

**LEGAL AND TAX ALERT, March 20<sup>th</sup>, 2015****CHALLENGES IN PUBLIC PROCUREMENT PROCEDURES, BACK ON (THE GOOD-FAITH) TRACK**

As of yesterday, March 19<sup>th</sup>, 2015<sup>1</sup>, contracting authorities can no longer withhold the good conduct bond provided by economic operators who challenge public procurement procedures, in case the challenge is rejected by the National Council for Solving Complaints (in Romanian: *Consiliul Național de Soluționare a Contestațiilor* – CNSC) or by the court of law, or if the challenge is waived by the claimant. The Constitutional Court of Romania decided that the legal provisions regarding the withholding of the bond in such situations breaches constitutional provisions.

**Criticised Legal Provisions**

The good conduct bond was introduced in the public procurement legislation<sup>2</sup> in 2014 in view of protecting contracting authorities against the abusive filing of challenges in public procurement procedures. The measure of introducing this bond, the set-up of which represents a condition for filing a challenge, has been and continues to be subject to severe criticisms (i) on the one hand, because of the excessive amount of the bond<sup>3</sup>, which is likely to restrict the access to justice, and (ii) on the other hand, because of its automatic withholding in case the challenge is rejected or withdrawn, irrespective of the procedural conduct of the claimant.

**Constitutional Court's Opinion**

The Court upheld that the legal provisions which establish the obligation to set up the bond do not breach the constitutional provisions regarding the free access to justice and the voluntary and free nature of special administrative jurisdictions, such as that in front of CNSC. In the Court's opinion however, the unconditional withholding of the good conduct bond, by presuming the bad-faith and the abusive conduct of the claimant, restricts the free access to justice and affects the private property right, which are guaranteed by the Constitution. The measure of withholding the bond acts as a deterrent for the economic operator in filing a challenge as long as any rejection of such challenge leads to its sanctioning, even when exercising its procedural rights in good faith, and reduces the claimant's patrimony as a direct result of the claimant exercising a fundamental right.

**Court's Decision Impact**

The Constitutional Court's decision suspends the effects of the legal provisions declared unconstitutional for a period of 45 days as of its publishing (*i.e.* March 19<sup>th</sup>, 2015), during which the legislator has to amend these provisions in order to comply with the Constitution. Otherwise, the legal provisions at issued become definitively inapplicable, at the expiry of the aforementioned term.

<sup>1</sup> The date when the Constitutional Court's Decision No. 5/15.01.2015 regarding the constitutional challenge of art. 271<sup>1</sup> and art. 271<sup>2</sup> of Government Emergency Ordinance No. 34/2006 on the award of public procurement contracts, public works concession contracts and services concession contracts, was published in the Official Gazette of Romania.

<sup>2</sup> Government Emergency Ordinance No. 34/2006 on the award of public procurement contracts, public works concession contracts and services concession contracts.

<sup>3</sup> 1% of the contract's estimated value, capped at EUR 10,000 EUR, EUR 25,000 and EUR 100,000 respectively, depending on the type and value of the public procurement contract.

Therefore, starting March 19<sup>th</sup>, 2015, the automatic withholding of the good conduct bond by contracting authorities becomes illegal in case the challenge is rejected or withdrawn, regardless of whether the challenge has been submitted prior to the publication date of the Constitutional Court's decision, provided that CNSC's decision, respectively the court's resolution, has not become final prior to March 19<sup>th</sup>, 2015. In case the bond was set up through a guarantee instrument issued by a bank or an insurance company, this instrument can no longer be automatically executed by contracting authorities in case the challenge in relation to which the bond was set up, is rejected by CNSC or by the court. On the other hand, if the bond has been set up through wire transfer, the claimants will find themselves in a position where they shall have to undertake legal proceedings in order to recover the amounts paid, in case the contracting authority does not voluntarily refund such amounts.

Even under these circumstances, providing the good conduct bond continues to be a mandatory requirement for filing any challenge in public procurement procedures even after March 19<sup>th</sup>, 2015. In addition, the withholding of the good conduct bond shall nevertheless occur in case, in the last day of its validity, CNSC's decision or the court's resolution has not become final, and the economic operator has not prolonged its validity. Since the Constitutional Court has not declared these latter provisions unconstitutional, economic operators will have to ensure that the bond does not expire<sup>4</sup> before CNSC's decision, respectively the court's resolution, becomes final, and in case there is a risk for the bond to expire, to submit proof of its prolongation on the day preceding the last day of the bond's validity, at the latest, otherwise risking to lose the amounts at issue.

### **Conclusions**

Considering the Court's findings, the legal provisions declared unconstitutional might not be amended in order to comply with the Constitution otherwise than by introducing appropriate mechanisms by which the good conduct bond is refunded in all cases where the bad-faith of the claimant cannot be proved in consideration of the factual circumstances of the case.

Although the Constitutional Court's decision brings challenges in public procurement procedures on the right track in terms of acknowledging the necessity to observe the presumption of good-faith in exercising procedural rights, its actual effects depend, to a great extent, on the manner in which the legislator shall consider appropriate to amend the legal provisions in order to eliminate the aspects identified by the Court as unconstitutional.

Last but not least, the Court's decision does not settle an essential issue of the current legislation, namely the excessive value of the good conduct bond, in the context where the European Commission has already pointed out<sup>5</sup> that the measure of setting up this bond could be disproportionate and go beyond what is necessary to achieve the proposed objective, namely to limit abusive challenges, and could lead to a limitation of access to justice.

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<sup>4</sup> The law provides for a minimum validity period of 90 days for the good conduct bond.

<sup>5</sup> The letter of file No. 7189/14/MARK opened against Romania by the European Commission in the EU Pilot programme.

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