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# Considerations Relating to the Jurisdiction of the Arbitration Litigation on Solving Public Acquisition Contracts

**Gina Livioara Goga**[1]

**Abstract:** The current legislation on public procurement, namely Government Emergency Ordinance no. 34/2006 on the public procurement contracts, public works concession contracts and service concession, currently governs the arbitration institution, having the possibility of settling any disputes regarding the execution of contracts. We consider that the contested provisions infringe the principle of predictability, as they are not clear because of the regulation of the two articles, and thus the analysis of the entire chapter entitled "Solving complaints" (Chapter IX of the G.E.O. 34/2006) in conjunction with the title order or with the purpose and principles of the adoption of G.E.O. 34/2006, it appears that it refers only to the procedure for settling disputes arising in attributing public procurement contracts, concession contracts for public works service concession contracts.

**Keywords:** public procurement; principle of predictability; litigation

The object of contention of this article is the provisions of art. 286, par. 1 sentence II, based on the provisions of art. 288¹ Government Emergency Ordinance no. 34/2006 regarding the awarding of public acquisition contracts, public works concession contracts and service concession contracts published in the Official Gazette of Romania, Part I, no. 418 of 15 May 2006.

The current legislation on public acquisitions, namely Government Emergency Ordinance no. 34/2006 regarding the awarding of public acquisition contracts, public works concession contracts and service concession contracts now regulates the institution of arbitration as a possibility of solving the possible litigation on contracts' execution. According to depositions of art. 288[1] of GEO 34/2006, "parties may agree that all litigations related to the execution of contracts covered by this emergency ordinance shall be settled by arbitration".

According to the provisions of Art. 286 of GEO 34/2006, "trials and applications for compensation to repair damages caused in the award procedure and those on the execution, nullity, annulment, cancellation or unilateral denunciation of public acquisition contracts shall be settled in the first instance by the department of Administrative and Fiscal Contentious tribunal in the district where the headquarters of the contracting authority", but in conjunction with art. 288¹ jurisdiction can be attributed also to arbitration, in the execution of contracts

Administrative intrinsic nature of public acquisition contract is enshrined in the express provisions of GEO no. 34/2006, in accordance with the provisions of Law no. 554/2004, according to which litigations resulting from the execution of such contracts shall be decided by the administrative

[1] Senior Lecturer, PhD, Faculty of Law, "Danubius" University of Galati, Romania, Address: 3 Galati Blvd, 800654 Galati, Romania. Tel.: +40.372.361.102, fax: 40.372.361.290, Corresponding author: ginagoga@univ-danubius.ro.

contentious court that are materially competent to judge, given that the parties have not expressly stated, through an arbitration clause, that the dispute is assigned to the jurisdiction of arbitration. Thus, public acquisition contract is classified as being assimilated administrative act and not commercial contract.

Through the modifications made, it was so expressly stated that the courts competent to settle litigations that will arise both within the procedure for awarding Public acquisition contract, and in eventual litigations that will arise between contracting authorities and beneficiaries of acquisition contracts regarding their termination, are the administrative courts, excluding the jurisdiction of common law courts.

In our opinion, the provisions cited in the last sentence, start from the premise of existence into being of a public acquisition contract and do not refer to the previous stage of its award. In other words, these regulations relate to litigations arose after the time of the agreement of the parties contracting on perfecting the contract, implying that the award stage was initiated and completed successfully thus exceed the framework of GEO 34/2006.

In this situation, a litigation described as administrative contentious litigation, attracts the competence to settle it in the first instance to administrative department of the court in the procedure established by Law no. 554/2004.

Indeed, arbitration is an exception from the principle that justice is done through the courts and represents that legal mechanism effectively designed to ensure an impartial judgment, quicker and less formal, confidential, completed by enforceable resolutions (Decision of Constitutional Court no. 8 of 9 January 2007, published in the Official Gazette of Romania, Part I, no. 73 dated 31 January 2007).

However, if we consider the provisions of Law no. 24/2000 on legislative technique rules for drafting laws, the legislature in the manner in which has regulated the litigations settlement provisions, intended to regulate only the procedure for Solving Complaints arising in the award phase.

So the legislature intended to confer a special regulation to stage of awarding public acquisition contracts, meaning that litigation concerning them are within the competence of a particular court, those of contentious administrative and resolution procedure is expressly provided, with shorter trial terms and appeals with shorter term.

The motivation envisaged by the legislator was that of the legal relationship born out of these contracts and their impact on the public interest, which is required to be favored.

However, If the legislator had in mind to protect also the execution phase of public acquisition contract, it would have been regulated in the content of the Ordinance, starting from the title, purpose, principles, rule of provision in accordance with Law no. 24/2000, which can be considered in the exercise of constitutional review, by reference to the provisions of art. 1 par. (5) of the Constitution. In this respect it is the Constitutional Court jurisprudence, for example, Decision No. 26 of 18 January 2012, published in the Official Gazette of Romania, Part I, no. 116 of 15 February 2012, where Court ruled that norms of legislative technique have not a constitutional value, but by their regulation the legislator imposed a series of binding criteria for the adoption of any legislation, whose compliance is necessary to ensure systematization, uniformity and coordination of the laws, and the content and appropriate legal form to every normative act. Therefore, respecting those rules contributes to ensure a legislation which complies with the principle of legal relations security, having necessary clarity and predictability. In this sense is stated also in the jurisprudence of European Court of Human Rights concerning the availability and predictability of law.

So, we consider that contested provisions infringe the principle of predictability, as they are not clear because from the way of regulation of the two articles, and thus the analysis of the entire chapter entitled "resolving complaints" (Chapter IX of the GEO 34/2006), in conjunction with the title of the ordinance respectively with the provisions on the purpose and principles of the adoption of GEO 34/2006, it appears that it refers only to a procedure for resolving litigations arising in the stage of award of public acquisition contracts, public works concession contracts and service concession contracts.

According to art. 8 paragraph. (4) first sentence of Law no. 24/2000 on legislative technique rules for drafting normative documents, republished in the Official Gazette of Romania, Part I, no. 260 of 21 April 2010 "legislative text should be made clear, fluent and understandable, without syntactical difficulties and obscure or ambiguous passages", and according to art. 36 para. (1) of the same law, "legislative acts must be written in a legal language and style normatively specific, concise, sober, clear and precise which would exclude any ambiguity in strict compliance with the rules of grammar and spelling".

So from the title, but also from the purpose and principles set out in art. 1 Section 1, Chapter 1 of the Emergency Ordinance no. 34/2006 regarding the awarding of public acquisition contracts, public works concession contracts and service concession contracts, it appears that "this emergency ordinance regulates the legal regime of the public acquisition contract, the public works concession contract and service concession contract, contract awarding procedures and ways of solving the appeals submitted against documents issued in connection with these proceedings".

Further it is defined the purpose of adopting the ordinance and principles of public acquisition contract award, through regulates rules both texts referring to the awarding procedure.

According to Art. 2 par. 1 the purpose of this emergency ordinance is to promote competition between suppliers; guarantee equal treatment and non-discrimination of economic operators; ensure transparency and integrity of the public acquisition process; ensure efficient use of public funds by applying the procedures of award by the contracting authorities.

The principles underlying the public acquisition contract award are: non-discrimination; equal treatment; mutual recognition; transparency; proportionality; efficiency of use of funds; accountability.

Moreover, in the final part of the text of the Ordinance is clearly stressed that the Emergency Ordinance no. 34/2006 transposes certain European directives aiming only the award stage: "this emergency ordinance transposes Directive no. 2004/18 / EC on the coordination of awarding procedures of contracts for works, supplies and services, Directive no. 2004/17 / EC on the coordination of acquisition procedures applied by entities operating in the water, energy, transport and postal services sectors, published in the Official Journal of the European Union (OJEU) no. L134 of 30 April 2004, except art. 41 (3), art. 49 (3) - (5) and art. 53, which are transposed by Government Decision, Directive 1989/665 / EEC on the coordination of laws, regulations and administrative provisions relating to the application of review procedures concerning the award of supply contracts and public works contracts, published in the Official Journal of the European Communities (OJEC) no. L395 of December 30, 1989, and Directive 1992/13 / EEC on the coordination of laws, regulations and administrative provisions relating to the application of Community rules for the acquisition procedures of entities operating in the water, energy, transport and telecommunications sectors, published in the Official Journal of the European Communities (OJEC) no. L76 of 23 March 1992 except art. 9-11 which transpose by Government Decision".

CHAPTER IX entitled Settlement of complaints regulate entirely the procedure for resolving complaints namely litigations in front of the CNSC or the courts, correctly aiming the award stage. Any other litigations arising between the parties that exceed the award framework of contracts will be settled under the Law 554/2004.

In conclusion, looking from this perspective, we consider that the text contained in the art. 286 of GEO 34/2006, par. 1 sentence II, cannot target the contract execution. So, in the litigations arising in connection with the execution of the mentioned contracts against acts issued in connection with these procedures, they can be resolved only under the Law 554/2004 on administrative contentious.

For the reasons outlined in the contents of above reasons, we consider that the provisions of art. 286, par. 1 sentence II and 288¹ Government Emergency Ordinance no. 34/2006 on the award of public acquisition contracts, public works concession contracts and service concession contracts, are required to be reviewed by an emergency ordinance.

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