CONSIDERATIONS ON THE LEGAL NATURE OF THE CONTRACT OF PUBLIC PROCUREMENT

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The legal nature of the public procurement contract determines the correct rules of its conclusion, realization and producing the corresponding effects. The importance of this study resides in the fact that it should be a clear distinction between the administrative and the civil contracts. Thus, the contracts of public administration have certain special characteristics, which are required by the public interest, underlying the conclusion and execution of their foundation and are considered public contracts.

Key words: *public procurement, contract, the legal nature, legal effect.*

Introduction. According to the legislation of the Republic of Moldova, the contract of public procurement is a contract on a reimbursable basis, concluded in writing between one or more economic operators and one or more contracting authorities, which aims at procuring of goods, performance of works or provision of services [1, art. 1]. The theory of the legal nature of the contract of public procurement shows two positions – first that affirms that this contract is an administrative contract, and the second which considers this contract a private law contract. Research has found that, most argue that from the point of view of the legal nature, the contract of public procurement is an administrative contract but not a private law contract.

One reason behind this is the opinion of V. Vedinaș [3, p.118]. The point is that the contract of public procurement is an "agreement of will between a public authority, located on a position of legal superiority, on the one hand, and other entities of public law, on the other hand (individuals, legal entities or other bodies subordinate to the other hand) which aims to satisfy a general interest by providing a public service, conducting a public work or enhancement of a public good, subjected to a public power". The French author of the theory of administrative contracts, G. Jézeau, proposed the following definition [3, p. 117]: "the contracts, concluded by the administration to ensure the functioning of a public service, contracts that subjects to other rules than those that govern the relationships between people."

When it comes to the particularities of the contract, it is governed both by the private and the public law. Here we can highlight some important aspects, namely the characteristic features of the public procurement contract:

- The public procurement contract is a type of an administrative contract, which has specific aspects;

-The compulsory contractual terms represents an expression of the public authority's power, with the role of protecting the general interest.

-The compulsory character is relevant only to the extent that the terms in this case retain this purpose;

- In the context of the assigning procedures, the required conditions should ensure compliance with the principles of public procurement.

-The parties of the administrative contract don't have equal positions, the particular subordinates to a public authority;

- The conclusion, execution and termination of the administrative contract are subordinated to the principle of priority the public interest against the private interest;

- The administrative contract contains derogating from the common law terms, known as exorbitant clause, which cannot be subject to any negotiations;

- The disputes that spring from administrative contracts refers to the jurisdiction of the administrative court [4].

- Contracting authorities are required to respond to the requests of clarifycation/negotiation/modification on the terms of the contract.

- The terms of the contract can be specified or agreed by the parties, and also challenged when they are considered illegal or unjust by comparison with the principles that underpin the public procurement system.

Consequently it should be noted that before exploring the possibility of negotiating the contractual terms of a public procurement contract, should be analysed the legal character of the compulsory conditions that the procuring authority is forced to specify in the documentation award.

As a result, these provisions are designed to fix the necessary scope for the implementation and execution of the contract. Therefore, to guarantee the protection of the public interest associated with the implementation/execution of the project. The compulsory conditions can also contain aspects which give exercising power without equivalent to the public authority, denying the reciprocity of contractual terms, to the contracting party, which defines the inequality between the parties (the so-called exorbitant clauses). These types of clauses aren't ordinary in private law relations, where prevail the principles of equality and the balance.

Considering the derogatory nature, the doctrine showed that the compulsory clauses of the administrative contracts may be liable to revocation. Returning to the public procurement contract, by signing it, the parts, and, in particular, the private partner, admit that these conditions, should be placed, as the contractual position, outside the orbit of classical civil legal relationship [2, p. 132].

Obviously, the contracts concluded by local authorities have special characteristics, imposed by the public interest that lie at the basis of the conclusion and execution of them, and are considered public contracts. Thus, a direct consequence may be that the public procurement contract was qualified as an administrative contract.

Despite that a part of the doctrine argues that by combining two categories of clauses, namely binding clauses (regulatory) and negotiable clauses, this administrative contract takes on both specific elements of the unilaterally administrative act and specific elements of a contract of private law, which involves dialogue and negotiation [5].

Even though the contracting authority has the right to set mandatory clauses specific to a particular contract, it may still raise the question about the limits to which this right may be exercised, and even the legal-administrative opportunities in case of solving different disputes. That's because the public procurement domain involves a number of specific issues that lien on the nature of the administrative contract. Such aspects result from the principles underlying the award of public procurement contracts and of the whole system, has led to the principles, which violation cannot be justified by the public interest. Here we mean the need of the contracting authority to obtain within each award procedure, the optimum value for the spent money (best value for money), goal that can only be achieved by attracting the best marketing offers / tenders. That's why it's necessary to respect the interplay between the public interest with the insurance of commercial attractiveness of the public project.

In the practice of procurement, however, the powers mentioned above, may lead (and often leads) to the introduction of some inappropriate/abusive contractual clauses, that exceed the prerogatives of the

public authority, clauses that cannot lead to ensuring compelling framework envisaged by the legislator, but remove actors from the economic competition, actors that can ensure optimal value in exchange for the expended public funds, which leads to the violation of the principle of effectiveness. That's why appeared the question regarding the measure relating to the appropriateness of introducing such clauses by the authority. Certainly, the interpretation of the unfair/inadequate character of compulsory clauses is a subjective one, that's why a possible reason for conflict in this matter will be necessary concluded with the authorities, which have an administrative- jurisdictional role.

All things considered we can affirm that if the principle of the primacy of public interest is an indisputable sovereign one in this matter, we cannot absolutely extend this concept when we analyze the work and decisions of a public authority which acts as a contracting authority.

For instance, the current Moldovan legislation, regarding to public procurement, has as the main normative act the Moldovan Law on public procurement No. 96 of 13.04.2007, the Official Gazette no. 107-111 from 27.07.2007 from 01.05.2016, repealed by the Law of the Republic of Moldova nr. 131 of 03/07/15, MO197-205 / 07.31.15 article 402), had as main objective the EU's new directives [1].

On top of that, we want to mention that the new law on public procurement will seek to ensure full harmonization with the *communautaire acquis*, through the perspective of the acceleration of the process of European integration of Moldova. According to the European legislation, the acquisition of goods and services and awarding a contract by public authority, whether by national administration, local administration or subordinate organizations represents a public contract.

The opening of these markets, which are an important part of the EU's GDP, will lead to increased competition between economic operators from the European Union, reducing prices and guaranteeing the best quality of services for citizens.

In the meantime, the European Union has introduced regulations that modernize and simplify the process of rewarding. The EU has improved the transparency, fairness and collaboration in this area through a number of tools, such as database TED (the Bartender Electronic Daily), classification system (materialized by common on public procurement) and the information system on public procurement (SIMAP).

My own view on this matter is that I truly believe that, analysing its decisive characteristics, the public procurement contract is an administrative contract and not a private law contract. The public interest and public authorities play an important role in the smooth implementation of these contracts.

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