

## **PUBLIC WORKS CONCESSIONS - DELIMITATION FROM OTHER CONTRACTS**

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**ABSTRACT:** *Initially in France the judicial basis of contracts concerning the occupancy of public domain was the Law of 17 June 1938, but also art. L 84 of the Domain's Code (1790), as well as a number of relevant decisions of the State Council. Some of the contracts concerning the occupancy of public domain are the funeral contracts and certain public works or railway concession contracts. Other contracts are applicable to domain areas not affected by this type of occupancy, namely the public domain destined for public use, like concessions of public road services or of maritime fishing institutions. The distinction is significant, as in dedicated contracts, like the funeral concession, the occupant's utilization and disposition rights are considerably wider than in the case of contracts of general interest.*

**KEY WORDS:** *concession; contract; public work; public interest.*

**JEL CLASSIFICATION:** *K12*

### **1. PUBLIC WORKS CONCESSIONS. EMPHYTEUTIC LEASES.**

In the spirit of art. 1 of the Law of 17 June 1938 the contract of public domain occupancy has certain defining elements: the deed underlying private utilization is a contract, while acknowledgement of a contractual relationship is not determined by the existence of contract specifications; the contract needs to be constitutive in relation to public domain utilization; occupancy has to concern public domain, the concessionaire being the person authorized to manage the public domain.

The state is further responsible for public domain exploitation by a number of means, from simple access to the public domain to granting private utilisation rights.

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In Romanian legislation, it was the Law of administrative claims no. 554/2004 that defined for the first time the concept of administrative contracts and regulated the applicable judicial regime.

Thus, according to art. 2 par. 1 -c), second sentence of this law, the category of administrative deeds includes contracts closed by public authorities concerning exploitation of public goods by performance works and services of public interest, and by public acquisitions, respectively.

Consequently several categories of public work contracts can be identified: Public acquisition contracts (*marché de travaux publics*), public works concessions, public services concessions, contracts known as *les marchés d'entreprise de travaux publics*, and emphyteutic leases (*baux emphytéotiques*), the latter being initially established by the Law of 5 January 1988.

The Law of 29 August 2002 establishes that local public institutions and local communities can accept emphyteusis to private and public persons for a period of 18 to 99 years, by which the beneficiary is granted a real property right over the land on that works are performed.

The emphyteutic lessee however cannot alienate the object of the emphyteusis. Administrative emphyteusis is legally established in order for a public service, of operations of general interest to be carried out.

This contractual form allows a private person to develop the state owned public domain, the emphyteutic lessee exercising true property right over the erected buildings, what is assimilated to a public-private partnerships.

The law of the state of Québec considers emphyteusis a dismembered form of property and is a long term land contract that allows the beneficiary to improve a property in exchange for the right to enjoy that property as an actual owner over the duration of the contract. This institution is utilized in the large projects of urban management.

## 2. THE PUBLIC ACQUISITIONS CONTRACT

Through a *public acquisitions contract* a public person charges a contractor – a private person – to carry out public works for the benefit of the public person for a price (*prix*) agreed in that contract.

The identification criteria of these contracts were established by jurisprudence, starting from three elements: one of the co-contractors needs to be a public person (an organic criterion defining the very administrative judicial nature of the contract); the object of the contract needs to concern an operation of public works; the contractor is remunerated in form of a price. It is this last element that differentiates the public works acquisition contract from the public works concession.

According to art. 3 -f) of Government Emergency Ordinance no. 34/2006, the public acquisitions contract is the deed closed in writing between one or more contracting authorities on one hand and one or more economic operators on the other, with the object of conducting works, supplying products or performing services.

The contracting authority has to choose whether to implement the project in the traditional system of public acquisitions or as a concession.

The differences are outlined in the *Guide for the Implementation of Projects by Public Works Concessions in Romania* (The Guide for the Implementation of Projects by Public Works Concessions in Romania was approved by Order no.1517 of 27 May 2009 of the Ministry of Public Finances and no. 9574 of 16 July 2009 of the National Authority for Regulation and Monitoring of Public Acquisitions, published in „Monitorul oficial al României”, part I, no.512 of 27 July 2009, [http://discutii.mfinante.ro/static/10/Mfp/PPP/GHID\\_CONCES\\_PUBLICE.pdf](http://discutii.mfinante.ro/static/10/Mfp/PPP/GHID_CONCES_PUBLICE.pdf)): in the case of a concession, the exploitation right of the results of the conducted works is granted to the concessionaire, who at the same time *mandatorily assumes most of the risks* in connection with conducting and exploiting the works.

Exploitation risks include: a) *the risk of availability* (non-achievement of performance and quality parameters of the building or the provided service, clearly determined and measurable over the entire duration of the project); b) *Market risk* (Non-utilization by the end-users of the results of the completed works);

Thus the entity assigning the concession does not undertake to pay any amount of money, if the contract establishes that the exploitation risks are entirely assumed by the concessionaire.

If the exploitation risk is divided between the concession assigner and the concessionaire, the concession contract needs to explicitly stipulate the financial contribution of the concessionaire during the contract.

Should the requirements for project implementation in form of a concession (long term delegation of a public service to a private operator, service productivity, value of the investment, starting date of the works, existence of similar concession projects) not be satisfied, the contracting authority can choose a traditional scheme of public acquisitions instead of a concession.

The *public works contract* is defined as a contract the object of that is either the performing of one of the works related to the activities of Annex 1 of *Government Emergency Ordinance no.34/2006* or to the execution of a construction, or both design and execution of works related to the activities of Annex 1, or design and execution of a construction; or by achievement by any means of a construction that satisfies the necessity and the objectives of the contracting authority.

### 3. LES MARCHÉS D'ENTREPRISE DE TRAVAUX PUBLICS

*Les marchés d'entreprise de travaux publics* are those contracts by that a public person assigns building and exploitation of a „public edifice” (*ouvrage public*) and public services in principle to the contractor, the latter being remunerated by the public person (and not by royalties as in the case of concession). Similarly to the concessionaire, the contractor too has the obligation of exploiting the result of the work.

The *Mixed economy company*, as opposed to concession, is not limited to exploiting and organizing a public service, but can expand to exploiting certain assets by associating private capital to an activity of the state or to public services in form of a joint stock company, governed on one hand by the principles and rules of commercial

law, but that includes also state capital on the other. This was a form of state-owned subsoil exploitation after the Constitution of 1923.

The *Publicly owned enterprise* is a contractual form of performing public works by the administration itself. The Romanian doctrine stipulated that in addition to concession and the mixed economy company public service organization also includes the publicly owned enterprise under its various forms.

#### 4. ARRENDAMENTO

The *Arrendamento (lease)* is a type of contract the object of which is the exploitation of agricultural land, either by public exploitation plans or by private initiative.

The deed we refer to is the *Law of Agricultural Reform no. 45404/1964* of Brazil; art 9 of this act stipulates that the state can exploit directly or indirectly any of the agricultural properties in its ownership.

Exploitation is applied to „public lands”. These are either property of the „Union” (the federal state, s.n. - C.M.) and made available by the state to services and works of any kind, or belong to the individual federal states or townships.

*Arrendamento*, however, is significantly different from the concession of public works. Agricultural exploitation does not involve public works and, according to art. 94 of the same act, cannot be exercised on the public domain to other purposes than research, experimenting, demonstration and promotion of agricultural development.

All enumerated categories of contracts, although different under certain aspects, sometimes rather difficult to identify, have as a common denominator the fact that they are administrative contracts of public management. The purpose of closing public management contracts pertains to the essence of administrative contracts, hence the mere closing of such a contract between a public and a private person does not suffice.

All these contracts include clauses exorbitant to common law. As an exception the contracts closed between industrial and commercial public services and their users are always contracts of private law, regardless whether they include exorbitant clauses. Thus the object of the industrial and commercial public service contract is an activity comparable to that of a private company, namely the production of goods and services (for example railway transportation) and involves management comparable to the private sector (absence of a monopoly, the functioning of the public service in a competitive sector).

In Spain the public works concession contract is one of the three classic modalities of executing public works, next to execution of the works by the Administration and by outsourcing. The concession contract is regulated in articles 5.2.a, 7.2 and 220 – 226 of the *Law of Public Sector Contracts*.

Like any administrative contract, its regulation includes the standard structure characteristic to these public judicial deeds:

- ✓ devising of the preparatory documents (feasibility study – economic and financial feasibility study, project of the works and economic –

- financial plan, contract specifications including the administrative clauses and technical specifications, articles 227 – 233 of the law, art. 232 excepted),
- ✓ the modality of assignment (competition-based, exceptionally negotiated, art. 231.1),
  - ✓ the rights and obligations of the concessionaire (art. 242 and 243),
  - ✓ the privileges of the contracting authority (art. 249
  - ✓ and in addition, *ius variandi* art. 250, receivership – art 251, penalties – art. 252), reception of the works and causes for contract termination (art. 261 – 266).

## 5. THE CONCESSION CONTRACT OF PUBLIC SERVICES & THE PUBLIC WORKS CONTRACT

The public service is aimed at the regular and continuous satisfying of a general requirement, and is organized by the state and the local public administration authorities upon establishing the existence of general interest.

Public service has two senses:

- an organic one that entails the existence of a form of organization, of an administrative apparatus,
- a material sense that refers to an activity aimed at satisfying a general interest.

The latter is essential for the characterization of a public service, which is a widely analyzed concept. Identification criteria were determined already in the interwar period, one of the four essential elements rendering the performed service public being the general public interest to be satisfied. The elements identified by authors as specific for the concept of public service are:

- ✓ an element of enterprise,
- ✓ continuity of the public service,
- ✓ dependency on and subordination to the public power,
- ✓ general and collective utility.

In the interwar period it was argued, based on the theory of the public service, that this underlies also public works concession contracts, hence challenging the independent existence of the latter. The French doctrine defined the concession contract as having for its main objective the assignment of the public service to the concessionaire.

The object of the contract, however, can be the performing of operations required for that service, these being considered public works, „as they are performed on *property meant to ensure the functioning of the public service*”. The concession of public services without the concession of the related public works was viewed as an exception. The public services contract was considered to rank first among the administrative contracts.

The assimilation of public works to public services concession is also addressed in more recent literature, considering that the concession contract merges the category of public works with that of public services, as in practically every case the

beneficiary of the concession of a public work also undertakes the management of the public service the public works are meant for, and vice-versa, the concession of a public service will conduct and exploit public works related to this service.

The *pre-eminence of the public services concession* over public works concession is conditioned by the main object of the concession contract that has to concern the execution of a public service and not exclusively the execution of public works.

This principle is acknowledge to the present, and underlies the rationale of the Government Emergency Ordinance no. 34/2006 as subsequently modified and completed.

Also article 12 of the *Law of Public Sector Contracts (Spain)* provides that should a contract include provision of services based on one or the other type of contract, including the specific elements of public services or public works concession, respectively, the contractual provisions to be considered, based on certain criteria, are those most important from the economic viewpoint.

Public works concession contracts are not to be confused with and are regulated separately from those of public services. The service contract that includes the works contract is not be confused with the public works contract and the public services concession contract.

Thus art.10 of the *Law of Public Sector Contracts (Spain)*, defines the service contract as having the object of constant performance for the conducting of an activity or towards a different result of a work or provision.

In the sense of this law service contracts fall into the categories enumerated in Annex II. Art. 13 states that Annex II enumerates the cooperation contracts between the public and the private sector, amongst which the concession contract of public works of a certain computed value established by law.

## 6. CONCLUSIONS

The public works concession contract is a modality of efficient public management – a concrete example of ample implementation of the public power prerogatives. The concept of public works concession contract has acquired unconditional existence, recognized in both national and European law.

A comparative study is of relevance, as this contract – starting from a common basis - has different characteristics in the various states applying it in relation to their national legislations.

The aim of a comparative study is to reveal the conflicting aspects, but also the defining elements of such a contract type in the legal systems of Europe (France, Spain, Portugal, Great Britain), South America, the Middle East and the European Union.

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