

## *The Specificities of a Public Procurement Contract Formation*

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### **Abstract**

As opposed to civil law, where contracts are generally formed simply through offer and acceptance, in public procurement law the contract is the result of a complex procedure with rules and terms strictly established by national and European legislation. In civil law, for a promise to become an enforceable contract, parties must agree on the essential terms of the contract, such as price and subject matter. Also, the manifestation of the will may be expressed in either oral or written words (expressed contract) or by conduct or some combination of conduct and word (implied contract). With regard to these aspects, the public procurement contract is defined as a written contract, incompatible with a conduct manifestation. In practice, it is important to distinguish between the many and interesting differences regarding the two types of contracts due to the legal consequences of each contract. There are variations for each period of the contract: formation, implementation and breach of the contract. The analysis shall try to underline the specificities of a public procurement contract in regard with the general theory of contract formation. The scope of the study is to help the practitioners understand the elements of the public procurement contract and the possible consequences of their actions in the three periods mentioned above.

Keywords: contract formation, civil law, public procurement contract

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## **The Specificities of a Public Procurement Contract Formation**

The analysis determines the specificities of each period of a public procurement contract: formation, implementation and the termination of the contract. As opposed to civil law, where contracts are generally formed simply through offer and acceptance, in public procurement law the contract is the result of a complex procedure with rules and terms strictly established by the national and European legislation.

The legislation taken into consideration is the Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, repealing Directive 2004/18/EC (hereinafter called "Directive 24" or "directive") and the national Law of transposition no. 98/2016 on public procurement (hereinafter called "Law 98").

The two statutory documents describe the procedural rules that need to be followed by every contracting authority wanting to satisfy its needs. In this context, the contracting authority, after identifying the object of the procedure, is the one taking the initiative in the search for offers and will publish a contract notice with the procurement documents through the electronic means of communication. In this way, it is increased the efficiency and the transparency of the procurement procedure, as well as the number of national and international offers. The economic operators, if interested, should answer to this demand by submitting in writing a competitive offer before the deadline established in the contract notice.

In the period of evaluation, the contracting authority will verify the financial and technical offer and the documents presented in order to prove the conformity with the requirements set up in the procurement documents.

The regular and acceptable tenders will be classified with the respect of the selection criteria and the contract will be sign with the winner designated in the final report of the procedure.

Throughout the procurement procedure, the contracting authority has to respect the essential principles of transparency, non-discrimination, equal treatment, publicity, mutual recognition, proportionality as set forth in the article 18 of Directive 24. The contractor could be a firm resident in another country.

The obligation of transparency incumbent upon the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.

Moreover, the obligation of transparency implies, in particular, an obligation to ensure that an undertaking located in the territory of a Member State other than that in question can have access to appropriate information regarding the public contract concerned before it is awarded, so that, if that undertaking had so wished, it would have been in a position to express its interest in obtaining that contract (T-258/06, 2010, para 77-78).

The steps presented above are not met in the period of formation of any other contract. The public procurement contract has this specificity due to the administrative nature of the contract. As it has been underpinned before, the offer and the acceptance are accompanied by a relatively long procedure, as the practice has proven, procedure that will define the terms of the future public procurement contract. The essay will analyse, step by step, different elements of the contract formation, such as the definition, the legal characters of the contract, legal regime, validity conditions, the object of the contract, effects and execution, the modification of the contract and the termination of the contract.

### **The definition of the public procurement contract**

As set in the article 1 of the Directive 24, procurement within the meaning of this Directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.

Going further, in article 2 points 5, 6, 8 and 9, the Directive 24 defines the notions of public contracts, public works contracts, public supply contracts and public service contracts:

- "public contracts": contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services (point 5),
- "public works contracts": means public contracts having as their object one of the following: the execution, or both the design and execution of works to one of the activities within the meaning of Annex II; the execution, or both the design and execution, of a work; the realization, by whatever means, of a work corresponding to the requirements specified by the contracting authorities exercising a decisive influence on the type or design of the work (point 6);
- "public supply works": public contracts having as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products. A public supply contract may include, as an incidental matter, siting and installation operations (point 8);
- "public service works": public contracts having as their object the provision of services other than those referred to in point 6 (point 9).
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The national Law 98, transposing the European Directive 24, has taken the definitions as set up by the European legislator.

Going further in our analysis, notions like contracting authorities, tenders, economic operators need to be explained in the light of the directive for an easy browsing of the text.

Point 1 from article 3 of directive explains that contracting authorities are the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law.

Economic operator means any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market (point 10). Tenderer means an economic operator that has submitted a tender (point 11).

It is necessary the distinction between a public procurement contract and the concession contract. The European case-law has undelined that a public contract within the meaning of that directive involves consideration which is paid directly by the contracting authority to the service provider, meanwhile a concession exists where the agreed method of remuneration consists in the right of the service provider to exploit for payment his own service and means that he assumes the risk connected with operating the services in question. (CJUE, T-382/05, 2007, para 32-33).

### **Legal characters of the contract**

As a result of the definition, the public procurement contract is bilateral and mutually binding, synallagmatic, non-gratuitous, commutative and rights-transferring contract. The contract is *bilateral and synallagmatic*. The synallagmatic contract means a contract giving rise to obligations on both sides of the parties (Francisk Deak, 1999, p. 10). The contracting authorities will pay the price for the activities and the tenderer will execute the works, supply the products or provide services. The obligation of the contracting authority is the cause for the obligation of the tender, meaning that the obligations are interdependent.

The bilateral character is due to the fact the contract is sign by two parties, the contracting authority and the tenderer declared winner in the procurement procedure. The contract is *commutative* because the existence and the extent of rights and the obligations of the parties are clearly established in the contract at the moment of the signature (Gabriel Boroï and others, 2012, p. 81). The two elements are settled by the contracting authority in the procurement documents and by the economic operator in the tender presented in the conditions of the procedure.

The public procurement contract is defined as an *onerous contract* which means that each party follows a patrimonial interest in exchange for the obligations assumed in the contract (Gabriel Boroï and others, 2012, p. 79). The tenderer is pursuing the pecuniary interest of obtaining the price for his activity of execution of works, supply of products or provision of services.

As opposed to civil contract where the contract could be oral or in writing, the public procurement contract must be in writing in order to be enforceable. This contract is incompatible with any oral expressions or conducts. This legal character is clearly expressed by the directive. A written contract could prove easier in court the rights and the obligations of the signatory parties.

In a public procurement procedure, the content of the contract is known by any interested economic operator as a result of its publication on the electronic platforms once the contract notice is published. In the period of tender preparation, any economic operator has the possibility to address clarifications to the contracting authorities with regard to the terms of the contract (art. 153 Law 98; art. 47 directive).

Regarding the works contracts and supply contracts, the public procurement contract is rights-transferring contract because the ownership right is transferred from the winner to the contracting authority.

Moreover, the contract is signed *intuitu personae* because the contracting authority entrusts activities to be carried out by a particular contractor on account of its qualities (Florin Motiu, Bucharest, p. 201).

One tenderer is declared winner of the contract after a well-established procedure described in the directive. The contract could not be signed with another tenderer, participant in the procedure. The winner is the economic operator mentioned in the award notice published in the electronic platforms. As set in the article 84 from the directive, the individual report on the procedure prescribes the name of the successful tenderer and the reasons why its tender was selected.

### **Legal regime**

As defined in the Law 98, the public procurement law is *an administrative contract*, meaning the contract is subject to provisions of administrative law. The characteristics of the contract are the following: a) one of the subjects is a public authority; b) the object is satisfying a general interest through execution of works, supply of products or provision of services; c) the contract is subject to public law (Antonie Iorgovan, 1996, p. 368).

As opposed to civil contracts, where parties enjoy an equal position, the administrative contract is characterized by the superiority of one subject towards the other party (Virginia Vedinas, 2009, p. 126).

This superiority in public procurement is translated by the fact that the contracting authority is in charge of defining the parameters of the procedure, for example the object, the criteria, the technical specificities that need to be respected throughout the tenderer's offer.

### **The validity conditions of the contract**

In the doctrine, it is appreciated that any administrative contract has to meet the general criteria described in the civil law: the capacity, the consent, a determined object and a licit cause (Virginia Vedinas, 2009, p. 126).

*Consent.* The public contract, as any other contract, becomes enforceable when two parties reach an agreement on the terms of the contract. In public procurement, the agreement is mutually binding after following one of the tender procedures describe by the statutory documents.

In light of the above mentioned considerations, the contracting authority publishes a contract notice. In the open procedure, for example, an economic operator has 35 days to submit an offer. After the evaluation of the tenders, is declared one winner who signs the contract. If not, the contracting authority should execute the guarantees provided by the tenderer and sign the contract with the second tender with a regular and acceptable offer.

The offer and the acceptance meet through the individual report where is announced a winner and the communication of the result, but the signature of the contract is postponed until the waiting periods are over. During the waiting periods, the results of the procedure could be contested in court.

*Capacity of the parties.* Any economic operator can participate in the procedure if he meets the requirements explained in the procurement documents. The rule is the capacity and the exception the incapacity. The general rules on the capacity for moral persons, detailed in civil law, are applicable, but the directive imposes certain rules.

The object and activities described in the statutory document of a moral person must be correlated with the object of the procedure. For example, a firm providing services could not participate in the procedure whose object are works and/or supplies.

Articles 164-166 from Law 98 and article 57 from Directive 24 present the exclusion grounds, considered as special incapacities. These grounds could lead to automatic exclusion or could give the faculty to decide to the contracting authority.

Contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established or are otherwise aware that that economic operator has been the subject of a conviction by final judgment for one of the following reasons: participation in a criminal organization, corruption, fraud, terrorist offences or offences linked to terrorist activities, money laundering or terrorist financing, child labour and other forms of trafficking in human beings or breach of its obligations relating to the payment of taxes or social security contributions.

The obligation to exclude an economic operator shall also apply where the person convicted by final judgment is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control therein.

An economic operator could be exclude from participation in a procurement procedure in the following situations: the economic operator is bankrupt or is subject to insolvency or winding-up proceedings; the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable or that has entered into agreements with other economic operators aimed at distorting competition; conflict of interest; a distortion of competition from the prior involvement of the economic operators in the preparation of the procurement procedure; the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract; the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, etc.

Contracting authorities shall at any time during the procedure exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs 1 and 2.

The winner shall take all the necessary measures to prevent or to stop any situation that could compromise an objective and impartial performance of the contract.

*The object.* In case of the public contract, we are talking about individual determined assets due to the characteristics of the procurement procedure. The risks of the contract are transmitted together with the ownership right.

The object of the contract is represented by execution of works, supply of products or provisions of services. The object of the obligation are the actions or inactions assumed by the contracting parties in the contract (Ovidiu Ungureanu, 2007, p. 188). In this case, the winner will have to execute works, supply products or provide services. In exchange, the contracting authority shall pay the price indicated in the financial offer of the tenderer.

The price should be fixed in money, determined and serious. In public procurement, the price is reflected in the financial offer submitted by the tenderer and represents the value of the contract. The price must be serious, on the contrary, being abnormally low, the contracting authority will ask clarification on the formation methodology. If the tenderer does not explain all the elements of the offer and their legality, the offer shall be declared as irregular (article 69 directive).

*The legal cause.* The cause of a contract is the reason why parties are signing a contract. In a public contract, the contracting authority desires to satisfy its needs and the economic operator to obtain money.

### **The effects of a public procurement contract**

The effects of the contract are the rights and obligations of the parties, contracting authority and the winner. As settled in the directive, the rights and obligations are fixed by the contracting authority in the procurement documents, published on the electronic platform. Each economic operator has the possibility of analyzing the requirements and ask questions. In respect to the principle of transparency, the answers are communicated to all through the electronic platforms.

The contract is signed based on the elements settled throughout the procedure. The procurement documents and the offer are part of the contract. Once the contract is signed, it becomes enforceable and legally binding for both parties.

The contracting authority, as well as the contractor should act in good faith during the implementation of the contract and execute their obligations. So, the contractor shall execute the works, supply the products or provide the services, and the contracting authority shall pay the price according to the contract.

Due to the superiority position, the contracting authority has the right to execute the guarantees provided by the contractor.

Also, due to national provisions, the contracting authority has the right to useful use of the construction when talking about works contracts.

Law no. 10/1995 on quality in constructions has established special rules for the liability of the contractor, such as:

- a) The constructor is liable for all hidden vices of the construction, appeared in ten years after the reception of the work,
- b) The constructor is liable for all vices of the building's structure, resulted from the disrespect of the design rules and execution, throughout the period of existence of the construction.

The constructor is liable because the asset could not be used for the purpose it was obtained. This liability is similar to the one present in the sales contract. The vices should be hidden to the contracting authority even after normal, but careful checks. For works contracts, the contracting authority has the obligation to receive and take a construction when it is finished. Article 1862 from New Civil Code explains the details of the process of reception.

Going further, the rights and obligations have to be executed as settled in the contract. Generally, the terms of the contract refer to:

- **Parties** – the two contracting parties should be clearly stated at the beginning of the contract.
- **Definitions and interpretations** - this section provides explanations on the meaning of certain terms.
- **Payment Provisions** – the price, date and terms should be clearly stated.
- **A specific description of the goods or services** – the description corresponds to the technical specifications and the offer.
- **Term of contract and timescale** – are the ones mentioned in the procurement documents and the offer.
- **Limitation of liability and termination of the contract** – are interdependent as the liability implies the question of termination. The conditions for obtaining an indemnity are expressly mentioned.
- **Dispute Resolution** – the procedure to be followed if the parties have a dispute.
- **Confidentiality and intellectual property rights** – this section explains how confidentiality could be invoked during the performance of the contract and the cases when there is an intellectual property right.
- **Warranties** – Contracting parties could provide for goods and services certain warranties.
- **Force Majeure, assignment and the law applicable to the contract** – are other types of provisions present in a procurement contract.

These provisions are common to all contracts, the details making the difference.

### **Modification of the public procurement contract**

The contractual freedom, that characterizes civil contracts, is limited in case of public procurement contracts. The contracting parties don't have the right to make all the addendums they would wish, but have to respect certain rules due to the nature of the contract. The conditions for contract modifications have resulted from the case-law of the European Court of Justice.

The old Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works



contracts, public supply contracts and public service contracts didn't set forth provisions regarding the modification of a public procurement contract.

Trying to cover a legislative gap, Directive 24 has taken the case-law of the European Court of Justice from Luxembourg and has transposed the general principles into binding provisions for member states (article 72). The *Presstext* case (C-454/06, CJUE, 2008, para 34-37), the most important decision regarding this matter, has clarified the circumstances in which the amendments to an existing agreement between a contracting authority and a contractor may be regarded as constituting a new award of a public contract within the meaning of the Directive.

So, the amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract when:

- they are materially different in character from the original contract and, therefore, demonstrate the intention of the parties to renegotiate the essential terms of the contract,
- it introduces conditions, which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted,
- it extends the scope of the contract considerably to encompass services not initially covered,
- it changes the economic balance of the contract in favor of the contractor in a manner which was not provided for in the terms of the initial contract.

The new directive also clarifies the possibility of subcontracting in article 71. The contracting authority shall require the main contractor to notify the contracting authority of any changes to this information during the course of the contract as well as of the required information for any new subcontractors subsequently involved in such works or services.

### **Termination of the contract**

Generally, a contract terminates in the general cases mentioned in civil theory, such as reaching the contract term, finalizing the activity before the deadline, the liquidation of the winner.

There can be the case of the breach of contract when it could be terminated by both parties. The affected party could obtain damages. When of the essential conditions of contract are not fulfilled, it could be solicited the annulment of the contract. When the contractor is reorganizing or there is a merger ongoing, it is not a case for annulment.

Article 223 from Law 98 establishes specific cases of termination of the public procurement contract:

- The contractor is, when signing the contract, in one of cases of exclusion,
- Contract should not have been awarded to that contractor, taking into account a breach of obligations and of European legislation, observed in a decision by the Court of Justice of European Union,

There is the specific case of the non-respect for the waiting periods, when the contract could be declared null.

Moreover, being a synallagmatic contract, the general rules mentioned in the theory of obligations are applicable: the exception of non-execution of the contract, resolution due to non-accomplishment by one of the parties of his obligation, the risk of the contract (Francisk Deak, 1999, p. 10).

## **Conclusions**

The analysis has tried to underline the specificities of a public procurement contract in regard with the general theory of contract formation. The scope of the study is to help the practitioners understand the elements of the public procurement contract and the possible consequences of their actions in the periods mentioned above.

The new Directive on public procurement no 24 prescribes detailed rules regarding the formation and the modification of the contract. In the near future, it will be interesting to follow the approach of the Court of Justice to see if it maintains the existing principles or will provide a new interpretation in the light of the new provisions.

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