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Intro

- Can the New PPP Law Help Generate Private Investment in Public Projects?

Can the New PPP Law Help Generate Private Investment in Public Projects?

The end of 2010 saw the introduction of a new law to regulate public-private partnerships (PPP) in Romania.

PPP has been seen as an alternative means of financing public projects, especially in areas such as transport and public utilities, at a time when the authorities were facing a shortfall in public funding, and the lack of necessary skills and commitment formed serious obstacles to accessing EU money.

A PPP model should offer a suitable alternative not only to the traditional framework of public financing, but also to the public management of projects and, in particular, of project-related risks.

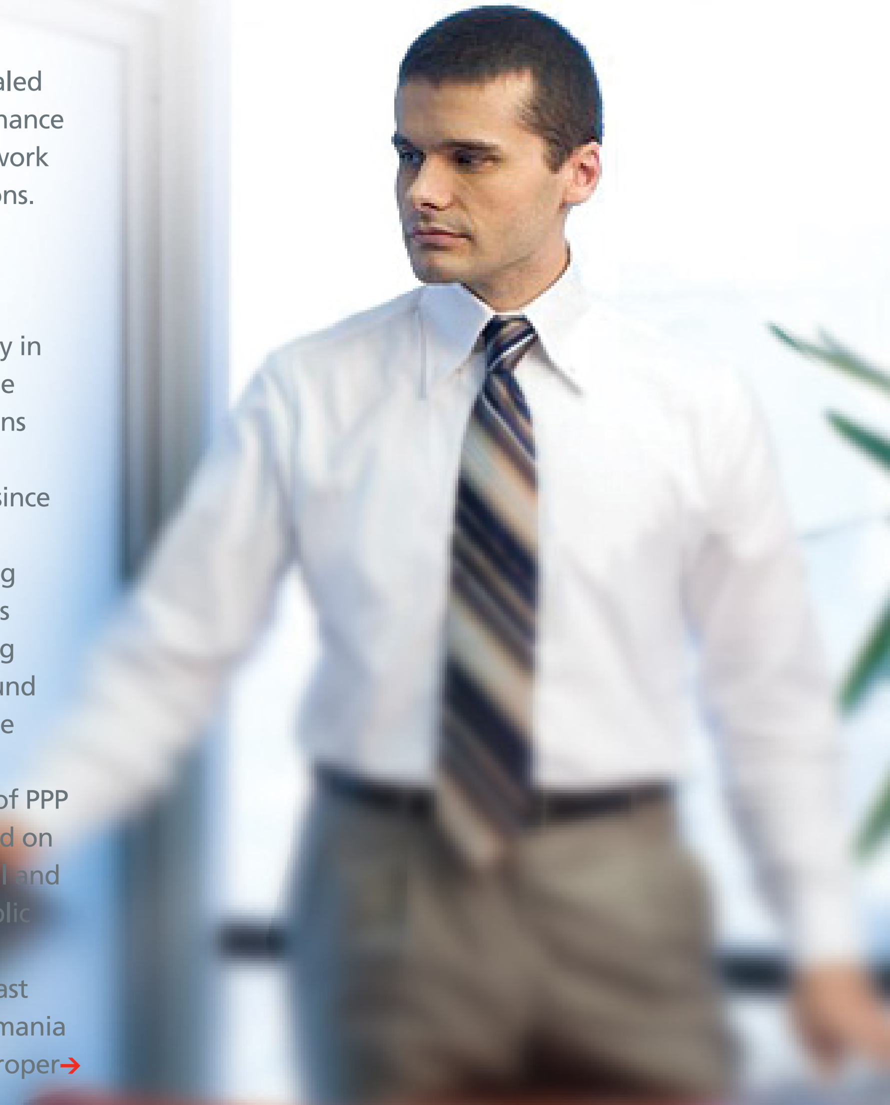
PPP has emerged as a successful strategy to finance public projects in Europe since the late 1980s and more recently in the US. PPP models have been developed to satisfy various project needs – DBO, BOT and DBOT, to name just a few.

Romania used to have a specific PPP law. In 2002 there were great expectations from the Government Ordinance No. 16, but its implementation failed, due to a lack of transparency, clarity and consistency with other legislation. Following criticism from the EU Commission, the ordinance was repealed in 2006 by Government Emergency Ordinance No. 34, which set out the general framework applicable to procurement and concessions.

Was a New PPP Law Necessary?

Historical and recent failures in the development of public projects, especially in road transport, made the calls for suitable PPP legislation more urgent. Such concerns have been heightened by the economic downturn and financial crisis, especially since the Romanian economy and availability of public finance show no signs of getting back on track anytime soon. Legislation is definitely important in all areas, including PPP. Lawmakers can set in place the ground rules that involve the private sector to the advantage of PPP and satisfy the public interest. But the actual implementation of PPP and successful project development based on PPP models depend more on political will and the administrative capabilities of the public authorities.

Unfortunately, experience over the past decade has shown that PPP failure in Romania was not primarily caused by the lack of proper→



legislation, but rather by the authorities not having the necessary experience, expertise and, sometimes, willingness to assume responsibility for handling complex arrangements such as those of a PPP project. While many have

> “ The DBOT contract signed for the Comarnic-Braşov highway is illustrative of a PPP type project developed under the concession models set forth by Government Emergency Ordinance No. 34/2006.

voiced their desire for PPP projects and various initiatives have been put in place each year, officials have not used the available legislation for the implementation of PPP projects to its best effect – and sometimes not at all.

The fact that Government Emergency Ordinance No. 34/2006 neither developed nor even defined PPP as a concept did not preclude the implementation of PPP projects. This legislation regulated concessions of public works and services, under the general procurement framework, and it could have accommodated PPP contracts relatively easily.

The DBOT contract signed for the Comarnic-Braşov highway is illustrative of a PPP type project developed under the concession models set forth by Government Emergency Ordinance No. 34/2006. The project failed, unfortunately, but due to the lack of finance and not because the legal support was not available.

Flaws in the New PPP Law

Although Law No. 178/2010 was drawn up with the specific aim of boosting private sector involvement in financing public projects and offering the public authorities funding alternatives, investors were initially cautious while legal practitioners voiced numerous objections.

To start with, it is not clear to which contracts the new law is supposed to apply. The envisaged model of relationship between public and private partners is similar to the one regulated as a concession in Government Emergency Ordinance No. 34/2010 (which is still in force). And yet at the same time Law No. 178/2010 expressly states that it shall not apply to contracts governed by Government Emergency Ordinance No. 34/2006.

Which invites the question, to which contracts does it apply?

The only substantial difference in the two pieces of legislation is the setting up of so called project companies, to be held jointly by the public and private partners. The project company is expressly regulated by Law No. 178/2010, but the establishment of such a project vehicle is not forbidden and so should be possible under Government Emergency Ordinance No. 34/2006 too.

Another key issue is the procedure by which the private investor is selected and the PPP contract awarded.

Under Law No. 178/2010, the selection procedure is largely left to the contracting authorities, as the minimum procedural terms set down are very brief. This would leave scope for the very principles of the law to be neglected, as the authorities’ commitment to transparency and fair competition when awarding public projects is usually questionable.

Consequently, the projects awarded under the new law are likely to often generate controversy.

Consequences

Law No. 178/2010 was approved in spite of criticism from the EU Commission and its first draft being rejected by the Presidency and sent back to Parliament.

Furthermore, it appears that Romania will face an infringement procedure brought by the EU Commission as a result of the flaws in this law.

Under these circumstances, is it likely that the new law will achieve its goals? Once again, the authorities will probably blame the failure of public projects on the lack of, or bad, legislation, when they should instead look at their own commitments and capabilities.

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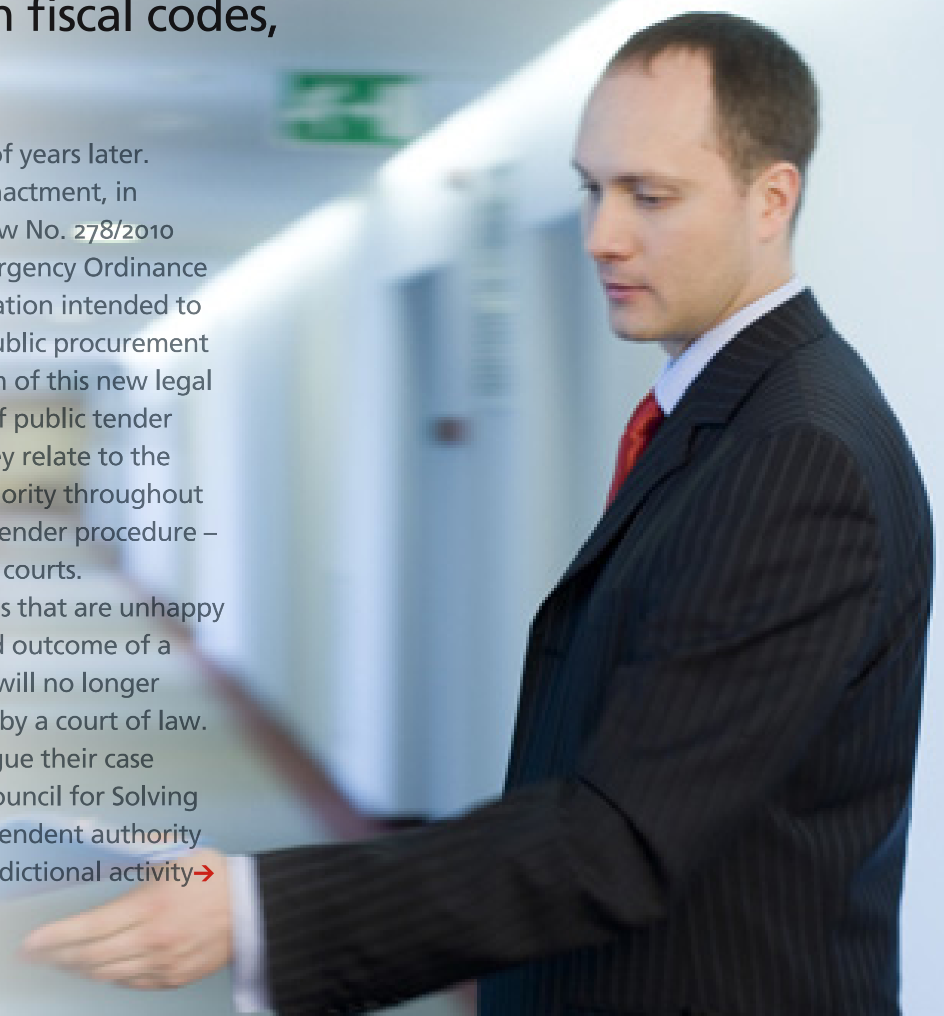
Focus

■ Public Procurement Law Reform: The Tries and Tribulations of the Romanian Public Tender Sector

Public Procurement Reform: The Tries and Tribulations of the Romanian Public Tender Sector

Experienced litigators snicker at their younger colleagues` attempts to show up in court with a printed edition of public tender legislation - much like Romanian fiscal codes, this too is dubbed a "perishable asset"



The reason for this is simple: Government Emergency Ordinance No. 34 on the awarding of public procurement, public work concession and service concession contracts has been substantially amended ten times since it was introduced in 2006. The Romanian legislator's unabated attempts to adjust the legal norms that set out tender procedures for public authorities are, sometimes, paradoxical: it is not uncommon for institutions expressly introduced through major amendments to be rendered entirely obsolete by changes brought by Parliament just a couple of years later.

> "Companies that are unhappy with the legal treatment and outcome of a public procurement process will no longer have their complaints heard by a court of law.

This is also true for the enactment, in early January this year, of Law No. 278/2010 approving Government Emergency Ordinance No. 76/2010, a piece of legislation intended to speed up the awarding of public procurement contracts. The main provision of this new legal norm takes the settlement of public tender legal complaints – where they relate to the actions of a contracting authority throughout and in connection with the tender procedure – out of the jurisdiction of the courts.

In other words, companies that are unhappy with the legal treatment and outcome of a public procurement process will no longer have their complaints heard by a court of law. Instead, they will have to argue their case solely before the National Council for Solving Complaints (NCSC), an independent authority with administrative and jurisdictional activity→

that is required to make a decision within 20 days of receiving the initial complaint.

NCSC monopoly over public tender complaints had used to be the rule until a few years ago when an amendment introduced the alternative jurisdiction of ordinary courts of law. With the Romanian legislator now deciding to return to its former stance on the subject, what is our reader to make of these legal twists and turns? And what, if any, is their impact on public procurement procedures in Romania?

To begin with, the problem that the legislator has tried to address through this amendment is truly major. Under current legislation, the announcement of a public tender is followed by a certain time interval in which companies can challenge the legality of the decision. Should such decision be contested, the public procurement procedure is suspended until judgment is passed on the complaint. Therefore, the amount of time taken to solve complaints directly affects the length of the public tender process. It is not uncommon for public contracts to be suspended for years because of stalling or deadlock in the trials deciding the legality of the decision. And, given that many public procurement contracts have a deadline to cash in European Union funds, their enforcement practically hangs on a bidder's ability to prolong litigation as much as possible.

It is also true that many bidders in public tender procedures view complaints against awards as a national sport. Such complaints are filed irrespective of having any grounds in order to serve as a bargaining chip in negotiations with hurried contracting authorities – companies then pretend they are ready to drop the complaint that caused the suspension of the procedure, should the contracting authority reconsider its legal position towards them. This phenomenon is widespread: ANRMAP, the Romanian legal watchdog for public procurement contracts, has announced a record 562 companies that have all made at least five complaints against public tender awards over 2008-2009.

What is the solution?

Law No. 278/2010 took radical action:

> “ NCSC monopoly over public tender complaints had used to be the rule until a few years ago when an amendment introduced the alternative jurisdiction of ordinary courts of law.

any complaint against the acts issued by a contracting authority throughout and in connection with the tender procedure has to be filed solely with the NCSC, which must make a ruling within 20 days. If the deadline is missed, the members of the panel are liable for administrative penalties, and can even be investigated for poor performance of their duties.

This is how the legislator ensures that procedures can be suspended for a maximum of three weeks only. Of course, the NCSC's decision can be challenged by final appeal in a court of law, but this will not prolong the suspension of the award. Indeed, this seems a practical solution, given the huge delays in awarding public procurement contracts as things stand. But is it a lawful one?

In its constant desire to help expedite the resolution of disputes that hold back the public procurement system, the Romanian legislator may have ignored one of the main rights of the parties in a court case: the fundamental right to a fair trial.

It is true that public procurement complaints are sometimes used to delay procedures; equally true it stands, however, that many disputes are purely technical in essence. Correct decisions on disputes of this sort are possible only after reading an expert's report, or hearing from an expert witness. The extremely short time frame in which the NCSC has to rule – within 20 days of being assigned the public procurement case – suggests that fully informed decisions would be difficult to reach.

Furthermore, the relevant legislation does not require that all NCSC members be law school graduates. This being the case, it is important that parties are also allowed an oral argument in support of their claims, particularly during highly complex disputes.

Unlike courtroom proceedings, the NCSC rarely permits this, as it is left to its discretion.→

But more than this, any solution entrusting the settlement of a type of dispute to the sole authority of an organism such as NCSC is bound to raise issues of non-compliance with the Romanian Constitution, namely Article 21 which upholds the principle of free access to justice: *"Special administrative jurisdictions are optional and free of charge."*

Since the jurisdiction of this sort of organism is optional, this would mean that, in any case, ordinary courts of law preserve general jurisdiction. However, this is not currently the case set out in Government Emergency Ordinance No. 34/2006, which allows only for the possibility to refer a dispute to the NCSC.

Of course, in defense of the constitutionality of the new provision, it may be argued that even in the absence of specific provisions under the Government Emergency Ordinance No. 34/2006, a party may challenge the actions of the contracting authority in a court of law, by classing them as administrative actions subject to the general provisions of Law No. 554/2004 on administrative disputes. But this might prove an even riskier interpretation: the applicable norms of Government Emergency Ordinance No. 34/2006 allow the award procedure to be suspended only if the claim is filed with the NCSC. Such discrimination in the treatment of one party opting for NCSC settlement and another opting for settlement in a court of law is also unconstitutional. Indeed, it seems it will not be long before the Constitutional Court is called to hear a case on the hot topic of constitutionality.

The ends envisaged by the Romanian Parliament are just: a swifter settlement of public tender disputes is needed. But the means to achieve such ends should somehow be different. These means would more likely have to encompass the endemic problems of Romanian justice: the need for specialized public procurement law sections of Tribunals, the need for more specialized judges who can issue fast decisions in complex public tender procedures, the need for more available courtrooms. The tribulations of the public procurement sector of Romanian law can only be fixed by structural reforms and certainly not by waving a magic wand.

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Case by Case

- Otopeni Joint Venture: Moving towards the International Model

Otopeni Joint Venture: Moving towards the International Model

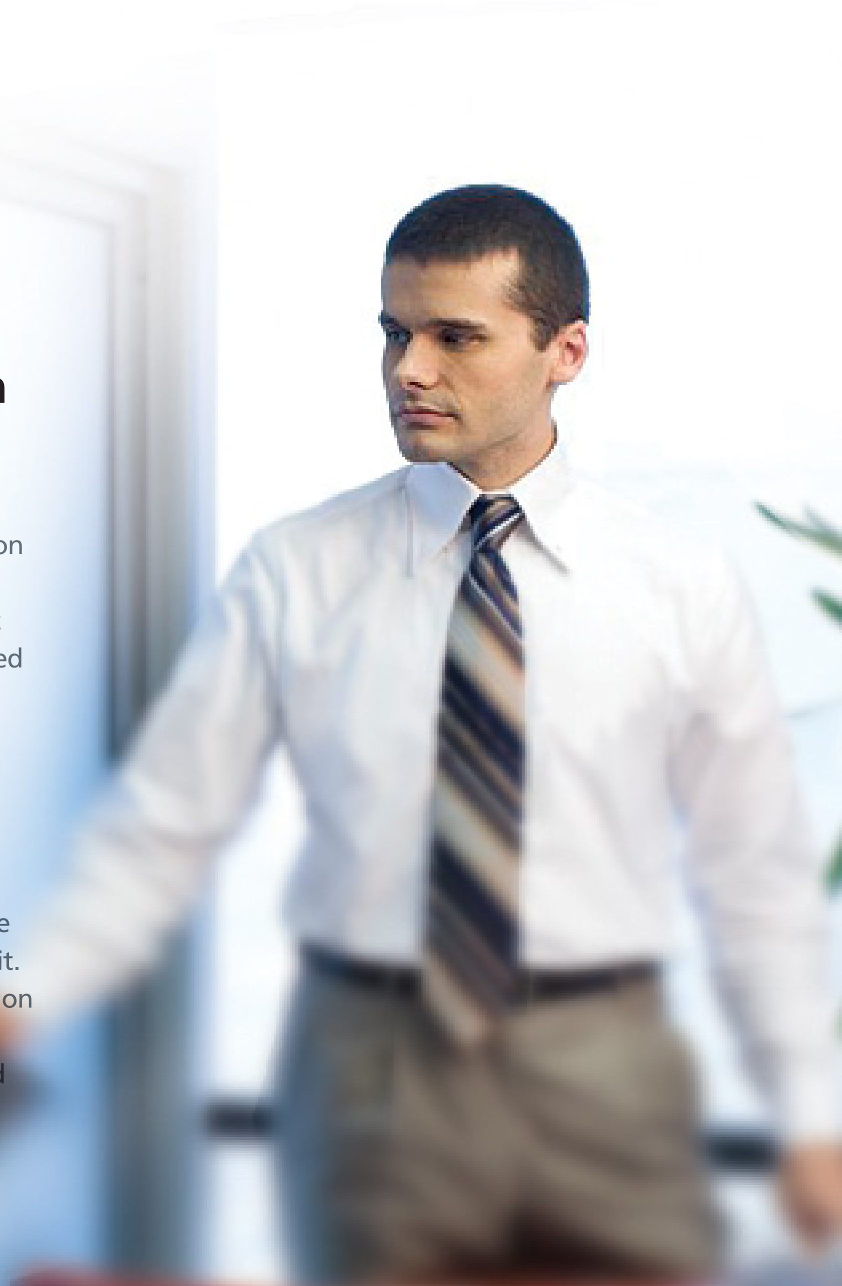
By default, many of us by travelling abroad have also passed through some of the most renowned international airports. Some may have been impressed by the variety and quality of products and services, the overall vibe, while some may have wondered how such commercial areas were developed...

... or whether our own Romanian international airports will ever look like that.

The answers would have to take into account that the one important driver for the continuous development of the commercial areas in noteworthy international airports is, without a doubt, the central involvement of specialized entities in the management of the non-aviation services offered to passengers. Traditionally, the main source of revenue for international airports came from the provision of its aviation services, such as the allocation of airport slots and other flight-related operations. However, in recent years, the weight of revenue from non-aviation services in international airports' total turnover has seen a significant and constant growth. Such non-aviation services come from the operation of the commercial area, marketing and advertising, promotion activities, renting out areas and other non-aviation services provided to customers.

The Needs

In the previous stage of development, the commercial area at Romania`s busiest international airport - Otopeni International Airport - was tailored to the actual size of the airport and the number of passengers using it. Due to the relatively small scale of non-aviation services, the landlord was also managing these areas, awarding them to operators and handling the general development plan for these premises. →



In 2008, the planned development and extension of Otopeni International Airport entailing the construction of a new terminal posed a new challenge for the management of Aeroportul International Henri Coandă Bucureşti S.A., the company then operating the Otopeni International Airport, and a State-owned company which subsequently merged with another State-owned company running Baneasa airport to form Aeroporturi Bucureşti S.A. The construction of a new terminal, set to be completed before March 2011, when Romania's accession to the Schengen area had been expected to take place, would have significantly extended the airport's commercial zone. Nonetheless, an extension of this sort would need coherent management of the commercial area, including the leasing of the commercial area at completion, when the new terminal is put into service. This would keep the future development of the airport in perspective. At that stage, these requirements were given due consideration and a selection procedure for the management and operation of the commercial area at international standards was launched.

This gave us the opportunity to be involved in the procedure from its outset, by assisting our client, Millenium Pro Design, in preparing the offer, but also through the entire period of negotiating the project documents.

The Model

The chosen model was one of joint venture. In November 2008, the Ministry of Transportation published a notice that it was launching the bid procedure, which envisaged a joint venture between Aeroportul International Henri Coandă Bucureşti S.A. and another undertaking which would provide consultancy and management of the commercial zone.

This model is based on existing practice at international airports, where the management of the airport is provided by someone other than the airport operator. In this capacity, they are entitled to establish the business strategy, operate the commercial zones themselves and/or assign them to other entities, while the airport operator receives a certain amount of earnings from the operation of the commercial areas. Under Romanian law, the joint venture structure is considered a flexible mechanism that allows the implementation of this international model. For instance, while in the case of directly leased commercial areas, the rent might not be entirely consistent with the actual progress and development of the business and the landlord handles the management of the commercial areas, under a joint venture model, the airport operator receives a share of the proceeds from the commercial zones while entrusting their management to the other partner. Likewise, in the absence of specific laws, which may have been applicable for projects of this type, such as public-private partnership regulations, the joint venture structure offered the necessary comfort for the parties, as it adequately regulates their relations and the operations of the commercial areas.

> "The model is based on existing practice at international airports, where the management of the airport is provided by someone other than the airport operator.

Project Development. Pre-Signing Negotiations

The bid procedure began in November 2008 with the publication of a notice on the Ministry of Transportation's website. The procedure was not governed by public procurement legislation, as the joint venture model does not require the execution of a public procurement contract. The project, as set out in the notice, had a twofold scope: (i) consultancy and (ii) operation of the commercial areas within the airport to be provided on the basis of a joint venture structure. Apart from such general requirements, the notice allowed interested parties to make proposals regarding the terms of their partnership with the operator of Otopeni International Airport. In this context, greater reliance was placed on the experience, capabilities and reputation of the interested undertakings, which would provide significant value added to the management and operation of the commercial areas inside the airport. Such qualifications were met by Millenium Pro Design, the Romanian arm→

operating on airports of the Heinemann Group, European leader and ranked third in the world on the Travel Retail and Duty Free markets, and Autogrill, the world leader in the Travel sector. To ensure the coherent development and management of the commercial areas in the airport, the two companies proposed, as a key element, an integrated master plan for the entire commercial area, comprising both retail and food & beverage outlets, designed to bring Otopeni International Airport to a similar level to other comparable international airports in terms of size and number of passengers. The bid procedure organized by the operator of Otopeni International Airport followed the rules and stages commonly used in similar procedures: submission of bidding documents, negotiations with the relevant committee, etc. The negotiations were lengthy, to allow assessment and agreement on a broad range of relevant matters included in the project documents, both general and specific. The general matters were related to the contractual structure of the project to accommodate the consultancy and operation services in the contractual framework, the main principles for the provision of services under the joint venture model, the main stages of the project, the contributions of the parties to the joint venture and the benefits derived from the services to be provided by the joint venture. The specific and detailed matters included the manner and methods of evaluating contributions to the joint venture, the payment terms, the clauses governing relations between the parties, the detailed rules on the operation of the commercial areas, the calculation and payment of benefits, the manner of integrating the fit-out works on the commercial areas into the construction works for the new terminal, as well as the manner of providing the consultancy services. Finally, on October 27, 2010, almost two years from the commencement of the procedure, the project documents were signed and the project moved to the operational stage.

Outcome

Now, when the construction of the new terminal and the fit-out works of the commercial areas are a completed, one may say that the first stage in the implementation of a successful project has come to an end. It remains to be seen how the project will continue to unfold and the extent to which the Otopeni airport may compare and even compete with international airports in terms of quality and diversity of products and services and maximization of passenger satisfaction.

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News and Views

- A Bidder Proves his Point: Admissibility of Expert Reports in Final Appeals Proceedings of Public Tender Litigation

Admissibility of Expert Reports in Final Appeals Proceedings of Public Tender Litigation

We have seen, in the Focus section of this magazine, that one of the imperatives of any public tender dispute is urgency: courts will be looking for a quick, swift judgment on matters related to public procurement contracts, irrespective of their complexity. This is especially so in the case of matters brought before the National Council for Solving Complaints (NCSC), a jurisdictional-administrative body called to come to first instance judgments within 20 days of receiving the initial complaint.

But is this rule an absolute one? Can all cases be solved in 20 days? And what happens if the complexity of the issue is not legal, but technical – so technical that no member of the panel can reasonably be aware of the facts of the dispute?

These are the questions raised by a recent case in which the bidder`s legal team had complained against the awarding of a public tender procedure which had disqualified his bid, judging that it did meet the criteria of the tender book.

The bidder remained convinced that he was right: his proposed solution of building a water-treatment plant was correct, and in compliance with all regulations set out by the contracting authority. True, some complex physics and calculations were needed to demonstrate this, but there was no mistake on his part – any person with knowledge in the field of complex physics could see this.

In view of this, his complaint to the NCSC was structured in three main parts: he first asked that an expert be assigned to the case, to analyze the claims of non-conformity. As well as this, the bidder independently requested a renowned expert to provide an extra-judicial report; the report, which was favorable to the claimant, was attached to the claim. Finally, argued the bidder, if all other requests are ignored, the NCSC should at least allow him to make an oral address, so that the members of the panel could become acquainted with the technical issues in question.

Under the pressure of the 20-day time limit, the NCSC rejected all the bidder`s requests and issued a succinct judgment of dismissal, siding entirely with the contracting authority's technical opinion. This did not stop the bidder from submitting a final appeal – which was to be judged by a proper court of law, i.e. the relevant Court of Appeals, allowing him→

to finally argue his case in observance of the necessary oral and adversarial nature of proceedings.

It was during the first hearing of the final appeal that the bidder's legal team achieved its first objective: the members of the Court of Appeals panel realized that they did not possess the specific knowledge required to rule upon the factual matter of the case. Contradicting arguments on the varying flow rate and height of water pumps, or the quantity of CBO5 to be released by different water pump solutions – these were surely issues that could not be pronounced upon by a legal panel. An expert was needed, and the NCSC was wrong in not requesting such an opinion.

And here is where the legal conundrums started to appear. Applicable provisions of Government Emergency Ordinance No. 34/2006 on the awarding of public procurement, public work concession and service concession contracts specify that the procedure to rule on a challenge to an NCSC decision must be identical to that of ordinary final appeals. Final appeals, in turn, allow for limited evidence to be filed in the case, as a result of the provisions of the Civil Proceedings Code – only written documents are deemed admissible evidence at this stage of the trial. This has led to a prevailing view in the jurisprudence that challenges to NCSC decisions preclude witnesses, party cross-examinations and, indeed, expert reports from being admitted at this stage of the case. The bidder, therefore, seemed to be prohibited from requesting an expert report to present to the Court of Appeals panel.

So, what can a judging panel do when faced with a dispute that it cannot rule upon without an expert report? Surely, send the case back to the court of first instance, so that a proper report can be submitted. Unfortunately, this is not possible in the field of public tender disputes – Government Emergency Ordinance No. 34/2006 provides for one single instance in which the case can be sent back to the court of first instance, and it has no relevance to the current situation.

> “The members of the Court of Appeals panel realized that they did not possess the specific knowledge required to rule upon the factual matter of the case.

The Court of Appeals was therefore held to retain jurisdiction over the case, and required to make a ruling – but how could it possibly do so, given its admitted lack of knowledge on the matter at the heart of the dispute?

It was at this point that the bidder decided to use a first-principle argument. Nothing in the special legislation of public tenders, he stated, can be construed as affecting the fundamental right to a fair trial; on the contrary, rather, all provisions of Government Emergency Ordinance No. 34/2006 have to serve the need to ensure the proper delivery of justice. Consequently, if a judging panel is unable to make an informed decision upon a legitimate dispute brought before it, the restrictions that have led to this inability become void. Any contrary interpretation would infringe the right of a litigating party to benefit from equitable treatment in front of a tribunal, as enshrined both in the Romanian Constitution and the European Convention on Human Rights.

Much to the satisfaction of the bidder`s legal team, the Court of Appeals came down in favor of this line of argument. It reasoned that it was unable to reach a rational conclusion on technical matters that it considered decisive for the claims at hand, and called for the selection of a renowned expert in the field, in spite of possible interpretations that such evidence would be inadmissible at this stage of the trial. It asked the parties to provide a list of university departments that had academic knowledge of the subject matter of the case, and to file their proposed objectives regarding the expert report. It then heard the parties debate the most suitable academic institution to be appointed in the case, and decided to ask the Technical University of Bucharest to provide an expert. When the university agreed, the court allowed both parties to contact the expert directly in order to provide him with all necessary case documents.

The expert then addressed the judging chamber, with both parties being allowed→

to cross-examine, and present their own opinion on the subject. Again to the satisfaction of the bidder, the expert explained that the contracting authority had made technical errors on all the points of non-conformity invoked in its decision. After hearing the technical evidence of the expert, the court immediately scheduled a hearing on the legal merits of the case for the next day. It then irrevocably admitted the bidder's complaint against the NCSC decision, annulled the initial award of the contracting authority and compelled it to accept the conformity of the claimant's offer.

The case constitutes an important precedent as to the admissibility of expert reports in the Court of Appeal stage of public tender dispute proceedings. It also provides a lesson in the field of public procurement litigation: as our reader may imagine, an abundance of public tender disputes depend on entirely technical issues.

Furthermore, as reported in the Focus section of this magazine, the NCSC, which has now become the sole authority for judging complaints against public tender awards, must deal with its cases in an incredibly short period of time. This is why the NCSC will always be tempted to dismiss all requests for the admission of evidence, except for written documents – they would aim at the prolongation of the solvency interval.

Nevertheless, if a bidder feels that right is on his side as regards a substantial matter under discussion, a legal team must employ all possible means to present the court with an independent voice confirming this stance.

In the absence of such a voice, any court will find it a hard burden to disagree with the decision of a contracting authority with knowledge of the technical field.

The actions a bidder might take include:

- Filing a request for an independent expert report;
- Privately requesting a renowned expert to provide an independent opinion on the matters under discussion, and submitting such expert opinion to the court;
- Asking the NCSC to allow oral conclusions in the case, and bringing in an expert to explain the technical position of the claimant to the judging panel.

More important still, another message can be taken from the successful odyssey of our bidder. It is a message that public tender litigants often forget, although it serves to their benefit: as specific and capricious as it may be, public procurement dispute legislation is still part of civil proceedings law. As a result, it must follow its lead.

Referenced Decision: Civil Decision No. 3071/25.11.2011 of Cluj Court of Appeals, Commercial, Administrative and Fiscal Dispute Division

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/ **The materials included herein are prepared for the general information of our clients and other interested persons. They are not and should not be regarded as legal advice.**

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