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PRICE ADJUSTMENT, CONTRACTUAL PENALTIES AND PERFORMANCE GUARANTEES IN ROMANIAN PUBLIC WORKS CONTRACTS: NOTES FROM RECENT PRACTICE

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Abstract: *This article examines three mechanisms that, in the ordinary course of a Romanian public works contract, rarely operate in isolation: price adjustment, contractual penalties, and performance guarantees. All three acquired renewed practical significance after 2022, once the gap between 2022-2023 tender prices and the actual cost of materials, labour and financing widened to a point where fixed-price contracts ceased to reflect any real economic equivalence between performance and consideration. The first part sets out the current legal architecture of price adjustment under Romanian public procurement law and its relationship to the penalty clause of the Civil Code. The second, and analytically more difficult, part examines what becomes of the adjustment entitlement where a subcontractor, rather than the main contractor, has performed the works in question, particularly where the subcontractor was never formally declared to the contracting authority. Drawing, in anonymised form, on recurring patterns encountered in recent Romanian construction practice, the article sets out the author's own position on how price adjustment, penalties and performance guarantees interact, and argues that price adjustment is not a discretionary concession contracting authorities may grant or withhold, but an imperative statutory entitlement that a main contractor cannot retain for itself by invoking its own failure to declare the subcontractor whose work generated it.*

Keywords: *price adjustment, contractual penalties, performance guarantees, public procurement, subcontractors, construction contracts*

Introduction

A public works contract preserves its character as a synallagmatic exchange only for as long as the price retains some relationship to the value of the works actually performed. Where execution is prolonged and the currency in which the price is denominated loses purchasing power in the meantime, that relationship breaks down unless the contract carries a corrective mechanism. The period beginning in 2021, marked by successive shocks to construction material prices, labour costs and financing conditions, turned that corrective mechanism, price adjustment, into one of the most litigated clauses in Romanian public procurement practice, and one whose theoretical entitlement frequently diverges from its practical availability.

A second, related mechanism concerns the sanctioning of delay in the performance of payment obligations, through contractual or statutory penalties. Price adjustment and penalties serve distinct legal functions, one restores value, the other punishes delay (Pop, 2015: p. 415-420), yet practice shows they frequently arise from the same factual matrix. A third mechanism, the performance guarantee (good workmanship guarantee), raises a structurally similar problem: a sum or a security instrument held by one party, subject to being retained, executed or substituted according to rules whose temporal application is not always straightforward for contracts predating successive legislative amendments.

The relationship of particular interest to this article is the one between main contractors and subcontractors. Romanian public procurement law grants subcontractors a set of protective mechanisms (Law nr. 98/2016, art. 218-219), yet those mechanisms operate only in favour of a subcontractor who has been formally declared to, and approved by, the contracting authority. Where that declaration is absent, not because the subcontractor concealed its participation but because the main contractor never made it, the statutory protective apparatus does not engage, notwithstanding that the works were, as a matter of fact, performed. The extent to which general principles of Romanian civil law can close this gap is examined below, and illustrated, in Sections IV and V, by reference to recurring patterns drawn from practice.

I. The legal framework of price adjustment in public works contracts

Price revision is addressed, in the first instance, by art. 221 alin. (1) lit. a) and lit. e) of Law nr. 98/2016 privind achizițiile publice (see also art. 164 of the Annex to Government Decision nr. 395/2016), which permit a public contract to be modified during its performance, without a new award procedure, where the possibility of adjustment was foreseen in clear, precise and unequivocal terms in the initial procurement documents, or where the modification results directly from a legislative or administrative measure affecting costs. In practice, both grounds remained largely theoretical for several years, since their invocation depended on a revision clause that the great majority of tender documentation drafted before 2022 simply did not include.

The regime changed materially, at least for works contracts already in progress, with Government Ordinance nr. 15/2021 (approved with amendments by Legea nr. 281/2021) and, more decisively, with Government Emergency Ordinance nr. 47/2022 (art. 1 and art. 3 alin. (4), as amended by Ordinance nr. 18/2023), which established a unitary and largely mandatory adjustment mechanism for public works contracts financed from public funds, irrespective of the contracting authority's field of activity, applicable to the value remaining to be executed as of 15 April 2022 and calculated by reference to the total construction cost index. The general regime of Law nr. 98/2016 was reinforced in parallel by Law nr. 208/2022, which introduced art. 222^2 of the law, making the inclusion of a price-revision clause compulsory for works contracts running for more than six months and for supply or service contracts running for more than twenty-four months; these thresholds were subsequently relaxed, for shorter-duration contracts, by Government Emergency Ordinance nr. 52/2024. Taken together, these successive interventions transformed price adjustment from a clause a contracting authority might, at its discretion, choose to include, into a statutory entitlement it is bound to grant, subject only to the conditions the law itself sets out.

The operational content of the mechanism is generally supplied by the formula recommended in the Instruction of the National Agency for Public Aquisitions nr. 1/2021, expressed as $K = av + (1 - av) \times IC(n)/IC(0)$, where av represents the fixed, non-adjustable share of the price, IC(n) is the relevant cost index at the moment of execution and IC(0) the reference index at the moment of bid submission. Where av equals zero, a common configuration for local infrastructure contracts, the entire remaining unexecuted value becomes subject to full indexation. The practical significance of this mechanism has only increased with successive minimum-wage increases and the rise of the standard VAT rate to 21 per cent, applicable since 1 August 2025 under Law nr. 141/2025, both of which materially affect the cost base on which contract prices were originally fundamented.

A recurring source of dispute concerns contracting authorities, frequently local public administrations acting as beneficiaries of nationally or European-funded works contracts, that refuse an adjustment request on the ground that the contract, signed in 2022 or 2023, contains no express adjustment formula. Such a refusal is difficult to reconcile with the public-order character of art. 221 and art. 222^{2} of Law nr. 98/2016: a contractor cannot properly be deemed to have waived a statutory entitlement that depends on future, objectively verifiable cost indices, merely because the tender documentation, drafted before the relevant price shocks occurred, failed to anticipate them.

A comparable dispute, arising under a materially different contractual framework, has been encountered by the author in connection with a design-and-build works contract governed by FIDIC-based conditions of contract rather than the default regime of Law nr. 98/2016. The contract recorded a single, undifferentiated duration of execution, expressed in days, comprising a design period and a subsequent construction period. The price-adjustment sub-clause of the particular conditions applied only where the total duration of execution exceeded a stated threshold; the contracting authority took the position that only the construction period should be counted for that purpose, since the sub-clause referred to execution rather than to the contract as a whole. On the wording actually used in the contract, however, duration of execution was defined as a single figure inclusive of design, and nothing in the particular conditions supported isolating the construction component for the purposes of the threshold. The example illustrates that the practical unavailability of price adjustment is not confined to contracts governed by the default regime of Law nr. 98/2016, but recurs wherever a contracting authority has an interest in reading a duration or value threshold restrictively.

II. Passing price adjustments down the subcontracting chain

Where works are executed, wholly or in part, by a subcontractor, the question arises whether an adjustment collected by the main contractor, calculated on the full value of the works, must be passed down to the subcontractor in proportion to the value it actually executed. For declared subcontractors, Law nr. 98/2016 answers this question through art. 218 alin. (1)-(4) and art. 219: a subcontractor who has opted, at the time of contracting, to be paid directly by the contracting authority is entitled to payment for the part of the contract it performed, once that performance is confirmed by documents agreed between all three parties. This protection, while genuine, is narrow in scope: it presupposes, at every stage, a subcontractor named in the offer or subsequently approved, and offers no remedy to one who was not.

The Regulations for the Reception of Construction Works, approved by Government Decision nr. 273/1994 and substantially rewritten by Government Decision nr. 343/2017, requires the executant, understood in practice as the main contractor's own organisation, and the designer, to take part as invited members in the reception commission at completion of the works (art. 11 alin. (5) of the Regulations). The Regulations does not, however, provide any mechanism through which an undeclared subcontractor's actual contribution to the works can be recorded, still less recognized, within that same reception process. This silence is not without consequence: it leaves the main contractor free to present the works to the reception commission as its own, in full, regardless of who in fact performed them.

The more difficult situation, examined in detail in Section IV, arises where a construction company executes a substantial, technically discrete component of a public works contract without ever being formally declared to, or approved by, the contracting authority, notwithstanding that the main contractor organised, supervised and plainly benefited from that execution. In such situations, the main contractor collects the full price adjustment from the contracting authority and retains the subcontractor's share, relying on the very absence of a declaration, an omission attributable to itself, as a defence against the subcontractor's claim. In the author's view, this position is difficult to reconcile with established principles of Romanian civil law.

The maxim nemo auditur propriam turpitudinem allegans precludes a party from deriving a benefit from its own wrongful conduct (Pop, 2015: p. 512-515); where the failure to declare is attributable exclusively to the main contractor, that failure cannot subsequently be invoked to defeat the subcontractor's underlying entitlement to the value of the works it actually performed. The general prohibition of unjust enrichment, art. 1345 and following of the Civil Code, and the duty of good faith in the performance of contracts, art. 1170 of the Civil Code, reinforce the same conclusion, in the author's assessment. A subcontractor who in fact executed works is, on this basis, entitled to recover the corresponding share of a price adjustment collected by the main contractor, assessed against actual execution rather than formal declaration status.

III. Contractual penalties: function, limits, and their relationship to price adjustment

The penalty clause, art. 1538 alin. (1) and following of the Civil Code, operates as a conventional pre-liquidation of damages for non-performance or delay, dispensing the creditor from the need to prove the actual extent of the prejudice suffered. For ordinary non-performance, art. 1538 alin. (2) affords the creditor a choice between enforcement of the principal obligation and the penalty, but not both; for delay in performance at an agreed time or place, however, art. 1539 expressly permits cumulation, allowing the creditor to pursue both the principal obligation and the penalty for the delay itself. Art. 1541 permits a court to reduce a manifestly excessive penalty, though not to eliminate it, preserving the deterrent function the parties intended the clause to serve.

In construction subcontracts, penalties are typically stipulated against the paying party for delay in the performance of payment obligations beyond a contractually fixed term. Such penalties remain conceptually distinct from price adjustment, even where both arise from the same overdue payment: adjustment restores the real economic value of a consideration eroded by inflation, an indexation function unrelated to delay, whereas a penalty sanctions the delay itself in the performance of an obligation that was already due, a liability function unrelated to the reason why the underlying value changed. Because the two claims proceed from different legal causes, they are, on the strength of art. 1539 of the Civil Code, cumulative rather than mutually exclusive, provided the penalty is calculated exclusively on sums that were themselves due and unpaid.

This domestic regime should also be read together with Law nr. 72/2013, transposing Directive 2011/7/EU of the European Parliament and of the Council on combating late payment in commercial transactions, which establishes a statutory reference interest and a standard compensation for recovery costs in business-to-business contracts, operating as a supplementary regime where the parties have not stipulated an equivalent contractual penalty.

From a procedural standpoint, because a penalty calculated on an overdue amount that itself includes a disputed price-adjustment component can only be liquidated once that component has been established, litigation strategy commonly combines a simplified payment-order procedure (payment order) for the liquid and undisputed portion of a claim with an ordinary action addressing the more complex adjustment and penalty components, and, where finalisation of the works reception would prejudice the claimant's position, a request for interim suspension by way of presidential ordinance pending resolution of the underlying dispute. Section IV illustrates this combination.

IV. A recurring pattern from recent practice: price adjustment and penalties in subcontracted infrastructure works

The interaction of the mechanisms examined above may be illustrated, in anonymised and generalised form, by a pattern the author has encountered in practice. A subcontractor executed stormwater drainage and slope stabilisation works forming part of a larger public infrastructure project, under a subcontract concluded with the main contractor responsible for the project as a whole, itself financed by a state investment company. The main contractor received from the funding entity a price adjustment calculated on the full value of the works, including the portion executed by the subcontractor, but did not redistribute the corresponding share; the main contractor separately contested the extent of the subcontractor's execution in related proceedings, in circumstances suggesting an intention to strengthen its position with respect to the works reception.

The subcontractor's claim, in the author's assessment, was properly framed as one for restitution of the withheld share of the price adjustment, together with penalties for the delay in its payment, invoking art. 218-219 of Law nr. 98/2016 and the nemo auditur principle discussed in Section II, on the basis that a main contractor's failure to declare a subcontractor under art. 219 of the law cannot be relied upon by that same contractor to deny the subcontractor's entitlement. Claims of this kind commonly proceed on parallel tracks: a simplified payment-order procedure for the liquid and undisputed portion, an ordinary action addressing the adjustment and penalty components, and, where the timing of the works reception makes it necessary, an application for interim suspension of that reception pending resolution of the underlying dispute, formulated in the alternative by reference to whichever proceeding is best placed to resolve the dispute first.

In the author's experience, Romanian courts have generally shown themselves receptive to the interim suspension of a works reception pending resolution of the underlying civil dispute, where allowing the reception to proceed would risk causing irreversible prejudice to a party whose substantive rights have not yet been adjudicated. The more difficult question, in this pattern as in comparable ones, is whether the restitution claim itself will be treated with the same urgency once the interim measures have run their course; the asymmetry between readily available interim protection and slower-moving relief on the merits is, in the author's view, one of the more significant practical shortcomings of the current framework.

V. A related mechanism: performance guarantees

The same underlying imbalance, a party in a position to withhold sums or securities belonging to another, recurs in disputes concerning the good workmanship guarantee (performance guarantee, GBE). In a further matter encountered by the author, a contractor executed works under a contract concluded in 2019 with a local public authority, which included a GBE retention corresponding to 30 per cent of amounts due. The contractor sought substitution of the retained amounts with a bank letter of guarantee, a substitution generally available under the methodological norms governing performance guarantees.

The matter was complicated by a question of temporal application. The provisions in force at the conclusion of the 2019 contract, including art. 39 alin. (2) and art. 42 of the Annex to Government Decision nr. 395/2016, were abrogated by Government Decision nr. 336/2023 (art. II pct. 14, 16 and 20 of that instrument, abrogating art. 38, art. 39 alin. (2) and art. 42 of the Annex), with effect from 19 April 2023, their substance being absorbed, in part, into art. 154 alin. (3) of Law nr. 98/2016, as amended by Law nr. 208/2022. Whether a contracting authority's power to make claims against a guarantee beyond the term of the contract, formerly addressed by art. 42 of the Annex, survives its abrogation for guarantees constituted before 19 April 2023, is not directly resolved by the transitional provisions of Government Decision nr. 336/2023.

The better view, in the author's assessment, is that the norms in force at the conclusion of a contract continue to govern its performance guarantee for as long as the contract itself remains in force, consistently with the general principle of the non-retroactivity of civil law (art. 6 of the Civil Code), and that the 2023 abrogation, absent an express transitional rule to the contrary, cannot be read as depriving a contractor of a substitution right it held at the time the guarantee was constituted. A comparable relationship also illustrates the penalty mechanism examined in Section III on a smaller scale: a notice of default for an unpaid instalment, together with contractual penalties calculated for the period of delay and an express reservation of penalties accruing under any further unpaid instalment, is a common accompaniment to disputes of this kind.

VI. Comparative and European law perspectives

Directive 2014/24/EU of the European Parliament and of the Council on public procurement permits, under art. 72, the modification of public contracts during their term, including through price revision clauses, provided such clauses were set out in the initial procurement documents in clear, precise and unequivocal terms. The Romanian legislator's shift from a merely permissive price-revision regime under the original text of art. 221 to the imperative regime introduced by art. 222^2 of Law nr. 98/2016 may fairly be read as a domestic response to inflationary pressure, developed within, and consistent with, this European framework.

Directive 2011/7/EU, discussed above in its domestic transposition, establishes an EU-wide floor of payment discipline across commercial supply chains, including the public sector, reinforcing that subcontractors, as downstream commercial parties, are entitled to late-payment protections comparable to those available to the main contractor in its own relationship with the contracting authority.

The structural vulnerability of subcontracting chains is not confined to Romanian practice. In its resolution on the revision of the EU public procurement rules, the European Parliament noted that long and complex subcontracting chains can be used to escape legal responsibilities, and that the current procurement directives do not equip contracting authorities with sufficient tools to address non-performance within such chains, calling for stronger enforcement mechanisms in the forthcoming revision of the procurement framework (European Parliament, 2025). This confirms, at the level of European Union policy, the same structural tension examined in this article at the level of domestic practice.

A useful comparative benchmark is offered by French law, where the Loi n° 75-1334 du 31 décembre 1975 relative à la sous-traitance (art. 12-14) grants an approved subcontractor a direct action (action directe) against the owner or the public contracting entity for sums due, independently of the main contractor's solvency or cooperation, and conditions the enforceability of the main contract's payment terms against the subcontractor on the subcontractor's prior approval by the owner. Romanian law pursues a broadly similar protective objective through art. 218-219 of Law nr. 98/2016, but its effectiveness remains, as shown above, largely dependent on the main contractor's voluntary declaration of the subcontractor, a dependency the French action directe was specifically designed to avoid.

Conclusions

Price adjustment, contractual penalties and performance guarantees are not isolated technical clauses appended to a public works contract; they are, in the author's view, three expressions of the same underlying principle, that a contract, however long its execution and however volatile the economic conditions surrounding it, must preserve a genuine equivalence between the value of the works performed and the price paid for them. Romanian law has moved, over the past four years, from treating price adjustment as a discretionary concession toward treating it as an imperative statutory entitlement, a development consistent with, and arguably compelled by, the broader European framework on contract modification and the timely payment of commercial obligations.

The more difficult question, and the one this article has sought to isolate through the patterns described in Sections IV and V, is whether that entitlement in fact reaches the subcontractor who performed the works, rather than terminating with the main contractor who signed the contract. Where a subcontractor executed works but was never formally declared, general principles of Romanian civil law, the prohibition on invoking one's own wrongdoing, the prohibition of unjust enrichment, and the duty of good faith, provide, in the author's assessment, a coherent basis for recognising that subcontractor's right to the corresponding share of any price adjustment collected by the main contractor. Practice suggests that courts are prepared to protect this right through interim measures where a works reception process risks entrenching a factual record adverse to the subcontractor's interests; courts appear markedly less consistent in treating the underlying restitution claim with comparable urgency, a divergence that, in the author's view, leaves subcontractors bearing most of the practical risk of a main contractor's non-declaration.

A further dimension of the problem concerns capacity rather than doctrine. The subcontractors encountered in this category of dispute are typically small or mid-sized construction undertakings specialised in a single technical component of a larger works project, and typically without the financial resources to sustain protracted litigation against a substantially larger main contractor. The legal principles identified in this article are, in the author's assessment, correctly resolved as a matter of doctrine; what they do not remedy is the asymmetry in the practical capacity of the parties to enforce them, an asymmetry that a well-designed statutory mechanism, rather than a favourable but slow-moving body of case law, would be better placed to correct.

De lege ferenda, the persistence of this pattern across a range of public works projects, together with its explicit recognition at European Parliament level as a structural weakness of current subcontracting chains (European Parliament, 2025), suggests, in the author's view, that Romanian law would benefit from a more direct mechanism of pass-through protection, closer to the French action directe, rather than one that continues to depend, as a practical matter, on the main contractor's voluntary compliance with its own declaration obligations. Pending such reform, careful contractual drafting, subcontracts that expressly mirror the main contract's adjustment formula, that fix a short, non-negotiable deadline for the redistribution of adjusted amounts, and that attach an autonomous penalty to its breach, together with vigilant attention to the temporal application of successive amendments to the rules governing performance guarantees, remain, in the author's assessment, the most reliable safeguards available within the existing legal framework.

Acknowledgement

Author's note: the factual patterns described in Sections IV and V are drawn, in anonymised and generalised form, from matters handled by the author. No party, contract, or case reference is identified, and the account should be read as an illustration of recurring legal issues rather than as a report on any specific proceeding.

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