

The concession contract of public goods

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Abstract

The paper aims at presenting the concession contract of public goods - the concept, legislative regulations, object and its particularities. It is a common contract in the public administration, therefore is important to be aware of both the objects and parts of the contract and how it is awarded. The royalty obtained from the contracts is an income for the state budget.

Keywords: concession contract, royalty, concessionaire, grantee, auction, free negotiating

Concept and features of the concession contract of public goods

The legal document that governs the concession of public goods is the Government Emergency Ordinance no. 54 of 28th of June 2006 on the concession of public assets, approved with amendments by Law no. 22/2007. The need to adopt this regulation results from the full compatibility of the national legislation on concessions with UE practice regulations.

According to GEO no. 54/2006 regarding the concession of public assets, art.1 para.2, the concession of public assets, called concession contract, is the contract concluded in writing by a public authority called the grantor; for a specified period through which a person named concessionaire shall act at the risk and responsibility, right and obligation for the exploitation of public property in exchange for a fee.

According to art.2 of Ordinance no. 54/2006, the provisions of this regulation shall not apply to contracts covered by the Government Emergency Ordinance no. 34/2006 regarding the award of public

procurement contracts, public works concession contracts and services concession. In a contract award which falls under the Emergency Ordinance no. 34/2006, the execution means necessarily the exploitation of public property, the right to exploit the good that is transmitted within and the procedure for the award of the contract in question.

In the legal doctrine, concession was defined as a public service management through which a public authority (the grantor) charges an individual (citizen or company) through an agreement with it to perform public service at the expense and risk of the latter, who had received compensation from fees charged to users (beneficiaries).

The concession contract marked its place in public law as an administrative contract or an embodiment of the field management of public goods, public services or public works. The legal institution of public law - administrative law has been and is the subject of study, though an analysis is justified to know the dimensions and implications of the administrative contracts in the society and, on this basis, to establish the effective actions and measures used by this type of contracts, in administration.

The concession contract is typical for the administrative law, and has no correspondent or similarity in the private law. The concessions can be only administrative, as they are not restricted to any lease of goods or services or to the sale of goods, but have a different focus: the obligation undertaken by the operator to operate an asset, an activity or a public service through their technical and financial means, the risk of the remuneration received in form of taxes.

As noted, the provisions of the concession agreement are contained in the Government Emergency Ordinance no. 54/2006 on the regime of concessions of public assets, approved with amendments by Law no. 22/2007 and Government Decision no. 168/2007 approving the Methodological Norms for the application of the Governments Emergency Ordinance no. 54/2006 regarding the concession of public assets.

Characteristics of the concession contract, resulting from the legal definition, are:

- is a contract for consideration, as each side seeks an advantage from the contract, the grantor giving a public service and getting a fee, while the dealer seeks the profit;

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- one of the parties – the grantor, is always a public authority, as only this can have public goods and the other part, namely the concessionaire, is an individual who may be a natural person or a legal person of private law;
- the contract is "intuitu personae" as, in view of the concessionaire person, he may be replaced by another person without the consent of grantor;
- it is a solemn agreement as written form is required by law as a condition "ad validitatem" of the contract;
- it has a fixed term of not more than 49 years as a good or a public heritage can not be definitively unavailable;
- the contract is commutative, i.e. the extent of each party benefits is uncertain and can be considered even when concluding the contract;
- it is a contract with successive execution in the form of further benefits.

According to Art. 13 of the Government Ordinance no. 54/2006, the principles underlying the award of concession contracts are:

- Transparency - providing information to all those interested in the procedure for awarding the concession;
- Equal treatment - application in a non-discriminatory manner by the public authority of the criteria for awarding the concession;
- Proportionality - requires that any public authority established to be necessary and appropriate to the nature of the contract;
- Discrimination - applying the same rules to the public authority, irrespective of the nationality of the procedure for awarding the concession, subject to the conditions contained in agreements and conventions to which Romania is a party;
- Free competition - the public authority provides that any conditions for participating in the tender procedure are allowed to become a concessionaire under the law of international conventions and agreements to which Romania is a party.

Concession contract is concluded in accordance with the Romanian law, regardless of nationality or citizenship lessee, for a period not to exceed 49 years from the date of signing. The concession period is determined by the grantor. Concession contract can be extended for a period equal to more than half of its original length, by mutual agreement of the parties. Another concession is prohibited, except as expressly provided by GEO no. 54/2006.

Object and parties of the concession contract

According to the regulations in this field, the assets/subject of a concession contract is public property or administrative units, according to the Constitution and legal regulations on public property.

In this respect there are art. 136 para. 4 of the Constitution revised in 2003, under which public ownership and state administration may be exercised either by putting the property in the management of autonomous administrations or public institutions, either through leasing or renting them.

Obtaining the concession fee revenue for the state budget and local budgets is appropriate. The calculation and payment of the fee is determined by the ministries or other bodies of central government or by local authorities. The fee is the amount of money that the operator pays the grantor in exchange for the right to operate a public good. It is a part of the profits from the grantee and is determined by the parties when the contract is drawn. The calculation and how to pay the fee are set by the grantor. According to art.4. (1) of GEO no. 54/2006, the concession fee revenue for the state budget and local budgets is obtained according to the property subject to concession.

According to art.5 of GEO. no. 54/2006, grantor can be a State, a county, a town or village:

- Ministries or other bodies of central public administration of public property assets;
- County councils, local councils, the General Council of Bucharest Municipality or local public institutions from counties, towns or villages.

In the quality of concessionaire can be any natural or legal person, Romanian or a foreigner (art. 6 of GEO no. 54/2006). To any concession contract concessionaire, a foreign legal entity, will be applied the Romanian law, motivated by the quality of public law corporation - as grantor, and the fact that the concession is only in the public state property, county, town or village, or public service activities of national or local interest. In other words, the parties of these contracts are, in fact, the state respectively the administrative units that are represented by competent public authorities. Therefore, the conclusion of concession contracts lies on the liability of public authorities undertaken by the state and respectively administrative units. Moreover,

local and county councils, having legal personality, do not respond in patrimonial disputes arising from the conclusion or performance of the concession contract. The plaintiff is forced to sue administrative-territorial unit in whose name the contract was concluded to be required to pay compensation in the event of court action admission. This conclusion applies as only administrative units have legal personality, have their own assets and have full legal capacity

Accordingly, parties to a dispute arising from a concession contract will be the Romanian state through public authority which acts as conceding the disputed contract, the grantor is the representative (agent)'s legal status. In this sense is art.25. (1) of Decree no. 31/1954, under which the state is a legal entity able to participate directly in its own name as the subject of rights and obligations.

The State participates in civil legal relations through the Ministry of Economy and Finance, but public legal body is the public authority under special laws, such as the legal relations arising from the concession. Therefore, in disputes regarding ownership of property in the public domain, the state is represented by the Ministry of Economy and Finance and by administrative units of county and local councils (who give written mandate, in each case, to Chairman of the Board - the county mayor). In disputes arising from the conclusion and implementation of concession contracts, the state and administrative-territorial units are represented by public authorities who granted these contracts.

Provisions of art.5.1 of GEO no. 54/2006, which refers to the quality of conceding administrative concession contracts should be reported and correlated with art.12 of Law no. 213/1998 on public property and its legal status. Thus, to conclude the concession of an asset, the grantor must be the owner of the property, based on the decision of the Government, the county council or local board, as appropriate.

This conclusion results from art.12. para. 3 of Law no. 213/1998, under which the owner of the administration may possess, use and dispose of its goods, giving the instrument by which the property was given in trust.

Although public property can be managed as autonomous administrations and authorities (public institutions), only the latter can act as the grantor, i.e. concession may be contracted according to art.5. 1 of GEO no. 54/2006. This administrative measure is necessary and

logical, as there may be exercised at the same time, the attributes of ownership of property by two people (a body, as the holder of the right of administration and a private legal person, as operator).

To conclude a concession contract is necessary to have full legal capacity to both parties. Grantor fulfills this condition because, by law, both state and administrative-territorial units have legal capacity. To be concessionaire, individual must be adult and not have altered judgment; the legal entity must be established legally and have a capacity to use the specialized object of the concession.

Conditions and the effects of closure of the concession contract

According to the legal framework, concession grant takes place at the initiative or following a proposal endorsed by a public authority. Concession proposal must be based on economic, financial, social and environmental issues.

Concession initiative must be based on a study opportunity, which includes the following main elements:

- Describing and identifying the property to be leased;
- Reasons of an economic, financial, social and environmental point of view, justifying the concession;
- The minimum fee;
- The procedure used to award the concession contract and the rationale for selection procedure;
- The estimated time of the concession;
- Predictable terms for the concession procedure;
- The approval of the Central State Office for Special Affairs and the General Staff of the concession object classification in national defense infrastructure, as appropriate;
- The approval of the management structure/custodian protected area, if the concessioned property is located within a protected natural area or territorial authority responsible for the environmental protection.

The grantor must, within 30 days of the acquisition of the concession proposal made by the person concerned, to proceed to the trial preparation of the study of opportunity.

In cases where the public authority does not have the organizational and technical capacity to develop opportunity studies, he can use the services of specialized consultants

To the extent that, after compiling, the opportunity study indicates that the property will be subject to exploitation by concession, necessarily involved in the execution of works and/or provision of services, the grantor shall, depending on the purpose and activities, to qualify the nature of the contract according to GEO no. 34/2006.

Opportunity study is approved by the grantor and the lease is approved by a decision of the Government, local councils, county or Bucharest General Council, as appropriate. Under opportunity study, grantor of the concession develops specifications

According to art. 14 of O.U.G. no. 54/2006, the procedures for the award of the concession contract are:

- Auction - the procedure in which a natural or legal person shall be entitled to submit a tender (art.14, lit. A, amended by Law no. 22/2007);
- Direct negotiation - the process through which the grantor negotiates contract terms, including royalty, with one or more participants in the procedure for awarding the concession.

The grantor is obliged to award the concession contract, usually by auction procedure. Notwithstanding other provisions of GEO no. 54/2006, the grantor is required to ensure the protection of that information communicated to the persons or bodies in confidence, to the extent that, objectively, the relevant disclosure would prejudice the legitimate interests of those persons, especially regarding trade secrets and intellectual property.

The grantor shall specify in the tender documents any requirements, criteria, rules and other information needed to provide comprehensive information bidder, fair and explicit on how to apply the award procedure (Article 17 of Ordinance no. 54/2006). The grantor has the right to impose the tender documents, to the extent that they are compatible with the contract, special conditions of contract fulfillment which seeks social effects or relating to the environment and promoting sustainable development. The person concerned has the right to submit a request for participation in the award of the concession contract.

The grantor shall provide tender documents by the person concerned, who shall submit a request to do so. He has the right to choose one of the following ways to obtain tender documents from the stakeholders:

- Ensure direct access, unrestricted and fully electronic, the content of tender documentation;

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- Providing interested person who has submitted a request for a copy of this tender documentation, in paper and/or on magnetic media.

Regarding auction, the grantor shall publish the notice of the procedure in the Official Gazette of Romania, Part VI, in a national daily newspaper and in one locally circulation newspaper. Information that must be included in the tender notice is provided in the terms of this law. Tender notice is sent for publication at least 20 calendar days before the deadline for submission of tenders. If the person concerned has submitted a request for a copy of the tender documentation, in paper and/or on magnetic media, the grantor's obligation is to make tender documentation available to the person concerned as soon as possible, within a period not to exceed 4 working days of receiving the request.

The interested party has the obligation to make reasonable efforts to comply with the statutory period and not to lead to a situation where the tender documentation is made available at more than 4 working days before the deadline for submission tenders.

However, the person concerned has the right to request clarifications on the tender documentation. In this respect, the grantor is required to respond clearly, completely and unambiguously to any clarification required, within a period not to exceed 4 working days of receipt of such request. Also, the grantor is required to provide the answers accompanied by questions related to all interested persons who have obtained, under present law, the tender documentation, taking measures to conceal the identity of the requested clarifications.

The grantor has the obligation to answer at any clarification send at least 4 working days before the deadline for submission of tenders. If the clarification request was not submitted in time, thus grantor is unable to meet the deadline set by law.

Tender procedure may take place only if the publication of the notice is followed by at least 3 offers. If, after publication of the notice there are not at least three valid offers, the grantor is obliged to cancel the procedure and organize a new tender.

With regard to the direct negotiation the law states that, according to art. 26 of GEO no. 54/29006, the grantor has the right to apply the negotiation procedure only if, after a repeated tender procedure there was not made at least 3 offers available. Direct

negotiation notice is sent for publication at least 10 calendar days before the deadline for submission of tenders.

Rules on offer are set out in art. 32-34 of GEO. 54/2006, as follows:

- The tenderer is required to prepare the offer in accordance with tender documents;
- The tenderer has the obligation to submit the tender in accordance with the detailed procedures;
- Binding offer, in terms of content, the entire period of validity established by conceding;
- The person concerned has the obligation to submit the tender at the address and by the deadline for submission set out in the notice procedure.

Delivery transmission risks, including major force is direct on the person concerned. Offer submitted to an address other than the grantor established or after the deadline for submission shall be returned unopened. Tenders content must remain confidential until the date set for the opening thereof, the grantor will take note of the content of tenders only after that date.

According to art.36 of GEO no. 54/2006, the criteria for awarding the concession contract is the highest level of fee. The grantor may take into account other criteria such as: the economic and financial capacity of tenderers; the environmental protection; the specific conditions resulting from the nature of the property leased.

The grantor has the obligation to determine the winning bid based on the criteria/award criteria set out in the tender documentation. During the implementation of the tender procedure, the grantor has the right to request clarification and, if necessary, amendments to the documents submitted by bidders, in order to demonstrate compliance with the requirements. The grantor is not entitled to use the requested clarifications or additions to result in a clear benefit in favor of a bidder. He must conclude a concession contract with the bidder whose bid has been declared winner.

However, the grantor shall inform tenderers on the decisions regarding the award of the concession contract in writing with return receipt requested, not later than in 3 working days from the issuance thereof. In its Communication the grantor has the obligation to inform the bidder/bidders/winners on acceptance of the offer/tenders submitted,

and must inform tenderers who have been rejected or whose tender was declared winner on the reasons the decision is based on.

The grantor is entitled to cancel the procedure for awarding the concession, if this decision is before the transmission of the communication regarding the result of the tendering procedure and, anyway, before concluding the contract, only in the conditions provided by law.

Failure to conclude a concession contract within 20 days from the expiration date provided by law may result in payment of damages by the party at fault. Tenderer's refusal to conclude the concession contract may entail payment of damages.

According to art.51 of GEO no. 54/2006, the concession contract includes clauses in the specifications and provisions agreed by the contracting parties, in addition to the specification and objectives set out in the specification.

The concession contract shall prohibit the grantee to create another concession, in whole or in part, to another subject of the concession, unless the sub-concessioning is explicitly allowed.

The concession contract will include clauses on the division of responsibilities between the grantor to the grantee.

The concession contract must separately specify the categories of goods to be used by the concessionaire in running the concession, namely: return goods incumbent of right, free and unencumbered upon termination of the concession grantor; own property upon termination of the lease that remains the property of the concessionaire.

The grantor may change unilaterally the regulations of the concession contract, with prior notice to the lessee, for exceptional reasons related to national or local interest, as appropriate. If unilateral modification to the contract brings injury, the concessionaire is entitled to receive fair compensation without delay. In case of disagreement between the grantor and the grantee on the amount of compensation, it will be determined by the competent court. This disagreement cannot, under any circumstances, allow the concessionaire not to perform its contractual obligations.

Contractual relationship between the grantor and the operator is based on the financial balance of the concession of rights which are granted to the concessionaire and the obligations imposed. The

concessionaire will be required to bear the new burdens related to the implementation of its obligations, if such increase results from:

- A measure taken by a public authority;
- A case of major force or unforeseeable circumstances.

Concessionaire must perform his obligations under the terms and conditions set out in the concession contract and in accordance with the legal provisions specific to the leased asset. The grantor has the right to check in the period of the contract how its terms are met by the concessionaire. The concessionaire must, not later than 90 days from the date of signing the concession, deposit as security, a fixed amount representing a share of the amount of obligation to the grantor due to the first year of operation. From this amount is deducted, if any, penalties and other amounts owed by the grantor in the concession contract. Concessionaire can have collateral debt securities, which will be put in pledge with the grantor.

A concession is finished in the following situations:

- Within the time established in the concession contract;
- For non-contractual obligations of the concessionaire, the termination by the grantor with payment of compensation from the lessee;
- For non-contractual obligations of the grantor, the termination of the concession with the payment of compensation to the concessionaire;
- The appearance of a case of major force, the disappearance of the leased asset or the inability of the concessionaire to exploit targets, by renunciation, without payment of compensations.

At the end of the concession contract, the concessionaire must return, with full title and free of any charge, the property leased. The concession contract will be drawn in Romanian, in two copies, one for each party. If the tenderer is of another nationality than a Romanian one and if the parties consider necessary, the concession contract will be concluded in four copies, two in Romanian and two in another language chosen by them. In this case, each party will have a copy in Romanian and one copy in the foreign language in which the contract was written. In case of dispute, the Romanian copies of the contract prevail.

Bibliography

Manda, C., Manda, C. C. (2007). Dreptul colectivităților locale, ediția a III-a revăzută și adăugită, Editura Lumina Lex, București

Legea nr. 22 din 11 ianuarie 2007 pentru aprobarea Ordonanței de urgență a Guvernului nr. 54/2006 privind regimul contractelor de concesiune de bunuri proprietate publică, publicată în Monitorul Oficial nr. 35 din data de 18 ianuarie 2007.

Legea nr. 219/1998 privind regimul concesiunilor, cu modificările și completările ulterioare - reprezenta o modalitate de eludare a prevederilor naționale armonizate cu cele comunitare

Ordonanța de Urgență nr. 34 din 19 aprilie 2006 privind atribuirea contractelor de achiziție publică, a contractelor de concesiune de lucrări publice și a contractelor de concesiune de servicii, publicată în Monitorul Oficial nr. 418 din 15 mai 2006.

Hotărârea Guvernului nr. 168/2007 pentru aprobarea Normelor metodologice de aplicare a Ordonanței de Urgență a Guvernului nr. 54/2006 privind regimul contractelor de concesiune de bunuri proprietate publică, publicată în Monitorul Oficial nr. 146 din data de 28.02.2007

Ordonanța de urgență nr. 54/2006 privind regimul contractelor de concesiune de bunuri proprietate publică, publicată în Monitorul Oficial nr. 146 din 28 februarie 2007

Legea administrației publice locale nr. 215/2001, cu modificările și completările ulterioare

Legea nr. 213/1998 privind proprietatea publică și regimul juridic al acesteia