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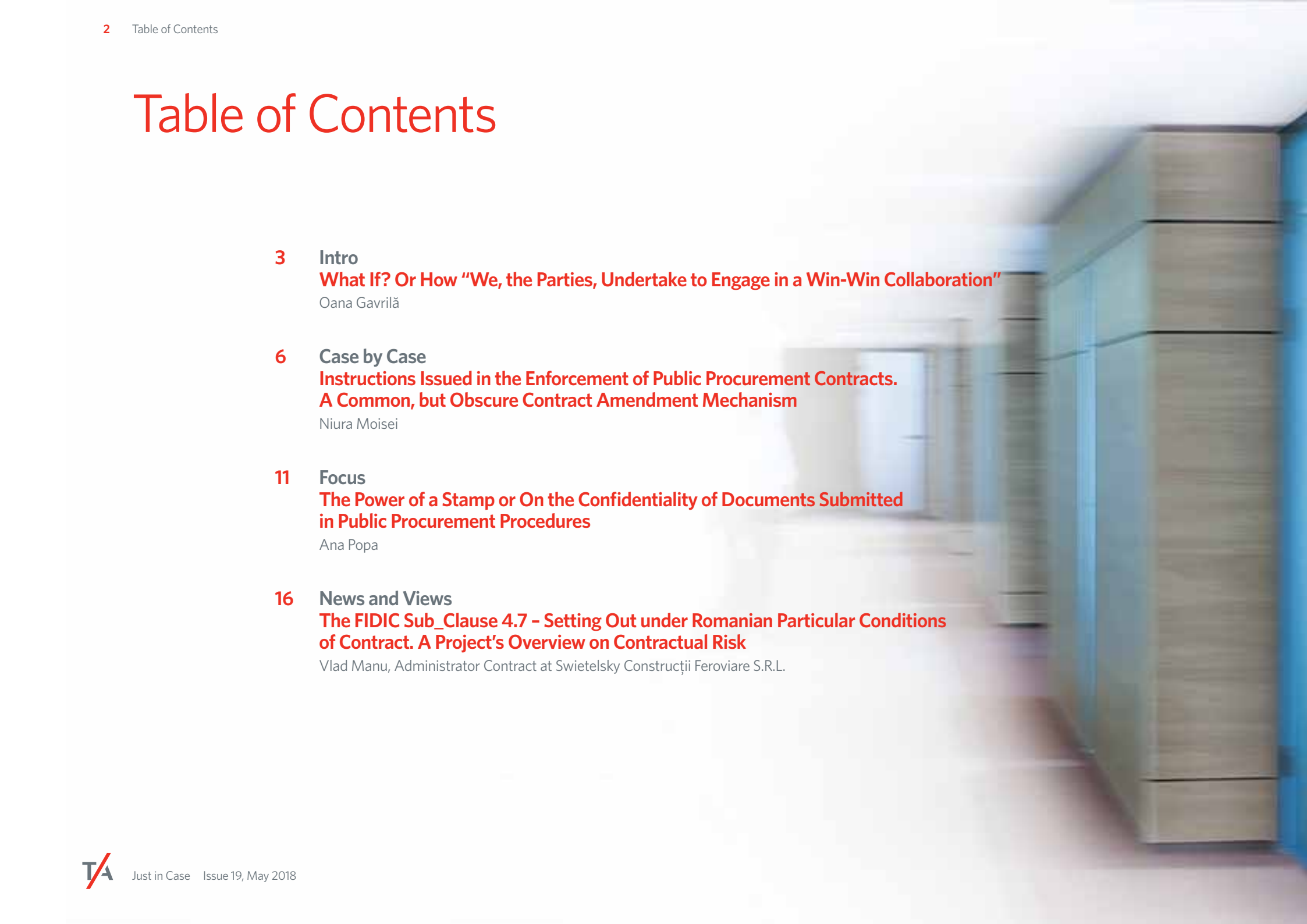
In this issue

Table of Contents



Intro

What If? Or How "We, the Parties, Undertake to Engage in a Win-Win Collaboration"

What If? Or How "We, the Parties, Undertake to Engage in a Win-Win Collaboration"

A highly regarded professional in the field recently told me about a certain place in the world where, after having been stated and acknowledged, the principle of collaborating in good faith when performing a project, has become the basic rule governing the behaviour of the parties involved in a project of public interest.

To be honest, I did not stop to check the accuracy, nor the actual source of law from where this principle derives. However, I did take a moment to ponder over what it represents and how it is applied, and I came to the conclusion that, although everybody mentions it on a daily basis, it fails to be implemented. At the same time, I strongly believe that we could manage our lives a lot more efficiently if we lived by it.

I take great interest in observing the development of the public procurement sector; both the contract award stage and the ever more notorious stage of contract performance. Bidders, contractors, beneficiaries, engineers and legal professionals - we are trying to grow together; we are trying to learn together about projects, about ever-changing laws, about the people involved, about the main issues which keep reoccurring, while still being approached in a surprisingly controversial manner and not ceasing to generate disputes. We refine our approach, we develop more and more sophisticated argumentations, we sneak a peek at what our more advanced peers are doing, we study more and better, we draw attention to the content of contractual documents. And we hope, under the illusion of the professional who trusts their wisdom and experience, that, following all these efforts, we will be able to solve all the necessary issues in a better, more thorough and fairer manner.

Somehow, we fail. Something is still missing. Disputes become more numerous and complex, cases keep piling up before the courts, problems persist, projects are left unfinished.

Although we all read the same "books", the same laws and the same contracts, we all openly declare >

that we want to "do better", we all claim that we want completed projects and quick and committed responses from the decision-makers, somewhere along the way the main point is lost; we are losing our footing and, under the pressure of obtaining an immediate, satisfactory result for our own comfort, we forget that tomorrow we will have to bear the consequences for what we obtained today undeservedly; we forget that any imbalance causes a domino effect, that any regulation is good only as long as its gist is not changed. Also, we forget that incomplete information and arguments developed out of context alter the truth and we forget that, at the end of the day, the principle should prevail over our own comfort; the public interest, i.e. the development and completion of the disputed project is, most of the time, the last, if at all, on the stakeholders' list of priorities. Each of us should bear in mind that we ought to restore a contractual balance which was affected due to our own fault or, as the case may be, to accept that sometimes the initial commitment may include taking on further responsibilities, in addition to those expressly provided, because otherwise we will no longer have a project. And, at least on the face of it, the project itself should be our raison d'être.

Hence, I wonder: how many new laws, template agreements, sophisticated legal arguments, power plays and/or actions meant to protect our professional comfort zone, do we actually need to remind us that, in fact, our sole desideratum should be a common one, namely to make things work properly and as initially intended and recorded in writing? What is, in fact, the logical connection between the applicable template agreements and what really happens in practice with these projects? Why do we glaze over the main point and, under the pretext of shy attempts at redefining the concept or mere affirmation of it (which, most of the times, also falls under the scope of our immediate interest) we are in fact trying to convince someone that something else than the proper operation of the project matters more? Why do we fail to cooperate?

For the first time after quite a few years of practice, I would be glad to find fairness applied to all the disputes of which I am aware. I have always been apprehensive of this concept, as I deemed that we do not have the discipline to use it (yet). I am still afraid, but I have started to believe that a win-win mentality should become an alternative to the chaos and unpredictability that are spreading too fast. I like clear regulations and concise rulings; however, I feel that it comes down to more than that, specifically down to that particular something which must be applied in the case of complex projects where regulatory predictability cannot get through: common sense, fairness or balance, coming up with constructive solutions together, irrespective of our position in the project, wise decisions (short and long-term) and optimal courses of action for things that crop up throughout the duration of the project. Do we lack the courage to cooperate in good faith? Why and how long will we prefer to toss the burden of a decision on anyone else to the detriment of a quick, clean, clear and constructive solution taken by those with a deep knowledge of the specific activities at stake?

London, a recent and very dear experience of mine, has taught me this: one can apply this principle when you have the common sense to admit it in front of all stakeholders. When the parties, of equal bargaining power, refer their dispute, in good faith and trust, to a third party whose capacity to resolve the dispute in an unbiased manner they fully acknowledge, that is when, in fact, they win the project. The winning is not and should not be about people and responsibilities, but about that "greater good" for which we should all strive together.

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Case by Case

Instructions Issued in the Enforcement of Public Procurement Contracts. A Common, but Obscure Contract Amendment Mechanism

Instructions Issued in the Enforcement of Public Procurement Contracts. A Common, but Obscure Contract Amendment Mechanism

A topic not too often approached in the doctrine is the mechanism by which the public authority makes sure that the objective of the project is reached and public interest is satisfied by the fulfilment of the public procurement contract under optimum conditions: the instruction.

One of the mechanisms used by the public authority to reach this desideratum is the issuance of instructions; thus, the private contractor is basically ordered to perform project-related obligations. This is a tool meant to render the contract flexible; particularly in highly complex works, where it thus becomes possible to adjust the contract without the parties necessarily having to execute addenda.

The issuance of an instruction does not necessarily lead to the amendment of the contract; instructions may clarify the scope of contractual obligations, supplement missing information which is vital to project implementation or provide the contractor with solutions to overcome unforeseeable events. However, sometimes instructions are used to burden private contractors with obligations in addition to those initially provided under the contract, as a reaction to various situations which are likely to obstruct regular project development.

Such situations are usually encountered in highly complex long-term construction contracts, where the parties cannot foresee all the situations which may impact the project, as the facts encountered on the site are often different from descriptions in the technical project or tender documentation. Such situations usually require additional works performance which had not been included in the contract. Under these circumstances, the instruction plays a crucial part because, as shown above, it renders the contract flexible, making possible an immediate amendment thereof and the continued development of the project, without major impediments.

Since instructions are issued by public authorities

for the alleged and assumed purpose of defending public interest, once issued, they are mandatory for the contractor and must be implemented; otherwise, the contractor is exposed to the consequences of a failure to perform its contractual obligations.

If the contractor does not agree to the instruction, it has the acknowledged right of raising objections; however, raising objections does not eliminate the obligation to comply with the instruction. The contractor's only remedy is to file legal action - time-consuming and costly proceedings for the contractor, which risks seeing enforcement proceedings initiated against it by the authority in question before its own claims have been proven.

The equivocal legal nature of the instruction from an administrative perspective is revealed when it becomes necessary to challenge it. Depending on the moment when it is challenged, it may have the nature of a genuine administrative act or it may become a mere unnamed instrument, the legal effects of which may be overcome without requiring the annulment thereof.

Our national law does not provide for the legal status of instructions and their legal nature is still unclear, generating different and, most of the times, inconsistent rulings.

In the preamble of this article we showed that the specificity of a public procurement contract is that the public authority does not indicate its intention in order to satisfy a private interest, but to satisfy the general interest of society. That is why, according to Law No. 554/2004, the public procurement contract is considered similar to an administrative act. Therefore, it may be construed that the instructions which are issued in the enforcement of the contract are also administrative acts. However, a careful and strict analysis of the definitions in Article 2(c) of Law No. 554/2004 may lead to a negative conclusion: administrative acts seem to be limited to those listed in the article and the scope of administrative acts seems to be limited to those acts which are issued in view of organizing or enforcing the law and the actual administrative contracts. There is no legal provision on the orders or instructions issued for the implementation thereof.

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However, if we analyse these acts by taking into consideration the features of administrative acts, at least as outlined in the doctrine, we notice that we may easily classify them into this category, given that: (i) they are issued by a public authority, (ii) they are subject to the legality control of the courts of law, since all disputes on the performance of public procurement contracts, including those on the annulment of the acts issued by the contracting authority in view of performing a public procurement contract, are under the express and exclusive jurisdiction of administrative courts which exercise the legality control thereon and (iii) they were issued in order to regulate rights and obligations, i.e. the issued acts were intended to write off and, as the case may be, to generate correlative rights and obligations.

For a better understanding of why the legal nature of instructions raises practical issues, we may think of a hypothetical situation when the public authority issues an instruction ordering the private contractor to perform additional works, but it is "silent" as to how such works are to be paid. Since they are very burdensome for the private contractor, its only option, in order to avoid the performance of additional works at its own expense, is to challenge the instruction/ administrative order by filing legal action before an administrative court for the annulment of the instruction.

Nevertheless, the atypical nature of the instruction becomes obvious if it is challenged after it is performed. In such case, unlike "typical" administrative acts, contractual balance may be restored and, thus, the damage incurred by the contractor may be repaired without being necessary to annul the act, which makes the instruction an exception, to say the least, from the regular status of administrative acts, where the granting of indemnifications is conditional on the annulment of the act.

More precisely, the private contractor may file legal action even after the performance of the instruction and request the repair of the damage caused by its performance, as well as the payment of the additional works performed at its expense or the extension of the contract duration when the enforcement of the instruction caused delays to the>

contractor. In such case, the effects of the instruction may be extinguished by the damages awarded by the court to cover the loss caused by the issuance of this act, without being necessary to annul the instruction, which was the source of the damage in the first place. In such case, the legal nature of administrative act of the instruction becomes equivocal, because it derogates from the rule that any administrative act continues to have effects unless it is annulled or revoked.

The question of the legal nature of the instructions becomes even more intricate when they are issued under a FIDIC public procurement contract. In the performance of such contracts, the contracting authority is represented by a consultant, called Engineer, who exercises specific duties such as: to verify and certify the performed works, to issue instructions for any missing information/ amendments occurring during the performance of the contract (and which are mandatory for the contractor) and to issue orders for the modification of works which had not been included in the initial scope of the contract. Since such contracts were drafted and thought so as to be very balanced for all the parties, the person who issues the instructions in the performance of the contract is the Engineer, acting as an unbiased arbitrator of the parties.

Therefore, given that in such type of contracts instructions are no longer issued by the public authority, but essentially by a private individual who is a third party to the contract, can they still be deemed to be administrative acts?

We believe that the answer could be positive, given that the Engineer acts, however, on behalf of the contracting authority, as its representative, even if his role requires impartiality and fairness. This approach is supported, at least partially, by the provision in Article 16 of Law No. 554/2004 which allows the filing of legal action against the person who contributed to the preparation, issuance or execution of the damaging act. Such person may be ordered to pay indemnifications jointly with the defendant public authority. Given that the Engineer is a member of the contracting authority's contractual staff, we may deem that the authority's power to direct and control is transferred to the Engineer and implicitly the acts issued by him maintain their nature of administrative acts because they are in fact issued by the contracting authority.

Regardless of whether instructions are seen as administrative acts or not, it is certain that they have the power to amend the contract when it is in the interest of the project. Unfortunately, it is a well-known fact that the faulty and superficial wording of tender documentations triggers, most of the times, the need to frequently issue instructions which substantially change the contractual obligations provided in the initially signed contract.

Sadly, the excessive use of the mechanism of instructions and the mandatory character of such instructions intended to determine private contractors to perform at their own expense additional works or to remedy errors for which the contracting authority itself is liable, has become a systemic approach in the implementation of public procurement contracts in Romania. In a growingly frequent approach, the contractor's obligation to perform works at its own expense is included in the instruction itself. In this case, the issue is whether the instruction must be considered mandatory for both its technical component and its financial component.

" Regardless of whether instructions are seen as administrative acts or not, it is certain that they have the power to amend the contract when it is in the interest of the project.

Such analysis must be made by reference to a fundamental principle of public procurement contracts, i.e. the principle of contractual balance, whose role is precisely to protect the private contractor from any abuse of power of the public authority. Compliance with this principle means that, in issuing instructions, public authorities cannot abusively and randomly amend the financial part of the contract, but only the technical part which concerns the actual performance of the obligations.

This is the obvious solution, given that an interpretation to the contrary could lead to the conclusion that a potential instruction/administrative order requiring the contractor to perform additional works, not provided in the initial contract, should be complied with by the contractor at its own expense, resulting in the unjust enrichment of the contracting authority; precisely in order to counteract such effect, the right of the public authority to unilaterally>

amend the contract cannot be exercised in relation to the financial provisions of the contract.

Without pretending to have clarified the question of the legal nature of the instructions issued in the performance of public procurement contracts, we, nevertheless, hope that we drew attention and interest to this topic which is almost non-existent in the specialized literature and it is not clearly regulated either. Sadly, the absence of regulations on the legal nature of instructions and the limits within which they may lead to an amendment of the contract will continue to leave room for abusive behaviour and the already common practice of abusive amendment of the contract to the detriment of the private contractor.

Although it is still unclear whether instructions are administrative acts, it is however generally acknowledged that the actions to challenge the instructions/ administrative acts which were issued in breach of these principles and/or the refusal of public authorities to restore the envisaged contractual balance follow the dispute resolution mechanisms of administrative claims, except for the cases when the contract contains clauses on special dispute resolution procedures.

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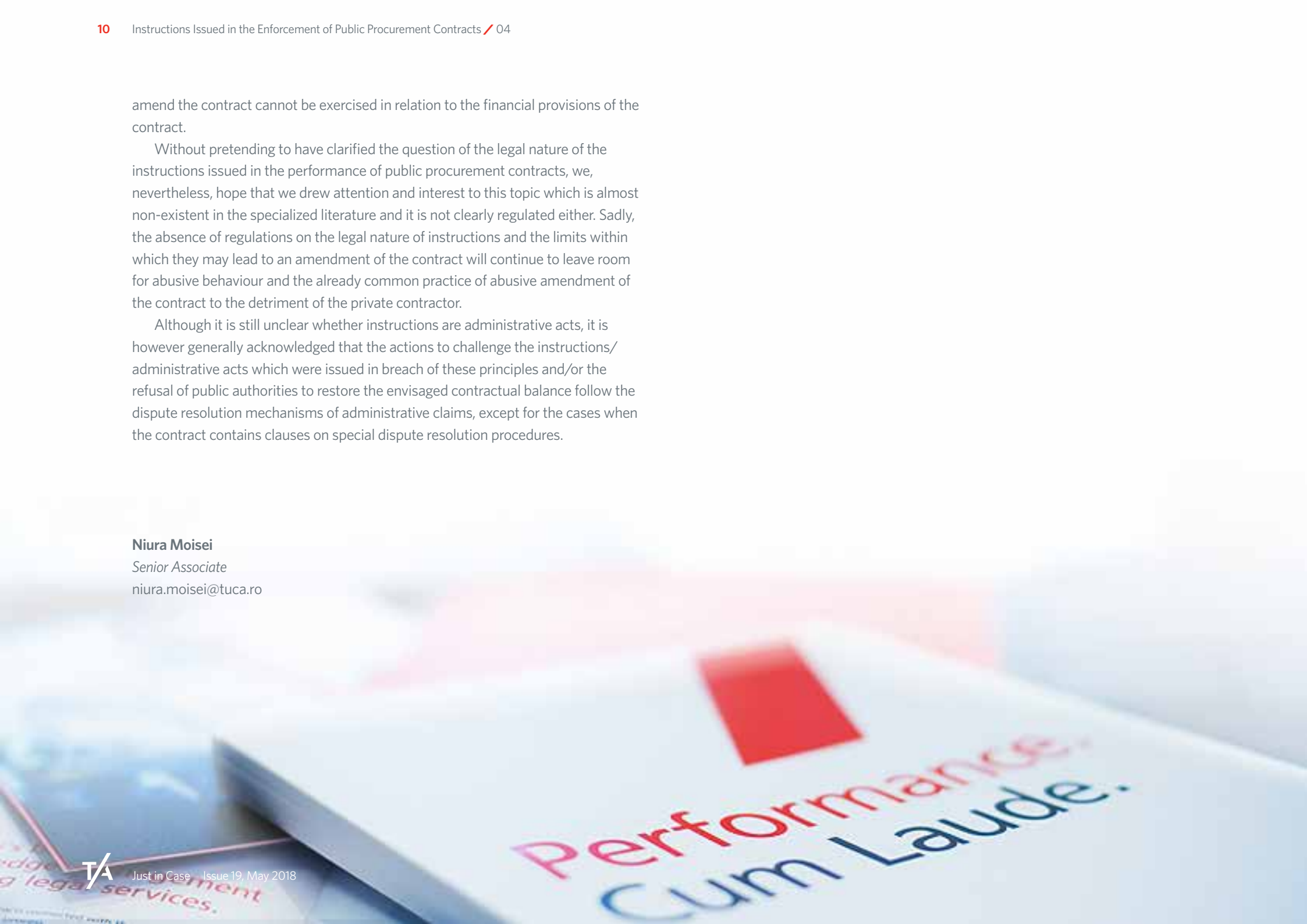

Focus

The Power of a Stamp or On the Confidentiality of Documents Submitted in Public Procurement Procedures

The Power of a Stamp or On the Confidentiality of Documents Submitted in Public Procurement Procedures

Introduction

Lately, there have been increasing talks about the confidentiality of documents submitted by economic operators in procedures of awarding public procurement contracts, about the need to specifically and efficiently ensure the confidentiality of these documents, but also about the obligation of contracting authorities to ensure the transparency of the public procurement process.

Naturally, two different opinions have emerged with regards to this issue, depending on one's own interest, and the national case law has been, in its turn, polarised and rather inconsistent.

While during the contract award procedure, in the tender submission and assessment stage, there are no major problems concerning the confidentiality of the documents submitted by the entities participating in the procedure, things change fundamentally when a public procurement procedure is finalised, and the successful tender is selected. After this point, under domestic legislation, the procurement file becomes a public document.

Although the tenders submitted in a public procurement procedure do not become part of the procurement file, when the successful tender is selected, reviewing the successful tenderer's documentation becomes a purpose *per se* and, I would even say, the supreme desideratum of the competitors whose tenders either receive inferior scoring or are rejected.

Under these circumstances, the following questions naturally arise: (i) does the public authority have, under the principle of transparency, the right/obligation to disclose the content of the tender or sensitive information in the clarifications sent to the economic operator while the tenders were assessed? (ii) how does a tenderer efficiently prove that its tender documents include confidential information, the disclosure of which is likely to cause significant damage? (iii) is the stamp "Confidential" *per se*, affixed to the tender documentation, sufficient to defeat the principle of transparency and to protect the documents that bear this marking? (iv) what are the effective remedies available to an economic operator whose tender documentation was disclosed to third parties so as to minimise the effect of disclosing sensitive/confidential information to third parties?

This article seeks to answer the questions above in accordance with the author's own interpretation of the applicable legal provisions.

Relevant provisions

At a national level, the matter of confidentiality of the tenders submitted in public procurement>

procedures is generally regulated by Law No. 98/2016 on Public Procurement and its application norms and by Law No. 101/2016 on the Remedies and Means of Appeal in matters of awarding public procurement contracts, sector-specific contracts and works concession and service concession contracts, as well as on organising and operating the National Council for Solving Complaints. In my opinion, the two above-mentioned regulations include important landmarks for determining/assessing the confidentiality of tender documents, which could and, at the same time, must be applied whenever a conflict arises in connection with the confidentiality of documents submitted in a contract award procedure.

At European level, we may rely on Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 and on the particularly eloquent case law of the Court of Justice of the European Union. A reference decision as regards the need to respect the confidentiality of tenders is the Judgment given in case C-450/06, Varec SA v Belgian State.

Strictly referring to awarding public procurement contracts[1], it should be noted that Law No. 98/2018 generally regulates the following aspects:

- The free access to information of public interest is ensured, however, without being an absolute right. As with any right, the free access to information of public interest has its limitations;
- The contracting authority has an obligation to not disclose the information submitted by the economic operators and indicated by them as confidential, including technical or business secrets and the confidential terms in the tenders;
- The contracting authority has a right to impose certain requirements on the economic operators in order to protect the confidentiality of the information that they disclose during the contract award procedure;
- The contracting authority has an obligation to protect the integrity of the data, the confidentiality of the tenders and of the applications concerning submitting, sending and storing the information;
- The content of the tenders and of the applications, as well as of the plans/designs in design contests is confidential until the date scheduled for their opening;
- The access to the public procurement file will comply with the deadlines and procedures provided in the regulations regarding free access to information of public interest and cannot be restricted unless such information is confidential, classified or proprietary, under the law;
- After the outcome of the contract award procedure is notified, the contracting authority must allow, upon request, within no more than one business day after receiving such a request, the unrestricted access of any bidder to the report of the contract award procedure, as well as to the information in the qualification documents, in the technical and/or financial proposals that were not declared confidential, classified or proprietary by the tenderers.

Moreover, with respect to the need to protect confidential information in the tender documents, Law No. 101/2016 provides the following:

- The parties to the case have access to the documents in the file created by the Council, similarly to the access to court files, save for the documents declared confidential by economic operators, since they include, without limitation, technical and/or trade secrets, established under the law, and their disclosure would undermine the legitimate interests of the economic operators, particularly as regards trade secrets or intellectual property. The confidentiality must be proven by any means of evidence;
- The documents may be declared confidential by tenderers by explicitly and visibly marking or indicating them as confidential documents. The confidential documents in the tenders may be reviewed only with the relevant tenderers' written consent.

Second of all, as regards the matter under consideration, there is extensive national case law that, nevertheless, fails to establish, even at principled level, the correct approach for the confidentiality of>

1. Although this review excludes the award procedures for some sector-specific contracts, the arguments presented and the resulting conclusions may be also applied mutatis mutandis to them and the regulations are essentially the same, although provided by two distinctive laws, i.e. Law No. 98/2018 on Public Procurement and Law No. 99/2016 on Sector-specific Procurement.

the documents submitted in public procurement procedures. Quite the contrary, the national case law is polarised, and the decisions given in this respect are diametrically opposite.

Certain opinions in case law state that the mere fact that the "confidential" stamp is affixed to the tender documents is sufficient for the respective documents to be protected and for third party access to be restricted.

On the other hand, some opinions state that the confidentiality of a tender/information declared confidential cannot be ensured by simply affixing the "confidential" stamp on the tender documents. According to this opinion, such an approach does not meet the requirements expressly provided by the law in order for the respective document to be deemed confidential. This is because, in accordance with Article 217 of Law No. 98/2016, the rule is the free access to the documents in the procurement file, with the exception (which must be interpreted restrictively) that access is restricted, inter alia, when the information is confidential under the law.

Analysis or attempt to provide answers to the multitude of questions with regards to the topic under consideration

In the introductory part of this article I proposed a series of questions, or rather personal doubts, that I have thoroughly reflected upon in an attempt to identify answers and solutions, faced ever more often with the issue of the confidentiality of the documents submitted in public procurement procedures.

As regards the first such doubt/question, namely whether the contracting authority has an obligation to disclose the content of the tender or the confidential information in the clarifications addressed to the economic operator based on the principle of transparency, the answer that I have eventually found is that it depends from one case to another.

Why do I believe that the answer should depend, on specific circumstances and not be a one-size fits all type? This is because the reality of projects of such magnitude as those subject to public procurement procedures is in its turn complex and unpredictable and the real-life situations are not simple and require specific consideration depending on their specifics.

Nevertheless, in an attempt to answer this question, which I find quite thought-provoking, I will first rely on the fact that the overall regulatory approach to tender confidentiality seems to rather establish as a matter of principle the fact that access to information of public interest is free. Such approach is to be expected considering that one of the

> *" On the other hand, some opinions state that the confidentiality of a tender/information declared confidential cannot be ensured by simply affixing the "confidential" stamp on the tender documents.*

fundamental principles of public procurement is the transparency that should be shown by the contracting authority. Therefore, transparency is a genuine control instrument, a guarantee of the efficient use of public funds, and applying the principle of transparency in concreto is likely to increase public trust in the public procurement process.

Without denying or minimizing the importance of this principle, I nevertheless consider that transparency in a public procurement process cannot be applied de plano, without a substantiated a priori consideration. Having this in mind, we are heading towards the answer to the second proposed question, namely: how does a tenderer efficiently demonstrate that its tender includes confidential information, the disclosure of which is likely to cause significant damage?

For instance, if an economic operator declares its tender confidential, and the confidentiality statement indicates that the answers to the clarifications required during the assessment stage are also confidential, and one of its competitors, relying on its free access to information of public interest, wishes to examine part of this tender or even the answers to clarifications, the contracting authority is not entitled, de plano, to give such latter tenderer access to examine the documents.

In my opinion, in such a case, the contracting authority should check whether: (i) there is a confidentiality statement with respect to the documents that a tenderer requests to examine; and (ii) whether the confidentiality statement is drafted according to the law, namely whether it mentions that the relevant documents include classified or proprietary information etc. If it finds that the confidentiality statement sets forth this information, in my opinion. the contracting authority is not entitled to disclose such information to competitors, since any such disclosure is likely to make the competitors aware of sensitive and relevant information that they can use to create similar or identical technical solutions and thus causing the entity>

whose tender became public to lose its economic advantage on the market. This is ever so relevant since "[...] contract award procedures are founded on a relationship of trust between the contracting authorities and participating economic operators. Those operators must be able to communicate any relevant information to the contracting authorities in the procurement process, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to them." (please see Judgment of the Court of Justice of the European Union of 14 February 2008, Varec SA v Belgian State, C-450/06, para. 36.)

However, if the tenderer simply affixes a stamp with the marking "confidential" on the tender documentation, without being able to prove the confidentiality of its documents and declaring its tender confidential "en bloc", in my opinion the contracting authority and, later, the courts of law/the National Council for Solving Complaints cannot be bound by this stamp and the principle of transparency and free access to information of public interest should prevail.

I have recently heard opinions (that I cannot agree with, in the absence of legal arguments and details regarding the specific circumstances to which they apply) that merely affixing the "confidential" stamp is sufficient and, moreover, as provided by Article 19 of Law No. 101/2016, the confidentiality statement would suffice in order to demonstrate the confidentiality of the tender. I cannot share this view, as long as the public nature of the documents is the rule, while confidentiality is the exception, which means that it should be specifically proven, not merely stated.

In particular, my interpretation of the legal provisions regarding confidentiality in public procurement procedures is that:

- The documents may be declared confidential insofar as they include technical/trade secrets etc., the disclosure of which could damage the concerned economic operators

  and

- The confidentiality of the documents is never presumed but must be proven by any means of admissible evidence by the economic operator that deemed that document "confidential".

Nevertheless, if the tender of an economic operator that demonstrated the confidentiality thereof is disclosed to third parties, the remedy available to minimise the effect of such wrongful disclosures is filing legal action against the responsible person(s) and asking that they be ordered to repair the damage caused by disclosing and/or using such information. With respect to the efficiency of such a remedy, I am somewhat reserved given that, under the general rules of law, in order to be repaired, the damage must be proven and, in this case, although not disputed, in practice the damage is difficult to assess/prove.

Conclusions

To end on a positive note, in my opinion, the current regulatory approach to the confidentiality of documents submitted in public procurement procedures efficiently ensures the confidentiality of the sensitive/secret information insofar as such sensitivity/secrecy is demonstrated. Based on current practice, I can confirm that, in order to ensure confidentiality of the tender documentation, neither the contracting authorities, nor the courts of law request the concerned economic operators to do what the doctrine qualifies as "probatio diabolica", namely to bring impossible evidence or to submit complex evidence to prove the confidentiality.

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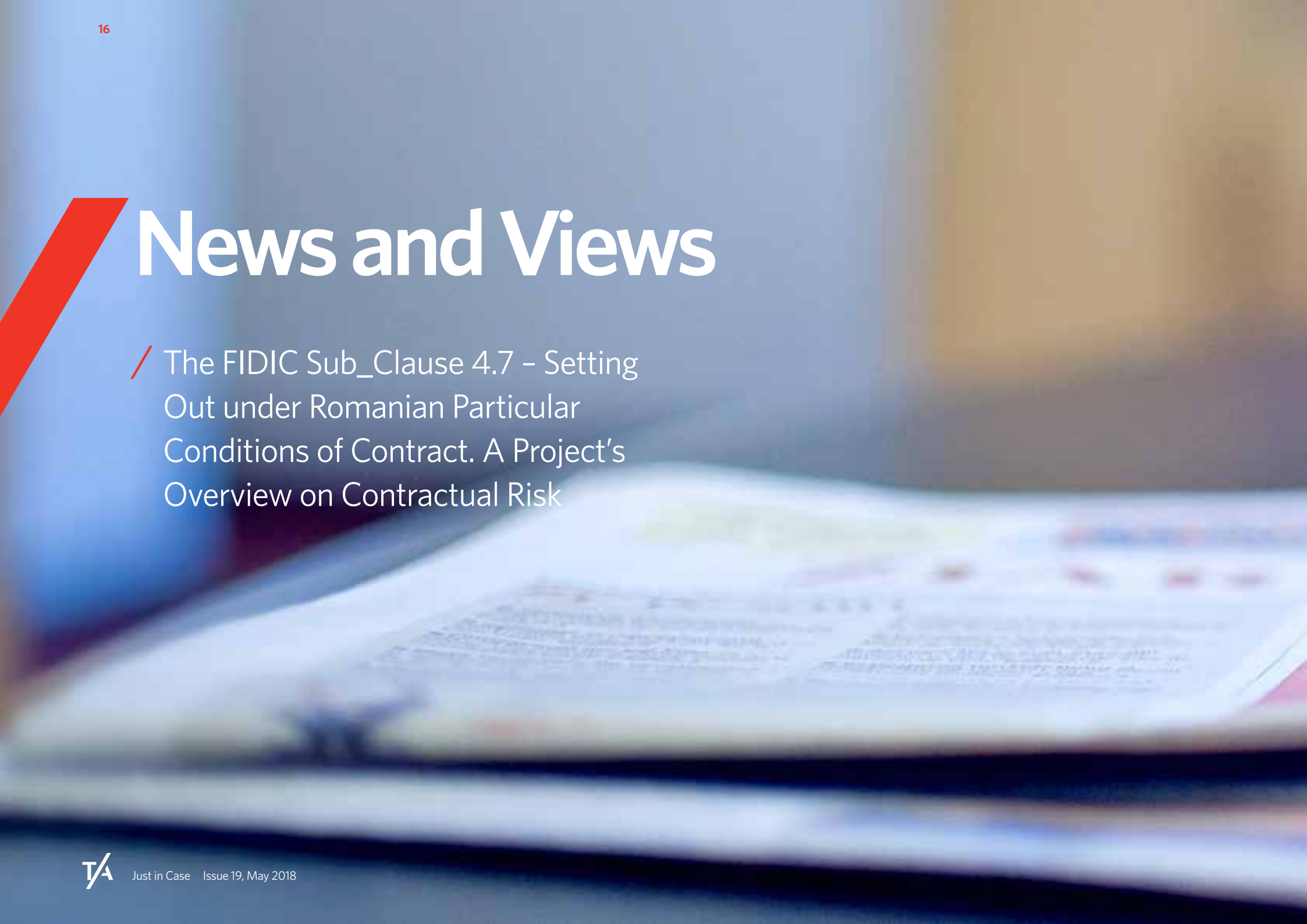
News and Views

The FIDIC Sub_Clause 4.7 – Setting Out under Romanian Particular Conditions of Contract. A Project's Overview on Contractual Risk



The FIDIC Sub_Clause 4.7 – Setting Out under Romanian Particular Conditions of Contract. A Project's Overview on Contractual Risk

The large Railway Works Projects in Romania are generally tendered under Red Book's General Conditions. Due to poor administration's performance, from the moment of the Design tendering and actual elaboration of the Design under the Employer's Responsibility, up to the Works contracting, usually 3 to 5 years are elapsing. During this period, some maintenance works and natural causes are triggering significative discrepancies between the Design original setting out and the actual situation which will be encountered by the Contractor.

In the Conditions of Particular Applications, under Sub-Clause 4, the Contractor is requested to elaborate the Technological Drawings and the As-Build Design, under the assumption that the Technical Design and Detailed Design, complemented by the Specifications, Drawings and Bills are fully defining the Technical Solutions. None of the Contractor's Design obligations are construed as to define the Technical Solutions of the Works, which are not in his responsibility, moreover he is not allowed to modify any of the Design parameters, without a clear Instruction of the Engineer.

The Bills of Quantities are containing provisions for additional topographic and geotechnical survey.

Consequently, in order to elaborate Technological Drawings and ensure buildability, the Setting Out of the Works is thoroughly crosschecked. This highlight errors in the relative position of the permanent Works and moreover discrepancies with the ground levels.

Under Sub-Clause 1.8, the Contractor is usually requesting instructions as to correct the Setting Out, without actually affecting the Technical Solutions of the Permanent Works. Provided that the Engineer is issuing a general instruction to correct, the Contractor shall issue corrected drawings of the plan and profile of the Railway alignment, adapting the embankments, civil works and other elements to the instructional geometric elements of the railway, and to the actual ground levels.

Those Drawings are approved by the Engineer and Works are progressing.

It is to be mentioned that under the Applicable Law, none of the Technical Solutions comprised in the Design cannot be altered without a prior concurrence of the original Designer. Usually due to the time lapse since the elaboration of the design and the inception of the works, the contractual relationship between>

the Employer and his Designer are conflictual, mostly due to time based Contracts or consumed man-month provisional sums, and the legal impossibility to complement such contracts with additional services, without new tendering procedures.

The Contractor shall progress with the Works and issue the first Monthly Statements, comprising the actual quantities of Works performed, based upon the endorsed revised setting out drawings, which are containing increased or decreased quantities of excavation and fills, concrete of bridges elevations etc, which are in excess of the original Bill.

Without having instructed any Variation, the Engineer shall only certify up to the original quantities, remeasurement of the actual increased ones will not be taken into account as per Sub-Clause 12, without any further explanations from the Contractor.

This situation, bearing in mind the scale of the phenomenon, will trigger a significative cash flow issue for the Contractor, certainly in the first year of the Works.

This is, as a summary, the usual development of the Project. Which are the remedies?

It is seldom seen that the Engineer shall issue in a time consuming process subsequent Variation Orders approvals, endorsed by the Employer, in which all the above mentioned varied quantities will actually be paid.

But what is the mechanism of requesting approval for a variation which was never instructed? The so called Modification Proposal. The Contractor must timely issue this kind of document for each and every quantity discrepancy, which is the effect a major corrections in the setting up of the Works, addressing all technical issues, carefully underlining the technical solution was not altered.

This document must comprise the entire development of the corrected drawing, the revised Bill of Quantity for the items concerned and other supporting documents. Time impact assessment will be commonly put under further possible assessment, the primary goal being the up do day payment of performed Works.

Under scattered encounters of such events, matters could be kept under control, but the scale of the phenomenon is verging towards a vicious Global Design Disruption. Under the circumstance that an Extension of Time is not Claimed for major issues such as possession of site, the multiple effect of time consuming process of correcting major sitting out flows, shall start diminishing with small amounts the productivity off all Works sequences, amounting in serious Contractor's delays.

The difficulties of actually claiming a encompassing Design Disruption which is affecting multiple activities are major, the usual best mile methods being flowed by minor out of phase scheduled activities which are the result of the Contractor efforts to progress under the given circumstances.

It seams that there is no miraculous cure for this situation, so serious efforts must be deployed from the begging as to speed up all the process of topographic measurements, design issuing and timely approvals in phase with the Work Program, watching carefully for any delay which could fly under the radar.

This is how an apparent minor issue can become a major Contractor's Risk.

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