

EGO 7/2016 AND FIDIC CONTRACTS

Emergency Government Ordinance no. 7/2016 on *several measures for acceleration of the implementation of trans-European transport infrastructure projects, as well as for the amendment and supplementation of certain legislation* ("**EGO 7/2016**") entered in force on 18 March 2016.

EGO 7/2016 brings several new provisions on the execution of FIDIC contracts with emphasis on the payment mechanism of amounts awarded as a result of dispute adjudication boards ("**DAB**") decisions.

The preamble of EGO 7/2016 mentions that the rationale behind the new provisions is to prevent the blockage of Trans-European infrastructure projects. The "inspiration" for the changes originated from claims filed by contractors for events occurred under the FIDIC contracts **and** repeated requests for the conclusion of addenda to the FIDIC contracts to regulate payment mechanism of amounts awarded by DAB decisions. Improving payment thereof eliminates the accrual of significant delay penalties and interest for late payments between the issuance of the DAB decision and the final solution in arbitration proceedings.

MAIN PROVISIONS

Beneficiaries under the Ministry of Transportation implementing trans-European infrastructure projects may sign an addendum to the existing public procurement contracts setting out the enforcement of DAB decisions. In order for the addendum to be concluded, EGO 7/2016 sets out several conditions, the most important being that contractors accept to waive their right to delay penalties.

Another preliminary condition for the conclusion of the above addendum is that contractors must set up a bank letter of guarantee in favor of the beneficiary. This guarantee can be foreclosed by the beneficiary in the event that he is successful in a DAB arbitration and the respective contractor refuses payment or simply fails to pay. Therefore, EGO 7/2016 ensures a swift payment to the state authorities managing the development of trans-European transport infrastructure projects. The validity of the bank letter of guarantee has to be maintained by the contractor until the writ of execution (i.e. arbitration decision) is issued.

Prior to making any payments, the beneficiaries have an obligation to carry out all procedural remedies in the contract for dispute adjudication. The beneficiary may propose to the main crediting authority to waive the right to carry out all procedural stages and this is allowed only based on substantiated grounds.

Lack of cash flow is also stated as a frequent cause for works interruption that delays the

completion of Trans-European infrastructure projects. EGO 7/2016 introduces a legal framework for the award, justification and retrieval of advance payments forwarded by the beneficiaries that will hopefully ensure project finalization on time. Beneficiaries may award up to 15% from the total value of the contract as advance payments.

EGO 7/2016 further adds that an order shall be issued by the Ministry of Transportation for the establishment of payment prioritization criteria. The maximum percentage is 35% from the value of budgetary credits approved annually by the state budget for trans-European transport infrastructure projects.

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