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The Legal Regime of Public Procurement Contracts

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Abstract: Within this paper we resume a topic widely debated in the specialized literature and always topical, by the implications that it has on the development of public administration and satisfying the general interests. The changes brought to the special legislation led, by identifying certain features, in determining the legal nature of the procurement contract, i.e. the administrative contract. In Romania, this notion is not fully established, although it is recognized by most of doctrinaires. In this paper we intend to identify by analyzing the legislation, the doctrine and jurisprudence, the elements that lead to the integration of public procurement contract in the category of administrative contract.

Keywords: administrative contract; public procurement contract; legal regime

1. Introduction. General Issues Related to Administrative Contracts

Based on the means by which the public interest is achieved, it is clear that over time, under the influence of changes in society's evolution (urbanization, industrialization and so on), the role of public administration has changed, reaching today at the level of a service provider, which it required the completion of legal management documents, which in most cases takes the form of contracts (Săraru, 2009, p. 18 and the next).

The theory of administrative contracts is nowadays more current than ever, being closely linked to the public domain, public property and public service. (Apostol Tofan, 2004, p. 81; Iorgovan, 2005, p. 103)

According to the French legal doctrine, the administrative contract is considered, after 1990, a legal document signed by the public administration bodies with the administered ones, acts comprising a will agreement generator of rights and obligations for the contracting parties. (Negoiţă, 1996, p. 173)

In the current doctrine, the administrative contract is defined as "*an agreement of will, between a public authority, which is in a position of legal superiority, on the one hand and other subjects of law, on the other hand (legal and physical entities, or other state bodies subordinate to the other party), which aims at satisfying a general interest, by providing a public service, performing a work or enhancement of a public asset, submitted to a regime of public power*" (Vedinaş, 2009, p. 125).

Still in the doctrine it is referred to two closely related concepts, namely: the contracts of public administration and administrative contracts, considering that the latter represents the first kind

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compared to the first, which represents a concept. (Săraru, 2009, p. 18 and the next; Rouault, 2005, p. 312; Truchet, 2010, p. 259)

In the category of public administration contracts there are two kinds: private contracts (civil or commercial) that the public administration concludes under private law regime and the administrative contracts to which it is applied the public law regime.

In order to reflect the legal regime applicable to administrative contracts, it is necessary to identify the differences between administrative contracts and the civil or commercial contracts.[1]

As it is highlighted in the specialized literature, usually, the administrative contracts are concluded by selecting the partner by the public administration, through the means provided by the law (auction, negotiation, etc.); in the case of civil or commercial contracts the parties "choose each other freely" (Săraru, 2009, p. 33). However, unlike private law contracts, where the terms are negotiated, established with mutual consent, the administrative contracts contain settlement terms[2] and contract clauses negotiated by the parties. Meanwhile, the civil or commercial contracts serve a private interest, making them applicable to private law regime, while administrative contracts serve the public interest, the applicable legal regime being the public law.

Referring to the legal regime of the administrative contracts, Professor Negoiţă (1996, p. 173) points out that, by their nature, they are identical to the civil contracts, the difference consisting in the applicable legal regime, the administrative contracts being also submitted to some rules of public law rules, which are part of the legal administration regime.

Another author states that the legal regime of the administrative contracts is based on two essential elements: the inequality of the parties, in the sense that the public authority has a position of superiority and it acts as a holder of some public powers; public authority, part of the contract, has no free will, as it is regulated by the private law. (Popa, 2000, p. 140)

The acclaimed Professor Antonie Iorgovan identifies the following elements on the concept of administrative contract: it represents an agreement of will between an authority of public administration or another entity authorized by an authority of public administration and a private entity; it envisages the achievement of works, services and so on, by the private entity in exchange of a remuneration; it aims at ensuring the functioning of the same public service, whose organization represents a legal obligation of the contracting authority of public administration (has as purpose the public service) or, where appropriate, the enhancement of the same public asset; the parties must accept some regulatory terms, established by law or based on the law, by government decision; the authority of public administration (the authorized one) may transfer the rights, interests or obligations, only to other public administration authorities under the law, and that private entity can grant them, with the approval of the public authority to any person; the authority of public administration may unilaterally amend or terminate the contract, without resorting to the courts, under certain conditions[3]; the parties, by express provision or by simply accepting pre-established clauses to which they have understood to submit, including the solving of litigations, of a public law regime; solving litigations is of the court of administrative contentious (Iorgovan, 2005, p. 118).

[1] In the contemporary French law, it is noted that, for the identification of administrative contracts, the legal practice uses two criteria: the presence of exorbitant clauses (derogations from the common law), on the one hand and the direct participation of contractors to achieve the same public services. See (de Laubadère, 1956, p 1, *apud* Săraru, 2009, p. 37 and the next).
[2] Settlement terms are established unilaterally by a public authority.
[3] When the public interest requires, or when a private entity has not fulfilled out of guilt the obligations of the contract or when the execution seems to be too burdensome for the private entity.

The special legal regime, to which the administrative contracts are subject, is characterized by special forms required for their completion (task notes, auctions, approvals from public authorities, etc.), and special principles regarding their performance (Apostol Tofan, 2004, p. 78).

2. Regulating the Public Procurement Contract

The issue of public procurement is timeless, which is determined by the legislative changes at European and national level, designed to streamline the activity in this area.[1]

The doctrine is not unitary on this concept. So the opinions vary, ranging from the more restrictive concept according to which the public procurement represents "a situation in which a public institution obtains the goods and services that they need under a contract with another entity, which is usually a company of private sector (Arrowsmitth, Linarelli & Don Wallace, 2000, p. 6, *apud* Cătană, 2011, p. 17) and the broader view where the public procurement is "a concept broader than government procurement, since it does no relate only to purchases made by the central public administration, but also those made by institutions and bodies of public interest, such as those that have as the activity object the service delivery of public interest (electricity, public transport, postal services, telecommunications, water supply etc.) (Woolcoock, 2001, p. 3, *apud* Cătană, 2011, p. 17)

It is worth meaning also the acceptation of procedure granted to this concept "public procurement is the sum of all processes of planning, prioritizing, organizing, advertising and procedures, in order to achieve purchase by organizations that are totally or partially funded by the public budgets (European, national, central or local, international donors) (http://ro.wikipedia.org).

Public procurement contract is governed by Emergency Ordinance no. 34/2006, as amended, relating to the assigning public procurement contracts, public works concession contracts and services concession contracts. Under this legislative act, the public procurement contract is a contract for a fee, concluded in writing between one or more contracting authorities on the one hand, and one or more economic operators, on the other hand, having as their object the execution of works, providing products or services delivery. Public procurement contract includes the sectoral contract, which is assigned to carry out a relevant activity in the following public sectors: water, energy, transport, post-office.

Public procurement contracts include: works contracts, supply contracts, service contracts.

The public procurement contract has as object: a) the execution of works related to one of the activities listed in Annex. 1 G.E.O. no. 34/2006 or the execution of a building, by building it is understood the result of a series of works for buildings or civil engineering works intended to satisfy by itself an economic or technical function; b) the design and execution of works related to one of the activities listed in Annex. 1 G.E.O. no. 34/2006 or the design and execution of a construction; c) the achievement by any means of a building corresponding to the need and objectives of the contracting authority, to the extent that they do not correspond to letters a) and b).

Public procurement contract for supplying is that public contract, other than works contract, which covers the supplying of one or more products, by purchase, including in installments, hire or lease with or without the option to buy (Albu 2008, p. 102). As supply contract is considered also the public procurement contract having as main object the supply of products and as secondary operations,

[1] During the preparation of this article it was published in the Official Journal of the European Union the Directive 2014/24/UE of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

installation works and pitting them into use. In the same category belongs the contract which covers both the supply of products and services delivery, if the estimated value of the products is higher than the estimated value of the services provided in that contract.

In order to have the correct classification of a public procurement contract, the priority lies in its main object (Lazar, 2009, p. 27). According to article 6, paragraph (1) G.E.O. no. 34/2006, contract for services is that public procurement contract, other than works or supply contract, which covers the delivery of one or more services, as they are provided in the Annexes 2A and 2B to this legislative act, and according to paragraph (2), the public procurement contract whose main object is the delivery of some services and as secondary operations the carrying out of activities stipulated in Annex 1 is considered a services contract. It is also considered a service contract the procurement contract which covers both the supply of products and the services delivery, if the estimated value of the services is higher than the estimated value of products included in the contract.

Features of Public Procurement Contract

In the specialized legal literature there are listed a number of features that determine the classification of public procurement contracts in the category of administrative contracts (Săraru, 2009, p. 323 and the next). Among these are:

- public procurement contract is an agreement of will between a body set up to meet the needs of general interest, as stated in article 8 G.E.O. no. 34/2006 and another, public or private entity;
- through public procurement system it is pursued the satisfaction of public interest;
- it includes unreasonable clauses of common law, established by the contracting authority by the task notebook, and other requirements specified in the documentation for granting the contract[1];
- the contract ends after the completion of granting procedures, which constitute the special formalities (Săraru, 2009, p. 325)[2];
- the competence of solving the litigations on the conclusion and execution of the public procurement contract belonging to the administrative contentious.[3]

[1] The unreasonable clauses are those relating to technical specifications (requirements, directives, technical features) listed in the task notebook and they define, where appropriate, characteristics related to the technical and performance quality, requirements on the environmental impact, operational safety, dimensions, terminology, testing and test methods, packaging, labeling, use instructions, etc. The technical specifications may refer to, in the case of works contract and the designing requirements and cost calculation, verification, inspection and reception conditions for works or techniques, procedures and methods of execution, and any other conditions of technical feature that the contracting authority is able to describe, according to various legislative acts and general or specific regulations, in relation to the finalized works and to the materials or other components of these works (article 35 of G.E.O. no. 34/2006).

[2] These procedures are: a) open auction, i.e. the procedure in which any interested economic operator has the right to submit the offer; b) restricted auction, i.e. the procedure in which any economic operator has the right to submit an application, and only selected candidates will be entitled to submit the offer; c) the competitive dialogue, i.e. the procedure in which any economic operator has the right to submit its application and by which the contracting authority conducts a dialogue with the admitted candidates, in order to identify one or more suitable alternatives capable of meeting its requirements, so that based on the solution / solutions, the selected candidates would prepare their final offer; d) the negotiation, i.e. the procedure in which the contracting authority carries out consultations with the selected candidates and it negotiates the terms of the contract, including price, with one or more of them; e) request for proposals, namely the simplified procedure whereby the contracting authority requests offers from several economic operators.
The contracting authority has the right to organize a contest of, that is a special procedure by which it purchases, particularly in the field of territory arrangement, town and architecture planning, engineering or the data processing, a plan or project by selecting it on a competitive basis by a jury, with or without awards (article 18 of G.E.O. no. 34/2006).

[3] According to article 286, paragraph (1) the processes and the applications for compensation for caused damages within the granting procedure, and those concerning performance, nullity, cancellation, termination, resolution or termination of

Regarding the latter feature it should be mentioned that the entry into force of the New Code of Civil Procedure has implications on the jurisdiction of courts in public procurement domain. This involvement is determined primarily by changing the threshold value of the administrative contentious actions (1,000,000 lei for the competence of the court) (Cotoi, 2013, p. 72).

Also, in the jurisprudence[1], there are identified some of the characteristics that determine the legal nature of the public procurement contract, namely the administrative contract: quality of the contractor (public authority or another entity authorized by it); the destination of the procurement; the existence of such regulatory clauses; the existence of clauses with special feature referring to cession, modification or termination of public procurement contract; Special procedure for contesting.

The provisions of the Emergency Ordinance no. 34/2006 does not apply for assigning contracts (articles 13-16), a fact which leads us to consider that under the mentioned circumstances, the purchase of goods, works or services shall be made either by common law contracts (sale-purchase contract, for example) or through contracts subject to special regulations. For example, in the article 13 it is shown that the legislative act to which we refer is not applicable for assigning services contract which: covers the purchase or rental, by any financial means, of land, existing buildings or other immovable property or concerning rights thereon; b) refers to the acquisition, development, production or co-production of programs intended for broadcasting by broadcasting institutions; c) refers to service delivery of arbitration and conciliation; d) relates to the delivery of financial services in connection with the issuance, sale, purchase or transfer of securities or other financial instruments, in particular operations of the contracting authority performed in order to attract financial resources and /or capital, and the delivery of services by central banks; e) refers to the employment of labor force, i.e. labor contracts; f) refers to the delivery of research and development services paid entirely by the contracting authority and whose results are not exclusively for the contracting authority for its own benefit.

These exceptions are grounded, in the doctrine, by the fact that the public procurement is part of the administrative sphere, where public contracting authorities execute the legal depositions (Săraru, 2009, p. 328)

3. Conclusions

Although the views on understanding the role of public procurement in the life of collectivities are varied in the recent years, the national legislation, adapted to the European legislation, clarifies the legal nature of the public procurement contract. Thus, by changing the Emergency Ordinance no. 34/2006 with the Emergency Ordinance no. 70/2012, it is changed the nature of the public contract in commercial contract, in the assimilated contract, according to the law, to the administrative act. This is important for determining the legal regime applicable to public procurement contract and for establishing the jurisdiction of the court.

unilateral public procurement contracts are settled in the first court by the Department of administrative contentious and fiscal court in the jurisdiction of which the contracting authority is situated.

[1] Decision no. 3044/2000 issued by the Administrative Contentious Section of the Supreme Court.

4. References

Albu, Emanuel (2008). *Dreptul administrativ al bunurilor/Administrative law of assets*. Bucharest: Fundaţia România de Mâine.

Apostol Tofan, Dana (2004). *Drept administrativ/Administrative Law*. Vol. II. Bucharest: All Beck.

Cătană, M. C. (2011). *Achiziţii publice/Public Procurement*. Bucharest: Universul Juridic.

Cotoi, Emilia (2013). Impactul noului cod de procedură civilă asupra competenţei instanţelor de judecată în domeniul achiziţiilor publice/The impact of the new code of civil procedure on the competence of the courts in public procurement domain. *Volumul „Noi reglementări privind achiziţiile publice. Impactul absorbţiei fondurilor structurale în contextul reorganizării administrative. /The Volume New regulations on public procurement. The impact of absorption of structural funds in the context of administrative reorganization.* Bucharest: Universul Juridic.

Iorgovan, Antonie (2005). *Tratat de drept administrativ/Treaty of administrative Law*. Vol. II, Issue 4. Bucharest: All Beck.

Lazăr, Sebastian (2009). *Achiziţii publice. Principii-Proceduri-Operaţiuni-Metodologie/Public Procurement. Principles Procedures-Operations-Methodology*. Bucharest: Wolters Kluwer.

Negoiţă, Alexandru (1996). *Drept administrativ/Administrative Law*. Bucharest: Syilvi.

Popa, Eugen (2000). *Drept administrativ/Administrative Law.* Arad: Servo -Sat.

Rouault, Marie Christine (2005). *Droit administratif/Administrative Law.* Paris: Editeur Gualiano.

Săraru, Cătălin-Silviu. (2009). *Contractele administrative. Reglementare. Doctrină. Jurisprudenţă/Administrative contracts. Regulation. Doctrine. Jurisprudence*. Bucharest: C. H. Beck.

Truchet, Didier (2010). *Droit administrative/Administrative Law.* Paris: Thémis Droit.

Vedinaş, Verginia (2009). *Drept administrativ/Administrative Law*. 4th Edition revised and enlarged. Bucharest: Universul Juridic.