

SOME LEGAL ASPECTS CONCERNING THE AWARD OF MANAGEMENT DELEGATION CONTRACTS OF PUBLIC WATER SUPPLY AND SEWAGE

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Abstract

The Law no. 303 of 13/12/2013 governs a new contract in the field of public service management, through which public administration authorities delegate all the powers and responsibilities regarding the public service of water supply and sewerage to one or more operators. It is a contract with many new elements for Republic of Moldova, where the service of water supply and sewerage is provided mainly through municipal enterprises under direct management. The right of delegated management of public water supply and sewerage service may be granted in two ways: public auction organized under the laws in force, or direct award.

In this work we propose to analyze the legal regime of each, from the very beginning of these phase until the conclusion of management delegation contract of public water supply and sewerage system.

Keywords: management delegation contract, public auction, direct award, local public authority, feasibility study, operators.

All other the world, governments of developed or less developed countries face the problem of providing better services in areas more and more extended due to limited budgets.

The local public administration, which has new competences after applying the decentralization of public services is not yet ready to ensure their management and at the same time, to set its development and allocation priorities of financial resources. Meanwhile, public sector restructuring is followed by the approach of private sector by taking some activities which until recently constituted the exclusive monopoly of the state.

Is the case of delegated management, when a public authority responsible for providing public service awards to some legal entities of private law, by a management delegation contract, the right and the obligation to operate under its control the public service, ensuring its equipment.

In Republic of Moldova, the delegated management of public services has been regulated by adopting the Law on public service of water supply and sewerage no. 303 of 13/12/2013¹. In practice, management delegation contracts of public service of water supply and sewerage were concluded in 2011, before the legal regulation of

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¹ Law on Public Water Supply and Sewage no. 303 of 13/12/2013, published in the Official Gazette of the Republic of Moldova no. 60-65 of 14/03/2014.

them within the project "Development Program of Water Supply and Sewerage Companies", funded by the European Bank for Reconstruction and Development ("EBRD").

According to art. 11 paragraph (1) of Law no. 303 of 13.12.2013, public service management of water supply and sewerage system is organized and carried out either by direct management or by delegated management.

Direct management is the management method of water supply and sewerage public service achieved through some specialized structures (department, direction) organized by local authorities. In this case, the deliberative and executive authorities, on behalf of territorial administrative units that they represent, directly assume all the duties and responsibilities concerning the organization, management, administration, operation, functioning and financing of water supply and sewerage public service .

The most traditional management way will be those of direct management, because the public authorities know better the limits of general interest, being able to change more easily the service organization when the user requires it.

Delegated management, according to art. 13 of Law no. 303 of 13.12.2013, is the management method by which local public administration authorities transfer, based on a contract, called *management delegation contract*, to one or to more operators all the duties and responsibilities concerning the provision of public water supply and sewage service, as well as the management and operation of systems and technical and urban infrastructure which are related to them.

Within the delegated management, the administrative territorial units exercise a direct control and influence over the decisions of the operators concerning the provision of public service of water supply and sewage system, both in case of social capital operators of administrative territorial units, as well as in case of legal persons of private law with mixed or private social capital.

Granting the right to provide/to supply the public service of water supply and sewerage of some commercial companies, as a result of service management delegation involves "a separation of management functions of services from those for establishing the policy and services strategy, as well as the control over the way of their achievement, that is incumbent to local authorities²".

A delimitation between the management service function awarded to operators of public water supply and sewage systems and between the function of establishing of policies and strategies for their development, it is enshrined in art. 13 paragraph (13) of Law no. 303 of 13/12/2013, so, "in the case of delegated management, the local public administration authorities keep in accordance with their powers under the law, the prerogatives and responsibilities concerning the adoption of policies and strategies for the development of services, including programs for development of water supply and sewage systems, as well as the obligation to follow, to control and to supervise the way in which is achieved the provision of public water supply and sewerage, namely:

² E. A. Ranta, *Management of public services* in "Transilvanian Review of Administrative Sciences", 1 (10), 2004, pp. 137-138.

- a) the respect and the fulfillment of contractual obligations assumed by operators, including in the relationship with the customers;
- b) the quality indicators of provided service;
- c) the management, the operation, the conservation and the maintenance in function, the development or the modernization of water supply and sewerage systems;
- d) the formation, the establishment, the modification and the adjustment of tariffs for public service of water supply and sewerage systems."

Therefore, the control of local public administration authorities on operators of public service of water supply and sewerage is strictly limited on the fulfillment by operators of obligations stipulated in the service management delegation contract on conditions of service provision, but in no way on economic management and on financial autonomy of these operators.

The delegation of public service management of water supply and sewerage systems is based on an award decision adopted by the deliberative authorities of the administrative territorial unit, as well as by the conclusion of the management delegation contract, under the law.

The award procedure of the management delegation contract of public water supply and sewerage systems that must cover the local public administration authorities, initiates in a first phase with the adoption of a decision on service management delegation and the development / the approval of a study to substantiate and to identify the optimal solutions for management delegation.

Thus, according to art. 13 para. (14) of Law no. 303 of 13.12.2013, the local councils or the specialized central body, as appropriate, will ensure the elaboration and will approve, within 6 months from the decision on management delegation or from the receipt of a proposal made by an interested investor, a feasibility study to substantiate and identify the optimal solutions for management delegation, as well as the management delegation documentation.

Analyzing these legal provisions we find that the feasibility study to substantiate and identify optimal solutions for management delegation, as well as the management delegation documentation, will be developed and approved by the local authority within 6 months from the approval of the management delegation while, in the second situation, when there is a proposal from an investor interested, the study should be prepared and approved within six months from the receiving of the proposal, after which the management delegation of public service is approved.

For local public authorities, who initiated the management delegation procedure of public service of water supply and sewerage systems before the entry into force of the Law no. 303 of 13.12.2013 (date of entry into force - 14.09.2014), but they do not approved the management delegation and the opportunity study, we consider that in a first phase should be approved the opportunity study (which is already carried out) and based on the conclusions of this study to be approved the management delegation of public service of water supply and sewerage.

At the same time, I want to signal the confusion that makes the legislator regarding the name of the study, as being feasibility study to substantiate and identify optimal solutions for management delegation.

The notion of feasibility study has a relatively recent occurrence, differently defined in the legislation of Republic of Moldova, depending on the legislative or regulatory act which it regulates. For public services of water supply and sewerage, the feasibility study is defined in art. 4 of Law no. 303 of 13/12/2013 as being "the document elaborated for an investment in the infrastructure of water supply and sewerage, which presents an analysis of the ability to develop and successfully complete a project by taking into account all technical, financial, environmental, socio-economical and institutional factors ". A similar definition is contained in the Government Decision No. 199 of 20/03/2014, where the feasibility study represents the document based on which is elaborated the project documentation, which includes and provides the information on the multidimensional impact of the project, as well as the economic viability and financial sustainability of capital investment project.

From the content of these legal provisions, it can be concluded that the feasibility study, whose aim is an investment in infrastructure of water supply and sewerage, is different from the study entitled to procure for local public authorities information about management delegation opportunities of public service, with the identification of delegation optimal solutions.

Starting from these considerations, *lex ferenda*, is proposed to amend Art. 13 para. (14) of Law no. 303 of 13.12.2013 by replacing the term "feasibility study to substantiate and identify optimal solutions for management delegation" with „opportunity study to substantiate and identify optimal solutions for management delegation".

The procedure for award of management delegation contracts of public service of water supply and sewerage, established by art. 13 para. (2) of Law no. 303 of 13.12.2013, is the public auction organized in terms of transparency and in accordance with the legislation in force.

The organization of public auction procedure and its conduct, is made under a documentation regarding the organization and the conduct of the procedure for management delegation, approved by the deliberative authorities of the administrative territorial units, which will include, necessarily, the specification conditions of the service and its specific selection criteria.

According to Article 13 para. (4) of Law no. 303 of 13/12/2013, the function of operator or of participant in the procedure for service management delegation of public service of water supply and sewerage belongs:

a) To trading companies, municipal and state enterprises providing public service of water supply and sewerage, set up by local public administration authorities or by specialized central body, as appropriate, with social capital of administrative territorial units or of state;

b) trading companies providing public service of water supply and sewerage with social private or mixed capital.

A first finding that we make is that the legislator established as operators of public service of water supply and sewerage the trading companies either with social capital of administrative territorial units or with social private or mixed capital. But is

not conditioned, however, the form that should have these trading companies, they may choose between the forms regulated by the Civil Code of the Republic of Moldova.

To entrust the supply / provision of public service of water supply and sewerage to some private legal persons, representing a private management of public control³ is part of the national policy for the development of public services in Moldova

Another finding required by the interpretation of Article 13. (4) of Law no. 303 of 13.12.2013, is that, similar to trading companies, the right of delegated management may be granted also to municipal enterprises.

Municipal enterprises are private legal persons with profit aim, which is founded and is endowed by the local public administration authorities, for the provision of some public services.

By Government Decision on the restructuring of the household of water supply and sewerage no. 530 of 06.06.2000⁴, the patrimony (assets, liabilities and staff) of communal enterprises that provide services of water supply and sewerage was sent to the property of administrative territorial units of first and second level. It was also ordered by local authorities the creation of communal enterprises providing services of water supply and sewerage with the status of joint stock companies.

In most urban localities (except of Chisinau and Floresti, which were reorganized into joint stock company) after the transmission of the patrimony to administrative territorial units, the communal enterprises providing services of water supply and sewerage were organized in municipal enterprises, which operate until now.

Water supply and sewage systems, being public property goods are sent by the founder to the company for the development of the activity in the limits of economic management right.

According to the legislation in force, local public authorities have the right and the obligation to permanently control the activity of municipal enterprises of public service provision, set up by them, thereby ensuring continuity and quality of any service. This is, however, maximized by local authorities and the municipal enterprises have a relative financial autonomy, they do not have the freedom to set tariffs that cover the costs and to ensure continuity and permanence of the service, and the politicization is detrimental to beneficiaries of this service.

In our opinion, the activity of municipal enterprises is an intermediate management form between the direct and the delegated form, because it represents own entities of public administration, different from the trading companies.

The delegated management realized through municipal enterprises will create confusion and difficulties in practice. This entity is under the direct monitoring and control of local public authorities providing the public service of water supply and sewerage in a public law regime.

Also, the management form of water supply and sewerage systems, which are sent in the operation and administration of operators differs.

Goods affected by the provision of public service of water supply and sewerage are the property of administrative territorial units of level I, being subject to the

³ A. Vasile, *Provision of public services through private agents*, All Beck Publishing House, 2003, p. 100.

⁴ Government Decision on the restructuring of the household of water supply and sewerage no. 530 of 06/06/2000 / published in Official Gazette of the Republic of Moldavia no 65-67 of 08.06.2000.

following legal regime established by art. 77 para. (2) of the Local Public Administration Law no. 436 of 28.12.2006⁵: "Public domain goods of the territorial administrative unit can be managed by municipal enterprises and public institutions, can be concessioned, rented or leased, as appropriate, according to the decision of local or district council under to the law. "

Hence it follows that, the water supply and sewerage systems may be transmitted in administration to municipal enterprises, while to trading companies may be transmitted in concession.

The composition and the structure of the tariff for water supply and sewerage service, financial and accounting record of goods, public management, nowise private management representative for the delegated management of the service - are just some aspects that differentiate the work of municipal enterprises from those of trading companies .

In view of the above, we propose *lex ferenda*, the amendment of art. 12 para. (2) and art. 13 para. (4) a) of Law no. 303 of 13.12.2013, with the inclusion of municipal enterprises in the number of operators working under the direct management, respectively the exclusion in the case of delegated management. So:

" Art. 12 - (2) Direct management is achieved through specialized structures (department, direction) organized within public administration and municipal enterprises"

"Art. 13 - (4) a) trading companies set up by local public administration authorities or by specialized central body, as appropriate, with social capital of administrative territorial units or of state;"

Returning to the award procedure, we note that, by exception from provisions of art. 13 para. (2) of Law no. 303 of 13.12.2013, the management delegation contract of public service of water supply and sewerage can be directly attributed to the trading companies with social capital of the administrative territorial units, as well as to the state and municipal enterprises.

From the content of art.13 alin. (12) of Law no 303 dof 13.12.2013, which establishes the above mentioned exception, we find that the only condition imposed for the direct award of management delegation contract of public service of water supply and sewerage, refers to the entity that will provide / operate the public service of water supply and sewerage, namely legal persons founded by local authorities and with majority social capital belonging to administrative territorial units.

This provision derives from the fact that the administrative territorial units, who founded these legal persons for the provision of public service of water supply and sewerage, they have endowed with goods for the development of activities, exercises a continuous influence and an permanent control on the operator etc.

The adjudication of public auction or direct award situation, give rise to other rights and obligations to local public authorities, respectively to operators.

So, the last stage in the awarding procedure of the management delegation contract of public service of water supply and sewerage is the signing of the contract.

⁵ Local public administration Law no. 436 of 28.12.2006, published in the Official Gazette of the Republic of Moldavia no 32-35 dof 09.03.2007.

Referring to this stage, art. 13 para. (3) of Law no. 303 of 13.12.2013 provides, in a didactic way, that the conclusion of management delegation contract of public service of water supply and sewerage are carried out by a decision adopted by the local council.

In other words, the clauses of management delegation contract of public service of water supply and sewerage will be approved by the decision of the local deliberative authority, together with its annexes. By the same decision the mayor would be empowered to sign the management delegation contract, on behalf of the administrative territorial unit.

Management delegation contract of public service of water supply and sewerage is concluded in accordance with the legislation of the Republic of Moldova for a term which can not be higher than the time required to recoup the investments, but not exceed 49 years.

In conclusion, we can say that the delegated management of public services of water supply and sewerage is the way by which the local public administration authorities at the level of administrative territorial units transfer the right and obligation to supply / to provide it to some selected operators by public auction procedure or direct award. Operator selection by public authorities requires a detailed regulation, which contains procedural rules respecting the principles of publicity, transparency, non-discrimination etc.

Reason for which, *lex ferenda*, is proposed to regulate the procedure for award of the management delegation contract of public service of water supply and sewerage in a simple and clear way, written in a fluent and understandable language, characterized by precision and simplicity, starting from the main stages analyzed above.