

DIRECT PAYMENT TO SUBCONTRACTORS IN ROMANIAN PUBLIC PROCUREMENT

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Abstract

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. Gradually it has become a significant area of EU regulation. It is the first time that the EU legislation on public procurement includes explicit rules on contract performance.

A major innovation of the 2014 Directive is the introduction of rules regarding subcontracting. Regarding subcontracting, the new legislative package on public procurement had the following goals: the increasing of the participation of SMEs in the public procurement procedure, the guarantee that subcontractors comply with environmental, social and labor rules, the increasing of transparency in subcontracting and the granting to subcontractors of additional support in relation to a bad faith contractor by using the direct payment mechanism. Most of the new EU provisions give a vast discretionary power to the Member States and leave a lot of room for interpretation. The duty of the national legislator is to anchor the European regulation on public procurement contract performance to the national legal context and to create a framework that is clear and comprehensible. Otherwise, the regulation may lead to large variety of interpretations and legal uncertainty.

The present study aims to explain and elucidate the multilayered instrument of direct payment to subcontractors, as seen by the romanian legislator. The study analyzes the provisions on direct payment to subcontractors, provisions that have been drafted carelessly, as if national legislator wished to shed darkness on the terms to which the contracting authority will be bound to with the subcontractor.

Keywords: *public procurement, subcontractor, direct payment mechanism, confirmation of contract performance, late payment*

JEL Classification: [K23]

1. Public Procurement Subcontracting and its Rationale

The Public Sector Directive from 2004¹ had little stipulations related to post-award phase; furthermore, the rules related to subcontracting were minimal. Article 25 from Public Sector Directive simply regulated that in the contract documents, the contracting authorities are able to request or may be required by a Member State to ask the tenderer to indicate in his tender any

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¹ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004.

share of the contract he may intend to subcontract to third parties and to any proposed subcontractors. Following the EU procurement reform process, the new Public Sector Directive 2014/24/EU², in contrast to old Directive 2004/18/EC, establishes rules with a specific policy objective of facilitating and encouraging the participation of small and medium enterprises in public procurement procedures. There is no doubt about the benefits of involving SMEs in public procurement (Kidalov M. V., 2011: 443-509).

Regarding subcontracting, the new legislative package on public procurement has sought to increase the participation of SMEs in public procurement procedure, increase transparency in subcontracting, make sure the subcontractors comply with environmental, social and labor rules and offer the subcontractors additional support in relation to a bad faith contractor. These issues in respect to subcontracting are treated in a brief manner in the eight paragraphs of the article 71 of the Directive.

The Directive's provisions on subcontracting are characterized by deference to national preferences and depend on their effectiveness to a large extent on the discretion of Member States and contracting authorities (Wiesbrock A., 2016:87). The Directive is cautious in its wording and leaves an unwelcomed interpretation burden on the shoulders of the Member States and/or contracting authorities.

Leaving aside the provisions from the European regulation related to subcontracting that are mandatory for Member States to include in their transposing legislation, there are a number of alternatives for Member States to consider. The Romanian legislator had to find the appropriate provisions in order to answer the following crucial questions:

- 1) Whether it should be mandatory for contracting authorities to require bidders to indicate in their proposal any share of the contract they may intend to subcontract and the information related to the supposed subcontractors or it is more appropriate to allow contracting authorities a certain degree of flexibility regarding the details that they require from bidders in what regards the aspects mentioned above;
- 2) Whether the obligation of the main contractor to provide information about subcontractors should be extended to all types of contracts and to the entire supply chain or not;
- 3) Whether it should be mandatory for contracting authorities to verify the existence of mandatory or discretionary exclusion grounds for any subcontractor; in case the verification shows the existence of non-compulsory ground for exclusion, whether it should be binding for

² Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014.

contracting authorities or not to require the main contractor to replace that certain subcontractor;

- 4) Whether to provide for the facility of direct payment to subcontractors or to allow contracting authorities flexibility in deciding upon the direct payment procedure in accordance to the individual circumstances of the procurement process.

The majority of the relevant rules related to subcontracting are to be found in Articles 218-220 from Law no. 98/2016³ on classic public procurement and Articles 150-161 from Government Decision 395/2016 on the approval of the Application Norms of Law 98/2016⁴, but references to subcontracting are also included in article 55, 170 from Law 98/2016. As emphasized by J Budak, E. Rajh incentives and problems associated with public procurement differ significantly between companies that negotiate in the bidding process on their own and companies that are acting as subcontractors after the public contract has been awarded (Budak J., Rajh E. 2016:78). Taking into consideration the importance of subcontracting, which profitably involves a greater number of businesses (in most cases local ones) in the process of performing public contracts, Romanian legislator made an attempt to regulate subcontracting more extensively to better assure proper performance of procurement contracts.

In this paper we will provide an answer regarding the fourth question: whether to provide for the facility of direct payment to subcontractors or to allow contracting authorities flexibility in deciding upon the direct payment procedure in accordance to the individual circumstances of the procurement process. As shall be seen in the following the national legislator has chosen once again strictness as opposed to the flexibility of the Directive.

2. Payment to Subcontractors. The Direct Approach

Even though they perform activities part of the subject matter of the contract, subcontractors are not part of the public procurement contract. They have a contractual relationship with the main contractor (not the contracting authority), are liable in front of the contractor and receive their fee from the main contractor. Practitioners and lawmakers have identified a stringent need to regulate the issue concerning failure to make timely payment to subcontractors in public procurement contracts and to create a system of guarantees of payment of amounts owed to subcontractors. It is not uncommon for main contractors to delay payments to their subcontractors by using the amount received from the contracting authority for their own needs, leading to cash-flow issues for

³ Published in The Official Gazette, Part I, No. 390, 23.05.2016.

⁴ Published in The Official Gazette, Part I, No.423, 06.06.2016.

subcontractors and even bankruptcy. Even worse, there are economic operators that deal exclusively with contract management and have almost no participation in the actual implementation of the contract. They sometimes go further and, in an unjustified way delay payments to subcontractors who had actually executed the subject matter of the contract. Unfortunately there is a low degree of transparency in what concerns the payments between the prime contractors and their subcontractors. Governments should take steps in order to protect subcontractors from unfair treatment and to better monitor their payments. Korea represents an example of a use of electronic platforms for subcontractors management regarding the treatment of subcontractors by prime government contractors (OECD, 2018:72-73).

In order to avoid all these issues, a version of direct payments to subcontractors was encouraged, but not imposed by 2014/24/EU Directive. The possibility of the subcontractor to be paid directly by the contracting authority represents another innovation introduced in the Directive to the subcontracting regime. This development is especially important for SMEs, which frequently get assignments at the secondary public procurement market as subcontractors to main contractors that are large companies (Panagopoulos S., 2016:291). The target of Directive 2014/24/EU is not to ensure payments to subcontractors in general, the real goal is to ensure payments to subcontractors on-time and in full (Pallo E., 2019: 32).

According to Art. 71(3) of the Directive, the Member States may provide this direct payment according to which the contracting authority transfers due payments directly to the subcontractor at the request of a subcontractor and where the nature of the contract so allows. This may be an efficient way of protecting the subcontractors from waiting long periods of time to get their payments from the prime contractor. Paragraph 3 from article 71 underlines that all payment arrangements must be set out clearly in the procurement documents. As the Construction Industry Federation in its Submission on Transposition of the new EU Procurement Directives pointed out it is essential that main contractors have complete knowledge concerning payment arrangements up front, in order to price contracts properly.

The national legislators have the possibility to include procedures that permit the prime contractors to object to undue payments to the subcontractor. By allowing the main contractor to object to such payments it may lead to avoiding possible abuses of this facility of direct payment.

The Directive gives member states much flexibility in applying the direct payment procedure. According to Article 71(7), the EU Member States have the possibility to provide for direct payments to subcontractors without being necessary for them to request such direct payment. Quite on the contrary, paragraph 8 of the same article allows Member States to limit the applicability of the procedures related to direct payment for instance in respect

of “certain types of contracts, certain categories of contracting authorities or economic operators or as of certain amounts.” The general direct payment rule in Article 71(3), the possibility to go further in Article 71(7) and introduce the direct payment to subcontractors without being necessary for them to request such direct payments on the one hand, and the possibility to limit the applicability of the rule on the other hand are options – Member States do not even have to implement the direct payment regime of the Directive at all, they can limit it and/or extend it (Trybus M., Andrecka M., 2017:236).

Recital 78 of the Directive clearly states that it is not compulsory for the Member States to include the direct payment mechanism as they “should also be free to provide mechanism for direct payments to subcontractors”.

Let us now examine the way these provisions were transposed in the Romanian legislation. We have to include in our consideration Article 218 from Law 98/2016 and Article 150 from Implementation norms. The decision to include the procedure of direct payment in our legislation can be seen as a step forward in strengthening the position of subcontractors involved in the execution of public procurement contracts, but the provision also has interpretative issues. The Romanian legislator has made frequent use of the technique of translating the Directive in the implementation process. However, for the direct payment mechanism it actually had to draft the regulation, as the Directive left a lot of space to the Member State in choosing the appropriate implementation form. From this point on, we need to deal with the interpretative problems of a provision that has been drafted carelessly, as if it wished to shed darkness on the terms to which the contracting authority will be bound to with the subcontractor (Perera A. C., 2018:3).

2.1 General Conditions for the Application of Direct Payment Mechanism. Assignments of Receivable or Direct Action?

Firstly, according to article 218 from Law 98/2018 for the direct payment mechanism to be applicable the following general conditions have to be met: the nature of the contract to allow for direct payment; the proposed subcontractors have expressed their choice for direct payment and they require such a payment. In case the first two conditions are met, the contracting authority has the duty to lay down in the procurement contract mandatory clauses for direct payment.

Paragraph 3 from article 218 provides that “where a subcontractor expresses the option of being paid directly, the contracting authority shall have the obligation to determine in the public procurement contract mandatory contractual clauses providing for the transfer, by operation of law of payment obligations to Subcontractor/Subcontractors for the part/parts of the contract related to them (...)”. Thus, it is extremely debatable that under paragraph 3 from article 218 the mandatory contractual clauses provide “for the transfer,

by operation of law of payment obligations to Subcontractor/Subcontractors”. Obviously, not the obligation of payment is transferred by operation of law to the subcontractors, but the payment is made directly to them. The payment obligation remains within the responsibility of the contracting authority, which, in this particular case will not make certain payment to the main contractor, but to the subcontractor (Ratiu M. A., 2017:196). Our opinion is that the intention of the legislator, even if it did not succeed into formulating it was to consider the transfer, by operation of law to the contracting authority of the obligation to make the payment directly to the subcontractor. This interpretation is in line with the Directive which states in article 71(7) “Member States may provide (...) or to go further under national law on direct payments to subcontractors, for instance by providing for direct payments to subcontractors without it being necessary for them to request such direct payment”.

Under Article 150(1) from GD 395/2016, the mechanism for direct payment is performed through assignments of receivable. Vranceanu considers that this is the solution (assignments of receivable) for avoiding the resolution of the contract when the winner of the contract has a subcontractor and is not paying him for his works (Vrânceanu A., 2016:1).

We consider as arguable the solution from the secondary legislation to use the mechanism of assignments of receivable for transferring the right to receive the payment from the main contractor to the subcontractor. Our opinion is that this mechanism is foreign to the approach of the community law and primary national legislation, which have seen the right to direct payment of subcontractors as a legal benefit granted to certain categories of creditors. Some academics argue that the direct payment to subcontractors may be justified by art. 218 of Law 98/2016 correlated with art. 1856 of the Civil Code⁵ that refers to the workers’ direct action against the client. Art. 1856 recognizes the right of the workers to direct action against the beneficiary, whatever the object of the contractor agreement, according to the amount the latter owes to the contractor at the time the action is brought (Dobrev D., 2018: 141, Tita-Nicolescu G., 2016: 591-605). Nevertheless, there are voices which consider that the direct action provided by the art. 1856 is only available for certain individuals and not for legal entities (such as the case of subcontractors) (Lipcanu E., 2013: 13-26).

The choice made by the secondary legislator (assignments of receivable) has important practical consequences, not just theoretical ones. It is impossible to include here an exhaustive analysis of the aspects related to the assignments of receivable, but we will emphasize the aspects that are relevant from the public procurement point of view.

⁵ Published in a modified form in The Official Gazette, Part I, No. 489, 08.11.2011.

The assignment of receivables is a transferring contract that has two parties: the assignor (creditor transmitting rights) and assignee (acquirer of the rights) (Pop L., Popa I.-F., Vidu S. I., 2012:636). The assigned debtor (borrower indebted to make the payment) is considered to be a third party. The contract has to respect certain formalities: publicity requirements- acceptance of the assignment by the debtor through an act under private signature with certain date, written notification of the assignment, enrollment in the electronic archive with regard to third parties, file in court that incorporates the debtor notification and notification in Land Registry (Vrânceanu A., 2016:5). According to Art. 1574 of the Civil Code the assignor has the obligation to transmit to the assignee the title that ascertains the assignment and all the written documents related to the transmitted right. After meeting the publicity requirements, the assigned debtor has to act as if another creditor would never have existed (Vasilescu P., 2017:41). The assigned debtor will not be able to pay to the assignor anymore. This is obviously in contradiction with the provisions from Law 98/2016 which states that in order for the direct payment mechanism to actually operate it is necessary to have the confirmation of all three parties (contracting authority, main contractor and subcontractor), or at least the refusal of the main contractor to be considered as unjustified by the contracting authority, otherwise the subcontractor shall not be able to receive the payment directly from the contracting authority and the payment shall be made to the main contractor. The failure to meet the publicity requirements leads the assignment of receivables to take no effects, as if the right to direct payment never existed.

We strongly emphasize that in our opinion, the fact that the mechanism of assignment of receivables, as the secondary legislator provides in Article 150 from GD 395/2016 is just one more inconsistency and gap in the Romanian public procurement legislation.

2.2 Confirmation of Contract Performance

A confirmation of the contract performance through documents accepted by all three parties, namely the contracting authority, the contractor and the subcontractor, is required for the contracting authority to actually make the payment directly to the subcontractor. This cannot be considered as a second area of discretion given to the contracting authority, but only a confirmation of the right to receive the payment based on the Public Procurement legislation and the tender documents.

The question is what happens if, as is to be expected, there is a dispute between the contractor and subcontractor. According to Article 218(1), even when the contractor refuses to approve the direct payment the contracting authority shall pay the subcontractor if the refusal of the contractors is “unjustified”. It seems that the legislator considers the contracting authority as

an arbitrator of the approval, because it is in its power to consider the lack of confirmation from the contractor as unjustified. The regulation does not set any objective criteria for the contracting authority to use in order to contradict the non-confirmation/to bring evidence in favor of the subcontractor. It results that the payability of the subcontractor claim is not always subject to a third-party approval (the contractor) or a Court judgement as the contracting authority has the possibility to consider the subcontractor entitle to receive the payment even when the main contractor expressly stated that it contests the performance of the subcontractor's contractual duties. The correct functioning of direct payment may be severely affected by this power awarded to contracting authorities especially in case of corrupt public officials that require (obviously unofficially) the winning tender to subcontract part of the contract to political connected companies. It is true that the winning bidder has the possibility to denounce the corruption act, but in most cases it will not have any advantage from proceeding in such a manner, because the investigations for corruption are difficult and slow and the contracting authority will do its best in creating barriers for the tender in performing the contract, and, most importantly, in receiving the payment. G. Locatelli and others pointed out in the introductory part of their extremely interesting empirical research upon the impact of corrupt context in megaprojects that there are even supporters of the theory of “efficient corruption” (Locatelli G., Mariani G., Sainati T., Greco M., 2017: 255).

From the wording of the legislation, it looks like only the subcontractor of the main contractor may benefit from the use of the direct payment mechanism. The other subcontractors that may occur in the subcontracting chain are not expressly excluded, but the legal provisions do not provide any guidelines as regards direct payment for subcontractors found lower down in the chain. We consider that direct payment may be included in the contracts between these subcontractors, but actually applying the mechanism would be nearly impossible as it would require the approval of all parties involved in the subcontracting chain until the requestor.

2.3 Alignment of the Subcontract with the Main Procurement Contract

When subcontractors are involved in the performance of the public procurement contract, the main contractor has the duty to submit the agreement concluded with the subcontractor at the moment of the conclusion of the procurement contract. The same rule of submitting the agreement applies for any new subcontractor involved in the performance of the contract. These agreements between the main contractor and the subcontractors shall become an appendix to the procurement contract.

Under Art. 218(5) form Law no. 98/2016 the contract concluded by the main contractor with the subcontractor has to be in line with the tender. This provision assures that the entire project is carried out properly and on schedule

(Cyrul-Karpinska M., 2014:9). It is imperative to know the exact part of the contract that is to be executed by the subcontractor and the contract price.

The most important clauses are the ones related to the subject matter of the contract, the payment clauses, the test, inspection and acceptance conditions. In case of deviation from the clauses of the main contract, from the contracting authority's point of view the contract terms of the procurement contract concluded by it with the main contractor shall prevail. As Trandafir pointed out this will most certainly lead to difficulties or even to the impossibility of using the direct payment mechanism (Trandafir G., 2018). For instance, in case of a contract for the construction of a hospital with different departments, according to the procurement contract, the main contractor is entitled to payment after the completion of each department. One of the subcontractors has fully performed and completed the work in accordance to the subcontract (electrical installation of the pediatric department), but the main contractor found itself in the impossibility of completing the entire department. Due to a lack of correlation between the main contract and the contract concluded by the subcontractor with the main contractor, the subcontractor cannot receive the money directly from the contracting authority for the part executed by him.

The legislation does not include provisions related to the good performance guarantee that should be required from the subcontractors in case of direct payment. The performance guarantee is, in most cases formed by successive withholdings of the amounts due for partial invoices. The contracting authority should include in the procurement contract clauses related to the possibility to withhold the performance guarantee also from the part of the price directly paid to a subcontractor.

By this time we do not possess a jurisprudence related to the direct payment mechanism applicable to subcontractors. We have to wait and see how the contracting authority will make use of it. We expect quite a myriad of cases on these aspects.

Conclusions

The Procurement Directives have not paid great attention to the institution of subcontracting. In 2014, with the Public Sector Directive more extensive provisions on subcontracting have been included. The rules are incorporated in article 71. The most part of article 71 includes non-mandatory provisions that have a rather clarificatory nature. The 2014 Directive has not made it obligatory to introduce rules related to direct payment to subcontractors in public procurement. The European legislator gave the option to Member States to provide for direct payment to subcontractors or not.

Considering the importance of subcontracting in public procurement, which profitably involves a greater number of businesses – mostly local ones –

in the execution phase of public contracts, the national legislator made an attempt to regulate the mechanism in a comprehensively manner to better assure proper performance of procurements. The new regulations provide contracting authorities with the necessary tools to verify whether the proposed subcontractors are properly involved and also to protect them by using the direct payment mechanism.

Subcontracting is widely used in public procurement. The history of poor payment performance or solvency issues in regard to subcontractors in Romanian public procurement are proof that extra protection for subcontractors is required. Romania has chosen to introduce direct payment to subcontractors, as Directive 2014/24/EU foresees, but unfortunately did not create a mechanism adapted to the specificities of the national legal system. The duty of a Member State to correctly transpose the EU directives is not always an easy task. This is especially the case where the Directive leaves a lot of space to the Member State in choosing the appropriate implementation form.

We have to acknowledge the fact that it is a big step forward to finally have provisions related to the direct payment of subcontractors included in the procurement legal framework. In this paper we have analyzed the institution of direct payment to subcontractors with its positive aspects, shortcomings and problems that actors involved in public procurement are facing. The inconsistencies between the primary and secondary legislation have created confusion upon how to correctly apply the new provision. A proper functioning of the mechanism related to direct payment to subcontractors can make the difference between succeeding in completing the project or failing to do so. An important role shall be played by the CNSC, the NAPP and, of course, the courts of law. Their interpretation upon the legal provisions should aim to solve the interpretative uncertainties caused by the legislation.

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