

# Participation of construction works subcontractors in public procurement. Part I – procurement procedure

Under the Civil Code (CC), subcontractors' participation in the execution of construction works involves the issue of joint and several liability of the employer and the general contractor as regards the payment of remuneration to effectively notified subcontractors, pursuant to Art. 647<sup>1</sup> of the CC, and the issue of payment guarantee, which may be requested pursuant to Art. 6495. The notion of "subcontractor" is not expressed in any other provisions of the CC, nor is it defined elsewhere in the legislation. Therefore, when hiring subcontractors, the employer and the contractor (general contractor) involved in the construction process governed solely by the provisions of the CC and the Construction Law will only be confronted by these two issues referring strictly to subcontractors that are referred to in the CC. However, following the passing of the amended law of 22 June 2016 (Amendment of Public Procurement Law), the Public Procurement Law appears to treat the notion of subcontractor in greater detail. In this article, I will briefly outline issues related to a procurement procedure concerning an order that will be performed with the participation of third parties. The second part of the article will focus on the legal aspects of subcontractors' participation in the execution of public procurement contracts.

The Public Procurement Law (PPL) defines a subcontracting agreement. Pursuant to Art. 2.9b of the PPL, the subcontracting agreement should be understood as a written agreement for pecuniary interest the subject matter of which concerns services, supplies or construction works constituting part of the public contract concluded between a contractor selected by the contracting authority and another entity (a subcontractor), and in the case of public contracts for construction works, the agreement will also govern the relationship between the subcontractor and further subcontractor or between further subcontractors.

The possibility of hiring subcontractors for the purpose of implementing a public procurement contract is relevant already when the contractor is seeking to win the contract.

Under Art. 36.11 of the PPL, the contracting authority is authorised to specify the requirements concerning future subcontracting agreements the subject matter of which will concern construction works, failure of fulfilment of which will result in the contracting authority lodging an objection or appeal against such an agreement. Moreover, under Art. 36a of the PPL, the contracting authority may impose on the contractor the obligation to perform the key parts of the construction work order in person. If this is the case, the "key" parts of the construction work order may not be performed by subcontractors. Obviously, the contracting authority is responsible for specifying which parts of the order are to be classified as the key parts. 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. Interestingly, the National Appeals Chamber's case-law emphasises that it is incorrect to refer to the fact of hiring subcontractors just by determining subcontractors' percentage shares in the execution of the public procurement contract. The National Appeals Chamber (NAC) emphasises that since the legislator permits the contracting authority to interfere with the contractors' decisions with respect to hiring subcontractors, e.g. by introducing the obligation for the contractor appointed to perform a public procurement order to carry out key parts of the order or give detailed information on the subcontractor, then determining only a percentage share of the order to be assigned to the subcontractor would render the contracting authority's right misleading and ineffective (NAC 416/17).

Particularly relevant is the obligation specified in Art. 25.5 of the PPL, which stipulates that upon request of the contracting authority, the contractor who intends to assign part of the contract to subcontractors is required to submit documents or declarations relating to subcontractors in order to demon-

strate the lack of grounds for the exclusion of the subcontractors from the tender procedure. It should be noted that the contracting authority has the right – but not an obligation – to request such documents, but it is the contractor's responsibility to carefully review the procurement notice and the Terms of Reference to recognise the contracting authority's wish.

The contractor's right to rely on third-party capacity in order to fulfil the conditions for participation in the procedure is also related to the subcontracting issue. Pursuant to Art. 22.4 of the PPL, contractors may rely on capabilities of other entities in terms of education, professional qualifications or experience provided that such entities shall perform construction works or provide services that require such capabilities. It should be stressed that the phrase "entities shall perform construction works or provide services" is a narrower notion than their "participation" in the execution of the order. Legal commentators stress that the obligation to perform parts of the contract involving resources made available should be understood as the obligation of the actual performance of parts of the order by a subcontractor or jointly with the contractor, e.g. by the third party posting its employees to perform the order in person. Therefore, the provisions of Art. 22a.4 of the PPL imposes the obligation to perform construction works or provide services by the party making its resources available that require such resources, as confirmed by the National Appeals Chamber's case-law, which shows that reliance on the expertise and experience presented by the third party without the actual participation of the third party in the execution of the order is only apparent, not actual, reliance on the third party's capacity. It should be concluded that the the Amendment of Public Procurement Law has greatly diminished the practice of "contract reference trading" and fictitious lending of capabilities, while the role of subcontractors has been strengthened.

In point of fact, the legal issues discussed in this article boil down to adding new obligations to the contractor at the bid submission stage. In the next article, I will describe the scope of activities and constraints of contractors while performing a public procurement order associated with hiring a subcontractor.

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