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Particularities of the Public Procurement Contentious

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Abstract: The paper with the above mentioned title approaches an issue current not only for juridical research, but also for practical activities. This study resumes an issue approached by other authors as well, but highlighting some particulars of the contentious business of public acquisitions using analysis, observation and case study. Thus, based on the regulations prior to coming into force of the Emergency Ordinance no. 34/2006, I have performed a brief analysis of the means available to the individuals who wish to challenge the legality of a procedure of awarding the public procurement contract. At the same time, in this study we aim at clarifying the aspects related to the legal nature of the documents prior to concluding the public procurement contracts used by the contracting authority and also the legal conditions applicable to public procurement contracts concluded following the awarding procedure.

Keywords: contract; public procurement; jurisdictional - administrative procedure; judicial procedure

1. General Aspects

As mentioned in the literature (Sararu, 2009, p. 31), the term "*contract is, according to the perspective in which it is examined, the object of two definitions: from a formal point of view it is a consensual agreement; from a material point of view, it is an act creating individual judicial statute and, as such, it is characterized by its remarkable stability*".

The administrative contract, subject of actuality, with implications in the sectors of interest in economy, has known different regulations in time, which led to the necessity for the adoption, after 1990, of some administrative acts which would make the difference between the administrative contract and the administrative act, as well as between the different types of administrative contract (contract of concession, public procurement contract, goods lease, service provision etc.). More than that, although in practice the administrative contract is present, the current legislation as well as the doctrine, especially the Romanian one is not unitary. Therefore, if in the occidental legislation the collocation "administrative contract" is frequently encountered and the regulations of the European Union use the term "public contract", in our country the administrative contract is defined only the Law of administrative contentious no. 554/2004 (Sararu, 2009, p. 2). The specific contracts, namely the contract of public procurement and contract of concession do not fall under the special regulations in this category. The framing of the latter as administrative contracts is made by the doctrine[2], which has a special role not only from this point of view but also for the clarification of aspects emerging as a consequence of the breach of provisions in the specific legislation, which entails the intervention of competent institutions for the restoration of legality.

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[2] In an opinion, the public procurement contract is comprised in the category of the administrative contracts from the following considerations; is a willingly agreement between a public authority and a subject of private or public law; has an onerous character; some of the clauses of the contract have exorbitant character and are established by a normative act and cannot be negotiated; the contract is concluded following the application of a special procedure; the competence to rule on litigations deriving from it is held by the administrative contentious instances (Dacian, 2002, pp. 37-38).

2. Principles on Which the Contract of Public Procurement Is Founded

In doctrine, public procurement is seen as "*the object of a contract concluded between a contracting authority according to the law, which consists in the delivery of a product, service or execution of works*" (Serban, 2012, p. 2) or "*the procedure of obtainment, by a contracting authority, of goods, services or works, according to the legislation in force*" (Georgescu & Vrabie, 2006, p. 3).

The public procurement contract is defined in the current legislation[1] as being "*the contract, assimilated according to the law, to the administrative act, which contains also the category of sector contract, as defined in article 229, paragraph (2), with onerous title, concluded in writing between one or more contracting authorities on one side and one or more economic operators on the other side, with the object of execution of works, delivery of goods or services*" (paragraph 3, f).

It is well known that the law cannot cover all the aspects in the public procurement activity. In situations as such, the legal frame of public procurement is related to the principles generally accepted in the European space in this sector (Serban, 2012, p. 70). Thus, the principle of free competition signifies the assurance of conditions for the suppliers of goods, executants of works or service providers to have the right to become contractors, irrespective of nationality, according to the law (Carstea & Nedelcu, 2002, p. 20). Although it is not specifically in the ordinance, the principle of free competition derives from its content, given one of the purposes of the Emergency Ordinance no. 34/2006, namely the promotion of the competition between the economic operators.

The other principles on which the attribution of the public procurement contract is founded are: non discrimination, equal treatment, mutual recognition, transparency, proportionality, efficiency in using the funds, assuming responsibility.

The principles of equal treatment and non discrimination take into consideration the fact that all the operators enlisted in the competition, irrespective of the citizenship or nationality would have equal chances to accede to the contract but also the obligation of the public authority to take the necessary measures to exert that economic activity, as reiterated numerous times by the Court of Justice of the European Union. The respect of the two principles involves, necessarily, the application of the principle of transparency, obligation of the contracting authority and which entails the guarantee, in the favor of every potential tenderer, of an adequate level of publicity, namely a prior publicity but also the publication of the result of the assignment (Serban, 2012, p. 77).

Assumed from the European legislation, the principle of proportionality implies, according to article 179 in Emergency Ordinance no. 34/2006 the application acceptable criteria of qualification and selection of the winner of a public procurement contract, in reasonable limits.[2]

The principle of efficiency of using the funds is mentioned even in the Strategy Europe 2020[3], where it is underlined that the policy in public procurement contracts has to ensure the use of public funds in the most effective way possible and maintain open the market of procurement in the Union. The policy in public procurement has to contribute as well at the attainment of the common social objectives, among which is the fight against climate change and promotion of innovation, challenge Europe is confronting.

The principle of mutual recognition establishes the obligation to accept the documents equivalent to those in Romania but issued by organs established in other states member of the European Union and not only. Also, the authority has the obligation to accept the products, services and works offered legally on the market of the European Union, as well as the technical specifications equivalent to those requested at national level.

[1] Government Emergency Ordinance no. 34/2006, amended and completed by Emergency Ordinance no. 77/2012.

[2] See the Decision of the National Council of Appeal Settlement no. 354 din 16.03.2003, in which it is indicated that the measure for disqualification in relation to the deficiency of presentation of the offer, breaching the principle of proportionality. Specifically, in a procedure of awarding, at the opening of the offers, the offer submitted by the litigant company was disqualified because two of the qualification documents were submitted in the envelope with the technical offer of the company, instead of the eligibility envelope. (Şerban, 2012, p. 93).

[3] http://ec.europa.eu/europe2020/index_ro.htm.

The last principle provisioned by the emergency Ordinance no. 34/2006 – assuming responsibility- aims at the clear determination of the tasks and responsibilities of the people involved in the process of public procurement. Article 6 expressly establishes too the responsibility of the contracting authority regarding the decisions adopted during the process of awarding contracts falling under the law of public procurement.

3. Particularities of the Public Procurement Contentious

The public procurement contentious expresses, as mentioned in the literature, a procedure for solving the conflicts between two subject of law, respectively an economic operator, contester on one side and a contracting authority, on the other side, in relation to the awarding, by the latter, of a contract of public procurement. The contentious involves litigation, a conflict, a contentious procedure, discrepancy, parts with divergent interests (Tigareu, 1994, p. 6).

The contentious of public procurement is different from the administrative contentious regulated by Law no. 554/2004 by the fact that the former is a specialised one and has a wider scope because the solution of the conflicts can be referred to an extra judicial structure, namely the National Council for Appeal Settlement (Serban, 2012, p. 128).

Sometimes, the administration can damage the rights and legitimate interests of those administered, by acts and administrative facts.

According to the provisions of article 255, paragraph 1 in the Emergency Ordinance no. 34/2006 "*any person who considers that his right or legitimate interest has been damaged by an act of the contracting authority, by the breach of the legal dispositions in public procurement can request, by administrative- jurisdictional appeal, the annulment of the act, obligation of the contracting authority to issue and act, recognition of the claimed right of legitimate interest*".

As observed, the administrative way of attack of the illegal acts and decisions in public procurement is the appeal. Through the abovementioned normative act, the National Council for Appeal Settlement was 'endowed" with a limited material competence namely that it can only solve the litigations related to the damaging acts adopted before the moment of the conclusion of contracts, the other litigations being referred to the competent judicial courts.

The administrative jurisdiction instituted by the Emergency Ordinance no. 34/2006 is considered by some authors (Bojinca & Cilibiu, 2011, p. 156) as being "*the most developed administrative jurisdiction in our country*". What must be added is that according to the provisions of article 21, paragraph (4) in the Constitution, the administrative- jurisdictional way of appeal is optional and free of charge. Consequently, those appealing on the legality of a procedure of awarding a public procurement contract have two options: the administrative – jurisdictional way and the judicial one. Although it might be asserted that the object of the two actions is identical[1], the procedure is different.

Through the administrative-jurisdictional procedure the correction or the annulment of the illegal acts adopted by the contracting authority is targeted, before the conclusion of the public procurement contract.

In the meaning of the provisions of the ordinance, the damaged represents any economic operator which: has or had a legitimate interest related to the awarding procedure; has suffered, suffers or is likely to suffer from a prejudice as a consequence of an act of the contracting authority, likely to have judicial effects or as a consequence of not solving in due legal time a request regarding the awarding procedure. At the same time, an act of the contracting authority represents any administrative act, any other administrative operation that has or can have judicial effects, the non fulfillment in the legal due time of an obligation provisioned in the Emergency Ordinance no. 34/2006, omission or refuse to issue an act or perform a certain operation, related to or within the awarding procedure.

[1] Annulment of the damaging act, obligation of the contracting authority to issue and act, recognition of the claimed right or legitimate interest.

The litigations that can occur related to the awarding of the public procurement contracts, the concession of public works and concession of services can have as object: the awarding procedure, before the conclusion of the contract; the granting of compensations for the repair of the prejudice caused within the awarding procedure; execution, annulment, resolution, termination or unilateral denunciation of the public procurement contracts (Serban, 2012, p. 162).

The National Council for Appeal Settlement is competent to solve the appeals formulated within the awarding procedure, before the conclusion of the contract (article 266, paragraph 1). The lawsuits and request regarding the compensations for the repair of the prejudice caused within the awarding procedure, as well as those related to the execution, nullity, annulment, resolution, termination or unilateral denunciation of the public procurement contracts are solved in first instance by the department of administrative and fiscal contentious of the tribunal in whose jurisdiction the headquarter of the contracting authority is located (Article 286, paragraph 1).[1]

For the solving of the appeals on administrative-jurisdictional way, the damaged part has the right to refer to the National Council for Appeal Settlement within the terms provisioned by article 256 in the Emergency Ordinance no. 34/2006, for the annulment of the act and/or recognition of the claimed right or legitimate interest.

The appeal has to contain certain specific elements expressly listed in article 270-271.

The appeals are solved in respect of the principle of legality, celerity, contradictory and right to defense, by specialized structures, constituted according to the Regulation of organization and functioning of the Council. The procedure for the Council is written and, if necessary, the parts will be interviewed by the solution structure.

The appeal is solved within 20 days from the receipt of the file of the procurement from the contracting authority, respectively in 10 days in case of an exception preventing the analysis of the contestation according to article 278, paragraph 1. At the same time, the term for the solving of the appeal can be extended one time with 10 days, in justified cases.

The Council, after the examination of the legality and grounds of the can issue a decision of annulment, completely or partly, obliges the contracting authority to issue an act or disposes other measures necessary for the remediation of the acts affecting the awarding procedure. Depending on the solution given, the Council will decide upon the continuation or annulment of the awarding procedure of the public procurement contract.

After the solving, the motivated decision is published within 5 days from the ruling on the internet page of the Council, in the official bulletin, without reference to the identification information of the decision and parts, personal information, as well as that information the economic operator mentions in its offer as being confidential, classified or protected by a right of intellectual property. Also, the motivated decision will be communicated in writing to the parts, within 3 days from ruling.

According to the provisions of article 281, paragraph 1, the decisions of the Council regarding the solving of the appeal can be litigated by the contracting authority and/or any person damaged, with complaint at the judicial instance specified in article 283, paragraph 1, respectively the court of appeal, department of administrative and fiscal contentious in the jurisdiction of the contracting authority, within 10 days from the communication of the decision. The complaints against the decision ruled by the Council on the procedures of awarding services and/or works related to the transportation infrastructure of national interest are the competence of the Court of Appeal Bucharest, department of administrative and fiscal contentious.

[1] Paragraph (1) was amended by paragraph 68 of the Emergency Ordinance no. 77/2012 beginning with 01.01.2013. Prior to this amendment, the litigation regarding the award of compensations caused in the awarding procedure, as well as those regarding the execution, nullity, annulment, resolution, termination or unilateral denunciation of the public procurement contracts were solved in the courts of first instance by the commercial department in the jurisdiction of the contracting authority.

In case the complaint is admitted, the instance modifies the decision of the Council, disposing, where necessary: the annulment, totally or partly, of the act of the contracting authority; obligation of the contracting authority to issue the act; fulfillment of an obligation by the contracting authority, including the elimination of any technical, economic or financial specification that proves to be discriminatory from the announcement/ invitation for participation, documentation or other documents issued related to the awarding procedure; any other measures necessary for the remedy of the breaches of the legal dispositions in the matter of public procurement.

The suits and requests regarding the damages for the repair of the prejudice caused within the procedure of procurement as well as those regarding the execution, nullity, annulment, resolution, termination or unilateral denunciation of the public procurement contracts are solved in first instance by the department of fiscal and administrative contentious of the court in the jurisdiction of which the contracting authority is located.

In conclusion, the Emergency Ordinance no. 34/2006 has represented a big step in the remediation of the judicial mechanisms in this sector, mechanisms which had the role to regulate and discipline the procedure of awarding the public procurement contracts, offering the possibility for the people whose rights or legitimate interests have been breached by an act of the contracting authority, by breach of the legal dispositions in the matter of public procurement, to request, by appeal, the annulment of the act, obligation of the contracting authority to issue an act, administratively- jurisdictional recognition of the claimed right or legitimate interest.

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