

The administrative review of concession agreements

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Abstract

Concession agreements represent the most utilized and preferred legal option in the exercise of public functions by private entities. Before entering into a concessionary agreement, there is a special procedure that takes place, and that is one of the distinctive characteristics of this type of contract vis-a-vis other civil contracts. This procedure is provided for under the Public procurement law. Consequently, all agreements stemming from the exercise of the concession agreement are regulated according to the modalities defined in this law. According to the Public Procurement law, administrative reviews represent the first obligatory instrument used in defense of the rights that parties claim to have been violated or otherwise infringed. The administrative review is the scope of this paper, with the view to clearly determining the administrative entity where the appeal will be addressed to, the subject matter of the appeal, and the legitimated subject, as its integral part. The role of the Public Procurement Commission and its competencies during the process of the administrative review represent another aspect.

The practice of concessionary agreements in Albania is only in its early steps of development. Furthermore, the legislation that provides for the concession agreements has suffered changes to reflect the international legislation. All of which have led to the case law encountering various issues, which we have only humbly tried to reflect in this paper, while also providing our opinion with regard to addressing them.

Keywords: Concession Agreement; Public Procurement; Public Delivery Standard; Albanian Legal Framework, International Legal Framework; Contractual Dispute Resolution; Public Functions; Public Administration.

Introduction

Concession agreements represent one of the forms for the exercise of public functions by private entities. This form is itself an evolution of the traditional concept for the exercise of public functions, as a novelty of the modern administrative law. Private law is used by the public administration, given that the public law does not provide for all the space to achieve its objectives, in the backdrop of a wider space for action which is rendered in the context of the private law¹. Due to the technological developments, on the one hand, and the existence of limited public means, on the other, private entities may be more efficient in the delivery of some tasks of public interest, than

¹ "Issues of Administrative Law from a comparative perspective." Edited by Prof Manuel Ballbe, Prof Dr Xhezair Zaganjori, Dr Carlos Pablos, Dr Eralda Cani, Tirana 2010, pg 182

the public administration itself²³. In the recent years there is a tendency of alleviating the public administration from the burden of any public functions, and that is done through the cooperation with private entities⁴.

A concession agreement represents one of the forms of public- private partnerships (PPPs), whereby the public administration involves a private entity in the conduct of a public activity. The concessionary is given the right to exercise several functions that otherwise would belong to the public administration, with the view to ensure the efficiency and development of public service delivery infrastructure⁵.

The legislation in effect provides in detail for the concession agreement, but the overview is a legal perspective of material value. Hence, of special importance in this context is the methodology for addressing conflicts arising from, or which are due to the implementation of the concession agreements. To be able to explain this, we should consider the following important statement: The existence of social relations leads to disagreements between or among parties/entities. This statement is valid for the legal agreement that is generated from the signature of the concession agreements. Settlement of these disagreements/disputes is an important task for any government, to bring an end to anarchy and chaos.

Furthermore, in the face of the fact that there can be no comparison in the measure of powers of any government vis-a-vis any private entity.

Therefore, the legislator being at the service of the entity in whose favor the subjective right is being exercised has provided for several modalities, the use of which would lead to their eventual solution. These methods include the following:

- Addressing the court remains the traditional way of approaching the issue. Since a long time, the court has been and still is the institution where everybody goes to seek justice.
- Settlement of disputes through arbitration. Arbitration is a quasi court institution. Settlement of disputes through arbitration entails a specificity which makes it distinct from settlement of disputes at a court. In this case, the arbitration procedure only occurs when there is an agreement between the parties for the settlement of the dispute through arbitration.

It is important hence to point out that the judicial review of these disputes is fore run by an administrative review, which constitutes the scope of this paper.

² See: Ahmet Mancellari, Sulo Haderi, Dhori Kule, Stefan Qirici "Introduction to Economics", Pegi publishing house, Tirana 2007, pg. 64

³ There are many contributory factors, among which the most important are: limited factors of manufacturing and opportune cost, financial aspects, but with major consequences for the legal framework, serving as positive indicators in the choices individuals make to channel their energy.

⁴ See Sokol Sadushi "Administrative Law 2" third revised edition., Tirana 2005, pg. 303

⁵ "Issues of Administrative Law from a comparative perspective." Edited by Prof Manuel Ballbe, Prof Dr Xhezair Zaganjori, Dr Carlos Pablos, Dr Eralda Cani, Tirana 2010, pg 182

The administrative review

The procedure that fore runs the process for the signature of the concessionary agreement is provided for in the Public Procurement Law⁶. Thus, all conflicts arising in the course of this procedure shall be settled according to the provisions of this law. The law stipulates that the administrative review is the first instrument that parties claiming that their right has been violated or infringed, can use to defend the said right.

The legal institution for the administrative review of administrative acts and actions is of paramount importance, since it is meant to monitor the decision-making of administrative entities, which is directly related to the legitimate rights and interests of physical and legal entities. The review, as a concept, refers to both internal and external reviews⁷. These types of reviews are provided for in the Administrative Procedures Code (APC), precisely under the principle of internal review and court review. According to this principle defending constitutional and legal rights of private entities takes place by subjecting them to the administrative activities such as internal administrative and court review.⁸

The administrative review focuses on handling the appeal with the contractual authority, and then with the superior entity, namely, the Public Procurement Commission (hereafter to be referred to as PPC)⁹.

Appeal/grievance with the Contractual Authority

Each individual enjoys the constitutional right to appeal the decisions of the public administration entities, whose decisions have otherwise infringed or violated their legitimate rights and interests. The constitutional law with regard to the administrative appeal lays in the interpretation of Articles 42 and 44 of the Constitution of the Republic of Albania. The ECHR which is part of the internal legal system, in its Article 13¹⁰ also provides for the right for administrative grievance. In addition, Article 18 of the Administrative Procedures Code (APC) provides for the right of administrative appeal. In this sense, during the procurement process, as well, the economic operator, whose rights have been infringed from a decision-making by the contractual authorities, which decision runs contrary to the public procurement law, enjoys the right to appeal the said decision initially with the entity that has issued the act, and then later to the highest administrative entity, namely the Public Procurement Commission (PPC).

⁶ See Article 3/20 of Law no. 151/2013 "On concessions and public – private partnerships"

⁷ See Ermir Dobjani "Administrative law 1, revised edition, Tirana 2007, pg. 382

⁸ S.Sadushi, "Administrative law", Grandprind, Tirana, September 2008, pg. 265

⁹ To this end, we will primarily refer to law No.9643, dated 20.11.2006 "On public procurement", recently amended with law no. 22/2012 and law no. 131/2012 (hereafter PPL).

¹⁰ Article 13 of ECHR- Anybody whose rights and freedoms, acknowledged by this conviction have been violated enjoys the right to make an appeal with the respective body in his/her own country, even when the violation is the result of actions of persons that act in performance of their official functions.

Administrative law doctrine stipulates that the appeal with the entity that has issued the act is more of a right of the subject/entity that claims that he has been suffered a damaged, rather than an obligation for the latter. An appeal of this form (namely to the entity that has issued the act) does not represent the usual form of appeal and neither does it represent a mandatory procedural chain, which needs to be exhausted in order to be able to proceed with the appeal to the highest entity.¹¹ However, the Public Procurement Law provides for an exception to the rule, in this aspect, since according to Article 63/7, it provides that failure that to pursue/follow all instances of an appeal would in turn make that appeal invalid. On the other hand, it seems that the law on Public Procurement has not adhered to the general principles stipulated under Article 135/2 of the Administrative Procedures Code, whereby the appeal with the entity that has either issued the act, or has refused to issue the act, and the appeal with a superior body are competitive appeals, meaning that they take place independently from one another, and are not inter-related. The first form of appeal is not necessarily exhaustive to trigger the beginning of the second form.¹²

Scope of the appeal/grievance

Public procurement of works, services and goods goes through several phases, before a decision is taken on the winner that will enter into the relevant concession agreement. The first phase is that of announcing the public bidding for contract signature, which describes the criteria that the economic operators need to meet, in order for them to qualify for winning the bidding process and the relevant specifications of the agreement terms. According to Article 20 of the Public Procurement Law, these criteria should not be discriminatory to the economic operators, and should enable equal and fair treatment for all potential bidders, and should not serve as obstacles in the open competition process entailed by the public procurement¹³.

The second phase is that of bid opening, bid evaluation, classification and award of the contract to the winner by the Bid Evaluation Committee (BEC). Whereas the third phase is that of contract signature by the head of the contractual authority. This process should take place only upon completion of the administrative review process (if there has been an appeal) or upon expiry of the deadline for the announcement of ranking (Article 58/6). Contract signature prior to the completion of this process shall be considered invalid.

With regard to the above mentioned, according to Article 63 of the Public Procurement Law, an appeal can firstly be filed with regard to the bidding documents. This should be construed as an appeal/grievance regarding the qualification criteria and the technical specifications. The appeal can be about the fact that these documents are either discriminatory, or not in consistency with the requirements of the law.

¹¹ S.Sadushi, "Administrative law", Grandprind, Tirana, September 2008, pg. 212

¹² For more information, see Article 135/2, letter b) of the Administrative Procedures Code.

¹³ See Article 23/2 of law no.9643, dated 20.11.2006 "On public procurement ", revised recently by law no. 22/2012 and law no. 131/2012

Legitimized entity/party

According to the first paragraph of the Article 63 of the Public Procurement Law, every individual which either has, or has had in the past an interest in a procurement procedure shall qualify, when he has either suffered damages, or is at risk of suffering damages, by a decision of a contractual authority taken contrary to this law. The discussion here is about the meaning of the term “shall qualify” for an individual which “has had an *interest*”. In our view, this provision is not entirely consistent with the meaning of the general interest,¹⁴ provided in the civil procedure law, which is necessary to address a court, for the latter to consider the law suit. In this context, the interest to appeal before the contractual authority should be current, otherwise what would be the benefit of the appellant from the decision-making of the authority. If he has lost interest, the decision would not be any good. This way, the right of appeal takes the shape of an act “to defend the legitimacy”. However, let us assume for a moment that the legal formulation is accurate. The issue still remains when the economic operator is going to address the court. According to the Civil Procedure Code (CPC), the plaintiff should have a legitimate interest, which should also be current. As a result we are faced with a clash of principles. Therefore, we believe that in the event that an economic operator addresses a court, the latter should adhere to the Civil Procedure Code, as the normative act with highest legal power and make an evaluation of the currency of the legitimate interest. If the plaintiff does not qualify for filing such a suit because of lack of current interest, then the court rejects the law suit.

The same procedure applies for the administrative appeal in general, and in the case of an appeal against a decision of the contractual authority regarding the bidding documents, this too shall be subject to deadlines. According to Article 63, point 1.1, economic operators may file a appeal with the contractual authority within 7 days from the date of the publication of the contract announcement in the web page of the Public Procurement Agency. The law does not provide for the content, in order for it to be considered valid for review. For this purpose, we need to refer to the Decision of the Council of Ministers (DCM), which clearly provides that the appellant shall use the standard form for the appeal request. This form includes the name and address of the the appellant, the reference to the concrete procedure, the legal reference, as well as a description of the claimed violation. Whenever possible, a copy of the act that is the being objected to, is attached to the appeal. If any of the above mentioned elements is missing, or the form has not been duly filled in, the contractual authority shall not automatically relinquish the right for participation in the procurement procedure to the said party/entity. The contractual authority notifies the party/entity about any missing elements in the documentation, by giving him 48 hours time. Only if the appeal is not corrected within 48 hours after the notification, it is considered that it has not been submitted. If the appeal is not filed according to the appropriate modalities, which are provided for in the Standard Bidding Documents (SBD), where the the fact about which this appeal is being filed is not clear, in the first instance, the authority refuses to review the appeal, whereas in the second case, the contractual

¹⁴ article 32 of the Civil Procedure Code

authority immediately upon being notified, asks the economic operator to make the necessary corrections/amendments in the appeal form. In the instances when the operator submits the appeal later than 7 days from its publication in the web page of the Public Procurement Agency, the authority does not review the appeal, and returns it to the operator, together with the reasons for not reviewing the appeal.

Even though on this topic, the law is not clear, from the point of view of the legislative technique, from the systematic interpretation of Article 63 of the Public Procurement Law, we gather that the contractual authority should review the appeal within three days from the date of its submission. This decision can be appealed with the Public Procurement Commission within ten days. The deadline starts from the date that the plaintiff has been notified by the authority of the decision for the rejection of his appeal, or when the authority has not issued an opinion from the next working day, upon expiry of the deadline. The question which normally arises is what shall we understand with the wording: "starting from the following/next working day"?

To respond to this question, it is necessary to be able to interpret Point 5 of Article 63, which stipulates that: *"The contractual authority reviews the appeal and takes a reasoned decision within 7 days, following the receipt of the appeal, which it should notify to the appellant not later than the following day of work."* It is therefore necessary to understand the meaning of the sentence "...should notify the appellant, not later than the following working day." Based on the general principles for the announcement of administrative acts established under the Administrative Procedures Code, namely Article 59/2, according to which: *"deadlines (announcement deadline) start to be counted from the date following the day on which the act is issued..."*, so in the calculation of the deadlines (article 62 of the Code¹⁵) we can conclude that: the contractual authority has 7 days at its disposal to take a decision. But, the announcement of the decision to the interested party can also take place on the eighth day, which if it falls on a holiday can be postponed to the next working day. In this context, the deadline for the appeal with the Public Procurement Commission, when the contractual authority has not expressed itself within 3 days shall start on the fourth day, or if it falls on a holiday, then this deadline should be counted from the next working day of the contractual authority.

It must be pointed out that the 3 days deadline uses the assumption that within this period, the public authority not only shall review the appeal in full, in its entirety, but also notify the appellant. The limit deadline for the notification is not later than the following working day. This interpretation stems from the fact that if the contractual authority would not respond within this deadline, then the economic operator would have the right of appealing the decision with the Public Procurement Commission. The expression, as used in the Law, that: *"the operator appeals with the Public Procurement Commission, in the event when the authority has denied/rejected the appeal, from*

¹⁵ "In the calculation of the deadlines, the following rules apply: a) in the calculation of the deadline the day on which the act is issued does not count; b) the deadline does not include Saturdays, Sunday and official holidays; c) in the event that the expiry of the deadline coincides on a day when the public administration is closed or works with reduced hours, then the enforcement of the act is postponed for the following working day."

the moment of the response from the authority” shall be construed to mean that when the authority does respond and notifies the operator, it shall be maximum the following working day, upon expiry of 3 days deadline. Therefore, the law, even though it is not explicit about it, leads to the logical interpretation that there is a legal obligation for the authority to respond and to notify the operator within this deadline. Otherwise, if the authority has taken a decision, but has failed to notify the operator within the deadline, we believe that this constitutes a situation of illegality created by the authority itself, and the operator should not bear any consequences. This in turn means that the operator enjoys the right of appeal with the Public Procurement Commission due to the fact that the authority has not responded within the next working day, following a 3 days deadline. From the moment of the notification of the act, the entity/party enjoys the right to appeal that decision with the highest administrative instance (...).¹⁶

Even though the law does not provide for it explicitly, Decision of Council of Ministers (DCM) no. 1, dated 10.01.2007 “On rules of public procurement” revised, established that when for taking a decision, additional information is sought on the side of the appellant, then the deadline for taking the decision is suspended only to resume after the contractual authority has obtained this information. The contractual authority should inform the appellant about the decision, and the arguments for the said decision, not later than 24 hours after such a decision has been taken.

It is understandable that the deadline for the appeal with the Public Procurement Commission will start from the day when the economic operator has been notified about the decision of the contractual authority for the rejection of the appeal. The problem lays when the authority, even though it has notified the economic operator about the suspension of the deadline for the review of the appeal, does not take a decision. In this case, the question is when does the deadline for the appeal with the Commission begin? According to point 1/d, Heading IX of the above mentioned Decision of Council of Ministers, the suspended deadline resumes, once the contractual authority has obtained the information. Thus, the appeal deadline should start from the fourth day, after the resumption of the suspended deadline.

Who is in charge of reviewing the appeal? According to the DCM, the request is reviewed by the Head of the contractual authority, or another official or office alternatively, within the authority delegated by the Head of the contractual authority. The appeal may also be reviewed by the Bid Evaluation Committee (BEC). But, the ultimate decision-making right lays with the head of the contractual authority because the function of the BEC is mainly of “recommendation” nature.

Even though the Public Procurement Law does not explicitly provide for it, the systematic interpretation indicates that if the appeal of the economic operator holds ground, then the head of the authority should introduce changes to the bidding documents, which should then be made public. We believe that taking in an appeal of

¹⁶ S.Sadushi, “Administrative law”, Grandprind, Tirana, September 2008, pg. 89

any economic operator about removal of a discriminatory and illegal criterion extends its effect to other operators as well, who in the past might have been penalized because of that criterion, but which have not appealed the decision with the authority. This interpretation is in line with the meaning of Article 42/2 of the Public Procurement Law¹⁷, according to which, any change in the bidding documents is made known to other operators as well.

With the submission of an appeal, the head of the contractual authority should issue an order for the suspension of the bidding procedures. The suspension of the procedure is done for the purpose of reviewing the appeal, without any concern about exceeding the deadlines of the procedure, but also in order not to deny the operator that has filed the appeal his participation in the procurement procedure. An additional warranty to this effect is Point 4 of Article 63 of the law, whereby the contractual authority may decide to postpone the procedures, for as long as it is in suspension phase. Furthermore, we notice that the Public Procurement Law, in its point 4 does not necessarily link extension of the deadline with the fact of suspension, since some appeals are not even reviewed because of their abusiveness, in order to gain time, while some others have a short review time since the claimed facts may very well not exist at all, or may constitute discriminatory criteria, or criteria that do not violate equality in the bidding procedure.

Secondly, against the decisions of the contractual authority, once the bids have been opened. In concrete terms, an appeal may be raised against a decision about disqualification of the economic operator, or against a decision for the final bid ranking. The time frame for the appeal against such a decision is within 7 days, with the Public Procurement Commission. This deadline begins from the day when the appellant has been notified or should have been notified about the claimed violation, in accordance with the Public Procurement Law. After the bid opening, the contractual authority through the Bid Evaluation Committees takes a decision about the ranking of the said operator. Starting with the following working day, after the announcement of the ranking/rating decision, and closure in the system of the bid evaluation, the operator enjoys the right that within 7 days, in line with point 2 of Article 63 of the Public Procurement Law, to file for an administrative appeal with the authority. The administrative appeal should be in the form and content described in points 3, 7 and 8 of article 63 of Public Procurement Law. Immediately, upon receipt of the appeal, the head of the authority, in line with points 3 and 8 of Article 63 of the Public Procurement Law issues an order for the suspension of the procurement procedures. In this case, the procurement procedure is not suspended in the system of the Public Procurement Agency (PPA), but it prevents further actions, such as the award of the winning bid, and contract signature. Upon issuing the decision about the appeal of the operator, the authority, in order to lift the suspension, and to continue with business as usual,

¹⁷ the contractual authority, at any time prior to the expiry of the deadline for the bids submission, and on whatever ground, with its own initiative, or upon a request for clarification by an economic operator may make changes in the tender documents, through an Annex. Any Annex will be immediately notified to all economic operators that have received bidding documents and **becomes binding**. The annex is made available electronically.

it would need to wait 10 days, from the following working day, upon expiry of the deadline established in Article 63/5. this is in line with point 6 of article 63 of the Public Procurement Law.

With regard to the legitimacy of the appellant and the understanding of the concepts, we see the same issues appear as in the case of the appeal/grievance about the bidding documents, and the same arguments hold true.

In difference from the appeal about the bidding documents, the Bid Evaluation Committee can not be responsible for the review of the appeal. The decision of the head of the contractual authority, in this case will be either about the qualification of the claimant economic operator, which has been disqualified unjustly, or alternatively for changing bid ranking.

In this case as well, the head of the authority should suspend the bidding procedures, except when the Bid Evaluation Committee has decided otherwise. (Article 63/8 of the Public Procurement Law.) Exhausting the appeal with the contractual authority is a per-requisite for starting with the appeal with the Public Procurement Commission.

The appeal with the Public Procurement Commission

The Public Procurement Law provides for the establishment of the Public Procurement Commission (PPC), as an instance of appeal. It was established by the law as a public body that would act under the auspices of the Council of Ministers, with funding from the state budget. The law provides for the PPC as the most important body in the procurement area, in charge of reviewing the appeals/grievance regarding public procurement procedures, in line with the requirements of the law¹⁸. In line with the PPL, the role of the PPC is the following: to review, as a second instance reviewing body (the first being the respective contractual authority), the appeals submitted by the economic operators against decisions taken by the contractual authorities. In concrete terms, the duty of the PPC is to review compliance/consistency of the procurement procedures as established in the PPL, the public procurement rules, as a result of the appeals of any party with a stake in the public procurement procedure (administrative investigation procedure).

Article 63, point 1.1 of the Public Procurement Law stipulates that the final decision of the contractual authority may be appealed against, in writing, to the Commission. In this case, the subject matter/scope of the written appeal is related to the bidding documents, thus relating to the phase prior to contract signature, and announcement of the winner. From the reading of Point 6 of article 63 of PPL it is evident that it is not always necessary to take a final decision by the contractual authority for an appeal. This because the contractual authority may not take a decision within the deadline of 7 days, after receipt of the appeal. In this case, the law has provided that the economic operators may address the Commission within a deadline of 10 days,

¹⁸ See, Manual on the review of the public procurement procedures for the contractual authorities, Public Procurement Agency, 2012.

which deadline begins from the following working day, upon expiry of the above mentioned 7 days deadline. Whereas, the other situation is simpler and does not lead to misunderstandings, since if the appeal is rejected by the contractual authority, it shall take a decision. In this case, the economic operators may appeal with the Commission within the 10 days deadline, from the day when the appellant has been notified by the contractual authority.

The appeal with the Commission has several features, with reference to point 7 of article 63 of the above mentioned law. First, it needs to be submitted in writing, and it needs to be official. Thus the Commission will be triggered into motion through the request of interested parties, and not *proprio motu*. Interested parties shall address the Commission through a special form, which should contain the following elements: i) name and address of the appellant, ii) reference to the concrete procedure, iii) reference to the legislation and description of the violation, iv) the claim of the appellant regarding the final decision, v) instances of the appeal, together with the relevant documentation, and vi) the decision of the contractual authority. All of these elements are necessary for reviewing the appeal, otherwise it will not be reviewed. If any of the above mentioned elements is missing, or the form has been filled in erroneously, the public procurement commission should notify the appellant to duly fill in the form. The notification can be in many forms, including electronically. If the appeal is not corrected within 48 hours from this notification, then it is considered that it has not been submitted, and may lead to loss of the deadline for the appeal.

At any rate, the Public Procurement Commission shall make an evaluation, if the appellant has exhausted the instruments and modalities of the first instance of the appeal. To this end is the request to keep in the form, the decision of the contractual authority. This because the Public Procurement Commission, as a specialized entity shall act as a quasi "*administrative court*", by handling all appeal cases about the procurement procedures, at the second instance. Failure to follow the instances of the appeal according to the public procurement law is linked with the consequence of invalidity of *the appeal*¹⁹ meaning that they are binding for the parties, and are separate and independent from each-other. If the appeal does not respect the deadlines, as well as the instances of appeal, it shall not be reviewed, and the decision of the contractual authority shall remain valid.

The Public Procurement Commission should respond to the appeals in line with legal criteria of the public procurement law within 7 days from receiving the appeal in writing. But, it could also happen, that it could be impossible for the Commission to express itself within the said deadline, for failure of availing itself of all necessary information. In this case, the Public Procurement Commission, (PPC) would need to obtain information from the contractual authority, and a longer deadline is made available, which should however not exceed 20 days, in reference to point 9 of article 63 of the public procurement law.

¹⁹ Article 63, point 8, Public Procurement Law.

As a rule, the Public Procurement Commission should make sure that the *procurement procedure has been suspended* by the contractual authority, which should be in charge of obtaining the appeal, but it can also be related through a decision. Suspension, as a measure, makes part of the ad.hoc. measures²⁰, which are actions that guaranty to the interested entities suspension of the procedures related to contract/bidding document announcement, or the announcement of the winner by the contractual authorities, but as well with fast correctional measures related to the decisions of the contractual authorities. This is done for preventing potential consequences/implications for the appellant, but also for the decision-making of the public procurement commission to have consequences for the parties, and not remain just something formal on paper. The law, as an exception, has granted the public procurement commission the competence for issuing an interim order, that would allow the pursuance/continuation of the procurement procedure. This competence should be considered as something exemplary, and limited only to two cases, explicitly provided for in point 2 of article 64 of the law.

In concrete terms, the Public Procurement Commission may allow the contractual authority, via an interim order, until a final decision has been reached, to continue with the procurement procedure, if:

- data indicate that the appellant shall not be successful with his appeal;
- such suspension is indirectly detrimental to the public interest, the interest of the contractual authority or of the bidder.

This should be understood that the law leaves to the discretion of the PPC a competency which should be construed that it should be exercised only as an exception. It should be exercised only following a preliminary review of the appeal, if the per-requisites exist or not for the issuance of an interim order. The issue at the discretion of the PPC remains the definition that the appellant shall not be successful with his appeal, thus putting at stake the interests of the appellant. In the first instance, according to letter (a) this is about the so-called clearly unfounded appeal, which at the end is going to be rejected by the PPC. However, the issue remains how has the PPC come to the conclusion at such an early phase, where it is stipulated that it should express itself immediately upon receipt of the appeal/grievance.

But, on the other hand, article 64, point 2 points out that PPC may issue such an order, at any time, after receipt of the appeal, with the only time limitation for contract signature. This contradiction between Article 64, points 1 and 2 of the PPL could be settled in favor of the second point which permits the administrative body to create a stronger conviction, following an even broader investigation. Whereas according to Article 64, point 1 of the PPL, the legislator may address the situation, by not having them undergo the review at all, since they would clearly be unfounded. From the legal formulation, one can detect that there are two cases for issuing the interim order, thus lacking the formulation of the DCM No. 1, dated 10.01.2007 "On the adoption

²⁰ ad.hoc measures represent a legal instrument and mechanism introduced in Directive 89/665/ EEC of the European Union "On indemnifications related to public procurements".

of public procurement rules, whereby this competency has been vested to the Public Procurement Agency (PPA). The formulation according to this article looked at both cases for the issuance of the interim order both as inter-related, and concomitantly looked at the order as revocable at any time.

Already, the revised law does not recognize the co-existence of two incidents/cases for the issuance of the interim order, nor does it recognize the temporary nature of the latter. In the second case of the issuance of the order mention is made of the indirect detriment/undermining of the public interest, that of the contractual authority or of the other bidders, that could co-exist with the evaluation that the appeal may not be successful. However, in the second case, the legislator has put the above mentioned interests on balance with those of another bidder (appellant), giving priority to the first. Whereas, the temporary (ad.hoc.) nature of the order does not constitute a problem for infringing the interests of the appellant According to the Public Procurement Law: *“Signature of the contract/agreement prior to the expiry of the deadline for the ranking notification or prior to the completion of the administrative review, according to Heading VII of this Law, makes it totally invalid.”* Thus, the law prevents signature of the contract prior to the completion of the administrative review, by guarantying the rights of the appellants, when the contractual authority continues with the procurement procedure.

The Public Procurement Commission is an institution of broad competencies, which are divided into: competencies prior to contract signature, and after the contract signature. Regarding the phase prior to the signature of the contract, its competencies are established in Article 64, point 3 of the public procurement law. If the Commission observes violations of the legal provisions by the contractual authority, it enjoys the right to make legal interpretations of the laws and legal principles that should apply for the subject matter of the appeal. This competence turns the Public Procurement Commission into a player for monitoring and maintaining its practice, by also guiding the contractual authorities towards the solution of the matter.

In addition, the PPC enjoys the right to cancel the actions or decisions of the contractual authority, which have been issued in violation of the law, and in particular the elimination of those technical specifications, and others which fall against the provisions of the law. This competence helps the PPC play its role as a specialized oversight body for the public administration in the procurement area. The PPC supervises and makes sure that all principles and legal provisions that regulate the competition activity get applied correctly in all cases. In particular, the PPC should makes sure that the technical or professional specifications should guarantee the selection criteria of article 2²¹ of the Public Procurement Law. Thus, for instance, the PPC has found out the introduction of erroneous criteria for qualification by the contractual authorities regarding “technical

²¹ Article 2 of PPL

the selection of winners of public contracts takes place in line with the following general principles:

- a) non-discrimination and equal and fair treatment of all bidders and potential bidders;
- b) transparency in the procurement procedures;
- c) fairness and equality in the treatment of requests and obligations of the bidder or potential bidders.

capacities” such as: “request for machinery and equipments, which are not consistent with the type and size of the facility” or “requests for a larger number of workers/employees than necessary” etc. or instances when the qualification criteria have not been formulated clearly, are evasive, and which have later on served as grounds for the disqualification of one or several economic operators²².

Another important competence of the Public Procurement Commission is the instruction for corrections and the obligation of the contractual authority to continue with the procurement procedure. This competence is subject of misinterpretation in practice, being understood as a competence of the PPC for determining the winner. But, the tasks of PPC are of instructional, and not of binding nature, since it has different and separate competencies from those of the contractual authority. In this concrete case, the PPC should identify the legal violations and seek the continuation of the procurement procedure, with the necessary corrections.

At this point, there is need to make a distinction between the establishment of the winner, and the order for the qualification of the economic operator that has been unjustly disqualified. The public procurement commission (PPC) is in its legal right, when it orders the qualification²³ of an economic operator, following the conduct of a comprehensive administrative investigation, while asking for clarifications and documentation related to the case under investigation. For example, in the event that PPC observes that the operator has submitted the appropriate documentation, in line with the technical and professional criteria and specifications²⁴ it should order the qualification of the bidder, by making this bidder part of the tendering procedure again, but while not declaring him as a winner, since the evaluation of these criteria according to the rating/ranking should be done by the contractual authority. In addition, the PPC may conclude that the contractual authority has been wrong in its evaluation of the economic operators beyond the requirements and criteria provided in the standard bidding documents, by applying criteria that it has not announced in advance, thus violating the provisions of Article 2 of the PPL.

This is because the review bodies do not check the accuracy of the decisions of the contractual authority, or the way the contractual authority has come to these decisions. They check only if the decision about the winning bid is acceptable or if the contractual authority has made a serious mistake, in particular if it has obviously misused its judgment for determining a specification, in the selection of a candidate, or the award of a contract. This role is in compliance with the scope of the Directive 89/665/CEE, which permits to the review bodies to check if the decisions about the decisions related to winning bids are founded and substantiated, but not to decide “again” on a winning bid, which is part of the area of the expertise of the contractual authority²⁵.

²² See Annual Report of the Public Procurement Commission, 2011, f.26-7.

²³ for more information see ruling no1859 dated 11.07.2012 of the Court of Appeal of Tirana.

²⁴ See, decision no.1197/3dated 04.01.2013 of the PPC.

²⁵ Module F, Public Procurement Training for IPA beneficiary countries, Review and instruments/procedures of appeal; Anti-corruption, pg 19.

But, the competencies of the PPC are even broader, and they include an order for the cancellation of the procedures for the award of the winning bid. This competence makes it perfectly clear that the PPC prevents the announcement of an economic operator as the contract winner, in the case it has observed legal violations referring to procedural irregularities. These legal violations compared to the first can not be amended/corrected, since they refer to a rather advanced phase of the procedure. Thus, the PPC represents a second instance of appeal that prevents the award of the contract to a bidder not deserving it, thus meaning that the procurement procedure in the contractual authority should start from the beginning.

Exhausting the administrative review and analysis of issues relating with it

According to article 19/1 of law no. 9643 “*On public procurement*”, the *Public Procurement Commission* is the most important body in the procurement field, which is in charge of reviewing the appeals regarding the procurement procedures, given that the economic operators initially may launch their appeal with the contractual authority²⁶. After exhausting the appeal with the contractual authority,²⁷ the appellant may submit an appeal in writing to the *Public Procurement Commission*. Hence, the Public Procurement Commission, at the end of the review of the appeal, takes decisions which are final, from the administrative perspective. It is precisely the final decision(s) of this entity that give the parties legitimate cause to address the court, when they have objections regarding the procurement procedure, both from the material, as well as from the procedural aspects. According to Article 64/3, point 1 of Law no. 9643 “*On public procurement*”, parties have the right to press charges for the review of an administrative dispute with the relevant court, against the decision of the Public Procurement Commission. The public procurement commission is the highest administrative instance in charge with the review of the appeals of the entities that participate in public procurement procedures against the decisions, actions or failure to act of the contractual authorities. Failure of exercising the administrative review in this entity would cause the interested party to lose the right to address the court with a suit on the subject matter objecting to the administrative act of the contractual authority.

The above mentioned is an overview of the way that needs to be pursued by any party/entity (economic operator) before addressing the court. In a systemic fashion, by way of referring the phases that would need to be followed, the following is the picture: *1. the contractual authority 2. Public Procurement Commission 3. the Court*. Understanding this path is of major importance, since in practice failure to duly understand and implement it has led to the court’s ceasing the case. In one

²⁶ The appellant against the *decisions of the contractual authority*, first submits an appeal in writing to the said contractual authority, within 7 days from the day when the appellant has been notified or should have been notified about the claimed violation, according to this law.(article 63/2 of law no. 9643 “*On public procurement*”)

²⁷ Should the contractual authority not review the appeal within the time frame specified in point 5 of this article, or reject it, the appellant may submit a written appeal with the *Public Procurement Commission*, within 10 days, from the following working day, after the expiry of the deadline, as established in point 5 of this article, or when the appeal is rejected by the contractual authority, from the day, the appellant has been notified by the contractual authority.

of the rulings of the Supreme Court²⁸, this court has pointed to the fact that the administrative act, the subject matter of the dispute was not initially reviewed by the superior administrative entity, i.e. The Public Procurement Commission, in line with the provision of Article 63 of Law no.9643, dated 20.11.2006 "On public procurement", and article 137 of the Administrative Procedure Code.

Meanwhile, Tirana Judicial District Court in its ruling no.3840, dated 19.04.2012 ruled on taking the civil case outside the court jurisdiction on ground of.. *Article 63, points 7, 9 and 10, and 64/1 and 3 of Law no.9643, dated 20.11.2006 provides for the obligation of the party/entity, that prior to seeking a review from the court of an administrative acts, such as the decision of the contractual authority, that entity should submit an appeal with the superior administrative entity, namely the Public Procurement Commission (PPC).*" In line with Article 136 of the Administrative Procedure Code, and article 328 of the Civil Procedure Code: *"Any interested party enjoys the right to appeal against an administrative act or against the refusal for the issuance of such administrative act. Interested parties may address the court, only after having exhausted the administrative recourse"*. In other words *"court inspection comes after the administrative procedure has been exhausted first."* According to the Supreme Court, in this concrete instance we have to do with an administrative appeal explicitly provided for in the law²⁹, as a complete legal instrument to seek the abrogation or amendment of the administrative act, this constitutes an exhaustive appeal instrument and at the same time binding to be exhausted, in order to later address the court.

The United Colleges of the Supreme Court in their unified ruling no.1, dated 26.11.2010 have come to the unified conclusion that: *"...The pursuit of the administrative modality (administrative appeal) for the settlement of the administrative disputes prior to addressing the court shall be mandatory only if the law that provides for the legal relations and the administrative activity of the relevant field explicitly provides that the administrative act may be exercised as an administrative reviews, as well as indicates the concrete administrative entity or entities, where eventually in line with the hierarchy the administrative appeal must be addressed to.* Law no.9643, dated 20.11.2006 "On public procurement" clearly provides for the administrative path that needs to be pursued by the entity/party prior to addressing the court. This law explicitly provides for the bodies in charge of reviewing the administrative appeal, the deadlines for the reviews, what do these bodies decide, the right for appeal etc. It is important to have these elements described in the law, in order to ensure pursuit of the mandatory administrative appeal.

²⁸ ruling of the Supreme Court no.389, dated 18 September 2012

²⁹ Administrative Procedures Code recognizes the exercise of the administrative appeal through the administrative appeal and non-formal request. The purpose and the distinction between these instruments for appeal influences the establishment of the jurisdiction for their review, the procedures, modalities for the mandatory order for the investment of the administrative and judicial jurisdiction. The exercise of the administrative appeal through the non-formal request is not binding for the entity, but represents one of its rights to address the administrative body, in order to review the appeal, and address the problem. In the event of the non-formal request, as an option, it is an opportunity that the law recognizes to the individual to submit to the administrative entity its claim, but the court has no problem with direct involvement for the review.

First, with regard to exhausting the administrative modality, in the court practice there are different approaches regarding the meaning and role of Article 42 of the Public Procurement Law. In some instances, the courts have expressed their stand that the utilization of such an opportunity recognized by the legislator is a necessary per-requisite. This is related to the fact that it can not make any claims later based on the fact of disqualification for failure to meet the required criteria by the contractual authority is unfounded, as long as the latter has defined in the bidding documents the necessary criteria for qualification. For example, in a concrete case, the contractual authority had included as one the conditions to be met by the economic operator the submission of ISO certificates, in line with the scope of activity. Under these circumstances, the economic operator submitted the following types of certificates: ISO 9001 -2008 and ISO 14001, which provided for the certificates of the activity run by his company. Based on these certificates, the contractual authority disqualified the economic operator on the ground that the certificates submitted by the operator did not match the scope of the bidding, and as such they did not meet the specific qualification criteria established by the contractual authority. Stemming from the fact that the economic operator had not made use of the provision of Article 42 of the public procurement law, the court as one of the arguments for rejecting the law suit, brought about the fact that the plaintiff *“should have submitted an appeal or request for clarification with the contractual authority, five days prior to the expiry of the deadline for bids submission, regarding this qualification criteria, which it results has not happened.”*³⁰

This is also in line with the practice followed by the Public Procurement Commission, which in the cases when the economic operators have addressed an appeal to this Commission, in line with Article 63/2, for disqualification reasons have ruled that: *“Based on the fact that the appellant economic operator has not submitted an appeal/grievance or request for clarification with the contractual authority, in compliance with Article 42 of the Public Procurement Law, we rule that this qualification criterion should have been met by the appellant economic operator.”*³¹ On these grounds, we observe that the Public Procurement Commission lays before the economic operator the obligation to make full use of the provisions of Article 42 of the PPL, otherwise the claims that the latter will then be linked with the qualification criteria shall be tied to exhausting this legal possibility.

On the other hand, on similar cases, the court, despite the claims of the defendant (represented by the state advocate) that the plaintiff has acted in violation of the legal provisions of Article 42 of law No.9643 dated 20.11.2006 *“On public procurement”*, revised, has ruled that this provision is not binding for the economic operator. According to the court, *“seeking explanations from a potential bidder simply represents a legal opportunity for the later.”*³²

³⁰ ruling no.9793, dated 18.10.2012, Tirana judicial district court

³¹ ruling no.3268, dated 01.04.2013, Tirana judicial district court.

³² Ruling no 390, dated 25.01.2012, Tirana judicial district court.

In our view, based on the literal interpretation of Article 42 of the Law³³ and in line with the goal that the legislator has set to be achieved through this law, exhausting this possibility is not binding on the economic operator. Hence, with reference to the above mentioned provision, we note that the expression as used in the law is: “*may seek clarification*.” This means that it is in the discretion of the economic operator to seek for clarifications regarding the bidding documents. The economic operator may feel free to exercise this right, depending on the claims, in the cases or under the circumstances stipulated in the provision, any time he deems it necessary. Thus, in this case, we have to do with a legal opportunity, and not a legal binding. In this case, Article 42 of the law does not provide for an obligation, and nor does it tie this opportunity with a possible appeal at a later phase with the relevant authorities. In this case, Article 42 of the law does not provide for an obligation, and nor does it tie this opportunity with a possible appeal at a later phase with the relevant authorities. If the legislator had meant to use it as an opportunity, binding in nature, then it would not have used the term “*may*”, but rather the term “*should*”. Its purpose, as expressed through the above mentioned article is to provide for legal opportunities for the economic operators, in line with defending their rights, in face of the stands of the contractual authorities. This provision is the bases for supporting their claims on a legal bases, which then trigger the contractual authority’s obligation for action. So, the situation is different for the contractual authority which has to provide explanations regarding the bidding documents to the economic operator, within the deadline provided in the provision in line with article 42 of the Law. In this case, this provision is binding. On purpose, the law provides for the right of appeal with the Public Procurement Commission, in case of failure to act on the side of the contractual authority.

Second, one of the issues in terms of objecting to the decisions of the Public Procurement Commission is related to its decision-making in the event of an appeal/grievance by the economic operators. In line with Article 64/2 of Law no. 9643 “*On public procurement*”, following the completion of the administrative review, when the Public Procurement Commission observes violations, it may decide to issue to the contractual authority involved, a decision in writing, in order to bring the illegality situation to an end, within a given time frame. With reference to this article, the question that arises from a ruling of the Appeal Court³⁴ is whether we have to do with exceeding one’s competencies when the Public Procurement Commission, which as a result of the appeals of “*Ecoacqua*” ltd and “*Ekologica Albania*” ltd have revised the final ranking of bidders in the procurement of the subject matter of “*Cleaning the city of Saranda*”? Has it taken the competencies of the Bid Evaluation Commission, and

³³ “*The potential bidder may seek clarification for the bidding documents from the contractual authority, which in turn should respond to any request for clarification regarding the bidding documents, of any economic operator, provided that the request has been revived not later than 5 days prior to the final deadline for bid submission.*”

The contractual authority should respond within 3 days from the submission of the request, in order to enable timely bid submission by the economic operator, and without identifying the source for the request, it should communicate with the necessary clarifications to all economic operators that have received bidding documents.

The final decision of the contractual authority may be appealed against with the Public Procurement Commission.”

³⁴ ruling of the court of Appeal, no.176, dated 15 February 2012.

do we have to do with an invalid act, in line with Article 116 of the Administrative Procedures Code?

In order to be able to address this question, we need to refer to DCM No. 184, dated 17.03.2010 *“On adoption of the regulation regarding the organization and operation of the Public Procurement Commission”*, which provides in detail for the decision-making of the Commission, should it decide to bring an end to an legal conduct, within a deadline, with the argument that a decision or action of the contractual authority falls against the law no. 9643/2006³⁵ according to the ruling of the Court of Appeal³⁶, under no circumstances shall the Public Procurement Commission qualify entities that have filed an appeal, or make the ranking by announcing the winners, but it can only make observations if there have been illicit actions, and in line with article 28, point 1/b it should stop the contractual authority from taking further illicit actions. This way, the Public Procurement Commission in violation of law no.9643, and by taking over the competencies of the Bid Evaluation Commission has issued an administrative decision/act which is totally invalid because it has been issued in exceeding its legal competencies³⁸. In line with Article 28/2, point b) of the DCM NO. 184, dated 17.03.2010, the Public Procurement Commission should have canceled either in full, or partially the decision or action of the contractual authority, which decision had been issued in violation of the law, and to instruct the continuation of the procurement procedure in line with the law, by indicating the actions that would need to follow suit. In accordance with Article 64, point 4 of Law no. 9643 *“On public procurement”*, after the contract signature, in the event that the *Public Procurement Commission* deems it that a decision or action of the contractual authority has been made in violation of any of the provisions of this law, it enjoys the right to take a declarative decision, on which bases the court may indemnify the appellant, which has suffered losses or damages, as the result of the violation of this law. Similarly, based on the same article, we may conclude that the indemnification of the appellant

³⁵ Article 28 of DCM no. 184, dated 17.03.2010 *“On adoption of the internal procedures rules for the Public Procurement Commission”* provides that if the PPC decides to bring an end to illicit conduct, within a given deadline, on the grounds that a decision or action of the contractual authority is in violation of the law no. 9643/2006, and the procurement contract has not yet been signed, then PPC enjoys the right to: a) *interpret the rules or legal principles that need to be applied with regard to the subject matter of the appeal, by instructing the contractual authority to act according to this interpretation for the continuation of the procurement procedure* b) *To totally or partially cancel the decision of action of the contractual authority issued in violation of the law, and to instruct with the continuation of the procurement procedure, in line with the law, by indicating actions that need to follow suit;* c) *To point out the concrete legal violation, and to instruct the contractual authority about the correction, and to pursue the procurement procedure;* d) *To cancel the procedures for the award of the winning contract, and instruct the contractual authority to resume the procurement procedure.*

Should the PPC decide to put an end to the illicit conduct, within a given time frame, with the reasoning that a decision or action of the contractual authority is in violation of law no. 9643/2006 and the procurement contract has been entered into, then the PPC enjoys the right to:

a) *interpret the rules and legal principles that should apply for the subject matter of the appeal, by instructing the contractual authority to act according to this interpretation, in line with pursuit of procurement procedure* b) *To declare a given fact, as a result of the administrative review. This decision may be used by the court, as a document that justifies court expenses of the appellant for the losses or damages inflicted by the violation of the law;* c) *To take concrete measure against persons who are liable, in line with the provisions of law no 9643/2006.* These measures may include counseling of the plaintiff to press charges/ file a suit in court, and reporting to the relevant supervisor about the purposeful violation of the law by an official of the contractual authority.

³⁶ Ruling of the court of Appeal no.176, dated 15 February 2012.

is acknowledged by law, when he gets disqualified, as a result of unfair actions, and once the contract has been signed, in the event of the impossibility for the entity to be part of the procurement procedure.

Thirdly, another questions related to the court practice is if the contractual authority is legitimized to object the decisions of the Public Procurement Commission? In one of the rulings of the Court of Appeal³⁸, the plaintiff is in its legitimate right to object in court an act of an administrative entity, with re-evaluation and revision competencies against the activity of the contractual authority, one of them being the Public Procurement Commission. Article 72 of Law no. 9643/2006, in its point 2 related to administrative violations acknowledges the explicit possibility of the contractual authority to address the court, in the event of a penalty/fine issued by the highest administrative body, thus legitimizing its right to object via the court about a decision of the Public Procurement Commission, which situation is not prohibited from the Administrative Procedures Code, article 117, second paragraph and is part of other specific pieces of legislation, as well.

In addition, these issues find a permanent solution in Article 64/3, point 1 of law no. 9643/2006 which provides for a court appeal through the provision according to which: *“Parties have the right to file a suit against a decision of the Public Procurement Commission, for the review of administrative disputes at the relevant court.”* In other words, parties shall be construed to mean both the contractual authority and the economic operator.

In principle, in line, as well, with Article 64/3, point 2 of law no. 9643/2006, the reviews of this appeal by the court does not suspend the procurement procedures, for signing a public contract for the procurement of goods, services or works by the contractual authority or execution of the obligations, according to the procurement contract by the respective parties.” However, on exceptional and I quote, on exceptional bases because of the specific nature of the public procurement contract, the court in line with Article 329 of the Civil Procedure Code may decide to freeze/suspend the enforcement of the administrative act. The court may allow for such a suspension at the eventual risk of a serious and irreplaceable damage to the plaintiff. There have been instances when against the unified ruling no.10/2004³⁷ the court has ruled through an interim ruling by asking for an injunction. Not only that, but in violation of Article 511 of the Civil Procedure Code,³⁸ the court has issued the execution order. Considering in these cases, the measure for the suspension of the enforcement of the administrative act, as an ad.hoc injunction measure, together with the delays in the review of the case, could mean for the contractual authority serious and irreplaceable damage, in the

³⁷ Unified colleges of the Supreme Court are of the opinion that the request for objection in court of an administrative act does not have the features of a pure civil law suit, and therefore the suspension of the enforcement of the administrative act by the court, when the law permits for it, should not be considered as an ad.hoc. Measure for law suit injunction, in line with article 206, point “b”, of the Civil Procedure Code. Thus, the reference in this case in article 202 and on to the Civil Procedure Code is not correct.

³⁸ No execution order is issued about the injunction ruling and for penalties issues by the court, which are directly executed by the bailiff's office, after the notification of the verdict.

event of law suit rejection. For this reason, the courts should exercise a lot of caution when they decide on suspension of the administrative act, by not turning it into a rule, what the specific law provides for as an exception. It is important to understand the general spirit of the Public Procurement law, which has ruled by not suspending the procedure, in the case of court appeal, and the application of the suspension of the administrative act of the Public Procurement Commission, in the event it gets appealed by the economic operators constitutes an obstacle for the progress of works of the contractual authority (in particular when a procurement procedure is carried out in response to an emergency need, which can not wait for the delays of the court procedures) and which runs against the public interest contained the public contract in itself. Thus, suspension of the administrative act through an interim decision, and based on article 429 of the Civil Procedure Code should be in line with the following factors:

- Exception, only when there is a risk for a serious and irreplaceable damage;
- in line with the public interest;
- legitimate and proportional;
- not be judgmental on the result of the case;
- in line with the emergency, speed, and needs of the contractual authority;
- whether the contract has been entered into or not.

Only by taking into account these factors, and making a balance, the judge can give an effective and fair ruling.

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