

## Capitalization of the Public Domain. Public Concession Contract

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**Abstract:** The field of public acquisition has a special relevance whose core consists in the involvement of public capital for their realization. Public acquisition enjoys an importance both at national and European level, being a stage that precedes and conditions the finality of a contractual affair. This concern materialized through the establishment by the legislator of some forms of control such as the one carried out by the National Agency for Public Procurement.

**Keywords:** concession; public property; public domain; welfare

### 1. Introduction

The Romanian Constitution consecrates in the content of article 136 par. (4) the inalienable character of public property simultaneously with the legal ways in which it can be capitalized. In this case, we acknowledge the four types of forms to enhance the public domain as follows: administration, concession, public rental and free use. Concession is the traditional means of capitalizing on public property that has played a major role in creating and developing the modern state and its organization, because it has capitalized on natural resources, used unproductive goods in the public domain and thus facilitated the development of civilization.

The finality of the concession consists in reaching the situation that a good belonging to the public domain can be used under the conditions of private property. The legal establishment of the concession contract was regulated until June 30, 2006 by Law no. 218/1998 on the legal regime of concessions, the date from which the new regulation in this case O.U.G. no.54 / 2006 of concessions and O.U.G. no. 34/2006 on the award of public procurement contracts, works concession contracts and service concession contracts, all of which are currently repealed.

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The concession of services and works is represented by Law no. 100/2016 by which transpose some provisions of Directive 2014/23 / EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts. Currently, the legal regime of the concession of public property enjoys a wide constitutional and legal regulation by the respective Administrative Code GEO 57/2019 in Title I of Part V, Section III between articles 302-331, whose content we will analyse in the following.

## **2. Content**

### **2.1. Definition and Features of the Concession Contract**

Mentioning the methods of public concession, respectively the concession of public property and the concession of services and works, we will analyze in complementary the defining norms that delimit the extension of applicability of the two types of concession that materialize through a public concession contract. Emergency Ordinance No. 57/2019 defines in the content of art. 303 paragraph (2) the contract for the concession of public property as being that contract concluded in written form by which a public authority, called the grantor, transmits, for a determined period of time, a person, called a concessionaire, who acts at his own risk and responsibility, the right and obligation to exploit a public property, in exchange for a royalty.

The legislator thus presents the public property concession contract as an administrative contract, which has as object public property goods whose exploitation falls both in the sphere of rights and in that of the contractual obligations of the concessionaire. We note that the GEO No. 57/2019 stipulates the temporary nature of this type of administrative contract. This is clarified in the content of art. 306 according to which the duration of the public property concession contract cannot exceed 49 years. Although the minimum limit of this contract is not provided, the grantor is the one who designates the period of validity following the elaboration of an opportunity study, the contracting parties having the possibility of extension provided that the total period of time does not exceed the legal maximum of 49 years on the date of its signing.

It is also remarked the onerous nature of the contract materialized in the payment of a fee by the concessionaire, acting in the execution of the contract on his responsibility and risk. Moreover, the public property concession contract consists of a regulated part that was briefly analyzed previously, but also of a conventional

part mentioned in art. 326 paragraph (6) according to which the grantor may unilaterally amend the regulatory part of the public property concession contract, with the prior notification of the concessionaire, for exceptional reasons related to the national or local interest, as the case may be. We note that the legislator offers the possibility of unilateral modification by the grantor of the rules governing the concession contract concluded only in cases limited and expressly provided by law. (GEO No. 57/2019).

By changing the legislative framework, Law no. 100/2016 on works concessions and service concessions defines in art. 5 let. g) the works concession contract as that contract for consideration, assimilated according to the law of the administrative act, concluded in writing, by which one or more contracting authorities / entities entrust the execution of works to one or more economic operators, in which the consideration for works is represented either exclusively by the right to exploit the result of the works that are the object of the contract, or by this right accompanied by a payment. (Law No. 100/2016).

Likewise within the same law, art.5 letter h) defines the service concession contract as that contract for consideration, assimilated according to the law of the administrative act, concluded in writing, by which one or more contracting authorities / entities entrust the provision and management of services, other than the execution of works provided in let. g), to one or more economic operators, in which the consideration for services is represented either exclusively by the right to operate the services that are the object of the contract, or by this right accompanied by a payment. (Law No. 100/2016).

Following the analysis of the way of defining these types of concession contracts, we easily notice a series of similarities. Thus, in the case of both concession contracts, we note the tendency of the legislator to classify these contracts directly in the category of administrative contract, preferring to qualify it as a contract assimilated to the administrative act, thus planning a regulatory reluctance on these regulations. the classification of certain contracts concluded by public authorities as administrative contracts (Vedinaş, 2020) .We can also observe as the first formal condition, the one written *ad validitatem* in the case of both categories of concession contracts as well as the similarity in the case of the object of the contract, namely the execution of a work, or the provision and management of a service.

Moreover, from the beginning of the definitions we note the onerous nature of these two contracts which materializes both by making an optional payment and by the

existence of the consideration to which economic operators are impelled and which consists in the right and obligation to operate services are the subject of the contract or the exploitation of the result of the works as the case may be. Thus, both the public property concession contract and the works or service concession contracts are administrative contracts, for a price, concluded in written form ad validitatem which have as object the exploitation of either a public property or the result a work or a service.

## **2.2. The Parties to the Concession Contract**

The concession contract has the contracting parties as the grantor, the one who transmits the concession and the concessionaire the one who receives it. Referring to the concession contract for public property, the quality of grantor may belong as we find in the content of GEO No. 57/2019 in art. 303 ministries or other specialized bodies of the central public administration for the public property of the state, or the mayor and the president of the county council as representatives of the administrative-territorial unit for their public property.

Regarding the service and works concession contract, the quality of grantor belongs to one or more contracting entities, notions explained in Law no. 100/2016 in art. 9 according to which the contracting entities are represented by the central public authorities and institutions or local bodies, bodies governed by public law, associations comprising at least one contracting authority, public enterprises which are in accordance with art. 5 letter s) of the present law, the legal persons that carry out economic activities and over which the dominant influence of a contracting authority is exercised (GEO No. 57/2020) The quality of concessionaire belongs according to the Civil Code in art. 871 paragraph (2) to any natural or legal person of private law, Romanian or foreign, in the case of the concession contract of public property goods. Thus, this administrative contract is concluded exclusively between a legal person under public law and a natural / legal person under private law.

The concessionaire of a service and works concession contract can be held by any economic operator to which a concession has been awarded. In order to clarify this notion, the legislator stipulated in Law no. 100/2016 in art.5 paragraph (1) letter x) the definition of the economic operator that designates him as any natural or legal person, public or private law, or group or association, including temporary, of such persons, who lawfully offer on the market the execution of works and / or a

construction, the provision of products or the provision of services. (Law No. 100/2016).

### **2.3. Concession Procedure**

#### **2.3.1. Procedure for Granting Public Property**

The procedure for granting public property is based on a series of principles that ensure the good functionality and effectiveness of this procedure, these being the basis for awarding contracts for the concession of public property as follows. Thus, the first principle is that of transparency, due to which any person interested in applying for the grant of the concession contract in the case has all the necessary information at his disposal. The same note follows the principle of equal treatment which regulates the non-discriminatory application by the public authority of the criteria for the grant of the public property concession contract.

The principle of proportionality plays an important role in this concession grant procedure due to the fact that it requires public authorities to ensure that any established measure corresponds to the necessity and nature of the contract. Another principle applicable in this matter is that of non-discrimination which ensures that the public authorities apply the rules in the same practice regardless of the nationality of the participants in the concession contract grant procedure. The last principle is that of free competition which consists in ensuring by the public authority the conditions for any participant in the grant procedure to have the right to become a concessionaire under the law, international conventions and agreements to which Romania is a party. (Ciobanu, 2015).

Thus, in order to comply with the legislative norms in force, the legislator regulates by GEO No. 57/2019 in article 312 a series of rules for allotting the public property concession contract according to which the grantor is impelled to award the concession contract in this case by the application of the tendering procedure as well as to ensure the protection of confidential information communicated to it by interested parties to the extent that its disclosure may harm them or may harm legitimate interests in trade secrets and intellectual property. Also, the grantor is the one who ensures and prepares the award documentation by elaborating a specification that will be approved later by order, decision or accord. Denotes from the above the obligation of the grantor to specify in the documentation any criteria, rules or requirements to ensure correct, complete and explicit information to the

bidder regarding the application of the procedure for awarding the public concession contract. (Ciobanu, 2015).

As stipulated in the ordinance, the interested person has the right to submit a request to participate in the concession contract award procedure, and the grantor has the obligation, equally, to ensure the obtaining of the award documentation by the person submitting a request in this regard. Moreover, the grantor has the right to obtain the necessary documentation in several ways and at his disposal as follows: by ensuring direct, unrestricted and full access by electronic means or by sending the interested party a copy of the paper award documentation or magnetic.

However, both computer systems and the applications used for this purpose must comply with the national legislation in force on electronic interoperability and on ensuring a high common level of security of networks and information systems (Ciobanu, 2015). According to the doctrine, the conclusion of a concession contract goes through two major stages, namely that of the preliminary procedures, with a preparatory role for the grant documentation and the stage of awarding procedures which has as resolution, usually the time of concluding the contract. In this sense, the administrative code establishes by art.309 paragraph (5) and paragraph (6), the principle of approving the concession based on the opportunity study approved by the grantor by order or decision, as the case may be, by Government Decision or by decision of the county, city or communal council, as previously mentioned. In the contents of GEO No. 57/2019 by art.312 and art.315 the two concession procedures are established, namely the concession by public auction and the concession by direct award. In the following we will briefly analyze each procedure in order to establish the circumstances of the application of each of them.

Therefore, the auction, according to art. 314 of GEO 57/2019 is carried out as follows: first, the grantor has the obligation to publish in the Official Gazette and in a daily newspaper of national and local circulation the auction notice, on its website internet or through other media or public electronic communications channels, giving the right and at the same time the possibility to any interested person to request and obtain the award documentation and any necessary clarifications regarding the participation in the auction. Secondly, the grantor is compelled to answer clearly, completely, objectively and without ambiguity or uncertainty to all clarifications or questions requested by potential participants as well as by persons who have obtained the award documents in conformity with the law, taking the necessary measures. to ensure and maintain the identity of the applicant anonymously.

Moreover, the auction procedure may take place only if at least two valid tenders have been submitted. Otherwise, the grantor is constrained to cancel the procedure and to take the necessary steps to organize a new auction procedure, which will in turn be valid in the event of two valid bids being submitted (Iorgovan, 2005).

Further analyzing the second procedure for concession of public property, namely direct award, we find according to GEO No. 57/2019 that this procedure is in fact an exception to the rule, applying when the goods are granted national companies, national companies or companies that were established by reorganizing the autonomous utilities, subordinated, under the authority or under the coordination of the authorities of the specialized central administration or local public administration and whose object of activity is the management, maintenance, repair and development of those assets only until the completion of their privatization. Within this procedure, it is not necessary to draw up the specifications or the study of the opportunity, these being, as we have seen before, essential elements in the auction procedure. (Tofan, 2018)

### **2.3.2. Procedure for Awarding Services and Works**

Moving on to the second concession procedure, namely the service and works concession procedure, we will analyze the regulations of Law no. 100/2016 according to which the content of art.50 stipulates that the contracting entity awards the concession contract through open auction and competitive dialogue. However, the law provides for an exception in articles 64 and 65, particularly that the possibility of using the negotiation without publishing the concession notice is allowed if the works / services can be provided by a single economic operator for a number of reasons, among others I will mention: the purpose of the concession is the creation or acquisition of a work of art or a unique artistic representation, the existence of an exclusive right, the protection of some intellectual property rights and other exclusive rights. (Law No. 100/2016).

Therefore, we will analyze the first way of awarding the concession of services and works, namely the open auction. This procedure is usually carried out in a single stage, but through the award documentation, the contracting authority may decide to carry it out in two stages. Thus, the first stage is represented by the submission of the award documentation together with the documents proving the fulfillment of all the qualification criteria in the concession procedure established by the contracting entity by the future participants.

The second stage consists in conducting negotiations in order to improve the offers and evaluate them according to the mentioned selection criteria. According to Law No. 100/2016 throughout the negotiation, the contracting authority is obliged to comply with the principle of equal treatment and to provide information in a non-discriminatory manner that could create advantages or disadvantages to other bidders. Also, the contracting entity has the obligation to keep confidential the solutions proposed by a tenderer who participates in the negotiation, without his consent, expressed in writing with the object clearly delimited. (Catana, 2017).

Competitive dialogue is the second way of awarding the works and services concession contract and is regulated in section 3 of Chapter IV of Law no. 100/2016 which details the rules according to which this complex procedure is carried out. For the first time, the initiation of the procedure takes place by sending for publication the concession notice by the contracting entity by which the economic operators are requested to submit the participation bids.

The particularity of this procedure is given by the possibility of applying to the concession all interested operators, following that only those who comply and qualify for the selection rules and award criteria will be selected to participate in the next stage. Thus, the competitive dialogue procedure is fragmented into three successive stages, the first of which consists, as mentioned above, in submitting applications to economic operators, and based on the criteria set out in the concession notice to select only those eligible (Avram, 2003).

According to the law, the contracting authority has the right to organize the dialogue in successive rounds in order to make a correct and complete assessment and to reduce the number of solutions to be discussed at the dialogue stage. In the second stage, the actual competitive dialogue takes place in which all economic operators in accordance with the required rules will submit their final bids, improved in order to obtain the concession contract. Like the previous procedure, and in this case throughout the dialogue, the contracting authority is compelled to respect the principle of equal treatment and is prohibited from providing information in a discriminatory manner that may create advantages for the other participants. The contracting authority / entity has the right to continue the dialogue until it considers itself able to identify the optimal solutions in order to meet its needs. Therefore, following the completion of the dialogue stage, the contracting authority simultaneously sends to all the remaining candidates in the competition an invitation to submit final bids, accompanied by the optimal solution established. (Cârlan, 2013) In order to ensure the validity and efficiency of the procedures deliberated, the law

impels the contracting authority or entity, as the case may be, to ensure transparency throughout the procedures for awarding the concession contract by publishing concession notices, notices of intent and award notices.

### **2.3. Completion of the Concession Contract**

#### **2.3.1. Completion of the Works and Services Concession Contract**

The manner of completion of the works and services concession contract regulated in Law No. 100/2016 is that of unilateral completion. Thus, in the present law, art.110 stipulates the procedure and conditions for terminating the contract by unilateral termination as follows: the contracting authority or entity concerned has the right to request the finding of absolute nullity of the concession contract, according to the rules of common law, having the right to unilaterally terminate the contract in one of the situations legally provided.

Therefore, the concessionaire can cease, according to the law, the concession contract if the concessionaire is in one of the situations stipulated in Article 79-81 of this law, namely: at the time of awarding the contract, he was convicted by a final court decision for the commission of crimes such as: forming an organized criminal group, corruption offenses, crimes against the financial interests of the European Union, acts of terrorism, money laundering, trafficking and exploitation of vulnerable people, or fraud, facts that would have led to his exclusion from the procedure assignment. (Ciobanu, 2015).

Moreover, in the event of a serious breach of obligations arising from European law and which was found by a decision of the Court of Justice of the European Union that the contract should not have been awarded to the concessionaire in question, the grantor has the right to unilaterally terminate the concession contract. However, the legislator also regulated the possibility of introducing the right of unilateral termination of the concession contract by the grantor in the award documentation, the contract basically representing the law of the parties. (Vedinaş, 2020).

#### **2.3.2. Completion of the Public Property Concession Contract**

Unlike the termination of the service and works concession contract, the public property concession contract enjoys numerous possibilities of termination, these being standardized by GEO No. 57/2019 in art. 327, the rule is represented by the

expiration of the concession period provided in the contract. Thus, at the end of the period for which the concession contract was concluded and the parties did not agree in writing to the extension, the concession contract for public property goods ceases.

As an exception, the public property concession contract may terminate according to law, before the expiration of the concession period stipulated in the contract, if the exploitation of consumable goods in accordance with the contractual provisions leads to their exhaustion, which makes it impossible to continue the operation of the leased property before the expiration of the agreed duration. The second exception regulated in GEO 57/2019 is by unilateral denunciation by the grantor in case the national or local interest so requires, the latter having the obligation to notify the concessionaire regarding the unilateral termination of the contract as well as to the reasons that led to the creation of this situation.

Further, by this ordinance, the legislator regulates as a way of terminating the public property concession contract the termination by the grantor or the concessionaire as follows: in case of non-compliance with the contractual obligations established by the concessionaire, the grantor has the right to cease the contract and the right to receive sanctioning damages from the concessionaire. The reciprocal of this situation is valid, in case the grantor does not meet its obligations by concluding the concession contract, the concessionaire having the possibility to unilaterally terminate the contract, having the right to receive compensation of the same nature. (Tofan, 2018).

Finally, the legislator also provides as a possibility for the termination of the public property concession contract and the remission, in case of disappearance of the concessioned property or of the impossibility of exploitation of the property by the concessionaire due to force majeure. Thus, the remission is instituted as a way of terminating the contract, without paying compensation.

### **3. Conclusion**

The public domain has been and continues to be one of the controversial topics among the institutions of administrative law due to the fact that it was the basis of extensive debates in national and international doctrine. Being by its nature, profit-making, the public domain is the owner, improperly said, of some categories of goods that by their specificity, cannot be appropriated, owned by natural or legal persons fact for which a complex and permissive legal framework was created for the exploitation of this division of goods.

Thus, the public domain includes both public property and private property which by their scientific, artistic, cultural, historical or economic significance justifies their membership in the public domain, thus attracting a specific legal regime in which the rules of public law overlap the rules of private law. The public concession contract thus provides for the possibility of capitalizing on goods that, in themselves, are not profitable, this contract being of particular importance within the rule of law, making a considerable contribution from an economic and monetary perspective

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