

# PROCEDURES FOR THE PROCUREMENT OF PUBLIC PROPERTY RIGHTS. THE LEGAL NATURE OF PUBLIC WORKS CONTRACTS

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## Abstract

*Public property belongs to the state or to an administrative-territorial unit and is made up of goods for public use or public interest declared as such either by their nature or by law. The goods constituting the public domain are defined on the one hand by the Constitution of Romania (Article 136, paragraph 3), on the other hand, by the Annex to Law 213 of November 17, 1998 on public property and its legal status, and last but not least by the Civil Code (Article 554). Procurement of the right to public property is performed in several ways provided by law, as we shall see below, and we shall pay particular attention to the public procurement contract. From the analysis of the procurement methods of the right of public ownership, we find that the legislation is not harmonized and does not clarify all the aspects related to the legal status applicable to the public domain, thus reaching complicated and controversial situations.*

**Keywords:** *public property, public goods, contract, public works, settling appeals.*

## 1. Public Property

Public goods and services in our country appear in the Organic Regulations, these being considered the first legal acts.

An important moment in the development of the public domain is the adoption in 1864 under the reign of Alexandru Ioan Cuza of the Law for the Establishment of the County Councils, the Law for the Regulation of Rural Property and the Law for Expropriation for the Public Purpose.

Along with them, the notion of public domain is certified and at the same time "the goods belonging to the county public domain, apart from those belonging to the township public domain, as well as the juridical regime of the expropriation for public purpose<sup>1</sup>".

According to the republished Constitution of Romania, Article 136, paragraph 3, "The mineral resources of public interest, the air, the waters with energy potential that can be used for national interests, the beaches, the territorial sea, the natural resources of the economic zone and the continental shelf, as well as other possessions established by the organic law, shall be public property exclusively".

Article 136, paragraph 2 defines the holders of public property rights. Thus, public property "can only belong to the state (public property of national interest) or administrative-territorial units (the public property of county, municipal, town or locality interest)<sup>2</sup>".

According to the new Civil Code<sup>3</sup>, Titlul VI, Capitolul I, articolul 858 "Public property is ownership that belongs to the state law or an administrative - territorial unit over the goods which, by their nature or by the declaration of law, are of public interest or use,

provided that they acquired by one of the ways stipulated by law".

Law No. 213 of November 17, 1998 in Article 9 regulates the way in which a good is transferred from the public domain of the state to the public domain of an administrative-territorial unit and vice versa from the public domain of the county to the public domain of an administrative-territorial unit within the jurisdiction of the respective county and vice versa, from the public domain of an administrative-territorial unit in the public domain of another administrative-territorial unit within the jurisdiction of the respective county and from the public domain of a county to the public domain of another county at the request of the county council, the latter considering only the pursuit of investment objectives, following the closing of the property to return to its original owner.

Acquisition of the right to public property is governed by the New Civil Code by Article 863, which partly restates the content of Article 7 of Law 213 of November 17, 1998 on public property and its legal status.

## 2. Acquisition of Public Property Rights

Article 7 of Law 213 of November 17, 1998 indicates the following ways of acquiring the right to public ownership: naturally "(subsoil, deposits, inland, coastal and seaside waterways, etc., subjected to a dynamic natural development processes which makes possible the extension and restriction of the initial surface)", through public procurement in compliance with (at present Law 98 / 19.05.2016), by the expropriation for public utility purposes (for public

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<sup>1</sup> Verginia Vedinaş, *Drept administrativ*, Ediția a X – a, revăzută și actualizată, editura Universul Juridic, București, 2017, p. 473

<sup>2</sup> Antonie Iorgovan, *Tratat de drept administrativ*, volumul II, ediția 4, Editura All Beck, București, 2005, p. 166

<sup>3</sup> Law No. 287 of July 17, 2009 as republished and subsequently amended on the Civil Code published in the Official Gazette no. 505 of July 15, 2011.

utility purposes, for works of national interest or local interest), by the donation or related acts accepted by the Government, the county council or the local council, as the case may be (provided that the property becomes of public use or interest) through the passage of property from the private domain of state or administrative-territorial units in their public domain, based on public utility reasons and by any other ways provided by the law.

After the repeal of Article 7 of Law 213/1998 by Law No 71 of June 3, 2011, Article 89, paragraph 2, and in accordance with the new Civil Code, Title VI, Chapter I, Article 863, the right to property is acquired in one of the following ways:

- by *public procurement*, in compliance with the law and here "it is only referred to the goods of public use or of public interest"<sup>4</sup>;

- by *expropriation* for reasons of public utility reasons, in compliance with the law. The current laws governing expropriation for public utility purposes are Law No 33 of May 27, 1994 on expropriation for public utility purposes and Law no. 255 of December 14, 2010 on the expropriation for public utility purposes necessary for the achievement of objectives of national, county and local interest. As a consequence of the multiple disputes which might arise regarding the implementation of Law 33/1994, Law 255/2010 was adopted in order to reduce the time dedicated to the expropriation procedure and at the same time to simplify it. By way of illustration, if Law 33/1994 provides that under the final and irrevocable judgement and decree on the expropriation (once the obligations imposed by it have been fulfilled), the property becomes the unencumbered property of the expropriator, Law 255/2010 provides that the property is transferred to the property of the expropriator at the date of the issuance of the Expropriation Decision, this being an enforceable title. Another comparable situation would be that Law 33/1994 provides that the payment of claims in the absence of an agreement between the parties, it shall be determined by court both in regard to the amount and the term (which shall be no more than 30 days from the date the final court decision), Law 255/2010 provides that the payment of claims in case of disputes shall be recorded on the name of the holder and shall be issued only at his written request (and the payment term shall be no more than 90 days from the date issue of the expropriator's decision);

- by *donation or bequest*, if accepted (for those made in the name of the state with the approval of the Government and for those made in the name of the administrative-territorial units according to Law 215 of April 13, 2001, Article 121, paragraph 3 with the

approval of the local / county councils) under the condition to become of public use or of interest, by its nature or by the will of the possessor;

- by *onerous agreement*, provided that it is of public use or of interest, by its nature or by the will of the acquirer. This paragraph comes to complement the previously existing gap and opens new perspectives;

- through *the transfer of a good from the private domain of the state into its public domain or from the private domain of an administrative-territorial unit to its public domain*, in compliance with the conditions of the law. The transfer of the property from the private domain to the public domain can be performed with a governmental, county council or local council decision, as the case may be;

- through other ways established by law.

### 3. Public Procurement Contract

#### 3.1. Definitions

The way the public procurement process, the organization of public procurement award procedures and the organization of solutions contests are carried out, the use of specific tools and techniques to be implemented for the award of public procurement contracts, and various specific aspects related to the execution of public procurement contracts are governed by Law No 98<sup>5</sup> of May 19, 2016 on public procurement.

These are based on principles such as: non-discrimination; equal treatment; mutual recognition; transparency; proportionality and accountability.

The public procurement contract is defined in Chapter I, Section 2, Article 3, paragraph 1, point 1, as "the onerous contract, assimilated by law to the administrative act, concluded in writing between one or more economic operators and one or more awarding entities, having as object the execution of works, the supply of goods or the provision of services".

Awarding entities within as described in this law are central or local public authorities and institutions, including their subordinate structures acting as credit release authorities and public procurement officers, bodies governed by public law and / or associations formed by one or more awarding entities of the foregoing.

#### 3.2. Award procedures and value thresholds

"Award procedures are the steps to be taken by the awarding entity and by the tenderers / candidates

<sup>4</sup> Ibidem, p. 289

<sup>5</sup> Law No. 98 of May 19, 2016 on public works Published in the Official Gazette no. 390 of May 23, 2016, amended and supplemented by: Emergency Ordinance no. 80 of November 16, 2016 for the establishment of measures in the field of central public administration for the extension of the term stipulated in art. 136 of the Law no. 304/2004 on judicial organization and for the amendment and supplementation of some normative acts, Law no. 80 of April 27, 2017 regarding the approval of Government Emergency Ordinance no. 80/2016 for the establishment of measures in the field of central public administration, for the extension of the term stipulated in art. 136 of the Law no. 304/2004 on judicial organization and for the amendment and supplementation of some normative acts and the Emergency Ordinance No. 107 of 20 December 2017 for the amendment and supplementation of some normative acts with impact in the field of public works.

in order for the agreement of the parties to engage in the public contract to be considered valid”<sup>6</sup>.

The procedures for the award of a public procurement contract are:

1. Direct purchase, in the case of the purchase of goods or services if the estimated value of the purchase, excluding VAT, is less than 132.519 lei, ie works, if the estimated value of the acquisition, excluding VAT, is inferior to 441.730 lei;
2. Simplified procedure where the thresholds estimated value, excluding VAT of the public procurement contract is inferior to:
  - a) 23.227.215 lei, for public procurement contracts / framework agreements for works;
  - b) 600.129 lei, for public procurement contracts / framework agreements for products and services; b<sup>1</sup> 929.089 lei, for public contracts / framework agreements for products and services awarded by local awarding entities;
  - c) 3.334.050 lei, for public service contracts / framework agreements for services which have as their object social services and other specific services.
3. The tender may be open, restricted, for competitive negotiation or competitive dialogue, negotiation without prior publication and solution contest, the award procedure applicable to social services and other specific services in the case of the award of public procurement / framework agreements with an estimated value, excluding VAT, of equal or higher than the thresholds specified above.

These thresholds are set and reviewed by the European Commission in accordance with the appropriate rules and procedures set out in Art. 6 of Directive 2014/24 / EU of the European Parliament and of the Council of February 26, 2014 on public procurement and repealing Directive 2004/18 / EC<sup>8</sup> and are published by the National Agency for Public Procurement on its website

Estimates for purchases are considered to be:

- For the contest of solutions in a procedure for the award of a public service contract, the estimated value excluding VAT of the public service contract, including the value of the prizes or other payments made to the participants;
- For solution contests treated as a distinct procedure, including prizes or payments to participants, this value is calculated by reference to the total amount of prizes or payments made to the participants and shall include the estimated value net of VAT of the public service contract which may be concluded in accordance

with the provisions of Article 104 (7)<sup>9</sup>, if the awarding entity expresses its intention to award that contract in the contest notice;

- For the framework agreement or for the dynamic purchasing system, the estimated acquisition value shall include the estimated maximum value, net of VAT, reflecting all the subsequent public procurement contracts expected to be awarded under the framework agreement or using the dynamic purchasing system;
- For the innovation partnership, the estimated acquisition value, net of VAT, shall be the estimated maximum value, including all research and development activities to be achieved during the partnership stages, the products, services or works to be performed and purchased at the end of the partnership;
  - For public works contracts, this shall include, on the one hand, the cost of the works and, on the other, the estimated total value of the goods and services that the awarding entity shall make available to the contractor for the execution of the works;
  - For public procurement contracts on separate lots, this shall include the total value resulting from the summing of all lots, net of VAT, and if the total amount of the lots is equal to or greater than the corresponding value thresholds, the award procedures shall apply to the award of each lot, indifferent of its estimated value (except where the estimated value net of VAT of the respective lot is below the threshold of 355,632 lei for the purchase of goods or services or is below the threshold of 4,445,400 lei for the purchase of works and the total amount of lots which are or have been assigned is registered below 20% of the total value of all lots, procurement of similar products or services and where the contracting authority may use the simplified procedure or direct purchase);
    - For the procurement of similar products attributed to separate lots, the estimated value shall include the estimated total value of all lots and the public procurement procedures for the value threshold shall be applied.
    - For the procurement of regular products or services, this is the actual total amount of all the contracts awarded within the last 12 months (or within the previous budget year) or the estimated cumulative amount of all successive contracts awarded over a 12-month period;
    - For the procurement of products by payment (in installments), rental or leasing (with or without a purchase option), the estimate is based on the duration of the contract;
    - For the procurement of insurance services, the estimated acquisition value shall include insurance

<sup>6</sup> Vasilica Negruț, Dreptul administrativ al bunurilor, Editura Universitară Danubius, 2017, Galați, p. 27

<sup>7</sup> Paragraph 1 of Article 7 (a) Section 4, Chapter I was supplemented by Point 4, Article I of Emergency Ordinance No 107 of December 20, 2017, published in the Official Gazette No 1022 of December 22, 2017.

<sup>8</sup> 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.

<sup>9</sup> The awarding entity has the right to apply the negotiated procedure without prior publication of a contract notice for the award of public service contracts where, following a solution bid, the public service contract is to be awarded according to the rules established for the respective solution bid, to the winning competitor or to one of the winning competitors of the respective bid; in the latter case, the awarding entity has the obligation to send invitations to negotiation to all winning competitors.

premiums and any other forms of payment related to these services;

- For the procurement of banking services, the value shall be estimated based on the fees, commissions, interests and any other forms of remuneration related to these services;

- For the procurement of design services, the value shall be estimated based on the fees, commissions and any other forms of remuneration related to these services;

- For the procurement of services for which a total price is not provided, the estimated value of the purchase is based on the duration of the contract (for contracts concluded for a fixed period of less than or equal to 48 months, the value is the whole contract expressed for the entire period of time and for contracts concluded for a determined period of more than 48 months the value shall be given by the monthly value multiplied by 48).

### 3.3. Framework agreement

The framework agreement has a duration of up to 4 years (except in duly justified cases) and may be concluded between the awarding entity and one or more economic operators established by applying criteria such as qualification, selection, award and evaluation, provided in the procurement documentation.

For the framework agreement that shall only be concluded with an operator, its content must include the minimum obligations of the economic operator (assumed within the bid) and the unit price of the offer included in the bid (based on which the price of each subsequent contract is determined).

For the framework agreement with several economic operators, it is executed:

- a) Without resuming the competition, if the framework agreement defines, on the one hand, all the terms and conditions governing the subject of the contract (the execution of works, the provision of services and the supply of products) and, on the other, the objective conditions based on which the economic operator is established in the framework agreement) that shall execute the contract (by performing the works, provisioning of services or supplying of products;
- b) With resumption of competition where the framework agreement does not cover all the terms and conditions attached to it (execution of works, provision of services and supply of products);
- c) partially without resumption and partly with

restarting the competition only if during the procedure for awarding the framework agreement were foreseen both the terms and conditions governing its subject matter (execution of works, provision of services and supply of products).

## 4. Settling appeals

In accordance with Law 101<sup>10</sup> of May 19, 2016, Article 2, paragraph 1, "Any person who considers himself or herself aggrieved regarding to a right or interest consequently to an act of the awarding entity or to the failure to resolve within the legal term a request, may seek the annulment of the act, may oblige on the awarding entity to issue an act or to take remedial action, to recognize the alleged right or legitimate interest, by administrative or administrative means within the jurisdiction or judicial means".

In this respect, the aggrieved party can address the National Council for Solving Complaints by administrative proceedings within the jurisdiction or the court by judicial means.

The National Council for Solving Complaints is an independent body with administrative-judicial activity, with legal personality, which operates under Law 101 of May 19, 2016 and is not subordinated to any public authority or institution.

Following the examination the lawfulness and merits of the contested act, the National Council for Solving Complaints may:

- a) issue a resolution annulling in whole or in part the contested act<sup>11</sup>;
- b) oblige the contractor (the awarding entity) to issue a document in order to remedy the situation;<sup>12</sup>
- c) dispose of other measures (with the exception of those set out above) in order to remedy the acts that affected the award procedure<sup>13</sup>.

If the awarding entity cannot take remedial action, it is bound to cancel the award procedure.

If during the settlement of the complaint the National Council for Solving Complaints identifies other violations (compared to those brought before by the appellant) of the legal provisions the National Agency for Public Procurement, the Romanian Audit Office, the awarding entity and in this respect shall transmit all the data and / or documents relevant in support of the complaint.

The awarding entity and / or the aggrieved party may appeal the decisions of the National Council for

<sup>10</sup> Law No. 101 of May 19, 2016 on the remedies and means of appeal in connection with the award of public works contracts, sectoral contracts and with works and services concession contracts, as well as on the organization and functioning of the National Council for Solving Complaints published in the Official Gazette no. 393 of May 23, 2016.

<sup>11</sup> Decision No. 290/C8/191, 194, 197 of 07.02.2017 of the National Council for Solving Complaints regarding the annulment of the minutes 2220/09.01.2017 and the subsequent acts, regarding the rejection of the claimants.

<sup>12</sup> Decision no. 2876/C2/3428, 3436, 3454 of 01.11.2017 of the National Council for Solving Complaints regarding the obligation of the contracting authority within 15 days from receiving the decision to reanalyze the offers submitted by: DIALFA SECURITY SRL for lots 2, 3, 4, 6, 7; ROMOLD SRL for lots 2, 4, 5, 6; INTEGRA PROFESIONAL SECURITY SRL for lots 3, 5, observing the legal provisions and those mentioned in the motivation.

<sup>13</sup> Decision No. 395/C11/353 of the 22.02.2017 of the National Council for Solving Complaints regarding the Council's motion to dismiss for lack of jurisdiction, invoked ex officio and declines the competence to settle the appeal filed by ALFARO SECURITY SRL, in favor of the Galati County Court - Contentious Administrative and Tax Matters.

Solving Complaints with a complaint to the competent court according to Law No. 554 of December 2, 2004, both on grounds of its unfounded and illegal character, within 10 days from the communication of the decision.

The court may, on the one hand, reject the substantive complaint or admit a defence used in litigation and, on the other, grant the complaint.

If the complaint is admitted, the court shall order the partial or total annulment of the act of the awarding entity or shall oblige the awarding entity to issue the act, shall oblige the awarding entity to fulfill an obligation until the elimination of any specifications (technical, economic or financial) that are considered discriminatory both from the contract notice and the awarding documentation, as well as from any other issued documents related to the award procedure. At the same time, the court may order any other measures considered necessary to remedy the violation of the legal procurement provisions (public, sectoral or regarding the concession).

## 5. The Legal Status of the Administrative Contract

The legal status of the administrative contract is becoming more and more precise. In French law, "it was the jurisprudence that had to do everything in its power to solve the problem of determining the administrative or private law character of a contract and to define the criteria of administrative contracts by their nature"<sup>14</sup>

Thus, three elements were identified: "the parts of the contract, the subject of the contract and the terms of the contract".

"The following main features of the administrative contract can currently be identified<sup>15</sup>":

- it represents an agreement between the parties, one of which is the authority of the administration;
- its object is the performance of works or the provision of services;
- its clauses are of regulatory nature;
- the public administration can only transfer the rights, obligations or interests to another authority;
- the public authority may modify or terminate the contract unilaterally;
- the contract is governed by public law;

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<sup>14</sup> Oliviu Puie, *Contractele administrative în contextul noului Cod Civil și al noului Cod de procedură civilă*, editura Universul Juridic, București, 2014, p. 10

<sup>15</sup> Dana Apostol Tofan, *Drept administrativ*, Volumul II, ediția 4, editura C. H. Beck, București, 2017, p. 104.

<sup>16</sup> Verginia Vedinaș, *Drept administrativ*, Ediția a X – a, revăzută și actualizată, editura Universul Juridic, București, 2017, p. 374.

<sup>17</sup> Dana Apostol Tofan, *Drept administrativ*, Volumul II, ediția 4, editura C. H. Beck, București, 2017, p.492

<sup>18</sup> Repealed by Article 238 of Law No 98 of May 19, 2016 on public procurement.

- disputes may be settled in administrative courts.

Thus, "the administrative contract represents an agreement between a public authority in a position of legal superiority on the one hand and other subjects of law on the other (natural persons, legal persons or other state bodies subordinated to the other party) pursuing the satisfaction of a general interest by the provision of a public service, the performance of a public works or the use of public goods, mainly, to a public power regime"<sup>16</sup>

## 6. Conclusions

Analyzing procurement methods of public domain by comparing the new Civil Code and Law 213 of November 17, 1998 on public property, we identify a major difference already since the first method of acquiring the right of public ownership, namely the attrition.

In the new Civil Code this form of acquisition no longer exists, although the Civil Code "always makes reference to the fact that it is related to goods" <sup>17</sup> that are of public use or interest

In the case of expropriations, Article 7 included in the new Civil Code was enriched with "under the law" which becomes "expropriation for a public utility purpose, under the law".

Considering that, it is the only form of expropriation, in order to ensure uniformity between the specific legislation and the new Civil Code, Article 863 (b) also includes the principle that expropriation is performed after the payment of compensation.

The introduction of a new method of acquiring public property by onerous agreement, thus opening up the way to civil contracts, is beneficial.

As regards to the public procurement, it is found to be an active body, in continuous movement and transformation. In 2016, the Ordinance No. 34<sup>18</sup> of April 19, 2006 on the award of public procurement contracts, public works concession contracts and services concession contracts was repealed by Law 98/2016. Since the issuance of the Law 98, a number of modifications and completions have been made by various acts which are expected to continue also in the future.

- Verginia Vedinaș, Drept administrativ, Ediția a X – a, revăzută și actualizată, editura Universul Juridic, București, 2017
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