and the adoption of the new legislative package in the field of public procurement constituted the opportunity to review the conditions of admissibility for formulating an appeal against an act of the contracting authority issued in breach of the legal provisions, within the procedure for assignment of the public procurement contract, contract which involves spending public money. The importance of the institution of notification of the contracted authority, an institution regulated also in the old applicable law in the field of public procurement, has grown under the new law on remedies and appeals, in fact seeking to improve the mechanism of appeal procedures in assignment procedures. Prior notification as a condition of admissibility may have advantages but also disadvantages for all actors involved in the procurement process, the practice being to demonstrate the effectiveness of this remedy before the contracting authority, or not.

Keywords: Prior notification; procurement process; conditions of admissibility for formulating an appeal

1. Brief History - Notification

1.1. Regulation

The institution of "*notification*" of the contracting authority has been regulated in the field of public procurement since 2009 by the amendments to the GEO no. 34/2006 through GEO no. 19/2009[2] so it was stipulated at point 36 that „art. 256[1] is amended and shall have the following contents: (1) Prior to addressing to the competent court, the injured party shall notify the contracting authority of the alleged breach of the legal provisions in the field of public procurement and the intention to bring the matter before the competent court. The provisions of art. 205 and 2562 remain applicable. (2) The notification provided in para (1) shall not have

[1] Office of Mediator, Bucharest, Romania, Corresponding author: dragan.tina@gmail.com.

[2] On certain measures in the field of public procurement legislation, published in Official Monitor Part I no. 156 of 12 March 2009.

as effect the suspension of the assignment procedure. Upon receipt of the notification, the contracting authority may adopt any measures it deems necessary to remedy the alleged infringement, including the suspension of the assignment procedure or the revocation of an act issued in the course of that procedure. (3) Measures adopted in accordance with para (2) shall be communicated within one working day both to the person who has notified the contracting authority and to the other economic operators involved in the assignment procedure. (4) The injured person who, receiving the communication provided in para (2), considers that the measures adopted are sufficient to remedy the alleged infringement shall send to the contracting authority a notification of waiving the right to bring an action before a court or, as the case may be, to waive the right of the trial proceedings. (5) The lack of notification provided in para (1) shall not prevent to bring the application before the competent court. (6) The provisions of para (1) to (5) shall apply accordingly in the case provided for in art. 5. 256 para (1)", an article that underwent two amendments in mid-2009[1] and 2011[2].

[1] By the Emergency Ordinance no. 72/2009 amending and supplementing the Government Emergency Ordinance no. 34/2006 on the assignment of public procurement contracts, public works concession contracts and services concession contracts, published in the Official Monitor of Romania, Part I no. 426 of 23 June 2009 "*Prior to addressing the competent court, the injured party notifies the contracting authority of the alleged breach of the legal provisions on public procurement and the intention to refer the matter to the competent court. The provisions of art. 205 and 2562 remain applicable.*

(2) The lack of notification provided in para (1) shall not prevent to bring the application before the competent court.

(3) The notification provided in para (1) shall not have as effect the suspension of the assignment procedure. Upon receipt of the notification, the contracting authority may adopt any measures it deems necessary to remedy the alleged infringement, including the suspension of the assignment procedure or the revocation of an act issued in the course of that procedure.

(4) Measures adopted in accordance with para (3) shall be communicated within one working day both to the person who has notified the contracting authority and to the other economic operators involved in the assignment procedure.

(5) The injured party who has notified the contracting authority according to the provisions of para (1) may immediately refer the matter to the competent court without being obliged to await the communication of the measures taken by the contracting authority according to para (3).

(6) The injured person who, receiving the communication provided in para (4), considers that the measures adopted are sufficient to remedy the alleged infringement shall send to the contracting authority a notice of waiving the right to bring legal proceedings or, as the case may be, to waive the right of trial proceedings in respect of that infringement.

(7) The provisions of para (1) to (6) shall apply accordingly in the case provided for in art. 256 para (1)"

[2] Emergency Ordinance no. 76/2010 amending and supplementing the Government Emergency Ordinance no. 34/2006 regarding the assignment of public procurement contracts, public works concession contracts and service concession contracts published in Official Monitor Part I no. 453 of July 2, 2010 " *Prior to addressing to the National Council for Solving Complaints, the injured party*

1.2. The Role of Notification

Initially, the role of the notification lies only in the possibility for the legislator of the contracting authority to take any measures it deems necessary to remedy the alleged violation brought by any injured person, of mediation of a conflict situation that might have led to the referral of C.N.S.C. through the administrative-judicial route and then the court, by exercising the right to appeal, a role that subsequently increased as a result of the amendments to art. 179 para (4) from GEO no. 34/2006 through Law no. 279/2011[1] considering that „*any amendment and/ or supplement of the qualification and selection criteria specified in para (3)*[2] *leads to the annulment of the assignment procedure*".

Because the provisions of art. 179 para (4) from GEO no. 34/2006 gave rise to interpretations which led to abuses because of ambiguous and unclear wording, it was subsequently amended, further emphasizing the importance of this institution of "notification", meaning that the contracting authority could not bring any amendment and/ or supplement to the qualification and selection criteria specified in the notice/ invitation to assign, the sanction being the annulment of the assignment procedure, except for the amendments ordered by the Council decision,

notifies the contracting authority of the alleged violation of the legal provisions on public procurement and the intention to refer the National Council for Solving Complaints. The provisions of art. 205 and 2562 remain applicable.

(2) The lack of notification provided in para (1) does not prevent from bringing the application before the National Council for Solving Complaints.

(3) The notification provided in para (1) shall not have as effect the suspension of the assignment procedure. Upon receipt of the notification, the contracting authority may adopt any measures it deems necessary to remedy the alleged infringement, including the suspension of the assignment procedure or the revocation of an act issued in the course of that procedure.

(4) Measures adopted in accordance with para (3) shall be communicated within one working day both to the person who has notified the contracting authority and to the other economic operators involved.

(5) The injured party who has notified the contracting authority according to the provisions of para (1) can immediately address to the National Council for Solving Complaints without being obliged to await the communication of the measures taken by the contracting authority according to para (3).

(6) The injured person who, receiving the communication provided in para (4), considers that the measures adopted are sufficient to remedy the alleged violation shall send to the contracting authority a notice of waiving the right to file an appeal before the National Council for Solving Complaints or, as the case may be, a request to waive to trial proceedings".

[1] For the amendment and supplementation of Government Emergency Ordinance no. 34/2006 on the assignment of public procurement contracts, public works concession contracts and services concession contracts, published in the Official Monitor, Part I no. 872 of December 9, 2011.

[2] "*The qualification and selection criteria specified in the invitation/ notice of participation must be the same as those specified in the assignment documentation*".

the amendments ordered by court rulings or the remedial measures ordered by the contracting authority under art. 2561 para (3)[1] and art. 256[3] para (1).

The role of this institution of "notification" grew even more in 2014, when the legislator introduced through GEO no. 51/2014, the obligation of the economic operators to constitute a guarantee of good conduct for the entire period between the date of filing the appeal and the date of the final decision of the Council for solving it, according to art. 271[1] from GEO no. 34/2006, in order to protect the contracting authorities from possible inappropriate conduct of the contestant, reasoned that before this referral to the Council, the economic operators may use the "notification" institution based on the provisions of art. 256[1] from GEO no. 34/2006, action/ manifestation of free will, without being necessary to "block" any amount of money in favor of the contracting authority and which could determine the contracting authority, if it deems it necessary, to take remedial measures.

In practice, this institution of "notification" has been very common, but both economic operators and contracting authorities have confused it with the request for clarifications formulated under the provisions of art. 78[2] from GEO no. 34/2006; between the two institutions, obviously existing important differences:

- in the event of filing a notification, the economic operator has understood the requirements of the assignment documentation but considers them illegal, restrictive, abusive, for which reason they request the contracting authority to remedy, amend, supplement or even eliminate them; while in the event of filing a request for clarification was made, the economic operator did not understand the requirements of the assignment documentation, the contracting authority being obliged to respond clearly;

[1] "*The notification provided in para (1) shall not have as effect the suspension of the assignment procedure. Upon receipt of the notification, the contracting authority may adopt any measures it deems necessary to remedy the alleged infringement, including the suspension of the assignment procedure or the revocation of an act issued in the course of that procedure*".

[2] "*Any interested economic operator has the right to request clarifications on the assignment documentation.*

(2) The contracting authority is obliged to respond clearly, completely and unambiguously as soon as possible to any requested clarification, within a period that should not, as a rule, exceed 3 working days after receipt of such request from the economic operator.

(3) The contracting authority has the obligation to send the answers - together with the related questions - to all the economic operators who obtained, under this Emergency Ordinance, the assignment documentation, taking measures not to disclose the identity of the person who requested the clarifications".

- the deadline and the manner of responding to the request for clarification, formulated in art. 78 from GEO no. 34/2006 was expressly set by the legislator [1], instead, in the case of filing a notification under art. 2561 from GEO no. 34/2006, the contracting authority was not under an obligation to respond within a certain period and in a certain way, but the contracting authority could adopt any measures it considered necessary to remedy the alleged infringement;

- the qualification and selection criteria specified in the invitation/ notice of participation could be amended following a notification under art. 2561 from GEO no. 34/2006[2], as opposed to the answer to the request for some clarifications by which these qualification and selection criteria remained unchanged, being only explained/ clarified/ resolved.

2. Notification under the Current Regulation

However, under Law no. 101/2016 on remedies and appeals in relation to the assignment of public procurement and concession contracts and on the organization and functioning of the National Council for Solving Complaints[3], the institution of notification will reach the climax in the sense that it will condition both the notification of the NCSR and the court to the completion of a prior procedure before the contracting authority, the appealer being obliged to prove its fulfillment[4].

The legislator defined the prior notification as a written request requiring the contracting authority to review an act of the contracting authority for the purpose of revoking or amending it[5].

2.1. The Role of Notification

The purpose of prior notification in the current regulation is to offer interested persons the possibility to resolve within a shorter deadline[6] and in a more operative manner, the alleged violations of public/ sectorial/ concession procurement legislation as the seized/ notified contracting authority has the possibility to return

[1] Art. 78 para (2) Of GEO no. 34/2006.
[2] Art. 179 para (4) let. c) of GEO. no. 34/2006.
[3] Published in the Official Monitor no. 393 of 23 May 2016.
[4] Art. 6, para (1) in conjunction with para (10) of the Law no. 101/2016.
[5] Art. 3, para (1) let. e) of Law no. 101/2016.
[6] 10 days (3 days of response and 7 more to effectively implement the disposed remedial measures) - art. 6 para (4) in conjunction with para (5) of the Law no. 101/2016.

to the previously issued act and even be able to issue another act that is subsequently accepted or not by the person who made the notification.

It should be underlined that this "*prior notice*" procedure is similar to the "*prior complaint*" regulated by Law no. 544/2004 stipulating at art. 7 that "*prior to addressing to the competent administrative contentious court, the person who considers himself or herself to be injured in a right of his own or in a legitimate interest by an individual administrative act must request the issuing public authority or superior authority, if any, within 30 days from the date of communication of the act, the revocation, in whole or in part, thereof*", however, it should be pointed out that the term "*prior notice*" is obviously much shorter than that of the "*prior complaint*" and is calculated differently from the estimated value of the type of contracting authority and contract[1].

However, between the prior complaint regulated by Law no. 544/2004 and the prior notification regulated by Law no. 101/2016 there is a great procedural difference; thus, the new Civil Procedure Code has made important changes to the conduct of civil proceedings, even though it contains a provision identical to that contained in the old Code of Civil Procedure, the new Code has regulated a different procedure concerning how to invoke the absence of this prior procedure. Thus, before communicating the summons of the defendant, the new Code regulates a non-controversial procedure in which the panel will verify the formal aspects of the application, the judge being able to cancel the application that does not meet those conditions. Consequently, according to art. 200 NCPC, the judge will verify that the request for summons complies with the requirements of articles 194-197. If the application does not meet these requirements, the applicant will be advised to fill these shortcomings within 10 days, otherwise the request will be canceled. It can be noted that in this non-contradictory procedure of preliminary verification of the fulfillment of the formal requirements of the summons the panel of judges should not verify the fulfillment by the applicant of the obligation imposed by art. 193 para (2)[2] NCPC, namely that of attaching proof of compliance

[1] 5 days/ 10 days being calculated according to the estimated value, the type of the contracting authority and the public/ sectorial/ concession procurement contract - art. 6 para (1) of the Law no. 101/2016.

[2] Art. 193 NCPC "*(1) Referral to the court may only be made after a prior procedure has been completed, if the law expressly so provides. Proof of the prior procedure shall be attached to the request for a summons.*

(2) The non-fulfillment of the preliminary procedure may be invoked only by the defendant by default, under the penalty of forfeiture.

with the preliminary procedure. As a result, the panel, even if it notices the lack of proof of the completion of the preliminary procedure, will be unable to order the annulment of the request for this lack, because the time of filing the contestation in the new Civil Procedure Code is after the formal verification procedure of the summons and the exception of the lack of this procedure may be invoked only by the defendant under art. 193 para (2) NCPC. That is, therefore, the only procedural time in which the defendant can invoke on the plea of lack of prior procedure[1].

However, in the field of the settlement of appeals concerning public/ sectorial/ concession procurement assignment procedures, the legislature provided that the "*prior notification*" is considered both by the CNSC and by the court as a condition of admissibility of the contestation, art. 6 para (10) of Law 101/2016 stating that „*the referral to the Council or the court, as the case may be, may only be made after the prior notification procedure has been completed*", but this plea of inadmissibility can also be invoked on ex officio, thus constituting art. 6 para (1) of the Law a derogatory rule from the provisions of art. 193 NCPC.

Unlike the "*notification*" regulated by GEO no. 34/2006, which did not have a certain form and a deadline, the "*prior notification*" regulated under Law no. 101/2016 mandatorily „*shall be made in writing and shall contain at least the identification data of the person who considers himself/ herself to be injured, the deficiencies notified and the remedial measures he or she deems necessary to be taken, as the case may be*"[2].

Even if it is entitled "*prior notice*", this institution is in fact an appeal to the contracting authority, as regulated in art. 1 para (5)[3] of Directive 66/2006 and as originally regulated by GEO no. 60/2001[4], an appeal, which at the time of 2005

(3) Upon referral to the court by the hearing of the inheritance proceedings, the applicant will file a court order issued by the public notary regarding the verification of the inheritance records provided by the Civil Code. In this case, the failure of the prior procedure will be invoked by the court, ex officio or by the defendant".

[1] For details see (Ursuța, 2012).

[2] Art. 6 para (2) of Law no. 101/2016.

[3] "*Member States may require that, in a first stage, the person concerned to exercise appeal before the contracting authority. In this case, Member States shall ensure that such an appeal results in immediate suspension of the possibility of terminating the contract"* of Directive 2007/66/ EC of the European Parliament and of the Council of 11 December 2007 amending Directives 89/665/ EEC and 92/13/ EEC of the Council as regards the improvement of the effectiveness of appeals in respect of the assignment of public procurement contracts.

[4] on public procurement, published in the Official Monitor, Part I no. 241 of 11 May 2001, repealed by GEO no. 34/2006.

proved ineffective and non-performing[1], in the sense that, in most cases, the contracted authorities did not modify the assignment documentation, the report of the procedure or any other contested acts issued in the procedure. Moreover, from administrative jurisdictional practice, there were very few cases where contracting authorities chose revise the assignment documentation or the decisions taken, although they were aware of the content of the appeal.

Furthermore, prior notification as regulated under Chapter II of the law could be assimilated also by conciliation; according to point 30 of the arguments of Directive 2007/66/ EC of the European Parliament and of the Council of 11 December 2007 amending Directives 89/665/ EEC and 92/13/ EEC as regards the improvement of the effectiveness of appeals in relation to the assignment of public procurement contracts „*the conciliation mechanism provided for by Directive 92/13/ EEC has not given rise to a real interest among economic operators. This is due to the fact that it cannot, by itself, lead to some binding provisional measures designed to prevent the illegal conclusion of a contract and also to its nature, which is not easily compatible with the time-limits particularly short procedures applicable to appeals for interim measures and the annulment of unlawful decisions. In addition, the potential effectiveness of the conciliation mechanism was further diminished by the difficulties encountered in establishing a complete and sufficiently comprehensive list of independent conciliators in each Member State, available at all times and able to analyze conciliation requests in time very short. For these reasons, the conciliation mechanism should be removed*", motivated by the fact that it is unlikely that the same persons who prepared the assignment documentation or assessed the submissions or their colleagues from the same contracting authority would review the documents already drawn up voluntarily following a "*notification*".

By including this preliminary stage, the legislator tries to make the contracting authority even more accountable by resolving acts and eliminating the dispute/ resolving dissatisfaction at this stage, without the need for procedural steps to be taken before the Council or the court.

[1] For details see Decision no. 901/2005 regarding the approval of the Public Procurement System Reform Strategy, as well as the Action Plan for its implementation in 2005-2007, published in Official Monitor, Part I no. 758 of August 19, 2005.

Short Conclusions

Finally, we would like to emphasize that although within the framework of the National Strategy for public procurement[1] we wanted to implement a simplified and efficient system, the new system proposed under Law no. 101/2016 which contains as a condition of admissibility for the submission of a complaint both by administrative-judicial and by judicial means notification of the contracting authority, to the system of notification and settlement of complaints regulated by GEO no. 34/2006 will extend the assignment procedures with a minimum of 13 days, a term consisting of 5 days - the deadline for submitting the prior notification, 3 days - for the reply to the notification and 5 days - for the contestation.

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