

# CONTROVERSIES AND PRACTICAL SOLUTIONS REGARDING THE AWARD OF CONTRACTS FOR THE DELEGATION OF THE MANAGEMENT OF ADMINISTRATION SERVICES OF THE PUBLIC AND PRIVATE DOMAIN OF THE TERRITORIAL ADMINISTRATIVE UNITS

Lawyer **Alina BILAN**<sup>1</sup>

## **Abstract**

*This study analyzes the teething troubles met by local public authorities when organizing and applying tender proceedings for the award of delegation contracts for the management of the administration services of public and private domain of the territorial administrative units in view of the Law no. 51/2006 regarding the public community utility services and aims to provide practical solutions for interpreting and applying conflicting provisions of the regulations in force. In order to support the local public authorities in their activity this study offers solutions for some legal issues as establishing the applicable law and the hierarchy of the regulations in force for organizing the tenders, determining the legal form of the delegation contract, identification of the applicable rules for selection criteria and for evaluation of the bidders` offers as well as identifying the review procedures available for bidders. The research methodology is based on both the deductive method comprising theoretical documentation, analysis and synthesis of the concerned legal issues and on the comparative method as this study provides practical answers consistent with the national legal system based on the European Commission`s Recommendations on the services of general interest.*

**Keywords:** territorial administrative units, public utility services, public domain, private domain.

**JEL Classification:** K23

## **1. Preliminary considerations**

With the amendment of Law no. 51/2006 on community public utility services by Law no. 204/2012 approving the Government Emergency Ordinance no. 13/2008, a number of difficulties arose concerning the implementation of special legislation on the organization and conduct of procedures for the delegation of management of the services for the administration of territorial administrative unit public and private domain, derived primarily from the amendment of article 30, of the current article 29, paragraph 12 of Law no. 51/2006, republished.

Before the amendment of Law no. 51/2006 by Law no. 204/2012, art. 30 paragraphs 11 and 12 provided for the community public utility services in article 1 paragraph 2 letter e) the sanitation of localities, f) the public lighting, g) the administration of public and private domain of territorial administrative units, that “*the procedure of awarding the contracts for delegating the management shall be determined under the provisions of the Government Emergency Ordinance no. 34/2006 regarding the award of public procurement contracts, public works concession and services concession contracts, approved with amendments and additions by Law no. 337/2006, as amended and supplemented*”.

For the services of water supply, sewerage and wastewater treatment; collection, sewerage and storm water discharges; generation, transmission, distribution and supply of heat in a centralized system for local public transport, the framework procedures for the delegation of management developed by ANRSC were used and are currently being used.

The great novelty brought by Law no. 204/2012 consisted of the following provisions that we shall present in the form of Law no. 51/2006 after republishing, namely:

Article 29 paragraph 11 “*The procedure for the award of public-private partnership contracts follows the legal regime provided by the Public-private Partnership Law no. 178/2010, as amended and supplemented.*”

Article 29 paragraph 12 “*The procedure for awarding the contract for delegating the management for the public utility services as defined in art. 1 paragraph (2) letters a) - g) is*

---

<sup>1</sup> Alina Bilan - Bucharest Bar, Romania, alinabilan@onvlaw.ro

*established under the framework procedure for the organization, conduct and award of contracts for delegating the management of public utility services developed by ANRSC and approved by Government decision. In the case of the local public transport service provided in article 1 paragraph (2) letter h), the award of management delegation contracts is based on framework standards developed by ANRSC according to the special law on the local public transport services.”*

Therefore, Law no. 51/2006 requires that the legal form took by a public service management delegation contract can be that of the concession contract or a PPP contract, and for public lighting, sanitation services and management services of the public and private domain of territorial administrative units, the compliance with the award procedures governed by GEO no. 34/2006 is no longer required but we note a “*framework procedure for the organization, conduct and award of contracts for the delegation of public utility service management, developed by ANRSC and approved by Government decision.*”

This study examines some of the problems encountered in the practice of public authorities who have tried or are trying to organize and carry out a procedure for the award of contracts for the delegation of management of territorial administrative unit public and private domain administration services.

Each public utility service listed by the Law no. 51/2006 benefits from custom rules provided by special laws<sup>2</sup>.

Equally, the services of management of public and private domain of territorial administrative units are governed by Ordinance no. 71/2002 on the organization and functioning of public services for the administration of local interest public and private domain, with subsequent amendments and additions, and by GD no. 955/2004 approving the framework regulations for the implementation of Government Ordinance no. 71/2002 on the organization and functioning of public services for the administration of local interest public and private domain.

GD no. 955/2004 approving the framework regulations for the implementation of GO no. 71/2002 on the organization and functioning of public services for the administration of local interest public and private domain includes in Appendix no. 2 the Framework regulation for delegating the management of public services for the administration of local interest public and private domain.

In the absence of the framework procedure for the organization, conduct and award of the contracts for the delegation of public utility service management developed by ANRSC<sup>3</sup> and approved by Government decision, it results that the delegation of management of the services for the administration of administrative territorial unit public and private domain is subject to the provisions of GD no. 955/2004.

It must be mentioned that, although in 2006, for the accession of Romania to the European Union, Law no. 51/2006 was enforced as a framework law for community public utility services as well as other special legislative acts<sup>4</sup> governing distinctly the community public utility services, GO no. 71/2002 is the only legislative act in matters of public utility services prior to the new legislative framework, which was not repealed, amended or revised and is not correlated with Law no. 51/2006 and with the European concepts and principles in the field of services of general interest<sup>5</sup>.

Given the legislative asymmetry between the provisions of GO no. 71/2002 and the Framework Law no. 51/2006, when organizing and carrying out a procedure for the award of the contracts of delegation of management of the services for the administration of public and private

---

<sup>2</sup> See Cătălin-Silviu Săraaru, *Cartea de contracte administrative. Modele. Comentarii. Explicații*, C.H. Beck Publishing House, Bucharest, 2013, p. 281-370.

<sup>3</sup> The framework procedure for the organization, conduct and award of delegation contracts by concession of the management of public utilities services developed by ANRSC is in the draft stage, in public debate, and can be found on the website of the regulating authority as of 08/26/2013.

<sup>4</sup> Law no. 241/2006 on the service of water supply and sewerage, Law no. 230/2006 on the public lighting service, Law no. 101/2006 on the locality sanitation service, Law no. 92/2007 on local public transport services, Law no. 325/2006 on the public heat supply service.

<sup>5</sup> O. Puie, *Serviciile de utilitate publică*, Universul Juridic Publishing House, Bucharest, 2012, p. 50

domain, public authorities face real practical difficulties arising from the application of these legislative acts that we will mention below.

## 2. Sedes materiae and the correlation of the provisions of the relevant legal provisions

Although there is a tendency to apply only the provisions of GO no. 71/2002 and of the Government Decision no. 955/2004 without taking into account the provisions of Law no. 51/2006, the provisions of the framework law on public utility services are fully applicable.

This results from the very text of art. 1 paragraphs (2) and (3) of the legislative act mentioned, which provides that *“for the purpose of this law, the community public utility services, hereinafter referred to as public utility services, are defined as the whole of the activities regulated by this law and by special laws (...)”* and *“the provisions of this law apply to the community public utility services defined in par. (2), established, organized and supplied / provided in villages, towns, cities, counties and the municipality of Bucharest, and, as appropriate, under the law, at the level of territorial administrative subdivisions of municipalities or the intercommunity development associations under the leadership, coordination, control and responsibility of local public administration authorities, if not agreed otherwise by special laws.”*

The tendency to apply only the provisions of GO no. 71/2002 and of the Government Decision no. 955/2004 is more open to question as the argument used is one sprang from Law 51/2006 itself, i.e. given that no express reference is made to the provisions of the Government Ordinance no. 34/2006 for the award procedure but to a framework procedure developed by ANRSC and such a procedure has not yet been established, then only the provisions of the Government Ordinance no. 71/2002 and of the Government Decision no. 955/2004 apply.

Clearly one cannot invoke the fact that an article of a law applies and the remaining content of the legislative act is not applicable.

The difficulty in applying the three legislative acts occurs when their provisions are in a conflict. To clarify which of the legislative acts has priority in application in such cases, we should consider the principle of hierarchy of legislative acts, the applicable rules for the implied or tacit repeal and the premise that a legislative act includes both substantive law and procedural law provisions. Analysing the three regulations, we refer to the following:

- (i) The Government Ordinance no. 71/2002 was approved by Law no. 3/2003 and is a special law, which results from the provisions of art. 1 paragraph 1 providing that the ordinance *“aims to regulate the establishment, organization, operation, financing, monitoring and control of the operation of public services for the administration of local interest public and private domain, hereinafter referred to as public and private domain management services.”*
- (ii) Law no. 51/2006 is a general law applicable to all community public utility services in its regulatory sphere, supplemented by special laws on the subject, as shown in the provisions of art. 1 paragraphs (2) and (3) aforesaid;
- (iii) The Framework Regulations for the application of the Government Ordinance no. 71/2002, which contain procedural provisions on the proceedings for the award of contracts for the delegation of services for the management of local interest public and private domain were approved by Government Decision, a legislative act with less legal enactment of a law, be it a general law;
- (iv) When having a legislative character, government decisions are issued to organize the law<sup>6</sup> and may not include primary legal regulations, and the failure to observe the hierarchy of normative acts is punishable by the penalty of non-applying the provisions of legislative acts with lower legal power when they contravene the rules contained in the superior legislative acts;

---

<sup>6</sup> According to article 108 paragraph (2) of the Constitution of Romania

- (v) The procedural provisions contained in the general regulations for the implementation of GO no. 71/2002 entered into force in 2004, when they were approved by GD no. 955/2004, while the procedural provisions of Law no. 51/2006 were applied later, and the procedural rules are directly applicable.

GO no. 71/2002 appeared on the grounds of Law no. 326/2001 regarding the public utility services. GD no. 955/2004 was issued for applying Ordinance no. 71/2002 and Law no. 326/2001. Law no. 51/2006 expressly repealed Law no. 326/2001.

We believe that in case of conflict between the provisions of Law no. 51/2006 and the provisions of GD no. 955/2004, the provisions of Law no. 51/2006 are prevalent; the latter repealed by default the contrary provisions of GD no. 955/2004, resulting from the fact that it is impossible to apply them simultaneously. An additional argument is that not only law no. 51/2006 expresses the latest will of the legislator but it is also an expression of the obligations undertaken by the Romanian state to accede to the European Union.

### 3. Practical difficulties arising out of the interpretation, application and correlation of the reference legal provisions

In practical terms, the major difficulties in a number of irreconcilable regulatory provisions such as:

- A) Contradictions on the types of procedures that can be chosen for the delegation of management

Thus, Chapter IV of Appendix no. 2 of GD no. 955/2004 entitled "*The procedure for delegation of management of the services for public and private domain administration*" mentions Section A on the procedures for awarding public procurement contracts (such as misleading terminological difference) that can be a) open public tender, b) restricted public tender c) direct negotiation, which may be: negotiation with only one source, or competitive negotiated procedure, d) design contest.

Article 29, paragraph 8 of Law no. 51/2006 provides that the procedures for awarding contracts for delegation of management of public utility services are: open public tender and direct negotiation.

In this case, we should note that the GD no. 955/2004 contradicts the provisions of the GO no. 71/2002 for the application of which they were enacted, namely the provisions of Article 13 paragraph 2, which provides that the management of public services for the administration of public and private domain can be achieved through: direct negotiation or open public tender.

- B) Contradiction on the number of bidders in an open tender procedure

According to article 31 paragraphs (1) and (4) of the Framework Regulation for delegating the management of public services for the administration of local interest public and private domain (Appendix no. 2 to the GD no. 955/2004), "*to conduct the open public tender procedure, the participation of at least two bidders is mandatory*" and "*to continue the process of tendering, after opening the outer envelopes, at least two tenders should meet the requirements of Art. 21*", namely to meet the conditions required by the contracting authority for the selection.

At the same time, art. 29, paragraph (9) second sentence of Law no. 51/2006 states that "*the tender procedure can be completed only if, after the publication of the invitation to tender, at least 3 offers were submitted and at least 3 bidders meet the eligibility criteria. If, after the publication of the notice, a minimum of 3 offers were not submitted and the eligibility criteria were not met by at least three bidders, the Delegator is required to cancel the procedure and organize a new tender (...)*".

We believe that as long as GO no. 71/2002 does not contain rules on the tender procedure, if the provisions of GD no. 955/2004 contain provisions contrary to law no. 51/2006, the latter will apply.

- C) Contradictions on the remedies at law which may be filed, the terms for filing, the competent courts

According to the provisions of article 51, paragraph 4 of Law no. 51/2006 “*The solving of disputes between administrative units or, where appropriate, between the intercommunity development associations with the public utility services as object of activity and operators in connection with the award, conclusion, performance, amendment and termination of the contracts for management delegation and of those concerning compensation shall be made according to Law no. 554/2004, as amended and supplemented. The request will be submitted to the administrative and litigation section of the tribunal under whose territorial jurisdiction is located the head office of the operator.*”

On the other hand, the provisions of articles 40-42 of Appendix 2 of the GD no. 955/2004 under Section G entitled *Complaints* provide as follows:

Article 40 (1) “*Within 5 calendar days of receipt of the copy of the minutes of the tender evaluation, the bidders may file complaints on how the legal provisions governing the concession procedure by open public tender were met, at the head office of the competent local public administration authorities or at the place of tender submission, according to the tender notice.*

(2) *Within 10 calendar days of receiving the complaint, the local public administration authority is required to solve the complaint and communicate the answer to the complainant.*”

Article 41 “*If the complaint is founded, the local public administration authority shall order corrective measures for the amendment, termination, revocation or cancellation to be made, and the decision will be notified to all bidders.*”

Article 42 “*In case of a negative answer to the complaint filed by the unsuccessful bidder, the bidder may address the court in the jurisdiction of which the head office of the local public administration authority is located.*”

Law no. 51/2006 sends to the Law on administrative disputes regarding the disputes on the award of management delegation contracts, namely the disputes regarding all documents issued by the Delegator in the award procedure – more specifically the business operators will address the prior complaint within the 30-day time interval and then with action for annulment to the administrative litigation court within the area of jurisdiction where the operator’s head office is located.

On the other hand, however, the provisions of GD no. 955/2006 set other deadlines for appeal, which in terms of administrative litigation is also a prior complaint, namely of 5 days as of receipt of the minutes of evaluation, the local authority having available only 10 days to solve the complaint, compared to the provisions of law no. 554/2004 providing a period of 30 days to respond<sup>7</sup>. GD no. 955/2004 shall designate the competent court as the court in the jurisdiction of which the head office of the competent local public administration authority is located.

Questions that arise are: what deadlines apply, which court has jurisdiction to hear such a dispute or in some cases, is the National Council for Solving Complaints competent to hear appeals against acts of local public authorities issued within the proceedings for the delegation of management of public and private domain administration services?

Given the reasoning on the prevalence of Law no. 51/2006 where the GD no. 955/2004 provides otherwise, the provisions of Law no. 51/2006 referring to the provisions of the administrative litigation law regarding the competent court shall apply.

In this case, it is arguable that the provisions of Art. 67 of Law no. 24/2000 regarding the legislative technical regulations referring to implicit legislative events<sup>8</sup> and the fact that the implicit

---

<sup>7</sup> Article 2, paragraph 1, letter h) of Law no. 554/2004 regarding the administrative litigation provides, in the definition of the failure to solve an application within the legal term – „the action of not replying to the applicant within 30 days as of the registration of the application, if no other deadline is provided by the law”.

<sup>8</sup> Art. 67 of Law 24/2000 provides that „*The implicit legislative events (1) In special cases, where upon the drafting and enforcing of a regulation it was not possible to identify all contrary regulations, we can assume that they were the subject of their implicit amendment, supplementing or repeal.*

(2) *Among its duties, the Legislative Council is required to identify all legal provisions that have suffered the implicit legislative events and propose to the Parliament and the Government, respectively, the measures required for their express amending, supplementing or repealing.*

(3) *The implicit legislative events are not recognized in case of special legislative acts the provisions of which cannot be considered as amended, supplemented or repealed by the general regulation of the matters, unless this is expressly provided.*”

repeal of a special law by a general law is not recognized, as the repeal must always be made expressly<sup>9</sup> as GD no. 955/2006 is a lower hierarchical legislative act compared to Law no. 51/2006.

Therefore, the local public authorities applying these provisions must take into account the principles of *Lex posterior derogat prior* and *Lex superior derogat inferior*<sup>10</sup>, the court in the jurisdiction of which the head office of the local public administration authority is located not being thus competent to solve the disputes, but the section of administrative litigation of the court in the territorial jurisdiction of which the head office of the operator is located.

Regarding the term of settlement of complaints against the minutes of evaluation of tenders by local public authorities, the one provided by Government Decision no. 955/2006, namely 10 calendar days will be applied, as the Law no. 554/2004 establishes the statutory period of 30 days for transmitting a reply, if the special law does not provide otherwise.

GD no. 955/2004 provides a remedy for complaint regarding only the minutes of evaluation of the tenders of business operators, but obviously any document issued by the local public authority in a procedure for delegation of management may be appealed under the Administrative Litigation Act.

In practice, we met cases where although the local public authorities had implemented procedures for the delegation of management of public and private domain administration services, the business operators who considered themselves injured in their rights by the authorities addressed NCSC with complaints. The Council is not competent to solve such complaints given that, under the provisions of Government Emergency Ordinance no. 34/2006, its area of competence is expressly bounded by the provisions of Article 255 paragraph 5, which provides that “the solving of appeals concerning the award of contracts for the delegation of management of a community public utility service for which the specific legislation refers to the application of this emergency ordinance” is made in compliance with the chapter on complaints.

NCSC is not competent to solve the complaints filed against the procedure for delegating the management of public and private domain administration services. In the absence of provisions for the solving of disputes of GO no. 71/2002, the provisions of the framework law referring to the administrative litigation law will be applied.

#### 4. Other controversial issues arising from the application of GD no. 955/2004

Article 21 of the Framework Regulation of 15 June 2004 for the delegation of management of the public services for the administration of local interest public and private domain (Appendix no. 2 GD. 955/2004), which provides the following: “*In the case of partnership between two or more operators wishing to contract the public and private domain administration service, each partner is bound to fulfil the conditions required by the contracting authority for selection purposes*”, namely the eligibility criteria laid down in article 20 of the same law.

In a literal interpretation, we can conclude that every member of a partnership should meet all the criteria mentioned in the tender documentation on the economic and financial situation, the technical and professional capacity, the quality of provision of the public and private administration service, the prior execution of similar services, and any other information that the contracting authority considered necessary to build the technical and financial capacity of operators participating in the procedure.

Although the provisions of art. 21 of Appendix no. 2 of GD no. 955/2004 are apparently clear, if the literal interpretation of the text is accepted, the very practical reason of a partnership

<sup>9</sup> In this case, the *specialia generalibus derogant* principle applies.

<sup>10</sup> „By virtue of these principles, when there are two contradictory legislative texts issued on different dates or levels, the latest text or the one with superior legal power is in force and the prior one or the one with inferior legal power is considered repealed. In such cases, we assume that the latest will of the legislator is the valid one, including the intention to repeal the contrary provisions”. See R.D: Popescu, A. Gheorghe, *Producerea efectelor juridice ale actelor normative*, Revista Transilvană de Științe Administrative no. 2/2012, p. 117

between operators would disappear, as long as each one would have wanted to meet all the criteria for qualification and selection, being thus able to participate individually in the award procedure.

Thus, we consider that the text cannot be applied literally because such application would be contrary to article 30, paragraph 4 of Law no. 51/2006 which states that the newly established operators may be admitted in the procedure for the award of a management delegation contract on the same terms as the existing companies, as well as to art. 7, paragraph 2, letter i) of the same law which provides that the organization, operation and management of public utility services must ensure the compliance with the principles of market economy, a competitive environment, the restriction and regulation of the monopoly areas.

In addition, since the public and private domain administration services are community public utility services, being part of the services of general interest, the general principles of equal treatment, competition and non-discrimination are applicable to them, underlying the provisions of the Treaty of Lisbon on the Functioning of the European Union, Article 106 of TFEU protocol no. 26 on the services of general interest and article 36 of the Charter of Fundamental Rights<sup>11</sup>.

Another issue that raises concern is whether the procedure for delegating the management of public and private domain administration services meets the condition of transparency, given that GD no. 955/2004 requires the publication of the tender notice only in the Official Journal and in widely circulated newspapers.

Article 10 of Appendix 2 to GD no. 955/2006 provides that in the case of an open public tender procedure, it is required to publish the public tender notice in the Official Journal of Romania, Part VI, in a national newspaper, and on the website, "*which will mandatorily contain the following: a) the name and address of the public administration authority tendering the service, b) the public service referred to in the delegation of management and the duration of the delegation, c) the place where it can be purchased, the surcharge, the tender book d) the objectives proposed by the public administration authority e) the documents required from bidders to demonstrate the technical and managerial experience in managing similar systems, the creditworthiness and financial capability to meet the specific requirements of the tender book, including the criminal record of the person who is a director of the operator f) the date and place of receipt of tenders; g) the duration for which the bidders remain employed by the terms of their tenders h) the date, time and place for opening the tenders.*"

Although the text of Appendix 2 to GD no. 955/2006 provides only the publishing of the tender notice in national publications, this form of advertising does not provide transparency for service operators in the European Union. A solution that fully meets the principle of transparency is reached by publishing the tender notice in the Official Journal of the European Union.

Furthermore, the Commission underlined in its Communication of 2011 on services of general interest in Europe<sup>12</sup> that the Communication contains a general interpretation of the principles of transparency, equal treatment and non-discrimination and that it recommends its use in the award of services concession contracts<sup>13</sup>, as the services of general interest with general economic character (such as community public utility services) are likely to generate cross-border interest.

The European Commission pointed out that in compliance with the case law of the European Court of Justice, the principles of transparency, equal treatment and non-discrimination require the public authority to announce in a proper manner the intention to award a concession contract so that

---

<sup>11</sup> The communication of the Commission to the European Parliament, The Council, the Economic and Social Committee and the Committee of the Regions, *A Quality Framework for Services of General Interest in Europe, final Com (2011) 900*, p. 2, available at the address: [http://ec.europa.eu/services\\_general\\_interest/docs/comm\\_quality\\_framework\\_en.pdf](http://ec.europa.eu/services_general_interest/docs/comm_quality_framework_en.pdf)

<sup>12</sup> *Idem*, p. 91

<sup>13</sup> In this communication we refer to, the Commission underlined that the services of general interest with economic character are subject to the provisions governing public procurement, regulated by 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 and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, when a public authority intends to award a service contract. While these directives do not apply to service concessions, the Commission held that public authorities must comply with the general principles underlying the TFEU.

all service operators in the Union European have a real opportunity to participate with a tender in the procedure.

The issues addressed in this study are some of the real problems caused by the lack of legislative correlation and of parallel regulations concerning the award of a concession contract. On the one hand, there are the provisions of GO no. 34/2006 which, in addition to the implementation of European directives governing public procurement, also govern the concession of services and, on the other hand, there are old regulations which no longer correspond to the latest will of the Romanian legislator and European standards that include different procedures for the award of management delegation contracts by concession.

The mission of public authorities when deciding the delegation of management of public and private domain administration services to private operators is thus a difficult one, requiring an interpretation of legislative acts containing conflicting provisions, while paying close attention to observing the principles enshrined in the Treaty on the Functioning of the European Union.

## Bibliography

1. Cătălin-Silviu Săraru, *Cartea de contracte administrative. Modele. Comentarii. Explicații*, C.H. Beck Publishing House, Bucharest, 2013
2. O. Puie, *Serviciile de utilitate publică*, Universul Juridic Publishing House, Bucharest, 2012
3. R.D: Popescu, A. Gheorghe, *Producerea efectelor juridice ale actelor normative*, Revista Transilvană de Științe Administrative no. 2/2012,
4. The communication of the Commission to the European Parliament, The Council, the Economic and Social Committee and the Committee of the Regions, *A Quality Framework for Services of General Interest in Europe, final Com (2011) 900*, available at the address: [http://ec.europa.eu/services\\_general\\_interest/docs/comm\\_quality\\_framework\\_en.pdf](http://ec.europa.eu/services_general_interest/docs/comm_quality_framework_en.pdf)