Some considerations on the legal qualification of the contracting authority[1]

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Abstract

The present study makes an analysis of the concept of contracting authority in the context in which the legal definition of this concept leads, in several specific cases, to doubts and the impossibility of correct application of the law when one puts into discussion the local authorities and some legal persons of public law who have a well-defined legal status. Both situations create real difficulties in practice by the correct application of public procurement law so that it may challenge these parts of such public contracts even if they are of good faith and desire the fair enforcement of law.

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JEL Classification: K12, K23

1. Preliminary considerations

The emergence of Law No. 98/2016[4] and GD 395/2016[5] besides regulating public procurement in Romania[6], brings many legal definitions of certain terms in practice, some of which may induce some confusion.

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[4] Law no. 98/2016 on public procurement, published in the Official Gazette, Part I no. 390 of 23 May 2016 as amended.

[5] Government Decision no. 395/2016 approving the Methodological Norms for the application of provisions concerning the award of public procurement contract / framework agreement of Law. 98/2016 on public procurement, published in the Official Gazette, Part I no. 423 of June 6, 2016.

[6] On regulation of public procurement by Law no. 98/2016 see Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, Ed. C. H. Beck, Bucharest, 2016, p. 160-165. The public procurement contract is an administrative contract - see this Cătălin-Silviu Săraru, *Cartea de Contracte administrative. Modele. Comentarii. Explicații*, Ed. C.H. Beck, Bucharest, 2013, p. 157-205. For the characteristics of the administrative contracts, see Cătălin-Silviu Săraru, *Capacitatea autorităților/instituțiilor publice de a încheia contracte administrative*, in „Dreptul" nr. 1/2010, p. 111-114; Cătălin-Silviu Săraru, *Contractele administrative. Reglementare. Doctrină. Jurisprudență*, Ed. C.H. Beck, Bucharest, 2009, p. 22-46.

From the multitude of legal definitions, one chose for this analysis the legislature's definition of the contracting authority. Thus, an entire section from the law outlines the concept of contracting authority[7]. In this context one will analyze as possible contracting authorities: The Romanian Red Cross and local public authorities.

2. The National Red Cross Society from Romania

The National Red Cross Society in Romania under article 1 of Law no. 139/ 1995[8] is described as being "**legal person of public law,** autonomous, nongovernmental, apolitical and non-profit organization. It operates humanitarian, aid organization as volunteer auxiliary of the public authority."

Put into discussion, this text dialog with the Article 4 (1) b of the Law No.98 / 2016, it is clear that this is a body governed by public law, this legal qualification allows it to access public funds for various humanitary programs undertaken by this public body. To meet the quality of public-law body, the contracting authority needs to meet three cumulative conditions:

- to be established in order to meet a general interest;
- to have legal personality;
- to be funded mostly by an authority or public institution or a structure of the components of the previously mentioned ones.

Applying these conditions to the Red Cross, this certainly meets the first two conditions, and, in what concerns the third, an analysis is needed, namely: to what extent is it financed mainly by the "state"? One used the generic term 'state' to stop repeating financial entities. Thus, analyzing the Law no.139 / 1995 one identified two articles that refer to the heritage and the expenditure incurred by the state.

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[7] *SECTION 3* ***Contracting authorities***
ART. 4
(1) Have the capacity of contracting authority under this law:
a) authorities and institutions of central or local governments and structures that have delegated their composition quality officer and have competences established in public procurement;
b) public bodies;
c) associations comprising at least one of the contracting authority referred to in subparagraph a) or b).
(2) By bodies governed by public law under par. (1) b) shoul be understood any entity, other than those provided in paragraph (1) a) which , irrespective of the form of incorporation or organization, fulfill the following conditions:
a) they are set to meet the needs of general interest without commercial or industrial character;
b) have legal personality;
c) They are funded mostly by entities of those under par. (1) a) or by other bodies governed by public law or are subordinated under the authority or coordination or control of the entity referred to in para. (1) a) or another public body or more than half the members of the board / management or supervisory body are appointed by an entity referred to in para. (1) a) or by another public body.

[8] Law no. 139/1995 of the National Red Cross Society in Romania, published in the Official Gazette, Part I no. 303 of December 30, 1995, as amended.

If one stopped just at article 15 of the Law no.139/1995 on the formation of its assets, it results, in a first reading, the self- management opportunity through media specific of all NGOs, which could lead one to the conclusion that this body would not meet third condition imposed by Law no.98 / 2016 in Article 4 (2) c).

But the text stipulated by Article 16 of Law no.139/1995[9] opens a completely different perspective, namely the support given by the state in direct support of this body.

In the conditions in which, following a review of the income share of the Romanian Red Cross due to budgeting different activities, one reaches a majority support of the "state" and then are met all three conditions imposed by law for the qualification of the NSRRC as a legal person of public law and, through the law no.98 / 2016 this body and in this context becomes a contracting authority and is subject to public procurement procedures laid down by it.

The present discussion does not have only a theoretical connotation, but it starts from a practical reality. Thus, the leadership of the NSRRC requested the National Agency of Public Procurement clarification on the application of Law No.98 / 2016 and its qualification through the law of "contracting authorities" based on the competencies provided by GEO no.13 / 2015 [10] to the above mentioned agency to make the application and correct interpretation of laws on public procurement.

To our surprise NAPP communicates NSRRC that it "does not have contracting quality" according to Law. 98/2016, only Article 6 (1) and (3) of the Law no.98 / 2016 being applied. Based on this response, NSRRC develops its own regulation of public procurement so that it departs from the legal procedure required by Law No.98 / 2016 to contracting authorities. One considers that, in this context, the public procurement activity of the NSRRC is weakened, this activity could be at any moment classified as contrary to Law No.98 / 2016 even if the respective entity is of good faith and acts as such in the belief induced by NAPP that its activity complies with the law!

3. Local public authorities

[9] ART. 16

(1) By means of the State budget law, the annual membership fee expenses for the International Federation of Red Cross and Red Crescent Societies and for the contribution to the funding of the International Committee of the Red Cross will be established.

(2) From the state budget, through the Ministry of Public Health, shall be ensured the funds necessary for carrying out the National Red Cross Society in Romania under Art. 11, letter a) - e), g) and h), based on programs drawn up by this.

(3) From the state budget, it is ensured the cover of the payment of value added tax relating to supplies of goods, provision of services and execution of works that are wholly or partly funded from sources other than the European Union's financial contribution.

[10] Government Emergency Ordinance no. 13/2015 on the establishment, organization and functioning of the National Agency for Public Procurement, published in the Official Gazette, Part I, no. 362 of 26 May, 2015.

According to Article 4 (1) a) of the Law no.98 / 2016, central and local authorities, along with public institutions and other bodies, have the capacity of contracting authorities in public procurement. In connection with these legal qualifications, one will analyze local authorities as contracting authorities.

According to Law no.215 / 2001 on local public administration[11] these are nominated with the content of Article 1 (2) d) and e) as: local and county councils as deliberative authorities and the mayor and the president as executive authorities. If in the case of mayors and local councils one has also constitutional support [see Article 121 of the Constitution] the existence of two distinct authorities which determine and the appropriate relationship between them,in the case of the County Council, the Constitution [see Article 122] does not recognize as authority than it as deliberative authority, by not speaking about the president, leaving the organic law no. 215 / 2015 to address this issue. Unfortunately, the law creates more chaos by constitutionalising a county council president ascendancy [executive authority] to lead meetings of the county council [as deliberative authority],inverting the ancestry of collegiate structures to the detriment of unipersonal structures. At the moment one will not discuss these "administrative authority" than through the Law no.98 / 2015, precisely their position as contracting authorities. If compared to other "interlocutors" there is no doubt who the contract authorities are, in the case of the administrative units recognized by law as "legal persons of public law" [see Article 21 of Law no.215 / 2001], serious questions on the definition of the contracting authority are raised. Which are these? Mayors or presidents of county councils or local councils or county councils? Given that at the level of the legal person of public law [the administrative- territorial unit] there are two public authorities, whichever is the contracting authority according to Law no. 98/2016?

By analyzing Law no. 215/2001 Article 63 (4) a) one may find that the mayor is the main authorizing officer and in Article 63 (5) letter c) reference is made to activities related to providing "the necessary framework for the delivery of public services "[see Article 36 (6) of Law no.215 / 2001] .If one adds to this the fact that the mayor represents the administrative territorial unit in court, one can outline an implicit conclusion [not explicit] that the mayor is the "contracting" authority. The mayor, not being a "legal person" under Law 215/2001, may not appear as a contracting party in an economic contract, the contracting party can only be the territorial administrative unit as it is a legal entity of public law[12].

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[11] Law no. 215/2001 on local public administration, published in the Official Gazette of Romania, Part I, no. 204 of 23 April 2001, as amended.

[12] *ART. 21*

(1) Administrative-territorial units are legal persons of public law with full legal capacity and their own patrimony. These are legal subjects of tax law, holders of tax ID and of accounts opened at territorial units of treasury and bank units. Administrative-territorial units are holders of rights and obligations arising from contracts for managing assets belonging to public and private domain in which they are parties, as well as relations with other natural or legal persons under the law.

(2) In court, the administrative-territorial units are represented, as appropriate, by the mayor or by the county council chairman.

On the other hand, analyzing the local council powers under Article 36 of Law no.215/2001, it appears that the local budget, credit transfers, management, concession, lease of assets in the public or private domain of the administrative-territorial unit are the exclusive competence of the local council. These major competences belonging to the deliberative authority determine its major involvement in the public procurement equation. Analyzing GD No. 395/2016 approving the Methodological Norms for the application of provisions concerning the award of public procurement contract / framework agreement of Law. 98/2016 on public procurement, one has inferred that the legislature is not giving the clarifications expected by practitioners. Thus, in Article 2 of N.M, approved by this decision, it is stipulated that:

" (1*) In view of public procurement, the contracting authority shall establish in compliance with the law an internal compartment specialized in the field of procurement, consisting, usually, of a minimum of three persons, of which at least two thirds higher educated and holding specializations in public procurement.*

(2) To the extent to which the organizational structure of the contracting authority does not allow the establishment of an internal distinct compartment specialized in public procurement, its main tasks are carried out by one or, where appropriate, more persons within the respective contracting authority, entrusted to do so by administrative act by the manager of the contracting authority." According to the Law no.215 / 2001, the approval of the establishment of specialized compartments goes to the local council, where, as known, a quorum and a coagulation of a majority are needed. What happens in case such a compartment is not voted? How does mayor fulfill its "implicit" [or logically inferred] duties of Law No.98 / 2016? Paragraph 6 a, art. 2 states:" *In applying the provisions of this Article, the contracting authority has also the right to purchase consulting services, referred to as ancillary services procurement, to support the work of the internal compartment specialized in acquisitions,as well as for drafting / documentation necessary for carrying out the steps of the procurement process and / or implementation of programs for prevention / mitigation of risks in procurement, covering all stages from planning / preparation of the process, organization / the award procedure until the execution / monitoring of implementation of the public procurement contract / the framework agreement, including in relation to the work of the evaluation committee and / or the determination of appeals.* What happens if the council opposes, for various reasons, to purchase such advisory services? How does the Mayor solve, as 'contracting authority' this problem? In Article 9 (2) of NM the contracting strategy of the contracting authority is presented. This is determined locally by the local council and brought out by the mayor. This has the right to propose strategies, but the right to approve the strategy lies with the deliberative. In this context it may occur in practice diverging from the mayor's proposal and approval of the local

(2^1) To defend the interests of administrative-territorial units, the mayor or the county council president, stands in court as the legal representative and not personally.

council and the mayor must meet a strategy that in some cases is not in accordance with his wishes, even if ultimately the wavelength of public procurement responsibility is at the latter. In this regard the most convincing example of dialogue between authorities is represented by Article 12 of NM, stipulating : "*(1) In the annual strategy for public procurement, the contracting authority is obliged to draw up the annual program of public procurement as a management tool used to plan and monitor the portfolio for purchasing processes at a contracting authority, for the planning of resources needed to run processes and to verify the strategy for achieving the objectives of the local / regional / national development, where applicable.*

(2) The annual program of public procurement shall be based on the requirement reports sent by contracting authorities compartments and includes all public contracts / framework agreements that the contracting authority intends to award over the next year "

4. Conclusion

In this context, the strategy and program are in the competence of the deliberative authority. Aspects related to the management in the public procurement field are connected to the mayor as executive authority. Lack of correlation between the two wills of the two types of public authorities in public procurement can lead to chaos, weakening both the specialized apparatus of the respective administrative-territorial unit, as well as the contracting position of the mayor as executive authority. As such, even if it is more difficult, by an amendment to the Law no. 98/2016 to make clarifications on the determination of the "contracting authority" from the administrative-territorial units, one believes that, by amending GD No. 395/2016, terminology statements and specific boundaries can be provided in order to explain the legal profile of the contracting authority in the case of the administrative- territorial units.

Considering the raised issues, it is necessary, in the secondary legislation, namely the GD No. 395/2016, to bring some specifications in order to clarify aspects of local authority qualification as a contracting authority in a public contract, clarification that may be made by the Government, by amending and supplementing the above mentioned decision.

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