

The Impact of Government Ordinance no. 15/2021 on the Modification of Public Procurement Contracts and Sector Contracts

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ABSTRACT

At the end of August 2021 Government Ordinance no. 15/2021 was adopted, which provides the updating of the contract prices resulting from the carrying out of public works financed from the state budget or local budgets. The adoption of this ordinance is a result of the excessive increase of the material prices this year, if we come down to raw materials like wood or ferrous products. In the absence of the possibility of adjusting the contract price, manufacturers would have to abandon the execution of the contract, which would have caused annulment of contracts and blocking many public investments.

Government Ordinance no. 15/2021 therefore takes into account with priority the objectives/investment projects financed by the state budget or local budgets, the adjustment being applied to public/sector procurement work contracts in progress at the date of entry into force of this ordinance or those contracts for which the granting procedures are in progress on the date of its entry into force. The impact of Government Ordinance no. 15/2021 is also extended to the irredeemable external financing programs granted by the European Union, the managing authorities are forced to adopt, if necessary, regulations to implement this ordinance within 15 days after the enforcement of the ordinance, according to the rules specific to the irredeemable external financing programs.

In this context, the study aims to analyze both the impact of Government Ordinance no. 15/2021 and the problems related to its application, the results of the research leading, hopefully, to the clarification, at least in part, of the issues raised.

KEYWORDS: *public procurement work contracts, sectoral works contracts, public investments, the adjustment of the contract price.*

1. Introduction

The context of the adoption of Government Ordinance no. 15/2021. Field of applicability

At the end of August 2021 Government Ordinance no. 15/2021¹ was published, having as an object of regulation the price fitting of the sectoral works contracts for the financed investments objectives/projects, totally or partially, from the public funds provided by art. 1 alin. (2) from Law

¹Government Ordinance no. 15/2021 regarding the regulation of certain fiscal measures, published in Official Monitor no.833 from 31 August 2021.



no. 500/2002², and, respectively, art. 1 alin. (2) from Law no. 273/2006³. Government Ordinance no. 15/2021 deals with the sectoral works contracts defined in art. 3 para. (1) letter m) from the law no. 98/2016⁴, art. 3 para. (1) letter l) from Law no. 99/2016⁵, respectively art. 3 point 13 from Government Emergency Ordinance no. 114/2011, endorsed with amendments and completions through Law no. 195/2012⁶, of which price is adjusting, in the ordinance conditions, through the updating of the related materials, with the application of an adjustment coefficient, to take into account any rise or reduction of the material costs on which the contracts price was based.

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The adoption of this Act is a result of the excessive rise in 2021 of the prices of materials, given the background of the Covid-19 pandemic⁷, if we come down to raw materials as the wood

²Law no. 15/2021 regarding public finances, published in the Official Monitor no.597 from 13 August 2002, with the subsequent alterations and completions; public funds provided at art. 1 alin. (2) from this law are those ones related to the elaboration, approval, execution and reporting: a) state budget; b) the state social insurance budget; c) special funds budgets; d) the state treasury budget; e) public autonomy institutions budgets; f) public institutions budgets fully or partially funded from the state budget, the social estate insurance budget and special funds budgets, after the case; g) public institutions budgets fully funded from personal incomes; h) funds budget provided from external contracted credits of whose refunds, interests rate and costs are ensured from public funds; i) irredeemable external funds budget.

³Law no. 273/2006 regarding the local public finances, published in Official Monitor no. 618 from 18 July 2006, with the subsequent alterations and completions; public funds provided at art. 1 alin. (2) from this law are those ones related to the elaboration, approval and reporting: a) local budgets of the villages, cities, municipalities, Bucharest's sectors and Bucharest; b) public institutions budgets fully or partially funded from the state budget, the social estate insurance budget and special funds budgets, after the case; c) public institutions budgets fully funded from personal incomes; d) extern and intern loans budget, for which refund, the interests, commissions, test cases payment are ensured from the local budgets and which come from: external state contracted loans and lending to public local administration or to the economical agents and public services under their subordination; contracted loans by the public authorities administration and guaranteed by the state; external/ internal loans contracted and guaranteed by the local public authorities administration; e) irredeemable external budget funds.

⁴Law of public procurement no. 98/2016, published in the Official Monitor no. 390 from 23 May 2016, with subsequent alterations and completions; at art. 3 alin. (1) letter m) from this law is defined the public procurement work contract as being the public procurement contract which has as an object: or exclusively the execution, or both design and works execution in connection with one of the provided activities from appendix no. 1 to this law; or exclusively the execution, both design and construction execution; or the accomplishment, through any kinds of resources, of a construction that meets the established requirements of the contracting authority that exercises a determining influence on the construction's type or design.

⁵Law no. 99/2016 regarding sector procurements, published in Official Monitor no. 391 from 23 May 2016, with the subsequent alterations and completions; at art. 3 alin. (1) letter l) from this law is defined the sector works contract as being the sector acquisition contract that has as an object: (i) or exclusively the execution, or both design and works execution in connection with one of the provided activities from appendix no. 1 to this law; (ii) or exclusively the execution, both design and construction execution; (iii) the accomplishment, through any kinds of resources, of a construction that meets the established requirements of the contracting entity that exercises a determining influence on the construction's type or design.

⁶Government Emergency Ordinance no. 114/2011 regarding assigning certain public acquisition contracts in the defense and security fields, published in the Official Monitor no. 932 from 29 December 2011, approved with alterations and completions through Law no. 195/2012, published in the Official Monitor no. 753 from 8 November 2012, with subsequent alterations and completions.

⁷For detalies about application of public procurement rules during the COVID-19 crisis, see SIGMA, *Application*

and ferrous products. Without the possibility of adjusting the contract price, the constructors would be obliged to give up carrying out the works, which would have led to the termination of the contract blocking many public investments.

The provisions of this ordinance apply to: sectoral works contracts ongoing at the date of entry into force; sectoral works contracts for which the granting procedures are in progress on the date of its entry into force, while at the end of the granting process, the contracts must include the price adjustment clause.

In what regards the public procurement contracts/sectorial contracts ongoing at the date of entry into force, the adjustment price applies to contracts: a) ended before the entry into force of Law no. 98/2016, respectively Law no. 99/2016 defined due to public procurement legislation ongoing at the closing date; b) closed after the date of entering into force of Law no. 98/2016, respectively of the Law no. 99/2016, no matter the execution time of these and in which there are no price adjustment clauses, due to the provisions of art. 236 of Law no. 99/2016, with subsequent amendments and completions; c) closed under the provisions O.U.G. no. 114/2011, approved with amendments and completions through Law no. 195/2012, no matter the execution time of these.

Therefore, Government Ordinance no. 15/2021 has as a priority the investments objectives/projects funded from the state budget or the local budget, the fitting price related to the materials applying to sectoral works contracts ongoing at the date of entry into force of this ordinance or those contracts for which the granting process is ongoing at its entry into force. The impact of Government Ordinance no. 15/2021 extends to irredeemable external finance programs granted by the European Union, the responsible management authorities having the obligation to proceed, within 15 days from the ordinance's entry into force, to drafting regulations for its implementation, according to the specific rules of the irredeemable external finance programs.

The adoption in emergency mode of this ordinance simultaneously with the short terms provided for its implementation, have generated application problems.

2. Legal framework of the alteration of sectoral works contracts resulting from Government Ordinance no. 15/2021 application

Art. 2 para. (9) from Government Ordinance no. 15/2021 provides that the modifications of the public procurement contracts/sector procurement contracts, resulted as a consequence of this ordinance application, fits situation provided by art. 221 para. (1) letter e) from Law no. 98/2016, respectively by art. 240 para. (2) from Law no. 99/2016.

In the hypothesis provided by art. 221 para. (1) letter e) from Law no. 98/2016, the public procurement contracts may be modified, without organizing a new assignment procedure, when the modification, no matter the value, is not substantial, similar stipulations being contained in art. 240 para. (2) from Law no. 99/2016.

of public procurement rules during the COVID-19 crisis from the perspective of the European Union's Procurement Directives and the Government Procurement Agreement, 8 April 2020, available at <http://www.sigmaweb.org/publications/Public-procurement-COVID-19-crisis-SIGMA-April-2020.pdf>

Romania fully transposed the Directive 2014/24/EU on public procurement, that clarifies cases where public contracts can be modified without the need for a new procurement procedure. The Directive aims to make the process of awarding public contracts more efficient and flexible. In general, modifications to the awarded contracts are possible, however within the strict boundaries specified in the Directive⁸.

On price adjustment on the basis of art. 221 para. (1) e) from Law no. 98/2016, in its explanations The National Agency for Public Procurement⁹ has shown that, as art. 164 para. (4) from Government Decision no. 395/2016¹⁰ provides, “under the conditions of art. 221 para. (1) e) from the Law, price adjustment, without the conditions provided by para. (2) and (3) being fulfilled, is directly applicable in the case of legislation alterations taking place or that have been issued by the local authorities’ administrative documents that have as an object the establishment, the alteration and the dropping of certain taxes/ local taxes, whose effect is reflected in the costs increase/ decrease on which the contract’s price was based”. Also, besides these direct applicability situations, in the same explanations The National Agency for Public Procurement appreciates that the contract’s price adjustment is possible even in the case in which the contracting authority demonstrates the fulfillment of the conditions provided by art. 221 para. (1) e) and para. 7 from Law no. 98/2016, respectively: - the contract or the framework agreement don’t present characteristics that substantially differ from the ones of the initial document; - no conditions are introduced, which if they had been included in the initial assignment procedure, would have permitted the selection of other candidates than the ones initially selected or the acceptance of another offer than the initial accepted or would have attracted other participants to the assignment procedure; - it doesn’t change the economic balance of the public procurement contract/framework agreement in the contractor’s favour in a way which wasn’t provided in the public procurement contract/ framework agreement; it doesn’t replace the initial contractor with a new contractor, in other cases than the ones provided by art. 221 para. (1) d)¹¹. Furthermore, The National Agency for Public Procurement underlines that “fitting in one of the situations in which the price of a public procurement contract/ framework agreement may be adjusted remains with the contracting authority, this one being the only one able to establish the nature’s adjustment and the situation in which this may be accomplished, with the compliance with applicable legal provisions, whereas the analysis and evaluation process presupposes taking into consideration the whole information/ documents that totally describe the situation, and the decision-making responsibility remains in the competence of the designated people in this sense. Therefore, in the view of taking a right and fundamental decision on framing one of the adjustment situations of the contract price/framework

⁸For details, see Olivera, R. O., *Modification of Public Contracts*, in *European Procurement & Public Private Partnership Law Review*, Vol. 10, No. 1 (2015), pp. 35-49; Vrâncianu, A., *The modification of a public procurement contract under the new european directives on public procurement*, in *Perspectives of Law and Public Administration*, Societatea de Stiinte Juridice si Administrative (Society of Juridical and Administrative Sciences), vol. 3(1), 2014, pp. 161-163.

⁹The National Agency for Public Procurement, Clarifications on the way of adjusting contract works prices, as a result of the materials rising prices, published on 11 August 2021 on <http://anap.gov.ro>

¹⁰Government Decision no 395/2016, published in the Official Monitor no.423 from 06 June 2016.

¹¹The National Agency for Public Procurement, Clarifications..., published at 11 August 2021 on <http://anap.gov.ro>

agreement, the contracting authority must analyze and check fulfillment of all the conditions that arise from the legal stipulations given above, in the information available regarding the actual and the right situation in connection with the contract's/ framework agreement development"¹².

The National Agency for Public Procurement states that "in the situation in which the contracting authority establishes the legal stipulations for contract price adjusting"¹³, the adjusting will be implemented through the written parties' agreement, expressed through one of the modalities provided by art. 1 para. (8) and (9) from the The National Agency for Public Procurement President's Instruction no. 1/2021¹⁴, which means that, in all cases where an extra budget commitment is necessary, any raise of a contract's value must be recorded through an additional act.

Therefore, we notice that, in the interpretation given by The National Agency for Public Procurement¹⁵ stipulations art. 221 para. (1) e) from Law no. 98/2016, the adjusting of the public procurement contract compels the contracting authority to a prior analysis and checking of all legal conditions fulfillment for this purpose. The finalization of the steps for establishing the modification of the contract by the agreement of the parties can be achieved only in the situation when the contracting authority finds the fulfillment of the requirements provided by law for the adjustment of its price.

3.Fitting of the contract price according to Government Ordinance no. 15/2021- "framing" in the situations provided by Law no. 98/2016 and Law no. 99/2016 or changing of paradigm?

Art. 2 para. (11) from Government Ordinance no. 15/2021 provides that: "Contracting authorities/Entities that have registered the applications provided by para. (10), within the deadline, are compelled to initiate the legal steps for price fitting of the public procurement contract/sectorial procurement contracts, with additional documents to these". The norm analysis contained in this provision of the ordinance, together with other stipulations of the ordinance that we will refer to, questions several aspects, that we will try to highlight in the present approach.

¹²*Ibidem.*

¹³*Ibidem.*

¹⁴The National Agency for Public Procurement, Instructions no. 1/2021 regarding the modification of public procurement contract/sectorial contract/framework agreement contract, published in the Official Monitor no. 56 from 19 January 2021; for details about modification of public procurement contract, see Trăilescu, A., *Modificarea contractelor de achiziții publice*, in Cătană, E.L. (coord.), 2020, *Achizițiile publice între norme și practici. Context national și european*, Bucharest, Romania: C.H.Beck Publishing House, pp.11-20.

¹⁵In this context we mention that, the main The National Agency for Public Procurement's objectives are the development, promotion and policy implementation in the public procurement domain, the establishment and implementation of the checking and control system of the unitary application of the legal and procedural dispositions, also the efficient official monitoring of the public acquisition system – art. 2 from Government Emergency Ordinance no. 13/2015 regarding the foundation, organizing and functioning of the National Agency for Public Procurement, published in the Official Monitor no. 362 from 26 May 2015, approved through Law no. 244/2015, with further additions.

Firstly, at a simple scrolling through the text, we notice that art. 2 para. (11) from Government Ordinance no. 15/2021 contains an imperative norm, respectively the contracting authorities/ entities that have registered applications from the contractors, in the term provided by the ordinance, “are compelled to initiate the legal steps for price fitting of the sectoral works contracts, with additional documents to these”. But the conclusion of additional documents being an obligation of the contracting authority due to art. 2 para. (11), it is questionable if this provision is consistent with the one from art. 2 alin. (9) from this normative act, according to which the alterations of the sectoral works contracts, resulted as enforcement of this ordinance, fits in the situation provided by art. 221 para. (1) e) from Law no. 98/2016, respectively art. 240 para. (2) from Law no. 99/2016. Regarding the provisions of Law no. 98/2016 and Law no. 99/2016 to which reference is made, as we detailed at the previous section from the survey, through the perspective of the legal text respectively considering the The National Agency for Public Procurement instructions and explanations, the conclusion of the additional documents to the contracts for contracts price adjustment under the two laws is not an obligation of the contracting authority but presupposes, previously to additional acts’ conclusion, an analysis and an inspection of the contracting authority of the fulfilment of all legal conditions for this purpose and the conclusion of the additional act only if this establishes meeting the requirements provided by the law for contracts price adjustment.

Therefore, we conclude in the sense that art. 2 para. (11) from Government Ordinance no. 15/2021 contains a derogating norm from the conclusion of the additional act alteration of the public procurement contracts non-obligation rule, the conclusion of the additional act being mandatory in the particular hypothesis of the public procurement contracts/sectorial contracts alteration for price fitting, under the conditions of this ordinance.

An imperative norm similar to the one from art. 2 para. (11), except that it refers to the public procurement contracts/sector contracts for which the assignment procedures are in progress on the date of its entry into force, is that from art. 6 from Government Ordinance no. 15/2021, according to which the contracting authorities/ entities are bound to introduce price adjustment clauses in all assignment documents initiated after the effective date of this ordinance, that have as an object public procurement contracts/sector contracts which take place in a period of time exceeding 6 months. Even more, art. 7 provides that the ordinance applies as well to sectoral works contracts for which the assignment procedures are in progress on the date of its entry into force, no matter the stage of the assignment procedure, and, after the completion of these procedures, sectoral works contracts that will be concluded, will include, mandatorily, the price adjustment clause established according to the ordinance stipulations.

Secondly, on the background of the imperative norms analyzed above, the question is if and under what conditions the contracting authority can achieve, in the Government Ordinance no. 15/2021 application, taking into account the whole information/documents which totally describe the situation, in order to make a correct and grounded decision regarding the falling into one of the adjustment situations of the sectoral works contracts price, mandatory requirement to be met due to The National Agency for Public Procurement explanations stated in the section 2 of this survey. Under this aspect, art. 2 para. (10) from Government Ordinance no. 15/2021 provides that, within

15 days from the date of entry into force of this ordinance, the contractors can transmit to the contracting authorities/ entities a notice by which they request: both adjusting the value of expenses with the materials for the remaining part to be executed, existing on the date of its entry into force, for all the public procurement contracts/sector contracts to which they are a party, through using a detailed formula in para. (6) and (7) of the same article, and of the other stipulations from the present ordinance, and also concluding additional documents to contracts within the term and with the provided content from para. (12). Para. (11) of art. 2 provides that the contracting authorities/ entities that have registered the provided applications from para. (10), within the term mentioned in it are obliged to initiate the legal steps for price fitting of the public/sector procurement work contracts, with additional documents to these. It is also provided by para. (12) of the same article that additional documents end within a maximum of 15 days from the expiry of the time limit of 15 days from the date of entry into force of this ordinance stipulated by para. (10). The conclusion is drawn that *the contracting authority is bound to conclude the additional act to the contract in all the situations when it has registered the contractor's address through which requires the contract's price adjustment and the conclusion of the additional act, to which attaches the calculation mode of the material expenses by applying an ordinance formula, the only condition being that the request address to be registered at the contracting authority within 15 days from the date of entry into force of the ordinance.* Therefore, the ordinance doesn't provide procedural requirements of prior verification by the contracting authority of the documentation on the calculation method of the material expenses attached to the request address of the contract's price fitting by the contractor, and even if this inspection is made, it becomes an approach without finality in the apotheosis of a miscalculation and it is not remedied by the contractor within 15 days term made available by the ordinance, in the conditions that the contracting authority is required to conclude the additional act.

Moreover, art. 3 para. (3) from Government Ordinance no. 15/2021 states the obligation for beneficiaries of national programmes, those being the contracting authorities in order to apply its provisions, to submit within 15 days from the additional act, a requirement including the necessary estimated amounts for adjusting the price of the public procurement contracts/sectorial procurement contracts, spaced out by years, until the objective/ investment project completion, that must be in accordance to the financing schedule, on sources and years, correlated with the execution schedule related to it, due to the provisions of Law no. 273/2006. This requirement must be drafted according to the legal regulations specific to each national program, accompanied by the following documents: a) the additional act to the contract, in authenticated copy for the original conformity; b) an explanatory note showing the value of the executed works and the estimated value of the works related to the remainder to be executed. Also, within 45 days from the expiry of the time limit provided by para. (3) of art. 3, with the condition of credit engagement allocation and of budgetary credits in the budgets of the main authorizing officers, additional acts are concluded together with the financing contracts between the main authorizing officers that handle the national programs and the beneficiaries. In the situation in which the beneficiary does not submit the transfer request, followed by the documents provided by art. 3 para. (3), within the time limit, the necessary sums for adjusting the prices of public/ sector procurement work contracts is

borne by the beneficiaries [art. 3 alin. (6)]. So, we notice that *the contracting authority has not only the obligation of concluding the additional act at the public procurement contracts/sector procurement contracts, but also the obligation to request, in the express terms of the ordinance, the estimated amounts for price fitting of public procurement contracts/sector procurement contracts, which must be attached both to the additional act to the contract and a supporting note from which shows the value of the executed works and the estimated value of the works related to the remainder to be executed, under the sanction of bearing these sums from the beneficiary budget program (the contracting authority).*

On the other hand, the application of the provisions Government Ordinance no.15/2021 raised discussions, once made public by the Agency for Rural Investment Finance (A.F.I.R.), a subordinated institution to the Agricultural and Rural Development Minister, having as an attribution the technical and financial implementation of the National Rural Development Program 2014-2020 (PNDR 2020)¹⁶, through the press release from 11 October 2021¹⁷ which shows the following: *"The supplementary costs generated by the price's adjustment do not make the object of the funding eligible funds FEADR, but **are supported from the own funds of the beneficiaries and will be highlighted on ineligibility, on the budget line actualizations from the indicative budget. We mention that the total eligible value of the project that makes the object of the irredeemable financing remains unchanged"**, which means that, contrary to the stipulations of Government Ordinance no. 15/2021, in the case of the contracts financed through PNDR 2020 the amounts related to the contracts price adjustment are ineligible and are supported from the beneficiary budget program, so by the contracting authority.*

Moreover, considering the stipulations of art. 5 from Government Ordinance no. 15/2021¹⁸, Ministry of Development, Public Works and Administration has emitted, as managing authority, **Order no. 1336/2021** through which he has approved the methodology for the implementation of Government Ordinance no. 15/2021 on the regulation of certain fiscal-budget measures through price fitting related to construction materials for the public/sector procurement contract works financed through the Regional Operational Program 2014-2020¹⁹ (POR 2014-2020). This ordinance provides an adjustment formula for the contracts price that benefits from irredeemable financing through POR 2014-2020, different from the detailed formula in para. (6) and (7) of art.

¹⁶Source: <https://www.afir.info>; for a doctrinal analysis of A.F.I.R.'s duties, see Cătană, M.C., Kovács, D., *Deblocarea investițiilor derulate prin Programul Național de Dezvoltare Rurală. Plata directă către subcontractanți*, în Cătană, E.L. (coord.), 2020, *Achizițiile publice între norme și practici. Context național și european*, Bucharest, Romania: C.H. Beck Publishing House, pp.240-241.

¹⁷Source: https://portal.afir.info/uploads/CdeP_2021

¹⁸Within 15 days from the entry into force of the present ordinance, the responsible management authorities for the management and implementation of the irredeemable financial assistance granted to European Union will proceed, after case, to drafting regulations for applying the present ordinance, due to specific programs with irredeemable external financing.

¹⁹The Development, Public Works and Administration Minister Order no. 1336/21.09.2021 for approving the methodology for implementation Government Ordinance no. 15/2021 on the regulation of certain fiscal-budget measures through price fitting related to construction materials for the public/sector procurement contract works financed through the Regional Operational Program 2014-2020, published on www.inforegio.ro

2 from Government Ordinance no. 15/2021, that must be used to adjust the expenses value with the materials for the remaining part of the contract to be executed. We, therefore, deduce that the Minister of Development, Public Works and Administration, ignoring the provisions from art. 5 Government Ordinance no. 15/2021 whose initiator he is, that compels the management authorities to elaborate regulations for implementing the ordinance, in reality has modified the ordinance and established a new fitting formula of the contract price in the case of financed contracts from irredeemable external contracts through POR 2014-2020, which put in an even bigger difficulty the application of ordinance, having in mind that both calculation formulae of the contract's fitting price are exclusively technical and require both specialty knowledge and calculation and checking time.

In conclusion, we consider that in applying Government Ordinance no. 15/2021 the contracting authorities cannot carry out an analysis and evaluation process, taking into consideration the whole information/ documents ensemble that describe the situation respectively the balance between the public interest and the private interest²⁰, in order to make a correct grounded decision on framing one of the fitting price situations of the public/sector procurement contract works, mandatory requirement to be respected according to the explanations The National Agency for Public Procurement regarding the modality of fitting prices of the contract works, as a result of the rising material prices²¹. By the way, shortly after the entry into force of Government Ordinance no. 15/2021, on the website of The National Agency for Public Procurement a Notification²² was published that shows the following: *"We mention that the interpretation of the application of the provisions of Government Ordinance no. 15/2021 on the regulation of certain fiscal-budget measures is made by the Development, Public Works and Administration Minister, the initiator of this normative act. Thus, all requirements of methodologic conciliation that have as an object the ordinance provisions under discussion are transmitted to the initiator."* Hence The National Agency for Public Procurement doesn't assume adopting this normative act, and consequently, neither the interpretation of the provisions of the Government Ordinance no. 15/2021.

4. Conclusions. The remediation of the application problems of Government Ordinance no. 15/2021: are there solutions?

From the point of view of the specialty direction from the Ministry of Development, Public Works and Administration regarding the application of the provisions Government Ordinance no. 15/2021, made public on the site of this Ministry, point of view, which, in our opinion, doesn't clarify at least the issues raised in the present survey, the following opinion has drawn our

²⁰About the balance between the public interest and the private interest, see Guézou, O., 2018, *Traité de contentieux de la commande publique*, 2 édition, Paris, France: Editions du Moniteur Publishing House, Antony, p.29.

²¹National Agency for Public Procurement, Clarifications..., published on 11 August 2021 on <https://anap.gov.ro>

²²The National Agency for Public Procurement, *Notification regarding the Government Ordinance no. 15/2021 on the regulation of certain fiscal-budget measures*, published on 10 September 2021 on the site www.anap.ro, link <http://anap.gov.ro/web>

attention: “*The right isn’t born under the law, but under the additional act through which the legal relationship between the parties was modified due to this.*”²³ We observe, therefore, that in the opinion of the specialty direction from the ministry which initiated Government Ordinance no. 15/2021 – but also the management authority on irredeemable funds, as we showed in the previous sections – the contractor’s right to price fitting of public procurement contracts/sector contracts is born once with the concluding of the additional act to the contract, imposed by Government Ordinance no. 15/2021. In the conditions of the application of Government Ordinance no. 15/2021, we appreciate that a possible solution consists in the concluding of the additional act, distinctive from the imposed clauses stipulated by art. 2 para. (2) of the ordinance²⁴, of some clauses according to which the responsibility for justifying the payment request regarding the rest to be executed at the date of the conclusion of the additional act, due to the centralizer of compulsory payment situations to be approved by the contracting authority/ entity, belongs exclusively to the executor.

Also, for the financed objectives/ investment projects through national programs on financing contracts, the additional act to the public procurement contracts/sector procurement contracts, we consider they should contain a suspension clause, due to which the provisions of the additional act enter into applicability under the conditions of the identification of commitment appropriations and budgetary appropriations by the main authorizing officers, in the terms and in the stipulated conditions in art. 3 and 4 from Government Ordinance no. 15/2021.

Not lastly, in supporting the application problems of Government Ordinance no. 15/2021, we consider that the Ministry of Development, Public Works and Administration, on the 24th of September 2021 submitted for public debate the project of an emergency ordinance for the modification and completion of Government Ordinance no. 15/2021, therefore, at three weeks of its entry into force, is illustrative for the matter. This emergency ordinance project, inasmuch as it will be adopted in the proposed form, comes to remedy one of the mentioned problems, support from the state budget (and not from the programs beneficiary budgets, as the ordinance stipulates), through the budgets of the main authorizing management officers and national authorities, if it’s the case, which carry out European financing programs, of supplementary necessary sums for adjusting the sectoral works contracts, as a result of concluding additional acts provided by art. 2 para. (12), exclusively for those irredeemable expenses through programs. Due to the substantiation note to the emergency ordinance project of modification of Government Ordinance no. 15/2021, the initiator took into consideration that “*The beneficiaries of the European financing*

²³To see, Development, Public Works and Administration Minister, *Point of view of the specialty direction from the Development, Public Works and Administration Minister on the provisions application of Government Ordinance no. 15/2021 on the regulation of certain fiscal-budget measures*, published on <https://www.mdpla.ro/uploads/articole/attachments.pdf>

²⁴In this way, at art. 2 alin. (2) from O.G. no. 15/2021 the additional acts predict, compulsory the rest remaining to be executed on the date of the additional document conclusion, determined quantitative and valuable, established on the centralized base authorized by the contracting authority/ entity including work situations made by the time of the additional act conclusion, learned by the executant and the site master, the share of material expenses, determined depending on the constructions type and on the general construction works which constitutes the contracts’ object due to art. 2 alin. (3) stipulations, provided formula at alin. (6), which will be used for adjusting the price for the remainder to be executed and the coefficient provided at alin. (7), that is being used within the formula.

projects transmit notifications to the attention of the management authorities providing the impossibility of continuing the projects through the application of the stipulations of Government Ordinance no. 15/2021, in the conditions that the pression on the local budgets for supporting these investments is very big.”

Problems still remain with respect to Government Ordinance no. 15/2021, apparently with no application solution. We refer, for example, to the obligation provided by art. 7 para. (1) and (2), of introducing the clause on price adjustment of the public procurement contracts/sector contracts for which the attribution procedures were under development at the date of entry into force, no matter the state of the conducting of the procedure, the contracts remaining to include, mandatorily, the clause adjusting the price established within the ordinance stipulations. In these situations, the attribution documentation includes a contract works proposal, assumed by bidders in the auction, that doesn't contain the price adjusting clause under Government Ordinance no. 15/2021, the attribution procedure being in progress at the date of entry into force of the ordinance. We consider that these provisions of the ordinance raise the question of the application of some fundamental principles in the matter of attribution of public procurement contracts/sector contracts, such as transparency and non-discrimination, established principles in the European directives regarding the public procurement, the case-law of Court of Justice of the European Union²⁵, Laws no. 98/2016 and 99/2016, the ordinance imposing the introduction of this clause inclusively if the evaluation stage has ended, respectively in the stage of signing the contract stage with the offeror declared winner. According to the doctrine²⁶, a possible cancellation of this contract may involve the liability of the members of the evaluation committee, who may be sued, if the canceled contract has been the subject of an action admitted by the court (*in solidum* liability of the members of the evaluation committee).

²⁵The Court has provided intellectual assistance to the efforts of European institutions in order to strengthen the three principles (non-discrimination, objectivity and transparency), underlying the regulation of public procurement – see Bovis, Ch. (ed.), 2016, *Research Handbook on EU Public Procurement Law*, Edward Elgar Publishing, Introduction.

²⁶ Șerban, D.-D., 2019, *Remedii și căi de atac în domeniul achizițiilor publice. Legea nr. 101/2016-geneză, interpretare, limite, perspective*, Bucharest, Romania: Hamangiu Publishing House, p.824.



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