Bulletin of the *Transilvania* University of Braşov
Series VII: Social Sciences • Law • Vol. 6 (55) No. 1 - 2013

DIFFERENCES BETWEEN THE CONCESSION CONTRACT OF PUBLIC SERVICES AND OTHER CONTRACTS

Cătălina G. MATEI[1]

Abstract: *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 European Court of Justice ruled that establishing the nature of a contract – whether it is a public works contract or a public contract of a different nature – is done by identifying the main purpose of the contract that determines the applicable directive, including situations where the contract has elements regarding the concession of public works as well as other types of public contracts. Also, the concept of concession used in relation to both concession and PPP was deemed in Romania as a source of confusion and ambiguity regarding the confidence of both the public and private partner within the context of project development.*

Key words: *public services, public works, general interest, concession.*

1. Introduction

The concept of public work was first defined in French jurisprudence by the State Council and the Tribunal of Conflicts. More recently, in community law, Directive 93/37 of 14 June 1993 introduced a different concept applicable to public acquisition of works. Initially the concept of public work had been established on three traditional conditions: the real object of the works, its purpose of general utility and its completion for the benefit of a public person. The latter of these conditions being very rigid, jurisprudence considered that public works should not be necessarily limited to work conducted for a public person. Thus this condition acquired alternative status: in order for a work to be public it needs to be executed either for a public person, or, if it is executed for subjects of private law, this has to be within a mission of public service [1]. Introducing the possibility of subordinating public works to works executed for a private person has lead to a reconsideration of public service theory and to an extension of the concept of public work.

2. The Concession contract of public services and the public works contract

The public service is aimed at the regular and continuous satisfying of a general requirement [5], and is organized by the

[1] Faculty of Law, *Transilvania* University of Braşov.

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, and 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.

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 as 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 in every case when 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 acknowledged 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)* stipulates 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 which are most important from the economic viewpoint. Public works concession contracts are not to be confused with those of public services as they are regulated separately [6].

This distinction is also reflected in Portuguese legislation by the Public Contract Code that also enumerates the public works and public services concession contracts, respectively.

In French doctrine [7], the classification of administrative contracts distinguishes between public works and public services concession contracts, indicating that the remuneration of the exploiting entrepreneur is ensured from the taxes received by the users of the work

In Romanian legislation, according to both *Law no. 219/1998 on concessions, currently abolished,* that distinguished between three categories of concession contracts: concession of public services, concession of assets and concession of economic activities, and Government Emergency Ordinance no. 34/2006 with its subsequent modifications and amendments, the concession of public works is also regulated distinctively from the other forms of concessions. Thus when

awarding a concession contract the contracting authority needs to establish its judicial nature, „as a contract cannot be, at the same time, a public works and public services concession contract". A concession contract of public works should be the option in case where the purpose of the concession is the execution of works, as defined by law, even *if the contract also includes the provision of services* required for conducting the specific activity.

The public works concession contract further includes, when applicable, the concession of public property [8]. In such situations *Government Emergency Ordinance no. 54/2006 on public property concession contracts,* approved by Law no. 22/2007 – the legal framework for public property concessions is no longer applicable.

3. The Case *Auroux et al. versus Roanne Region*

In relation to the preliminary appeal in the case *Auroux et al. vs. Roanne Region* [9] by the Administrative Tribunal of Lyon, France, The EU Court of Justice was requested to rule on the judicial nature of a contract, namely whether it is a public works concession contract.

The object of the preliminary appeal was the interpretation of article 1 and article 6 of Directive 93/37/EEC (OJ 1993 L 199, p.54; Directive 93/37/EEC was amended by Directive 97/52/CE of 13 October 1997, published in OJ 1997 L 328 p.1) of 14 June 1993 concerning the coordination of procedures for the award of public works contracts. The public works concession contract is regarded as a variety of public development contracts (public-private partnerships). The latter represents the public interest contract concluded between two contracting authorities in view of conducting a development procedure based on the fact that the second contracting authority conducts works such as to satisfy the requirements of the former, where upon completion of the procedure the result of those works is acquired by the first contracting authority.

The concession contract of public works, according to article 1d of Directive 93/37/EEC, represents a contract concerning the works stipulated at a) (public works contracts, s.n.), except the fact that the relevance of the works to be executed consists either exclusively in the exploitation right of the construction, or in the exploitation right of the construction in exchange for a fee.

Public works are those established in Annex II of the directive. Those at a) are the construction and engineering works of Class 50 of the general industrial classification of economic activities in the European Economic Community. The construction of buildings is expressly included. According to article 6 of the directive, this is applicable to: a) public works contracts the estimated value of which, including VAT is not less than the equivalent of 5 million Euros, b) the public works contracts referred to at article 2 par. 1 the estimated value of which is not less than 5 million Euros.

As regards the applicable national French legislation, article L300-4 of the Code of Urbanism stipulates that „the state, appointed local authorities or public institutions can award urbanism works and the implementation of the legally regulated development projects to any qualified public or private person". If a contract is concluded by a public institution, a semi-public local company as defined by Law no. 83-597 of 7 July 1983 whose majority capital is held by state, regions, departments, townships or groups thereof, this contract can take the form of a public-private partnership. In this case the contracting partner has to be ensured, by acquisition and execution of any measure

or operation concerning achievement of the project that is object of the partnership (*public development agreement*).

The considered case concerns the development of a leisure centre in a sequence of phases. The first phase is the construction of a multiplex cinema, commercial spaces to be transferred, parking spaces, access to public streets and spaces. The second phase is the building of a hotel. The Court of Lyon enquired with the Court of Justice whether such a contract engaged for the general interest where upon completion of works the result is automatically transferred to the first contracting authority, qualifies as a public works contract according to article 1 of Directive 93/37/EEC.

The Court of Justice ruled that a contract where a contracting authority awards works to a second contracting authority represents a public works contract, according to Directive 93/37/EEC, regardless of whether it is anticipated that the first contracting authority is or will become owner of all or just one of the resulting segments of the work (in the sense of an *ouvrage*, s.n.).

Consequently, *establishing the nature of a contract* – whether it is a public works contract or a public contract of a different nature – *is achieved by identifying the main purpose of the contract* that determines the applicable directive, including situations where the contract has elements regarding the concession of public works as well as other types of public contracts.

Acknowledgements

PhD Professor Dana Apostol Tofan, The Faculty of Law, The University of Bucharest.

References

1. Laubadere, A. de, Venezia, C.J., Gaudemet, Y. : *Droit administratif des biens*. Librairie générale de droit et de jurisprudence. Paris. E.J.A., 1999, vol. I, p.341.
2. Rojas, F. J. V. : *La concesión administrativa de obra pública como nueva formula de gestión de servicios sanitarios*. In : The XIVth Extraordinary Congress „Derecho y Salud", Universidad de la Laguna, vol.14, March 2006, p.6-7.
3. Sebeni, A.: *The Concept and the enclosure of the concession agreement*. In: The Romanian Law Review no.8/1999, p.5.
4. Avram, I.: *The contracts of Concession*. Bucureşti. Ed. Rosetti, 2003, p.19.
5. Rarincescu, C.: *Administrative Law. The University of Bucharest, 1926-1927*. Bucharest. Ed. Emil Stancescu, p.143.
6. Chapus, R.: *Droit Administratif Général (tome 2 – Domaine public)*, 15e edition. Paris. Paris Montchrestien Editeur, 2001, p.364.
7. CJUE, Case C-220/05, *Auroux et al. vs. Roanne Region*, judgment of 18 January 2007, ECR 2007, p.I-385, OJ C56 of 10 March 2007.