

Amendments to public contracts

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On 19th of January 2021, the Instruction No. 1 of the Chairman of the National Agency for Public Procurement regarding amendments to public contracts ("**Instruction**") came into effect. Its purpose consists, among other things, in reducing the number of legal acts by consolidating and updating 3 instructions (Nos. 3/2017, 2/2018 and 1/2019), which have thus expired, and the uniform application of the law.

Regulation

The Instruction regulates principally

- the procedure for amending public contracts;
This includes, for example, the assessment whether the envisaged contract amendment is material and therefore requires a new procurement procedure, or if such amendment is allowed without such a procedure, an analysis of the necessity and justification of the amendment, checking the availability of funds, the form of the parties' consent for modification of the contract (e.g., addendum, exchange of letters, instruction from the contracting authority), the registration of the amendments;
- material and non-material amendments of public contracts using practical examples;
- the price adjustment (including examples regarding the price adjustments as a consequence of the increase of the statutory minimum salary or for several types amendments);
- amendments (including price adjustment) of public contracts which have been awarded based on the Emergency Ordinance No. 34/ 2006¹ and concluded based on Law 98/ 2016² respectively Law 99/ 2016³.

Non-material amendments (*which do not require a new procurement procedure*) can be made based on

- clear, precise and unequivocal review clauses or options which have been provided in the initial awarding documentation and must fulfill certain legal conditions, or
- express legal provisions.

Amendments based on review clauses

Review clauses in the awarding documentation can refer to options to supplement or reduce the subject matter of the contract or the volumes of the contract as well as to other changes of the contract. The Instruction contains practical examples of such clauses and conditions for such amendments (e.g. delivery of state-of-the-art products, if the contractor brings better versions of the offered products to the market during the contract period, against payment of

¹ Government Emergency Ordinance 34/ 2006 on the award of public and concession contracts, which has been cancelled by Law 98/ 2016

² Law 98/ 2016 on public procurement

³ Law 99/ 2016 on procurement by entities operating, for example, in the water, energy and postal services sectors

the offered or adjusted prices, depending on the awarding documentation; price adjustment to reflect the extension of the procurement procedure beyond the original period of validity of the offers according to the awarding documentation, for reasons beyond the control of the contractor).

Amendments based on the legislation

For all amendments (additional works, services or supplies from the original contractor, unforeseeable circumstances, replacement of contractor, changes of low value, as well as other non-material amendments) that are regulated in the primary legislation, the Instruction contains practical examples of acceptable and, in certain cases, not acceptable amendments.

In addition, it regulates the calculation of the price increase for different types of amendments (e.g., compensation of the value of additional products with the value of products that are foregone due to contract amendment as a result of unforeseeable circumstances) in order to observe the maximum permitted share of the price increase.

From the examples of further non-material amendments mentioned in the Instruction, the following non-material amendments should be pointed out:

- the replacement of the consortium leader by a consortium member and / or the amendment of the original consortium constellation by taking over the powers of one / certain members by another / the other members, provided that, for example, the original criteria for qualitative selection are also met in the changed constellation and the member who the contracting authority has requested performs any essential tasks;
- changing the participation of the consortium members subject to certain conditions mentioned in the Instruction;
- insertion or replacement of a subcontractor in compliance to certain legal conditions;
- the price adjustment in case of extending the original contract duration for reasons that are independent of the contractor, provided that the adjustment does not represent a material amendment.

Conclusions

The reduction of the number of legal acts respectively the consolidation and updating of the provisions and the creation of working materials with practical examples are undoubtedly welcome. Practice will show to what extent the contracting authorities understand the meaning of the examples and interpret them correctly.

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