

WORKS CONTRACT - ADMINISTRATIVE CONTRACT. THE IMPLICATIONS OF LEGISLATIVE CHANGES ON ONGOING WORKS CONTRACTS

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Abstract

Law no. 98 of 19 May 2016 on public procurement has been continuously amended and submitted to additions. The Emergency Ordinance 114 of December 28, 2018, issued by the government, which stipulates that between 1 January 2019 and 31 December 2019, by way of derogation from the provisions of Art. 164 par. (1) of the Law no. 53/2003 – Labour Code, republished, with all further amendments and additions, "in the building sector, the state guaranteed gross minimum wage is determined in cash, without any other bonuses and supplements, at the amount of 3,000 lei per month, for a normal work schedule of an average of 167,333 hours/ month, representing 17,928 lei/ hour".

The increase of the minimum basic gross salary guaranteed by the state directly influences the price of the contract and in this article we will analyze the influence on the works contracts.

Keywords: administrative contract, works contract, contract price adjustment, EA 114/2018, GR 1/2018 EO (Emergency Ordinance), GR (Government Resolution).

1. Introduction

As defined in the Civil Code, in Art. 1166 the contract is "a legally recognized agreement by which two or more persons have expressed their intention of creating, modifying or extinguishing a legal relationship"¹ within the limits of law, public order and good morals. Thus, the contract shall be terminated when "The Contracting Parties shall have expressed their consistent wills in line with the conditions of the fund and the form required by law, by reference to the specifics of each contract"² if the law does not impose a certain other formality or form. The administrative contract has its origin in the French law, being the result of the jurisprudence of the State Council.³ In our country, this theory has emerged simultaneously with the development of legal relations between public administrations and the private entrepreneurs with the object of contracting various public works or services.⁴

A further stage of the evolution of the administrative contract's theory is the period after December 1989 "starting from the fact that the very Constitution of 1991 recognizes it without qualifying it expressly with the name of an administrative contract".⁵

2. Content

"The administrative contract is an agreement between a public authority in a position of legal superiority, on one hand, and other subjects of law on the other hand (individuals, legal persons or other public bodies subordinated to the superior entity, the purpose of which is to satisfy a general interest through the provision of a public service, the performance of public works or the use of a public good which is submitted to a political power regime."⁶

Concluding, we can say that a contract is an administrative contract if it fulfills at least the following criteria:

- Minimum one of the parties is a public entity;
- Its subject or object is to ensure a public facility or a public interest;
- The terms of the contract are governed by "unilateral administrative law or acts in order to protect public interests and conventional clauses negotiated by the parties".⁷

The administrative contract is also defined "to represent an agreement of will, totally or partially submitted to a regime of public power, between a public institution or another subject of the law authorised by it, on the one hand, and a private or any other public institution, on the other hand, in pursuing

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¹ Civil Code of 17 July 2009 republished and updated. Law no. 287/2009 was published in the Of. Journal of Romania, Part I, no. 511 of July 24, 2009, was amended by Law no. 71/2011 and rectified in Of. Journal of Romania, Part I, no. 427 of 17 June 2011 and in the Of. Journal of Romania, Part I, no. 489 of 8 July 2011 with subsequent amendments and additions.

² T. Prescure, A. Ciurea, Civil Contracts, ed. and 2 a, rev., ed. Hamangiu, 2007, p. 2

³ Vedinaş, Verginia (2017). Administrative law. The Xth Edition was revised and updated. Bucharest: Universul Juridic, p. 372

⁴ Iorgovan, Antonie (2005). Administrative Law Treaty, vol. II, Edition 4, Ed. Bucharest: All Beck, p. 101

⁵ Vedinas, Verginia (2017). Administrative law. The Xth Edition was revised and updated. Bucharest: Universul Juridic, p. 373

⁶ Vedinas, Verginia (2017). Administrative law. The Xth Edition was revised and updated. Bucharest: Universul Juridic, p. 374

⁷ Săraru, Cătălin-Silviu, (2014) CLAUSES OF PUBLIC LAW IN ADMINISTRATIVE CONTRACTS, Transylvanian Administrative Sciences Review 1 (34) / 2014, p. 99

the satisfaction of a general interest, through the provision of a public service, the execution of public works.

Putting the value of a good of public property into the legal relationship of public office."⁸

Thus, we can deduce the following features of the administrative contract:⁹

- a) it is a multiparty agreement of will or settlement;
- b) one of the parties is a determined subject, namely a body acting in the exercise of public power, an administrative body or another subject of law authorized by a body of administrative law;¹⁰
- c) different from civil contracts where there is a position of legal equality for the parties concerned, as when talking about the administrative contract, the parties involved are not in a position of legal equality, but one of them, namely the public authority, has a superior position towards the other subject of the administrative contract;
- d) the object of the administrative contract is determined, in pursuing to satisfy a general public interest and thus obtaining one of the following characteristics: obtaining a public service, capitalizing on a public good, performing public works;
- e) the setting, by law and conventionally, of the clauses of the administrative contract;
- f) due to the superiority of the public authority, it may determine the possibility of unilaterally modifying or terminating the administrative contract, if the public interest so requires;
- g) "governed by a regime of public power, unlike civil contracts, which are governed by common law";¹¹
- h) "the written form of the administrative contract, which, like the administrative act, cannot be of a consensual character, involving an authority acting on behalf of the public authority";¹²
- i) in order to solve potential litigations arising from the execution of an administrative contract, the competence to resolve them is the Administrative Contentious Courts.

The principles underlying the awarding of public procurement contracts and the organization of solutions competitions are: non-discrimination, equal treatment, mutual recognition, transparency, proportionality, accountability.

In Romanian legislation, we distinguish several types of administrative contracts. Among the types of administrative contracts, public procurement contracts are distinguished by the large number of contracts concluded by public authorities.

According to Law no. 98¹³ of 19 May 2016 on Public Procurement, Cap. I, art. 3(b) public procurement is "the acquisition of works, products or services by means of a public procurement contract by one or more contracting authorities from economic operators designated by them, whether the works, products or services are intended to ensure a public interest or not. "

Under the same law, Cap. I, art. 3(l) the contract of public procurement is "the contract for onerous interest, assimilated by law to the administrative act, concluded in writing between one or more economic operators and one or more contracting authorities, which has as its object the execution of works, the supply of products or provision of services".

Public procurement contracts are distinguished by the large number of public works contracts.

"Public works contract - public procurement contract having as its object either: exclusively the execution, or both the design and the execution of works in connection with one of the activities listed in Annex no. 1; either solely the execution, or both the design and construction of a building; or the construction by any means of a building which meets the requirements set by the contracting authority exercising decisive influence over the type or design of the construction)".¹⁴

Conclusion of public works contracts

As with any other contract, the first rule to be observed in the conclusion of public works contracts is the parties' agreement. Specifically, "in the case of an administrative contract, the administration is the one

⁸ Sararu, Cătălin-Silviu, (2010). Capacity of public authorities / institutions to conclude administrative contracts, in "Law", no. 1, p. 109

⁹ Vedinaș, Verginia (2017). Administrative law. The Xth Edition was revised and updated. Bucharest: Universul Juridic, p. 374

¹⁰ Vedinaș, Verginia (2017). Administrative law. The Xth Edition was revised and updated. Bucharest: Universul Juridic, p. 374

¹¹ A. Negoită quoted by Vedinaș, Verginia (2017). Administrative law. The Xth Edition was revised and updated. Bucharest: Universul Juridic, p. 375

¹² A. Negoită quoted by Vedinaș, Verginia (2017). Administrative law. The Xth Edition was revised and updated. Bucharest: Universul Juridic, p. 375

¹³ Law No 98 of 19 May 2016 on public procurement published in the Official Journal, issue 390 of 23 May 2016, amended and supplemented by: Emergency Ordinance No 80 of 16 November 2016 laying down measures in the field of central public administration for the extension of the deadline art. 136 of the Law no. 304/2004 on judicial organization and amending and completing some normative acts, Law no. 80 of April 27, 2017 regarding the approval of Government Emergency Ordinance no. 80/2016 for the establishment of measures in the field of central public administration, for the extension of the term stipulated in art. 136 of the Law no. 304/2004 on judicial organization and amending and supplementing some normative acts and the Emergency Ordinance No. 107 of 20 December 2017 for the amendment and completion of some normative acts with impact in the field of public procurement with the subsequent additions and modifications

¹⁴ Law No 98 of 19 May 2016 on public procurement published in the Official Journal, issue 390 of 23 May 2016, amended and supplemented by: Emergency Ordinance No 80 of 16 November 2016 laying down measures in the field of central public administration for the extension of the deadline art. 136 of the Law no. 304/2004 on judicial organization and amending and completing some normative acts, Law no. 80 of April 27, 2017 regarding the approval of Government Emergency Ordinance no. 80/2016 for the establishment of measures in the field of central public administration, for the extension of the term stipulated in art. 136 of the Law no. 304/2004 on judicial organization and amending and supplementing some normative acts and the Emergency Ordinance No. 107 of 20 December 2017 for the amendment and completion of some normative acts with impact in the field of public procurement with the subsequent additions and modifications

who invites and accepts and the applicants (candidates) are the ones who offer."¹⁵

The object of the contract is highlighted by the necessity report and / or the specifications drawn up at the level of the department requesting the acquisition and approved in advance by the management of the public authority.

The contract price is appreciated by the compartment making the necessity and / or specification and is made up of the price without V.A.T. to which is added V.A.T. according to the legal provisions in force at the date of the invoice issuance by the provider.

Payment methods and duration of the contract are also required by the necessity report and / or the specifications drawn up at the level of the compartment requesting the purchase. The term for the duration of the contract is imposed by the date of signing the contract by both parties.

It is the public authority that will choose among the offers received the most satisfactory tender in relation to the necessity report or the specification.

During the course of the contract the price may change in the following situations:

1. in the case where "certain conditions have occurred on the market resulting in the increase / decrease of the price indices for the constituent elements of the offer, the effect of which is reflected in the increase / decrease of the costs on which the price of the contract was based"¹⁶.

However, in order to ensure the principle of transparency, the public authority must specify in the works contract and in the documentation on which it was based the possibility of adjusting the price. This is to be argued by the "actual price adjustment, the indices to be used, and the source of information on their evolution, such as statistical bulletins or commodity exchange quotations".¹⁷ In the case of contracts ranging from 6 months to 24 months, the contracting authority may choose to include price adjustment / revision clauses, but for contracts that run for more than 24 months this clause is mandatory.

2. If "the legislative changes occur or were issued by local administrative acts which have as their object the establishment, modification or waiver of certain charges / local taxes, whose effect is reflected in the increase / decrease of the costs on which the price of the contract was based ".¹⁸

In both situations, the price of the contract can be adjusted only to the extent that the costs of substantiating the contract price are covered and this is the way in which the final result should not be different from the initial one of the award procedure.

On January 11, 2018, goes into effect the Government Resolution no. 1 of January 10, 2018 for approval of general and specific for certain categories of procurement contracts related to the investment objectives financed from public funds which considers the application of general and specific conditions and model framework agreement contract for public procurement contracts or sectorial works, on the execution of works on the one hand, and on the design and execution of works, on the other. Government resolution refers to the investment objectives financed from public funds including grants and / or reimbursable whose estimated value must be "equal to or greater than the thresholds provided by art. 7 (1.a) of Law no. 98/2016 on public procurement, as amended and supplemented ".¹⁹

It deals with price adjustment in Clause 48 and uses other time references when referring to the duration of the contract. Thus, if the duration of the contract is less than or equal to 365 days, it is considered that the contract prices are firm and can only be modified if the increase or decrease of the value of the contract is a consequence of the amendment of the law and this will prevent the contractor to fulfill its contractual obligations. If the duration of the contract is longer than 365 days, it is considered that the prices have been established taking into account the price and market conditions at the time of the offer and will be adjusted with the increase or decrease of the price indices.

4. Conclusions

The issue of the Emergency Ordinance no. 114 of December 28, 2018 regarding the establishment of measures in the field of public investments and fiscal-budgetary measures, the modification and completion of some normative acts and the extension of some deadlines in Article 71 stipulates that by way of derogation from the Law no. 53 of 24 January 2003 - Labour Code, republished, as amended and supplemented, art. 164, par. 1 the country's minimum gross salary for the construction sector between January 1, 2019 and December 31, 2019 is 3,000 lei per

¹⁵ Sararu, Cătălin-Silviu, (2009). Administrative contracts. Regulation. Doctrine. Jurisprudence. C. Beck Publishing House, p. 131

¹⁶ METHODOLOGICAL RULES of 2 June 2016 for the application of the provisions regarding the award of the public procurement contract / framework agreement of Law no. 98/2016 on Public Procurement, Section 4, Art. 164, par. 1, published in: Official Journal no. 423 of 6 June 2016 approved by Resolution No. 395 of June 2, 2016, with subsequent amendments and additions

¹⁷ METHODOLOGICAL RULES of 2 June 2016 for the application of the provisions regarding the award of the public procurement contract / framework agreement of Law no. 98/2016 on Public Procurement, Section 4, Art. 164, par. 1, published in: Official Journal no. 423 of 6 June 2016 approved by Resolution No. 395 of June 2, 2016, with subsequent amendments and additions

¹⁸ METHODOLOGICAL RULES of 2 June 2016 for the application of the provisions regarding the award of the public procurement contract / framework agreement of Law no. 98/2016 on Public Procurement, Section 4, Art. 164, par. 1, published in: Official Journal no. 423 of 6 June 2016 approved by Resolution No. 395 of June 2, 2016, with subsequent amendments and additions

¹⁹ Government Resolution no. 1 of January 10, 2018 for the approval of general and specific conditions for certain categories of procurement contracts related to publicly funded investment objectives, published in: Official Journal no. 26 of January 11, 2018

month for an average work schedule of 167,333 hours per month. It was thus established without including bonuses and other additions.

Emergency Ordinance no. 114 of 28 December 2018 does not show how the calculation of the value of the work will be adjusted in the works contract and how it will change this total value of the works contract.

The National Agency for Public Procurement issues on 21 December 2018 Instruction no. 2²⁰ regarding the price adjustment of the public procurement contract wishing to support both contracting authorities and economic operators by clarifying certain legal provisions aiming at ensuring a transparent framework and avoiding non-uniform interpretation in contradiction with the principles of public procurement / sector.

Thus, art. 1, par. (2.a) provides that by price adjustment an adjustment coefficient is to be applied regardless of the occurrence of an unforeseeable situation such as: legislative changes or other

administrative acts having an effect on increases or decreases in costs on which the price of the contract was based, the minimum applicable wage, the modification of the technical norms, the increase or decrease of the price of some raw materials, materials or other products, the extension of the contract award procedure over the validity period of the offer (initially established through the awarding documentation), the tenderer's obligation to change the declared supplier bid due to bankruptcy or incapacity to perform the works. Art. 1, par. (2.b) provides for a price adjustment "even if the price adjustment was not provided for in the procurement documentation / public procurement / sectorial procurement contract".

This article has given rise to many controversies. Is it fair that a contract that has the clause "the price of the contract remains firm and the contract price adjustment during the contract period is not acceptable" can be modified based on an instruction?

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- INSTRUCTION no. 2 of December 21, 2018 regarding the adjustment of the public procurement / sector procurement price, EMITENT: National Agency for Public Procurement, published in: Official Journal no. 32 of 11 January 2019

²⁰ INSTRUCTION no. 2 of December 21, 2018 regarding the adjustment of the public procurement / sector procurement price, EMITENT: National Agency for Public Procurement, published in: Official Journal no. 32 of 11 January 2019