

CUPRINS

List of abbreviations	11
-----------------------------	----

Chapter 1

1. Introduction	13
------------------------------	----

1.1. The general context	13
--------------------------------	----

1.2. The Relevance and Limits of the Research	24
---	----

1.3. The Research Methodology and Questions	28
---	----

1.4. Thesis Outline.....	31
--------------------------	----

Chapter 2

2. Understanding the Setting for Public Procurement Contract

Performance	34
--------------------------	----

2.1 The Public Procurement Legal Framework.....	34
---	----

2.1.1 The EU Legal Framework	34
------------------------------------	----

2.1.2 The Romanian Legal Framework	38
--	----

2.2 Stages in the Public Procurement Process.....	44
---	----

2.3 The Guiding Principles for the Execution of a Public Procurement Contract.....	45
--	----

2.4 The Legal Regime of a Public Procurement Contract.....	54
--	----

2.4.1 The Concept of “Public Contract”	55
--	----

2.4.2 The Parties to the Contract.....	73
--	----

2.4.2.1 The Contracting Authority	73
---	----

2.4.2.2 The Economic Operator	82
-------------------------------------	----

2.4.3 The Contract Types.....	86
-------------------------------	----

2.4.3.1 Public Works Contract	88
-------------------------------------	----

2.4.3.2 Public Supply Contract	88
--------------------------------------	----

2.4.3.3 Public Service Contract.....	89
--------------------------------------	----

2.4.3.4 Mixed Procurement.....	90
--------------------------------	----

2.4.4 The Subject of the Contract	90
---	----

2.4.5 Estimated Value of the Contract	91
---	----

2.4.6 Contracts below Thresholds.....	93
---------------------------------------	----

2.5 The Framework Agreements	96
------------------------------------	----

2.5.1 General Considerations.....	96
-----------------------------------	----

2.5.2 The Essentials of Framework Agreements	98
--	----

2.5.2.1 Stages of a Framework Agreement.....	101
--	-----

2.5.2.2 Procuring through Central Purchasing Bodies.....	103
--	-----

2.5.3 Taxonomy of Framework Agreements	110
2.5.3.1 Framework Agreements Concluded with a Single Economic Operator	110
2.5.3.2 Framework Agreements Concluded with Several Economic Operators	111
2.5.3.3 Valuation	116
2.5.3.4 Time frame	117
2.5.3.5 Binding or Non-binding Nature	119
2.5.4 Transparency Issues Regarding Framework-agreements Performance	121
2.5.5 Advantages and Disadvantages of Framework Agreements.....	122
2.6 Provisional Conclusions	124

Chapter 3

3. Modification of Contracts during Performance	127
3.1. General Considerations.....	127
3.2. Developments in the Court's Jurisprudence related to Amendments in Public Procurement Contracts.....	131
3.2.1 Succhi di Frutta Jurisprudence.....	133
3.2.2 The Presstext Case. Prohibition of Material Amendments	135
3.2.2.1 The Meaning of Substantial Amendment.....	135
3.2.2.2 Changes Concerning the Contracting Party	137
3.2.2.3 Changes Concerning the Price of the Contract	139
3.2.2.4 Changes Concerning the Duration of the Contract	139
3.2.3 The Wall Judgment. Issues around Subcontracting	140
3.2.4 Latest Court Judgments on Amendments	142
3.2.4.1 Commission v Spain	142
3.2.4.2 Finn Frogne	143
3.3. Current Provisions on Contract Amendments	147
3.3.1 Modifications Expressly Provided for in the Initial Procurement Documents.....	153
3.3.2 Additional Works, Services or Supplies by the Original Contractor that have become Necessary.....	157
3.3.3 Modifications Due to Unforeseen Circumstances	162
3.3.4 Replacement of a Contractual Partner	165
3.3.5 Low Value Modifications	169
3.3.6 Other Non-substantial Modifications.....	171
3.3.7 Substantial Modification	179
3.4 Provisional Conclusions	182

Chapter 4

4. Subcontracting	184
4.1 Public Procurement Subcontracting and its Rationale.....	184
4.2 The Concept of Subcontracting	187
4.2.1 Reliance on Third Party Capacities vs. Subcontracting.....	190
4.2.2 Subcontractor vs. Supplier	194
4.3. Legal Limits to Subcontracting	196
4.4 Transparency Rules in Subcontracting	206
4.4.1 Providing Information about Subcontractors. Tell Me Who Your Friends Are.....	207
4.5 Exclusion Grounds on Subcontractors.....	210
4.6 Payment to Subcontractors. The Direct Approach	212
4.6.1 General Conditions for the Application of Direct Payment Mechanism. Assignments of Receivable or Direct Action?.....	215
4.6.2 Confirmation of Contract Performance.....	217
4.6.3 Alignment of the Subcontract with the Main Procurement Contract.....	218
4.7 Liability of the main Contractor and Subcontractors. Joint and Several Liability?.....	219
4.8 Change of Subcontractors.....	222
4.8.1 Change of Subcontractors Indicated in the Tender	223
4.8.2 Introducing New Subcontractors	226
4.9 Economic Value of a Subcontract Agreement.....	232
4.10 Compliance of Subcontractors with Labor, Social and Environmental Rules	234
4.11 Provisional Concluding Remarks	235

Chapter 5

5. Oversight of the Performance Phase of the Contract	237
5.1 Monitoring Contract Performance.....	237
5.1.1 Management plan.....	238
5.1.2 Contract Commencement.....	239
5.1.2.1 Performance Guarantee	239
5.1.2.2 Order for Commencement of Works. Surrender of the Possession of the Site. Permits.....	241
5.1.3 Kick-off Meeting	243
5.1.4 Contract Monitoring: Cost, Time and Quality control.....	243
5.1.4.1 Cost control. Price Adjustments.....	244
5.1.4.2 Time control. Contract Extensions.....	245
5.1.4.3 Quality control	247
5.1.5 Performance Monitoring and Measurement	247

5.1.6 Risk Assessment	248
5.1.7 Contractual Changes	250
5.1.8 Managing Contractual Disputes.....	250
5.1.9 Contract Completion.....	251
5.1.10 Post-contract Performance Review. Findings Report	252
5.1.10.1 Findings Report.....	252
5.1.10.2 Consequences of a Negative Report.....	253
5.1.10.3 Actions for the Annulment of the Report.....	255
5.1.10.4 Dilemmas Regarding Negative Reports.....	258
5.1.10.5 The Delta Case	261
5.2 Institutional Oversight over the Execution of the Public Procurement	
Contracts	264
5.2.1 National Agency for Public Procurement	265
5.2.2 Court of Auditors	267
5.2.3 Competition Council.....	268
5.2.4 National Integrity Agency.....	268
5.3 Provisional Conclusions	269

Chapter 6

6 Contract Termination 271

6.1 General Considerations.....	271
6.2 Unilateral Termination of the Contracts by the Contracting Authority	272
6.2.1 Termination Due to Material Amendments Brought to the Contract	273
6.2.2 Termination Due to the Existence of Exclusion Grounds.....	277
6.2.3 Termination Due to Serious Infringement of the Obligations under the Treaties and 2014/24 Directive	285
6.3 Other Cases of Contract Termination	286
6.4 Termination Consequences.....	289
6.5 Suspension of the Execution or Termination? Force majeure case	291
6.5.1 The Conditions for a Force Majeure Event.....	292
6.5.2 Evaluating Force Majeure.....	293
6.5.2.1 What Does the Contract Say?	293
6.5.2.2 Absence of Force Majeure Clause	296
6.5.3 Unforeseeable Situations	298
6.6 Provisional Conclusions	299

Chapter 7

7. Remedies for the Contract Execution Phase 302

7.1 General Considerations.....	302
7.2 Scope of Application and Availability of Review Procedures	306

7.3 Types of Remedies	309
7.3.1 Pre-contractual Remedies	311
7.3.1.1 The Administrative-Judicial Procedure.....	316
7.3.1.2 The Judicial Complaint	324
7.3.2 Post-contractual Remedies. The System of Judicial Actions.....	325
7.3.2.1 Legal Disputes Regarding the Nullity or Annulment of the Public Contract and Damages Caused within the Awarding Procedure	325
7.3.2.2 Legal Disputes Regarding the Performance of the Contract.....	342
7.3.2.3 Suspension of the Execution of a Public Procurement Contract.....	350
7.3.3 Arbitration as a Dispute Solving Mechanism in Public Procurement.....	353
7.3.3.1 Arbitrability of an Administrative Contract	354
7.3.3.2 Arbitrability of the Public Procurement Contract. Arbitration – the New Rule?.....	356
7.4 Final Thoughts upon the Effectiveness of the Remedies Legislation.....	360

Chapter 8

8. Overview of the Research. Conclusive Remarks	365
8.1 Overview of the Research.....	365
8.2 General Conclusions and Remarks.....	381
Bibliography	388

Chapter 1

1. INTRODUCTION

The present study aims to explain and elucidate the multilayered field of public procurement contract execution by describing and analyzing the main challenges that occur during this “obscure”¹ phase of public procurement. This chapter introduces the research topic and the outline of its scope.

1.1. The general context

Public procurement has a multidisciplinary character, transcending all sectors of economy and society². Public procurement, the process by which public authorities purchase work, goods or services, makes up a substantial part of the economies of the European Union Member States. It involves over 250,000 contracting authorities across Europe and accounts for more than 14% of EU’s GDP (roughly around €2 trillion per year)³. Its importance within the economies of the Member States varies, but the significance is always considerable. This transforms the public procurement strategies and actions into a potentially strong instrument for governments to achieve economic, social, and environmental goals. But all these instruments depend substantially on the manner the public procurement system is managed, conducted and monitored.

Gradually, public procurement has become a significant area of EU regulation. The basis of the European procurement regulation and the EU’s interest in this subject

¹ “Obscure” is defined in Cambridge Dictionary as meaning both unknown and difficult to understand. I consider this phase of a public procurement contract as being obscure in the sense that it is the least regulated, has the lowest level of transparency from the entire procurement cycle, has a low level of monitoring and control (mainly control upon the legality of the process without quality considerations), is almost left out from analyses at a doctrinal level.

² For an analysis of public procurement, from a legal and economic perspective see S. Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, Volume 1, Third Edition, Thomson Reuters, London, 2014, A. Semple, *A Practical Guide to Public Procurement*, Oxford University Press, 2015, C. Bovis, *Law of EU Public Procurement*, Oxford University Press, 2015, G. Piga, *Public Procurement’s Place in the World. The Charge Towards Sustainability and Innovation*, Pöschel & Pöschel, 2014, A. Sanchez-Graells, *Public Procurement and the EU Competition Rules*, Second Edition, Hart Publishing, 2015, N. Khan, *Public Procurement Fundamentals. Lessons from and for the Field*, Emerald Publishing, Bingley, 2018.

³ https://ec.europa.eu/growth/single-market/public-procurement_en, last accessed 09.04.2021

lies mainly within the concept of internal market. The Treaty on the Functioning of the European Union (TFEU) establishes the basic framework for public procurement rules in the EU, even though the term “public contract” is nowhere to be found in the text. The most relevant aspect from a public procurement perspective is the regime on the free movement of goods and services, by removing the formal and informal barriers to intra-EU trade. The free movement rules prohibit the existence of discriminatory practices in public procurement within the EU, such as ‘buy national’ policies⁴. But these rules with a prohibitive character proved to be insufficient to reach the goal of an open market and to eliminate the protection offered by Member States to domestic suppliers. For this reason, coordinating directives⁵, which harmonize the procurement regulation of the Member States were enacted.

The evolution of EU public procurement law has been swift and expansive. Although European directives on public procurement have been in force since the 1970s⁶, transparency and fairness in the procedures for public contracts was strictly limited, with non-domestic enterprises almost completely excluded from national markets⁷. Between 1988 and 1993, a series of new directives were adopted defining the scope of public procurement and regulating the procedures according to which the purchasing entities may procure works, supplies and services. The aim of the regulation was to lay down a framework that would provide for fairness and openness in the European procurement market. The purposes of the provisions were: firstly, to achieve increased competition between European enterprises, secondly to improve the efficiency and competitiveness of European enterprises in global markets, and thirdly to reduce public-sector purchasing costs.

Another generation (the 4th) of public procurement directives was enacted in 2004. The procurement legislation was again consolidated providing for an “obvious

⁴ The main objective of the European public procurement is contained in the Treaty: opening up of the national procurement markets in order to provide for equal opportunity to submit offers and win contracts to bidders from other Member States.

⁵ According to Trybus, a Directive determines the results that must be achieved by a particular piece of regulation but leaves the choice of form and methods to the Member States. See M. Trybus, “Improving the Efficiency of Public Procurement Systems in the Context of the European Union Enlargement Process”, *Public Contract Law Journal*, vol. 35, No.3, 2006, p. 412.

⁶ 1971 for works and 1977 for supplies.

⁷ The Single Market Review, Volume 2: Dismantling of Barriers. Public Procurement, Office for Official Publications of the European Communities, 1996, p. 2, available online at <http://aei.pitt.edu/85778/1/V.2.III.pdf>, last accessed 20.04.2020. Two studies were relevant for the changes brought to the legislation Commission of the European Communities., *Basic Findings*, Vol. 5, Part. B: *The Cost of Non-Europe in Public Sector Procurement*, Official Publications of the European Communities, Luxembourg, 1988 and Cecchini Report, 1992: *The European Challenge, The Benefits of a Single Market*, Wildwood House, 1988.

simplification”⁸ and modernization⁹ of the European regulation in this field. A major innovation introduced by the 2004 Directive allowed Member States to pursue their own policies (social and environmental) through the regulation of public procurement¹⁰. In Recital 5 of 2004/18 Directive a reference is made for the first time in a procurement directive to the concept of value for money. The Recital provides for the right of the contracting authority to introduce green considerations whilst ensuring the possibility of obtaining best value for money. This innovation has raised the question if it is justifiable to consider the concept of value for money as a new “horizontal” objective of the procurement regulation. According to Arrowsmith and Kunzlik, the reference to value for money in Recital 5 does not indicate that this concept is a new objective of the Directive¹¹. In an article published in 2012, Arrowsmith considers that the Member States may adopt domestic rules to establish value for money, but the main purpose of the EU rules “would be to ensure that public bodies choose the best supplier to develop the internal market”¹². Comba assesses in an intriguing fashion that the procurement regulation may admit for the first time new objectives other than the classical achieving of the internal market with reference to concept of value for money. After an in-depth analysis of the concept of value for money in public procurement, Comba concludes in the same line

⁸ Y. Allain, “The New European Directives on Public Procurement: Change or Continuity?”, *Public Contract Law Journal*, vol. 35, No.3, 2006, p. 522.

⁹ The use of electronic means of communication, the use of central purchasing bodies, taking into account of environmental and social consideration, the mechanism of framework agreements are just few of the modernized rules provided by Directive 2004/18.

¹⁰ This right is expressly stated in Recital 1 of Directive 2004/18. Reference to the principle of freedom of establishment and freedom to provide services as provided by the Treaty is made in Recital 2.

¹¹ S. Arrowsmith, P. Kunzlik, *Social and Environmental Policies in EU Procurement Law - New Directives and New Directions*, Cambridge: Cambridge University Press, 2009, pp. 34-35. See also D. Davenport, *Review of Social and Environmental Policies in EC Procurement Law – New Directives and New Directions*, ed. Sue Arrowsmith and Peter Kunzlik, *Public Procurement Law Review*, 5, 2011, pp. 175-178.

¹² S. Arrowsmith, “The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies”, in C. Barnard, M. Gehring and I. Solanke eds., *The Cambridge Yearbook of European Legal Studies*, Volume 14, Hart Publishing, London, 2012. p. 24. In the same cited source, Arrowsmith criticizes the competition-oriented public procurement approach taken by A. Sanchez-Graells in *Public Procurement and the EU Competition Rules*, Oxford: Hart Publishing, 2011. Responding to Arrowsmith’s criticism, Sanchez-Graells writes in the second edition of his study that “It seems very clear that EU public procurement rules (...) are concerned with economic efficiency”. See A. Sanchez-Graells, *Public Procurement and the EU Competition Rules*, Oxford: Hart Publishing, 2015, p. XV.

of argument and points out that efficiency in public spending is a matter of national public administration¹³.

Following a reform process proposed by the Commission in 2011, the new rules for public procurements were finally published in 2014¹⁴.

Within the EU, national procurement rules have been coordinated by these EU public procurement directives. The vehicle of harmonization has been entrusted to carry the progress of public procurement regulation¹⁵. The European legislator chose to regulate in the Directives only those contracts whose monetary value exceeds a certain amount¹⁶. The European regulation does not aim to control and thrust a common regulatory regime on EU Member States in the field of public procurement. It allows the Member States to remain free in regulating a number of issues, adjusting substantive and procedural rules to their national procedures, as long as these rules are not in conflict with the provisions of the Directives and the ones from the Treaty. The EU aims to introduce “a discipline of regulation” in order to ensure that the undertakings from across the Internal Market have the opportunity to compete for public contracts, by ensuring equal treatment and by abolishing any scope for discriminatory purchasing through enhanced levels of transparency and accountability¹⁷. At the heart of the EU’s efforts to achieve an internal market in public procurement lies a prohibition on discrimination. The principle of non-discrimination prohibits practices on discriminating against

¹³ See M. Comba, “Variation in the Scope of the New EU public Procurement Directives of 2014: Efficiency in Public Spending and a Major Role on the Approximation of Laws, in F. Lichere, R. Caranta, S. Treumer (Eds.), *Modernizing Public Procurement. The New Directive*, Copenhagen: DJOF Publishing, 2014, pp. 35-36, 47.

¹⁴ Directive 2014/23/EU on concession contracts, Directive 2014/24/EU on public sector procurement, and Directive 2014/25/EU on procurements in the utilities sectors. Bovis argues that the new directive on public sector procurement has met three principal objectives: simplification, modernization and flexibility. See C. Bovis, “The priorities of EU public procurement regulation”, ERA Forum 21, 2020, pp. 283-297. The research will focus on the “classical” Directive on public procurement, namely 2014/24 Directive.

¹⁵ C. Bovis, „Public Procurement and the Internal Market of the Twenty-first Century: Economic Exercise versus Policy Choice”, *European Union Law for the Twenty-First Century*, Volume 2, *Rethinking the New Legal Order*, ed. Takis Tridimas and Paolisa Nebbia, London: Hart Publishing, 2004, pp. 291–310.

¹⁶ It is considered that the thresholds set by the Directive are sufficiently high to attract economic operators from other Member States. However, the actual impact of the Public Procurement Directive is much greater than the bellow thresholds procurement contracts. Furthermore, the ones falling outside the scope of the Directive, which are to be governed by domestic rules only, still have to respect the principles established by EU law.

¹⁷ C. Bovis, *EU Public Procurement Law*, Cheltenham: Edward Elgar Publishing, 2012, p. 2

suppliers/service providers because of their nationality. The procurement directive builds on the ban on discrimination on grounds of nationality and develops it further into a principle of equal treatment of tenderers¹⁸.

From the wording of the Directive, it is clear that it primarily focuses on the award phase of the public procurement contract¹⁹. Contract implementation traditionally belongs to the procedural autonomy of the Member States²⁰ and the legal framework and traditions differ heavily among them. Most legal systems differentiate clearly between public and private law and assign public procurement contracts to one of the two categories²¹. In general, in common law jurisdiction, there is no formal division between public and private contracts. The public procurement contract is considered a civil law contract and does not have an independent status, falling under the scope of private law²². There are also countries that consider public procurement contracts as administrative contracts that are governed by public law. This is the case of France, Belgium, Spain, Finland, Portugal. In other Member

¹⁸ See *Beetjes Case*, Case 31/87, ECLI:EU:C:1988:422: “all bidders must be treated equally”. In order to prevent discrimination, transparency is considered another general principle of EU public procurement law (The CJEU has interpreted that the free movement provisions themselves imply an obligation of transparency. See, for instance, *Teleaustria*, Case C-324/98 *Telaustria v Telekom Austria and Herold Business Data*, ECLI:EU:C:2000:669. K.-M. Halonen, R. Caranta, A. Sanchez-Graells, in “Transparency in EU Procurements: an Introduction”, in K.-M. Halonen, R. Caranta, A. Sanchez-Graells (Eds.), *Transparency in EU Procurements*, Cheltenham: Edward Elgar Publishing, 2019, pp. 1-8. See the transparency principle as a corollary of the general principle of non-discrimination. In order to achieve efficient procurement keeping competition fair is a key concern. As Sanchez-Graells points out, Directive 2014/24 stresses the relevance of competition considerations across the board. (A. Sanchez-Graells, *Public Procurement and the EU Competition Rules*, Oxford: Hart Publishing, 2015, p. XV). The author goes beyond his assessment and considers that is likely for EU public procurement rules to develop a further pro-competitive orientation. For a source that argues that the competition law continues to regulate the execution of the public procurement contract, and that the infringement of EC competition norms may well establish the illegality of the contracting authority's action, see M. A. Alexopoulou, “EC Competition Rules in Public Procurement Cases: A Ground for Judicial Review?”, The University of Oxford – Centre for Competition Law and Policy Working Paper, CCLP (L) 24.

¹⁹ In the same fashion with the WTO Government Procurement Agreement and the UNICTRAL Model Law on Public Procurement.

²⁰ Contract law was considered to be at the core of the domestic legal systems. However, in recent years, it was clear that the EU law interacted more with the national contract laws of the Member States. In this line see EU Contract Law, Report number: JURI_3_1, February 2009.

²¹ M. Trybus, *op. cit.*, p. 416.

²² In the UK, Germany, and the Nordic countries. Even in those countries where the public contract is subject to ordinary private law, there “are frequently some modifications in the way the law of contract is applied to government entities” (S. Arrowsmith, J. Linarelli, D. Wallace Jr., *Regulating Public Procurement. National and International Perspectives*, Hague: Kluwer Law International, 2000, p. 14).

States, such as Austria, Denmark, Estonia, Poland, Sweden, and Italy, there is no specific set of rules for all public procurement contracts. In these states, the public contracts are governed by the general principles of contract law, also being subject to certain principles drawn from administrative law.

We may ask ourselves: where does Romania belong in this bigger picture? EGO 34/2006 was the first public procurement regulation that included an express mention related to the legal nature of the public procurement contract. However, the contract was deemed as administrative according to the doctrine even before EGO 34/2006²³. With several amendments brought to procurement legislation after 2006 the legislature has changed the legal nature of the public procurement contract from an administrative to a commercial one. The strangest situation occurred after 2010²⁴ when, according to the legislation, the discussed contract received a mixed character: an administrative contract for the pre-contractual phase and a commercial one for the execution phase of the contract.

Considering that there are discrepancies in national law and practice concerning the framing of the contracts and their performance, it is an understatement to claim that the Treaty freedoms and principles which underlay procurement regulation would be frustrated, if the directives ceased to apply at the moment a contract was awarded²⁵. It is clear that non-discrimination, equal treatment, transparency and competition concerns may very well spread over the performance phase of the contract²⁶. As the EU Directive has not explicitly regulated the events occurring after the conclusion on the contract, it was considered that the European legislation on public procurement did not affect the contract performance phase. However, the CJEU has largely extended the applicable scope of the procurement directives. The *Pressetext* decision has legitimized control over whether operations are in

²³ For a study that considers the contract as administrative, see D.C. Dragoș, D. Buda, “Considerații teoretice privind noul cadru juridic al încheierii contractelor de achiziție publică”, *Revista Transilvană de Științe Administrative*, nr. 1(7)/2002, pp. 201-221.

²⁴ EGO 34/2006 was amended by EGO 76/2010 and the Law No.278/2010 (published in the Official Gazette of Romania No.898 from 31.12.2010).

²⁵ A. Semple, *A Practical Guide to Public Procurement*, Oxford: Oxford University Press, 2015, p. 119. When the execution of the contract differs substantially from the conditions set forth in the award, the whole equilibrium of the bid rankings, set in compliance with competition and nondiscrimination principles, is undermined (Gabriella M. Racca, Roberto Cavallo Perin, and Gian Luigi Albano, “Competition in the Execution Phase of Public Procurement”, *Public Contract Law Journal*, vol. 41, No.11, Fall 2011, p. 91).

²⁶ Specifically, the contracting authority may bring changes to the contract during its performance such as: the modifying of the scope of the public contract (the change would have attracted other economic operators), and the allowing for time extensions (denying the opportunity of other economic operators to participate in a new tender).