THE LEGAL ESSENCE OF THE PUBLIC ACQUISITIONS CONTRACT AND ITS FORMS

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Abstract
In this article, the author highlighted the particularities of the legal nature of of the public acquisitions contract, which is becoming an increasingly current topic and represents a special interest for public legal entities, as well as for natural and legal persons practicing entrepreneurial activities due to the market economy. In the Republic of Moldova, there is a need to refine the legislation in force, which regulates by various normative acts different varieties of contracts, as well as the process of their implementation. The author through his researches a demonstrated the correlation of different aspects of the legal nature of the public procurement contract, analyzes different new notions and other aspects that are considered new in the legislation of the country and the practice of application. Thus, carrying out a complex investigation on the specialized literature, of the legislation in force he creates a concept of this institution of law, highlighting the particularities and specific characters, being also a scientific novelty. As a result of this analysis the author formulates his own visions, as well as a series of interesting conclusions.

Keywords*: public procurement, the legal nature of the public procurement contract, contract public procurement of goods, public works contract, services, competition, auction, training.*

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The actuality of the subject. Obtaining an efficient and credible system of public procurement represents one of the fundamental elements of the development process of Moldova. In this context, intensifying efforts to develop legislation harmonized with European law and ensuring the proper implementation of the legal provisions

in practice will increase efficiency of our public procurement system and will reduce waste, fraud and corruption, thus increasing it trust of citizens and the business environment. Legal framework of the public procurement system a was recently brought closer to the European Union (EU) by adopting a new law on public procurement [1]. In general, the new law provides a satisfactory regulatory framework and incorporates the fundamental principles of the EU that govern the award of contracts public procurement [2].

The public procurement contract is a new variety of the administrative contract and one of the most widespread contracts lately updated in accordance with the Directives of European Union on public procurement. Public acquisition is the procurement through by means of a public procurement contract, of goods, works or services by one or several contracting authorities from the economic operators selected by them, regardless of whether the goods, works or services are intended for public purpose or not.

According to Directive 2004/18 / EC, public procurement contracts are title contracts onerous, concluded in writing between one or more economic operators and one or more contracting authorities whose purpose is the execution of works, the supply of products or the provision of services within the meaning of this Directive [3].

Content. In the specialized literature, the contracts concluded by the public administration have certain special characteristics, imposed by the public interest, which underlie the foundation their conclusion and execution, being considered public contracts [4] within which also includes the public procurement contract.

The national legislation defines the public procurement contract, as a contract with an onerous title, concluded in writing between one or more economic operators and one or more authorities contracting, whose object is the acquisition of goods, the execution of works or the provision of services [5] from those mentioned in the legal definition it is difficult to attribute this contract to those administrative. But some indigenous authors consider, without discussion, the public procurement contract – an administrative contract. Thus, the author S. Goriuc, concludes: The administrative contract represents the agreement of will between a public authority or an authorized person and one or more natural or legal persons, of private or public law, through which the achievement is sought to a public interest and to which a

special regime of administrative law applies. The variety of types of administrative contracts are increasing, depending on the evolution of the needs of the company. Thus, they are currently included in the category of administrative contracts: concession contracts and public procurement, contracts for the attribution of the use of public goods, public management contracts, public-private partnership contracts, loan agreements and the acts establishing the associative structures of public authorities [6]. Analyzing the French legal literature we find that three types of contracts can be distinguished, qualified as administrative contracts according to the quality of the contracting parties, these being:

1. Administrative contracts, concluded between two public persons;
2. The administrative contracts concluded between a public and a private person;
3. Administrative contracts between two private persons.

If, on the first category of contracts, we are tempted to think that all these contracts, are administrative contracts, it is traditionally admitted that such contracts can emphasize and private rights of public persons, while asserting that a contract between two public figures it is presumed in principle as administrative, since its object of regulation is public administration, such an agreement can not be applied in care if the contractors relationship is in terms of private law in administration of private sphere etc.

Regarding the contracts concluded between two private persons, the French legal literature is stating two solutions of the current case law, namely L 'affaire "Societé Entreprise Peyrot" and L'affaire "Dame Culard" qualifies such contracts as administrative, in consideration that to the object of these contracts is the character of a public service belonging to, by its nature, the state, such contracts being subject to the regime of public law [7].

And in the Romanian specialty literature, the opinion is that it is an administrative contract, although the legislation provides that it is a commercial contract.

Thus, as an example, the option of the Romanian legislator to consider is considered questionable the procurement contract publishes a commercial contract, all the more so as it was claimed as being imposed by the necessity of a legislative correlation, because, as we will show, the modification rather, it is the expression of a legislative incoherence.

Although, the imperative of the legislative correlation was invoked this correlation does not exist in fact. Thus, the current legal definition of the public procurement contract is not correlated under any aspect with the provisions of Law no. 554/2004 regarding the administrative litigation.

According to art. 2 paragraph 1 point (c) of this normative act, by the notion of "administrative act" it is understood "the unilateral act of an individual or normative character issued by a public authority, in regime of public power, in order to organize the execution of the law or the concrete execution of the law, which gives rise to, modifies or extinguishes legal relationships; are assimilated to administrative acts, in the meaning of the present law, and the contracts concluded by the public authorities whose purpose is to put in value of public property goods, execution of works of public interest, provision public services, public procurement; by special laws other categories of administrative contracts subject to the jurisdiction of the administrative litigation courts" [8].

The distinction between the situation where achieving the object of the contract is provided by a normal manner directly by the state, and that which has an exceptional title, in which the concessionaire has an implicit tacit mandate from the state [9].

Supporting the view that it is an administrative contract, we consider that this contract has the dual legal nature because it participates in commercial relations, pursues a profit purpose and, therefore, is also commercial. This is also confirmed by the provisions of the law on entrepreneurship and enterprises that allow the state and local public administration authorities as special contractors to practice such activities (art.2) [10]. The quality of the specials is created depending on the normative acts that regulate concrete activities.

Analyzing the law no. 131 we observe that there is a legal constraint of the administration, which manifests itself in its freedom to choose its contractual partners. So, the administration is limited to the freedom of choice of the contractor. If in private law the principle of freedom of legal acts gives individuals the freedom to choose with whom to conclude a certain contract, in administrative law the realities are different. Thus, for the purpose of designation the future administration contractors are required to undergo the award procedures listed, which are meant to provide an equal leveled condition for all interested parties. Finally, the administration is forced to accept a contractor that he did not choose

after his own will, but which is imposed by a predetermined criterion of objective and impartial designation of a winner in the competition of the aspirants to the contractual relationship with the administration.

Analyzing the law no. 131 we established that depending on the object of the contract we highlight three forms or categories of contracts: public procurement of goods whose object is the purchase of goods, their purchase in installments, the lease or the lease without option of buying. It is considered a public procurement contract and the one that has as its object the supply of goods and additionally covering installation work.

A second form or category of the public procurement contract is that of works - public procurement contract that aims to:

a) the execution or design and execution of works related to one of the activities provided for in annex no. 1 of the law no. 131:

b) the execution or the design and the execution of a work, other than those provided in letter. a);

c) carrying out a work that corresponds to the requirements established by the contracting authority which exerts a decisive influence on the type or project of the work [11];

The third form or category provided by law is the public procurement contract of services whose object is the provision of services, other than those which are the subject of a contract public works procurement.

From the legal provisions governing administrative contracts, they can outline the general principles that should be the basis of the attribution of anyone administrative contract. According to article 72 of the law no. 131 the principles are stipulated special awards for the public procurement contract. Thus, the public procurement contract is attributes according to the following principles:

a) observance of the law, the law order, the good manners and the professional ethics;

b) selecting the most advantageous offer;

c) ensuring environmental protection and supporting social programs in the execution process contract.

This contract, according to the cited law, also has special conditions for execution. So, based on the legal provisions, the special conditions for executing a procurement contract must be provided in the notice with the invitation to participate or in the specifications, that is, make a public announcement about creating a competition. They can be

targeted, in particular, encouraging vocational training in the workplace, employment of the unemployed, young people and of people with integration difficulties, unemployment reduction, vocational training of the unemployed and young people, environmental protection, improving working conditions and security labor, rural development and vocational training of farmers, protection and supporting small and medium - sized enterprises, including during the contract execution period and in subcontracting conditions.

Analyzing the legal provisions we have established that special requirements are established for the party contracting. Thus, the contracting authority will apply proportionate qualification criteria and selection related to the object of the contract, referring only to:

a) the eligibility of the bidder or the candidate;
b) the capacity to exercise the activity professional;
c) economic and financial capacity;
d) technical and / or professional capacity;
e) quality assurance standards;
f) environmental protection standards [13].

The public procurement contract is concluded according to the public procurement procedures provided by the present law, that is by competition, for the entire amount attributed to a purchase on year, under the procurement plan and within the approved allowances.

Notification of the winning bidder and the conclusion of the public procurement contract performs according to art. 31 of the nominated law. Bidders are informed at the moment requesting tenders, regarding the conditions for concluding the public procurement contract.

It is prohibited, at the time of the conclusion of the public procurement contract, to modify some elements of the winning bid, imposing new requirements on the winning bid or involvement to any bidder other than the one who submitted the most advantageous bid.

The deadline for the execution of the public procurement contract is established in the documentation attribution and is subsequently transposed into the contract, taking into account the reasonable needs of the contracting authority. It will be calculated taking into account the complexity of the expected acquisition, the quantity subcontracted in advance and the actual time required for production, storage and transportation of goods from the supply points or for the provision of services.

The conditions for the execution of the public procurement contract will not contain clauses, directly or indirectly, discriminatory. The public procurement contract and / or the framework agreement is concluded between the contracting authority and the tenderer(s) whose tender has been declared successful.

The public procurement contract / framework agreement for which the financial sources are allocated from the state budget / local budget is compulsorily recorded at one of the regional treasuries of Ministry of Finance and enters into force on the date of registration or at a later date provided by it after registration with one of the regional treasuries of the Ministry of Finance. The public procurement contract / framework agreement for which the management of financial sources is not performed through the treasury system, enters into force on the date of signature or another subsequent date indicated therein, provided that the waiting periods have expired [13].

Article 75 of the law no. 131 provides that in the attribution documentation, the authority the contracting party requests the tenderer to indicate in his tender the part of the contract which he intends to o subcontract it to third parties, as well as the proposed subcontractors.

In the case of works procurement contracts and the services to be provided be rendered at an installation under direct supervision of the contracting authority, after awarding the contract, but not later than the moment of its execution, the contracting authority asks the tenderer to indicate the name, the contact details and the legal representatives of the to its subcontractors involved in the respective works or services, insofar as they are information is known at that time.

The tenderer is obliged to notify the contracting authority of any changes in the duration the contract, as well as to present the information regarding the possible new subcontractors that will be subsequently involved in the respective works or services.

The contracting authorities have the right to extend the application of the obligations to:

a) contracts for the procurement of goods, to contracts for the procurement of services other than those regarding the services to be provided at installations under direct supervision of the contracting authority or the suppliers involved in the procurement of works or services.

The contracting authority shall verify that there are grounds for excluding subcontractors. In the in such cases, the contracting authority

requires the tenderer to replace the subcontractor in which resulted, after verification, that there are compulsory reasons for exclusion. If it is necessary, the requested information is accompanied by the statements of its own responsibility subcontractors.

The contracting authority has the right to make direct payments to subcontractors for the part (s) of the public procurement contract performed by them, for the goods provided, the works performed or the services provided to the tenderer according to the contract between bidder and subcontractor, when the nature of the contract allows this. Subcontractors will express at the time of the conclusion of the public procurement contract or, as the case may be, at the moment their inclusion in the public procurement contract the option to be paid directly by the contracting authority.

The contracting authority makes direct payments to the approved subcontractors only when their performance is confirmed by documents approved by the authority contractor, tenderer and subcontractor or by the contracting authority and subcontractor then when the tenderer unreasonably blocks the confirmation of the performance of the obligations assumed by the subcontractor. If a subcontractor expresses the option of being paid directly, the contracting authority has the obligation to establish clauses within the public procurement contract compulsory contracts providing for the transfer of rights of payment obligations to subcontractor / subcontractors for the related part (s) of the contract him / them, when the fulfillment of the obligations assumed by the subcontracting contract.

The contracting authority has the obligation to request, at the conclusion of the procurement contract public or when new subcontractors are introduced, the presentation of contracts concluded between bidder and the subcontractor / subcontractors nominated / nominated in the tender or declared subsequently, so that their activities, as well as the amounts related to the benefits, are contained in the public procurement contract. Those mentioned above do not diminish liability to the main contractor as to how to fulfill the future procurement contract public / public contract.

We also want to emphasize the provisions of article 77 of the law no. 131, which establishes cases specific termination of the public procurement contract. Thus, without prejudice to the frame legally regarding the termination of the contracts or the provisions of the present cited law regarding the invalidity the contracting authority has the right to unilaterally terminate a public procurement contract during

its validity period in one of the following situations:

a) the contractor was, at the time of his assignment, in one of the situations that would have determined its exclusion from the award procedure according to art. 19;

b) the contract has been subject to a substantial modification which requires a new procedure public procurement;

c) the contract should not have been awarded to the respective contractor, given a serious violation of the obligations resulting from this law and / or the international treaties to which Republic of Moldova is a party, which was established by a decision of a court national or, as the case may be, international.

Conclusions:

1. Considering the opinions expressed in the specialized literature, that the nature of the contract public procurement is that of an administrative contract, at least for reasons that represent an agreement of will between a public authority and another subject of law, public or private, as it has a onerous character, involving performing works, providing services or products; that some of the contractual clauses have an exorbitant character, of public law, are established by law. They give the contracting authority the right to unilaterally terminate the contract, in consideration of public interest.

2. We argue that the contract is concluded after the use of special procedures, such as the competition and or the public auction, expressly provided by Law no. 131.

3. Analyzing the legal content of the Romanian legislation, other states of the law no. 131 regarding public procurement contract concluded that it has a dual nature: it is administrative but also commercial. In the law no. 131 expresses the purpose of profit and the price, as well as other qualities of the commercial contract. At the same time, we emphasize that social relations regulated by law 131 fall under the regulatory framework of the law on entrepreneurship and enterprises no. 845.

The editorial space does not allow us to discuss all the issues raised or that can be raised, from a theoretical and practical point of view, regarding the new regulation on public procurement. On the other hand, in the absence of a conclusive judicial practice in this matter, the discussions are only in the theoretical and comparative law space.

Bibliographical references

1. Legea Nr. 131 din 03.07.2015 privind achiziţiile publice. Publicat: 16.11.2018 în Monitorul Oficial Nr. 424-429, art. Nr.: 666, data intrării în vigoare: 01.05.2016.
2. Strategia de dezvoltare a sistemului de achiziții publice în Moldova.
3. Directiva 2004/18/CE. Cererea de decizie preliminară privește interpretarea articolului 1 alineatul (2) litera (a) din Directiva 2004/18/CE a Parlamentului European și a Consiliului din 31 martie 2004 privind coordonarea procedurilor de atribuire a contractelor de achiziții publice de lucrări, de bunuri și de servicii (JO 2004, L 134, p. 114, Ediție specială, 06/vol. 8, p. 116): http://curia.europa.eu/juris/document/document_print.jsf?
4. Alina Codreanu. Consideraţiuni privind natura juridică a contractului de achiziţie publică: https://ibn.idsi.md/sites/default/files/imag_file/35_37_Consideratiuni%20privind%20natura%20juridica%20a%20contractului%20de%20achizitie%20publica.pdf
5. Legea Nr. 131 din 03.07.2015 privind achiziţiile publice. Publicat: 16.11.2018 în Monitorul Oficial Nr. 424-429, art. Nr.: 666. Data intrării în vigoare: 01.05.2016.
6. Goriuc S. Contractul administrativ asimilat actelor administrative în contenciosul administrativ. Administrația publică, nr.1, 2018, p. 56-61.
7. G. Jèze, Les contrats administratifs de l'Etat, des departements, des communes et des etablissementes public, vol. I, Paris, 1927, p. 16,
8. Lucian Gheorghe Pavel. Observații la natura juridică a contractului achiziții publice https://www.juridice.ro/
9. Oliviu Puie. Contractele administrative în contextul Noului Cod civil şi al Noului Cod de procedură civilă / Oliviu Puie. - Bucureşti: Universul Juridic, 2014, p. 26-50.
10. Legea cu privire la antreprenoriat și întreprinderi Nr. 845 din 03.01.1992. Publicat: 28.02.1994 în Monitorul Parlamentului Nr. 2, art. Nr.: 33.
11. Legea Nr. 131 din 03.07.2015 privind achiziţiile publice. Publicat: 16.11.2018 în Monitorul Oficial Nr. 424-429, art. Nr.: 666. Data intrării în vigoare: 01.05.2016.
12. Art.17 lit. a) a legii nr.131, modificată prin LP169 din 26.07.18, MO321-332/24.08.18 art.527; în vigoare din 01.10.18.
13. Legea, Nr. 131 din 03.07.2015 privind achiziţiile publice. Publicat: 16.11.2018 în Monitorul Oficial Nr. 424-429, art. Nr.: 666, Data intrării în vigoare: 01.05.2016.