

CUPRINS

List of abbreviations	11
-----------------------------	----

Chapter 1

1. Introduction	13
------------------------------	----

1.1. The general context	13
--------------------------------	----

1.2. The Relevance and Limits of the Research	24
---	----

1.3. The Research Methodology and Questions	28
---	----

1.4. Thesis Outline.....	31
--------------------------	----

Chapter 2

2. Understanding the Setting for Public Procurement Contract

Performance	34
--------------------------	----

2.1 The Public Procurement Legal Framework.....	34
---	----

2.1.1 The EU Legal Framework	34
------------------------------------	----

2.1.2 The Romanian Legal Framework	38
--	----

2.2 Stages in the Public Procurement Process.....	44
---	----

2.3 The Guiding Principles for the Execution of a Public Procurement Contract.....	45
--	----

2.4 The Legal Regime of a Public Procurement Contract.....	54
--	----

2.4.1 The Concept of “Public Contract”	55
--	----

2.4.2 The Parties to the Contract.....	73
--	----

2.4.2.1 The Contracting Authority	73
---	----

2.4.2.2 The Economic Operator	82
-------------------------------------	----

2.4.3 The Contract Types.....	86
-------------------------------	----

2.4.3.1 Public Works Contract	88
-------------------------------------	----

2.4.3.2 Public Supply Contract	88
--------------------------------------	----

2.4.3.3 Public Service Contract.....	89
--------------------------------------	----

2.4.3.4 Mixed Procurement.....	90
--------------------------------	----

2.4.4 The Subject of the Contract	90
---	----

2.4.5 Estimated Value of the Contract	91
---	----

2.4.6 Contracts below Thresholds.....	93
---------------------------------------	----

2.5 The Framework Agreements	96
------------------------------------	----

2.5.1 General Considerations.....	96
-----------------------------------	----

2.5.2 The Essentials of Framework Agreements	98
--	----

2.5.2.1 Stages of a Framework Agreement.....	101
--	-----

2.5.2.2 Procuring through Central Purchasing Bodies.....	103
--	-----

2.5.3 Taxonomy of Framework Agreements	110
2.5.3.1 Framework Agreements Concluded with a Single Economic Operator	110
2.5.3.2 Framework Agreements Concluded with Several Economic Operators	111
2.5.3.3 Valuation	116
2.5.3.4 Time frame	117
2.5.3.5 Binding or Non-binding Nature	119
2.5.4 Transparency Issues Regarding Framework-agreements Performance	121
2.5.5 Advantages and Disadvantages of Framework Agreements.....	122
2.6 Provisional Conclusions	124

Chapter 3

3. Modification of Contracts during Performance	127
3.1. General Considerations.....	127
3.2. Developments in the Court's Jurisprudence related to Amendments in Public Procurement Contracts.....	131
3.2.1 Succhi di Frutta Jurisprudence.....	133
3.2.2 The Presstext Case. Prohibition of Material Amendments	135
3.2.2.1 The Meaning of Substantial Amendment.....	135
3.2.2.2 Changes Concerning the Contracting Party	137
3.2.2.3 Changes Concerning the Price of the Contract	139
3.2.2.4 Changes Concerning the Duration of the Contract	139
3.2.3 The Wall Judgment. Issues around Subcontracting	140
3.2.4 Latest Court Judgments on Amendments	142
3.2.4.1 Commission v Spain	142
3.2.4.2 Finn Frogne	143
3.3. Current Provisions on Contract Amendments	147
3.3.1 Modifications Expressly Provided for in the Initial Procurement Documents.....	153
3.3.2 Additional Works, Services or Supplies by the Original Contractor that have become Necessary.....	157
3.3.3 Modifications Due to Unforeseen Circumstances	162
3.3.4 Replacement of a Contractual Partner	165
3.3.5 Low Value Modifications	169
3.3.6 Other Non-substantial Modifications.....	171
3.3.7 Substantial Modification	179
3.4 Provisional Conclusions	182

Chapter 4

4. Subcontracting	184
4.1 Public Procurement Subcontracting and its Rationale.....	184
4.2 The Concept of Subcontracting	187
4.2.1 Reliance on Third Party Capacities vs. Subcontracting.....	190
4.2.2 Subcontractor vs. Supplier	194
4.3. Legal Limits to Subcontracting	196
4.4 Transparency Rules in Subcontracting	206
4.4.1 Providing Information about Subcontractors. Tell Me Who Your Friends Are.....	207
4.5 Exclusion Grounds on Subcontractors.....	210
4.6 Payment to Subcontractors. The Direct Approach	212
4.6.1 General Conditions for the Application of Direct Payment Mechanism. Assignments of Receivable or Direct Action?.....	215
4.6.2 Confirmation of Contract Performance.....	217
4.6.3 Alignment of the Subcontract with the Main Procurement Contract.....	218
4.7 Liability of the main Contractor and Subcontractors. Joint and Several Liability?.....	219
4.8 Change of Subcontractors.....	222
4.8.1 Change of Subcontractors Indicated in the Tender	223
4.8.2 Introducing New Subcontractors	226
4.9 Economic Value of a Subcontract Agreement.....	232
4.10 Compliance of Subcontractors with Labor, Social and Environmental Rules	234
4.11 Provisional Concluding Remarks	235

Chapter 5

5. Oversight of the Performance Phase of the Contract	237
5.1 Monitoring Contract Performance.....	237
5.1.1 Management plan.....	238
5.1.2 Contract Commencement.....	239
5.1.2.1 Performance Guarantee	239
5.1.2.2 Order for Commencement of Works. Surrender of the Possession of the Site. Permits.....	241
5.1.3 Kick-off Meeting	243
5.1.4 Contract Monitoring: Cost, Time and Quality control.....	243
5.1.4.1 Cost control. Price Adjustments.....	244
5.1.4.2 Time control. Contract Extensions.....	245
5.1.4.3 Quality control	247
5.1.5 Performance Monitoring and Measurement	247

5.1.6 Risk Assessment	248
5.1.7 Contractual Changes	250
5.1.8 Managing Contractual Disputes.....	250
5.1.9 Contract Completion.....	251
5.1.10 Post-contract Performance Review. Findings Report	252
5.1.10.1 Findings Report.....	252
5.1.10.2 Consequences of a Negative Report.....	253
5.1.10.3 Actions for the Annulment of the Report.....	255
5.1.10.4 Dilemmas Regarding Negative Reports.....	258
5.1.10.5 The Delta Case	261
5.2 Institutional Oversight over the Execution of the Public Procurement	
Contracts	264
5.2.1 National Agency for Public Procurement	265
5.2.2 Court of Auditors	267
5.2.3 Competition Council.....	268
5.2.4 National Integrity Agency.....	268
5.3 Provisional Conclusions	269

Chapter 6

6 Contract Termination	271
6.1 General Considerations.....	271
6.2 Unilateral Termination of the Contracts by the Contracting Authority	272
6.2.1 Termination Due to Material Amendments Brought to the Contract	273
6.2.2 Termination Due to the Existence of Exclusion Grounds.....	277
6.2.3 Termination Due to Serious Infringement of the Obligations under the Treaties and 2014/24 Directive	285
6.3 Other Cases of Contract Termination	286
6.4 Termination Consequences.....	289
6.5 Suspension of the Execution or Termination? Force majeure case	291
6.5.1 The Conditions for a Force Majeure Event.....	292
6.5.2 Evaluating Force Majeure.....	293
6.5.2.1 What Does the Contract Say?	293
6.5.2.2 Absence of Force Majeure Clause	296
6.5.3 Unforeseeable Situations	298
6.6 Provisional Conclusions	299

Chapter 7

7. Remedies for the Contract Execution Phase	302
7.1 General Considerations.....	302
7.2 Scope of Application and Availability of Review Procedures	306

7.3 Types of Remedies	309
7.3.1 Pre-contractual Remedies	311
7.3.1.1 The Administrative-Judicial Procedure.....	316
7.3.1.2 The Judicial Complaint	324
7.3.2 Post-contractual Remedies. The System of Judicial Actions.....	325
7.3.2.1 Legal Disputes Regarding the Nullity or Annulment of the Public Contract and Damages Caused within the Awarding Procedure	325
7.3.2.2 Legal Disputes Regarding the Performance of the Contract.....	342
7.3.2.3 Suspension of the Execution of a Public Procurement Contract.....	350
7.3.3 Arbitration as a Dispute Solving Mechanism in Public Procurement.....	353
7.3.3.1 Arbitrability of an Administrative Contract	354
7.3.3.2 Arbitrability of the Public Procurement Contract. Arbitration – the New Rule?.....	356
7.4 Final Thoughts upon the Effectiveness of the Remedies Legislation.....	360

Chapter 8

8. Overview of the Research. Conclusive Remarks	365
8.1 Overview of the Research.....	365
8.2 General Conclusions and Remarks.....	381
Bibliography	388