

Participation of construction works subcontractors in public procurement. Part II – order execution

The first part of this article discusses legal issues related to bidding for public procurement contracts in cases where a part of the order is to be carried out by subcontractors. The discussion below concerns legal aspects of the stage in which construction works being the subject of a public procurement order are performed by subcontractors.

As it was pointed out in the first part of this article, when submitting a bid in a public procurement procedure, one should also bear in mind the provisions of Art. 36b.1 of the PPL which stipulate that the bid should already specify contract lots that the contractor intends to entrust to subcontractors and provide company names of the subcontractors. Another clause of the very same regulation (Art. 36b.2 of the PPL) stipulates that if the contractor decides to change a subcontractor whose resources the contractor relied upon so as to demonstrate the satisfaction of conditions for participation in the procedure, the contractor is required to demonstrate to the contracting authority that another proposed subcontractor or the contractor meets the requirements on its own at least to the extent they were fulfilled by the subcontractor on whose resources the contractor relied during the contract award procedure. Therefore, using the subcontractor's "services" during the contract award stage only to comply with the conditions for participation in the procedure and then replacing the subcontractor with an entity that will actually perform the works should not be allowed.

Contractors who decide that a part of the works should be performed by a subcontractor during the performance of the contract need to handle some other

formalities. Pursuant to Art. 36ba of the PPL, if a part of a contract for works or services is entrusted to a subcontractor during the execution of the contract, the contractor, upon the contracting authority's request, is required to prove that there are no grounds for excluding the subcontractor. Moreover, if the contracting authority states that there are grounds for exclusion of the given subcontractor, the contractor is required to replace this subcontractor or decide against entrusting the part of the contract to this subcontractor. These rules apply to subsequent subcontractors if the contracting authority has provided so in the relevant terms of reference.

A really important regulation is contained in Art. 143b of the PPL, which governs the procedure for notifying a subcontractor to the contracting authority and the issue of the contracting authority submitting comments on subcontracting agreements. Under Art. 143b.1 of the PPL, the contractor, subcontractor or subsequent subcontractor of the contract for construction works intending to conclude a subcontracting agreement having construction works as its subject matter is required, during the execution of the public construction works, to submit a draft of the subcontracting agreement to the contracting authority, with a proviso that the subcontractor or subsequent subcontractor is obliged to attach the contractor's consent to conclude a subcontracting agreement whose contents are consistent with the draft agreement. Pursuant to Art. 143b.3 of the PPL, the contracting authority is required to file reservations, in the written form, to the draft of the subcontracting agreement whose subject matter concerns construction

works within a time limit specified in the public procurement contract if the agreement (i) fails to meet the requirements specified in the terms of reference, (ii) provides for a time limit for payment of the remuneration in excess of 30 days from the delivery of an invoice or receipt to the contractor, subcontractor or further subcontractors – it is, at the same time, the longest time limit allowed in the subcontracting agreement (Art. 143b.2 of the PPL). Failure to submit reservations, in the written form, to the submitted draft subcontracting agreement whose subject matter concerns construction works within the time limit specified in the public procurement contract shall be deemed acceptance of the draft subcontracting agreement by the contracting authority.

Art. 143a and Art. 143c of the PPL also contain highly relevant provisions governing remuneration payable to subcontractors. Pursuant to Art. 143a.1 of the PPL, in the case of construction works contracts with a term exceeding 12 months, if the contract provides for the payment of the remuneration to the subcontractor in parts, a condition for payment of the second and subsequent parts of remuneration due for accepted construction works by the contracting authority is to present evidence that remuneration payable to subcontractors and further subcontractors involved in construction works who have entered into a subcontracting agreement accepted by the contracting authority has actually been paid. If the contractor fails to present full evidence that the remuneration has been paid, the payment of due remuneration should be suspended. It is a powerful measure to protect subcontractors' rights.

Another tool of this kind is the contracting authority's right to make direct payments to subcontractors. Pursuant to Art. 143c.1, the contracting authority makes a direct payment of remuneration payable to a subcontractor or further subcontractor who entered into a subcontracting agreement for construction works, or a subcontracting agreement for supplies or services, accepted by the contracting authority if the contractor, subcontractor or further subcontractor in-

volved in a construction works contract fails to make the relevant payment, with a proviso that prior to making the direct payment, the contracting authority is required to allow the contractor to submit comments, in the written form, on the legitimacy of making the direct payment within seven days from delivery of the relevant information. If the contracting authority has reasonable doubts as to the amount of remuneration or the entity to whom the payment is to be made, the contracting authority may pay the amount required to pay the subcontractor's or further subcontractor's remuneration into a court deposit. It should be noted that

if the contracting is required to make multiple direct payments to the subcontractor or further subcontractor or if direct payments amount to more than 5% of the public procurement contract amount, this may constitute grounds for the contracting authority to withdraw from the public procurement contract.

Both parts of the article only outline some of the legal issues related to subcontractors' participation in bidding for public procurement contracts and the actual execution of public procurement contracts. Seeking to provide an extensive array of protective measures for subcontractors and to ensure

that contracts are delivered by competent entities, the legislator imposed several obligations on contractors whose execution can involve a large number of legal risks.

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