

The Contract of Assignment in Public Procurement Law

Adelina Vrancianu, University of Bucharest, Romania

The European Conference on Politics, Economics & Law 2016
Official Conference Proceedings

Abstract

Contracts are legally binding between two signing parties. In some cases, rights can be transferred to third parties with respect to certain conditions, expressly and strictly mentioned in the Civil Code. The assignment is one of this type and means the transfer of rights from one person, the transferor, to another person, the transferees. It is commonly used by lawyers and legal counselors when dealing with private law issues and less when we are encountering public law relationships. Public procurement is a public field with strict rules regarding the ongoing of the public procurement procedure, the signing of the contract and the modification of the contract during its implementation. This analysis tries to seek the conditions in which the assignment is possible in public procurement law with its risks and benefits. For example, it is strongly believed that is the solution for avoiding the resolution of the contract when the winner of the contract has a subcontractor and is not paying him for his works. In essence, the conditions imposed by the Civil Code are discussed in terms of public procurement contract.

Keywords: assignment, third parties, public procurement law

iafor

The International Academic Forum

www.iafor.org

European and national legislation have imposed strict rules regarding the procedures of public procurement, the signature and the modification of the contract. The procedure starts with the publication of the contract notice and procurement documents. There is a period for preparation of offers and, then, every offer is analyzed through the intermediate of evaluation criteria imposed by the contracting authority. The offer that meets the criteria and is on the first place after the application of evaluation factors is declared winner of the procedure and will be invited to sign the contract.

Thus, the public procurement contract is legally binding between two signing parties, the contracting authority and the winner of the procedure. The contract establishes the rights and obligations clearly stated in the procedure followed in respect to the European and national provisions.

During the performance of the contract, rights can be transferred to third parties in certain conditions, expressly and strictly mentioned in the Civil Code. There are different techniques and the assignment is one of this type. The assignment is a contract where rights are transferred from one person, the transferor (assignor), to another person, the transferee (assignee). It is commonly used by lawyers and legal counselors when dealing with private law issues and less when we are encountering public law relationships. In essence, the conditions imposed by the Civil Code are discussed in terms of public procurement contract.

In the public procurement contract, there is no question of universal transmission of the patrimony, but only about transfer *ut singuli* (1) and on *inter vivos* (2) contracts. The possibility of such transfer is expressly regulated by law for practical necessities. If, for example, a person has a right to claim affected by a certain term and needs its performance prior to the expiration of that period, may alienate to other people the debt, usually, at a lower price than its nominal value (Liviu Pop and others 2012, p. 632).

It is important to distinguish between the assignment of rights, regulated by the Civil Code in art. 1566-1592, and the assignment of the whole contract, from art. 1315-1320 Civil Code. The analysis will look only into the first type.

The legislation taken into consideration is the Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, repealing Directive 2004/18/EC (hereinafter called "Directive 24" or "directive") and the national Law of transposition no. 98/2016 on public procurement (hereinafter called "Law 98").

This analysis tries to seek the conditions in which the assignment is possible in public procurement law with its risks and benefits. For example, it is strongly believed that is the solution for avoiding the resolution of the contract when the winner of the contract has a subcontractor and is not paying him for his works.

The mechanism of the assignment will respect the essential principles of transparency, non-discrimination, equal treatment, publicity, mutual recognition, proportionality as set

forth in the article 18 of Directive 24. The contracting authority and the winner have to respect all the other rules established by the legislature for the modification of public procurement contracts (3).

The obligation of transparency incumbent upon the contracting authority and winner implies an obligation to ensure that competition rules are respected during the performance of the contract.

The essay will analysis, step by step, different elements of the contract formation, such as the definition, the scope, validity and enforceability conditions and effects of the contract.

Nonetheless, it is necessary the distinction between a public procurement contract and the concession contract. The European case-law has undelined that a public contract within the meaning of that directive involves consideration which is paid directly by the contracting authority to the service provider, meanwhile a concession exists where the agreed method of remuneration consists in the right of the service provider to exploit for payment his own service and means that he assumes the risk connected with operating the services in question. (CJUE, T-382/05, 2007, para 32-33).

1. Definition

As stated before, the assignment means the transfer of rights from one person, the transferor, to another person, the transferee. The contract involves the following subjects: creditor transmitting rights, called assignor, and the acquirer of the rights, called assignee. There is a third party, borrower indebted to execute the contract, called the assigned debtor. The assigned debtor is considered to be a third party, not a signing party. The parties of the contract of assignment are the assignor and assignee (Liviu Pop and others, 2012, pp. 636-637).

In public procurement, the winner is the assignor, another economic operator is the assignee, and the contracting authority is the assigned debtor. The contract of assignment is signed by the winner of the public procurement procedure and another operator which is in legal relationship with the winner. The contract should be signed, also, by the contracting authority, who is in charge of money and will benefit from the performance of the contract.

In Romanian law, it was first expressly introduced through Law no 279/2011 for the modification of the Government Emergency Ordinance no 34/2006 on public procurement contracts, public works concession contracts, and services concession contracts, art. 204¹, which provided that under a public procurement contract it is only the rights arising from that specific contract that may be assigned, whereas the liabilities deriving from such contracts shall remain under the responsibility of the contracting parties as initially assumed.

The present law in force, no. 98/2016 on public procurement, transposing Directive 24 has no expressed provisions, but Government Decision no 395/2016 regarding the

approval of the Methodological rules of implementation of Law no. 98/2016 on public procurement has two articles for assignment.

” Article 50

(1) If the contractor has difficulties during the execution of public procurement contract / framework agreement and the support from third parties is intended to fulfill the criteria of economic and financial situation and/or technical and professional capacity, the contracting authority will request the bidder/candidate as the act concluded with the third party/third parties to ensure the respect of the commitment. Contractual provisions between the contracting authority and the main contractor shall ensure that the contracting authority may impose this obligation.

(2) The contracting authority must also include in the contract specific clauses that allow the contracting authority to pursue any claim for damages which the contractor would be able to have against the third party for non-compliance with the obligations assumed by the firm commitment such as, but not limited to, assignment of rights by the contractor to the contracting authority as a guarantee”.

Art. 151 stipulates

(1) According to art. 218, the contracting authority shall establish mandatory contractual assignment of receivables in favor of subcontractors linked to the part/parts of the contract performed by them”

(2) In determining the amount of the claim, the bidder is required to include in its offer the name of subcontractors, contact details, the part/parts of the contract to be fulfilled by them, the value to which amounts the party/parties concerned and agreement of the subcontractors on these issues.

It can be seen a change in the mode of regulation imposed by the legislature. The general provision from GEO 34 is, now, expressed in two very specific provisions, for third parties obligations and subcontractors. Nonetheless, it could be extended to other similar situations encountered during the performance of the contract based on the provisions in Civil Code and with the respect of the general principles of public procurement.

As a principle, in public procurement, only the assignment of receivables is allowed, not the assignment of liabilities.

2. The scope of the assignment of receivables

3.

In general, it may be transferred any right regardless of its subject, such as pecuniary rights (4) or otherwise (to do or not do), arising from any contract or promises. Practice certifies that, most times, there are assigned receivables that correspondes to a duty to pay a sum of money affected by standstill period or claims arising from a bilateral promise of alienation. There are exceptions, such as rights declared by law or by parties not transferable, rights *intuitu personae* (Liviu Pop and others, 2012, p. 637).

When talking about public procurement, any right of the winner will be transferred towards another operator with whom has a legal relationship.

The transfer of right does not change the entire contract. The legislature has taken into account the necessity to respect the principles of equal treatment, transparency and non-discrimination. The public procurement contract, which is awarded following a procedure of selection of bidders, has certainly a character *intuitu personae* because was taken into account the quality/performance of economic operator declared winner on the contrary to the counter-candidats (Calin Alexe).

According to case-law, it is open to the contracting authority when choosing the most economically advantageous tender to choose the criteria on which it proposes to base the award of contract, provided that the purpose of those criteria is to identify the most economically advantageous tender and that they do not confer on the contracting authority an unrestricted freedom of choice as regards the award of the contract to a tenderer (Cour de Justice, C-448/01, para 37).

4. The validity conditions

Assignment is a bilateral contract as emerges from the legal definition of art. 1566 of the Civil Code. The bilateral character is due to the fact the contract is sign by two parties, the assignor and the assignee (Gabriel Boroi, 1997, p. 92). The contracting authority is obliged to sign the contract with the economic operator that was declared winner of the procedure, base on the tehcnical and financial offer presented before the deadline presented in the tender documents (Dumitru Florescu, 2013, p. 145).

The assignment is a disposal contract and parties must have full legal capacity. The person lacking capacity or having limited legal capacity shall conclude the assignment contract through his legal representative or with his consent (Ovidiu Ungureanu, 2007, p. 78).

The winner is, in most of the cases, an economic operator and should have as the principal or secondary object activities similar to the object of the contract. Moreover, during the procedure, a contracting authority does not have the right to impose criteria for subcontractors. The European and national provisions leave it to the contracting authority to choose the criteria on which it intends to base its award of the contract, that choice may relate only to criteria aimed at identifying the offer which is the most economically advantageous (CJUE, C-315/01, para 64).

Accordingly, in terms of validity, it must meet the general legal conditions imposed any contract (capacity, consent, subject determined and licit, legal and moral cause). If not met, any party can ask for the annulment of the contract under the general rules expressed in the civil code. The consent should be expressed with the intent to produce legal effects and be freely expressed, not affected by error, fraud or violence.

The contract is, generally, legally binding through the simply will of the parties, being a consensual agreement, except when the transfer is free of charge and the assignment is actually a donation and the mandatory rules involve the authentic form.

The contract completed can be free of charge as a donation or can be an onerous one. The onerous contract means that each party follows a patrimonial interest in exchange for the obligations assumed in the contract (Gabriel Boroï and others, 2012, p. 79). In case of the onerous transfer, the special provisions in sales or any other contract could become applicable (Liviu Pop and others, 2012, p. 640).

Moreover, the new Civil Code introduces partial assignment in order to facilitate the free movement of legal entities and making more flexible the relations between professionals (Calin Alexe).

5. Conditions of enforceability

Although the assignment of receivables produces its full effect between the transferor and transferee from the time of concluding the contract, in order for the contract to be enforceable and opposable to third parties, certain formalities of advertising must be fulfilled towards third parties, for example the assigned debtor and other parties that might have an interest.

In respect of the debtor, the time of enforcement is essential, because only at this time, he will be required to pay directly to the transferee. There are different types of advertising, expressly mentioned by the legislature in art. 1578-1581 Civil Code, such as: acceptance of the assignment by the debtor through an act under private signature with certain date, written notification (7) of the assignment (5), enrollment in the electronic archive with regard to third parties (6), file in court that incorporates the debtor notification and notification in Land Registry (Liviu Pop and others, 2012, pp. 642-643).

For public procurement contracts, the opposability formality will be realized towards the contracting authority by the assignor - winner of the procedure or by the assignee. Generally, the contract is signed also by the contracting authority, which means that the formalities will not longer have to be achieved. It is considered that the signature proves the notification legally binding.

6. The effects of the assignment of rights

The main effect of the contract is the transfer of rights from the transferor to the transferee. The effects of the assignment must be analyzed on the one hand, between the transferor and transferee to third parties and, on the other hand, the parties (Liviu Pop and others, 2012, p. 643).

➤ Effects between parties

The primary effect of the contract is *the transfer of receivables, ut singuli* from the transferor's patrimony to the transferee's patrimony. The right is transmitted together

with all the rights that the assignor has on the ceded debt, the warranties (pledge, mortgage, privilege) and its accessories.

In terms of accessories, mainly, the legislature refers to interests and other income related to receivables. The translative effect of the transfer will occur also on the future interests and income, but even on those that became due on the date of assignment, the assignor but not cashed yet.

The receivable is transmitted at the nominal value (i.e., the value resulted from the receivable, remained unpaid at the date of the assignment), regardless if the assignment is realized at a lower price or is free.

It is also possible a partial transmission of the claim (partial assignment). In this case, the transferor and transferee have proportional rights in receiving payment from the assigned debtor, as required by art. 1584 C. civ.

The transferor has the obligation to transmit to the transferee the title that ascertains the assignment and all the written documents related to the title (Liviu Pop and others, 2012, p. 644). In the event of partial assignment, certified copies of the document are hand to the assignee, copies on which are mentioned the partial assignment and the signature of the parties (art. 1574 of the Civil Code).

Thus, doctrine raised the question whether the assignment of receivables may be regarded as a consensual agreement taking into account the formalities described above. The doctrine considered the formalities are not required for the validity of the contract, but an obligation resulted from the contract for the transferee who has the right to claim the title of the transferor acknowledging the claim. In this respect, handing the title does not refer to the assignment contract, but the actual title regarding the right transferred (Ileana Vali - Nita, Journal of Legal Sciences, p. 138).

Another effect of the contract in the relation between signing parties is the *obligation of the assignor to guarantee the assignee*. The guarantee obligation is different from case to case. The obligation regards the current and valid existence of the claim and its accessories.

The guarantee does not cover the solvency of the assigned debtor. If wanted, the assignor expressly assumes the obligation to guarantee the solvency of the debtor through contract provisions. If it is assumed such obligation, without otherwise indications, the law presumed that the assignor had agreed to cover only the actual solvency debtor, the one existing at the time of assignment. The special obligation of guarantee covers only up to the purchase price (Liviu Pop and others, 2012, p. 645).

The warranty obligation does not exist in the event of the assignment free of charge and when the ceded right has been annuled due to posterior causes.

Finally, in addition to the existing obligation to guarantee the validity of the claim and, eventually, the solvability of the assigned debtor, the transferor is liable for eviction. According to art. 1586 C. civ., assignor is liable if, through its own act or combined with the action of another person, the assignee does not acquire the right or can not do it opposable to third parties.

Under the obligation to guarantee, the assignor is bound to compensate the assignee for the damaged caused, consisting of the price of the purchased receivables, contract fees, court costs and other damages incurred by the assignee.

All the elements above apply to any contract of assignment in public procurement law. The specificities of the effects will be established through the provisions of the contract. All the elements must be clear and expressly stated so that the obligation of transparency is achieved.

The assignee will be willing to perform of the remaining duties under the agreement. All the sums which become payable by the contracting authority for the services/works rendered on and after the date of the assignment will be made to the assignee.

The assignee may acknowledge that no time extension or requests for additional compensation will not be granted.

➤ Effects towards third parties

On the contrary to the contract parties, the assignor and the assignee with their hereders, any other person will have the status of third parties, including the assigned debtor. Regarding the relation with the assigned debtor, *until notification or acceptance* with certain registered date, the assignment of claims is inapplicable to them. Therefore, before accepting or receiving the notification, the debtor can execute its obligations through payments made to the assignor. The payment made to the assignor has discharging effect for the debtor.

As a consequence, operations such as debt forgiveness that will free the debtor or the opposition of the extinctive prescription or compensation should be available. The same logic applies when, sued by the assignee, the debtor refuse the payments and opposes the receipts obtained from the assignor, even when the receipts do not have a certain date.

If the assignor accepts some form of payment (split, for example) and, subsequently, are meet the requirements of publicity, the assignee is obliged to accept the agreement between the assignor and the assigned debtor (Liviu Pop and others, 2012, p. 647).

In case of lack of acceptance and notification, according to the legal provisions, the contract of assignment of receivables has no effect, although the title has already been transmitted to the assignee. The contract has effect only between the parties to the transfer, not to the assigned debtor, which is a third party. Assigned debtor is entitled to behave as if the assignment does not exist, even though he knows it from another source than acceptance or notification.

After meeting the publicity requirements, the assigned debtor becomes the exclusive debtor of the assignee and he will not be able to pay to the assignor. As consequences, the assigned debtor may oppose the assignee all defenses that we could have raised against the assignor, the payment realized in good faith to an apparent creditor.

If the assigned debtor has accepted the assignment through an act under private signature, the debtor could not invoke the compensation that could be opposed to the assignor (Liviu Pop and others, 2012, p. 648).

In public procurement, the links created between the contracting authorities, the winner and the third party have to respect the conditions mentioned above.

7. Conclusion

As a conclusion, it is believed that the assignment of rights is possible in public procurement law and economic operators tend to use this operation to resolve different problems encountered in the performance of the contract. For example, it is strongly believed that is the solution for avoiding the resolution of the contract when the winner of the contract has a subcontractor and is not paying him for his works.

References

➤ Explanations

(1) Transfer of individualized assets (one or more assets). On the contrary, the transfer *ut universali* of the assets is considered a universality of goods.

(2) The contract is signed between living persons and not through a will.

(3) Article 72 from Directive 2014/24/UE on public procurement clearly establishes the rules for the modification of the contract in order to avoid financial corrections for substantial modification.

(4) involving amounts of money.

(5) on support paper or electronically (on the condition it shows the identity of the transferee, the debt ceded and the assigned debtor, and if it is a partial assignment, notification must also indicate its length).

(6) If the assignment's object is a universality of assets, present or future, art. 1579 C. civ. provides that, to third parties, enforceability is achieved only through registration of assignment in the electronic archive, creating in case of successive assignees an order of priority claims. In this case, the complex relationships are governed by rule *prior tempore, potior iure*.

(7) In connection with this notification is to remember that it can be done by both sides, the assignee and assignor. Transferor is not, however, legally obliged to make the notification. So it is done, most often by the assignee because it has the interest. As it is made by one or other of the parties, it produces different effects: 1. If it is done by the transferor, the assigned debtor must execute the performance directly to the transferee, enforceability is made from the communication of notification; 2. If the notification is made by the assignee, the debtor has the right to claim a written evidence of the transfer and to suspend payment until this moment; until the communication of the written proof to the debtor, notification is not effective.

➤ Books

Gabriel Boroi, Liviu Stanculescu, *Institutions of civil law under the New Civil Code*, Hamangiu Publishing House, Bucharest, 2012, p. 79

Gabriel Boroi, *Civil Law. General Theory*, All Educational Publishing House, Bucharest, 1997, p. 92

Liviu Pop, Ionut-Florin Popa, Stelian Ioan Vidu, *Elementary treaty of civil law. Liabilities under New Civil Code*, Universul Juridic Publishing House, Bucharest, 2012, pp. 632, 636-637, 639, 640-641, 642-643, 644, 645, 646, 647, 648

Ovidiu Ungureanu, *Civil Law, Introduction*, C. H. Beck Publishing House, Bucharest, 2007, p. 78

➤ **Articles**

Calin Alexe, *The assignment of the public procurement contract*, Public Procurement Journal

Vali Ileana-Nita, *Cesiunea de creanta – modalitate de transmite a obligatiilor civile*, Revista de Stiinte Juridice, Codul civil roman intre traditie si reforma la 140 de ani de la aplicare, p. 138

➤ **Legislation**

Directive 2014/24/UE of European Parliament and of the Council of 26 February 2014 on public procurement, repealing Directive 2004/18/EC

Law no. 287/2009 on New Civil Code, published in Official Journal no. 505/2011, entered in force starting 1st of October 2011

Law no 279/2011 for the modification of GEO OUG 34/2006 on public procurement contracts, public works concession contracts, and services concession contracts, published in Official Journal no 872/12 december 2011

Government Emergency Ordinance no. 34/2006 on public procurement contracts, public works concession contracts, and services concession contracts – published in the Official Journal of Romania, Part I, no. 418/2006

Government Decision no. 925/2006 for the approval of the rules of implementation of the provisions referring to the assignment of public procurement contracts of Government Emergency Ordinance no. 34/2006 on the assignment of public procurement contracts, public works concession contracts, and services concession contracts – published in the Official Journal of Romania, Part I, no. 625/2006

Law no. 98/2016 on public procurement

➤ **Case law**

Judgement of the Court, 4 December 2003, C-488/01, Winstrom GmbH, ECLI:EU:C:2003:651, para 37, available at www.curia.europa.eu

Judgement of the Court, 19 June 2003, C-315/01, Gesellschaft für Abfallentsorgungs-
Technik GmbH (GAT), ECLI:EU:C:2003:360, para 64, available at www.curia.europa.eu

CJUE, C-382/05, 18 July 2007, European Commission vs. Italy, ECLI:EU:C:2007:445,
para 33-34, available at www.curia.europa.eu