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## Price adjustment of public procurement contracts financed by non-reimbursable external funds. New applicable regulations

*The Government Emergency Ordinance no. 64/2022 on adjusting prices and the value of general estimates in projects financed by non-reimbursable external funds ("GEO") was published in the Official Gazette on 11 May 2022 and aims to regulate the rules necessary for adjusting the prices of the public procurement contracts which are financed by non-reimbursable external funds.*

### 1. Price adjustment

The GEO establishes new rules on the adjustment of the prices of public procurement contracts within projects financed from non-reimbursable external funds.

The price of public procurement contracts will be adjusted under this GEO in order to take into account increases or decreases in costs on the basis of which the price of the public procurement contracts was based and which could not be foreseen by bidders at the time of submitting the offers, even if the contracts stipulated that the price could not be adjusted.

The price adjustment will be made by applying calculation formulas presented extensively in the GEO and exclusively for the rest of the contract, remaining to be executed / supplied / performed according to the procurement contracts and may not exceed 50% of the initial contract price.

### 2. Which contracts does the GEO apply to?

As mentioned above, the GEO applies to public procurement contracts that are financed from non-reimbursable external funds. Secondly, the GEO does not apply to all public procurement contracts, but only to:

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- works procurement contracts;
- contracts for the procurement of products having as their object:
  - (a) endowments and/or machinery and technological and functional equipment, necessary for the execution of works, respectively for the commissioning, and / or intended for the specific equipment and endowment of the objectives / investment projects / maintenance works and current repairs / capital repairs.

Note however, that GEO is applicable only to the endowments and/or machinery and technological and functional equipment set forth by Sub-chapters 4.3, 4.4 and 4.5 of Annex 6 of Government Decision no. 907/2016 on the stages of elaboration and the framework content of the technical-economic documentation related to the objectives / investment projects financed from public funds, as follows:

#### Sub-chapter 4.3 – Machinery, technological and functional equipment that requires assembly

Covers expenses for the procurement of technological machinery and equipment, as well as those included in the functional installations.

#### Sub-chapter 4.4 – Machinery, technological and functional equipment that does not require assembly and transport equipment

Covers expenses for the procurement of machinery and equipment that does not require assembly, as well as transport equipment, inclusive technological transport.

#### Sub-chapter 4.5 – Endowments

Covers expenses for the procurement of goods that fall into the category of fixed assets or inventory items, such as: furniture, endowments for fire protection, endowments for household use, endowments regarding labor protection.

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(b) Fixed tangible assets.

- service procurement contracts for the purpose of carrying out feasibility studies and / or technical projects related to public infrastructure.

### 3. Fulfilling the unpredictability conditions

GEO applies to the above-mentioned public procurement contracts if the below conditions are cumulatively met:

- a) the change in the economic conditions, on the basis of which the price of the contracts was based, occurred after the deadline for the submission of the offers;
- b) the change, referred to in letter a), could not have been taken into account by the contracting parties when the award procedure was initiated, respectively, when the offer was drafted;
- c) the contractor, in the situations referred to in letters a) and b), could not objectively determine the correct extent of the contractual risk in the financial proposal;
- d) the contractor proves the increase of the costs on the basis of which the initial price of the contract was based, including through updated price offers and by declaration on its own responsibility that during this period it did not benefit from facilities granted by the Government of the State of its residence in order to mitigate the effects generated by the economic crisis in relation to the implementation of the contract.

### 4. Restriction on applying GEO

The provisions of GEO shall **not apply** to public procurement contracts in which the beneficiaries of non-reimbursable external funds (i.e., contracting authorities) have applied penalties / damages or other clauses of similar nature for culpable breach of contractual obligations by the contractor, other than those provided for in this GEO or to public procurement contracts which have exceeded the duration of performance of the obligations provided for in the contract without being amended according to the provisions of the contract or of the law.



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## 5. Since when is GEO applicable?

The GEO shall be applicable as of the publication date in the Official Gazette. However, in order for the provisions of GEO to be applicable to a particular contractor, such contractor has the obligation to notify the relevant beneficiary of non-reimbursable external funds (i.e., contracting authorities) requesting the price adjustment **within 60 days** (i.e., until 10 July 2022) as of the date of entry into force of GEO, under the sanction of losing the right to benefit from its provisions. However, in the case of contracts concluded after the entry into force of this GEO, for which the award procedures are ongoing, the contractors may communicate this notification within 30 days as of the date of signing the contract.

In response to the requests received, the relevant beneficiary of non-reimbursable external funds (i.e., contracting authorities) will have the obligation to initiate the necessary steps to adjust the price according to the provisions of GEO and conclude the addendums to the procurement contracts, so that the necessary addendums are concluded within 30 days as of the notification date.

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