Legal Nature of the Procedures for the Award of Public Procurement Contracts

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Summary: The article has as its subject the legal nature of the procedures for the award of public procurement contracts from the perspective of administrative law studies. The activity related to awarding public procurement is part of state government. The awarding of public procurement is a kind of administrative legal relation between subject – contracting authority and subject – economic operator. It is included in the broad notion of state government. It arises on the basis of administrative legal norm, pointed out in Public Procurement Law. The legal fact is the administrative act which determines the subjects who manage public funds. The main task of the procedures is for the contracting authorities, who function on behalf of the state in governing the public funds, to determine the subject – economic operator as a party of a future public contract. The procedures end with an administrative act which creates the statute of subject – economic operator.

Key words: awarding public procurement contracts, state government, administrative legal relation, contracting authorities, economic operator.

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The amendments[1] to the existing Public Procurement Law (PPL), in effect since 1 October 2004, restored the administrative law approach in the regulation of the public procurement award procedure.

The public procurement regime is an exception to the economic liberalism principle proclaimed in Article 19, paragraph 1 of the Constitution of the Republic of Bulgaria (CRB)[2] and to the principle of contractual autonomy set forth in Article 9 of the Law on Obligations and Contracts (LOA)[3], as it restricts the contractual freedom of public procurement contracting authorities to choose their contractors[4].

Article 11 of PPL proclaims the acts, which public procurement contracting authorities adopt in respect of public procurement award procedures, as independent administrative acts.

1 See LASPPL, prom., OJ, No. 37/5 May 2006, in effect since 1 July 2006.
2 Prom., OJ, No. 56/13 July 1991, as amm. and suppl.
3 Prom., OJ, No. 275/22 November 1950, as amm. and suppl.
4 Рачев, Ф., Ил. Горанова, Облигационно договорно право, Облигации и договори, 2005, p. 6-7

1. Public Procurement Legal Relationship – General Characteristics

It is not sufficient to point out that the public procurement procedure is a legal relationship. The particular type of legal relationship and legal characteristics are to be specified as well. A starting point in determining the type of legal relationship is the agents involved.

The public procurement contracting authority has its own specific features, which distinguish it form all other bodies governed by private law. Not only government bodies, but also other bodies governed by public law, such as traders, can be contracting authorities; they share a common feature: they are all budget spending units; that is, they are entitled to spend funds, which they do not themselves own, but are public funds. These include budget and non-budgetary funds, as well as funds relating to the performance of activities in the public interest, specified in the law (argument in Article 1 of PPL). These are public funds spent by government in its capacity of a budget- or property-owner. The government as a body, governed by public law, owns as property different legal instruments to participate in the free-market operations and privatization, and encourage market activities, which are essential in meeting public interests and the interests of the general public as a sovereign. It is in this respect that the government uses the public procurement system as a tool. It employs public procurement when a respective public good is to be purchased with public funds. The public procurement system is the legal form in which the government performs one of its major functions, namely providing for and satisfying public interests. The public procurement system is a historically verified tool enabling the government to guarantee the protection of public interests, which is one of its major goals. To be able to satisfy public needs, government also has to establish the necessary legal and regulatory framework to fulfill this task. In other words this presupposes creating the legal mechanism of fiscal policy.

Fiscal management is an authoritative activity. Powers of authority and control are exercised in implementing this activity, authoritative acts are issued and public law effects occur. The executive branch of government, more specifically the Council of ministers and the finance minister in particular, is entrusted with fiscal policy management. In the meaning of Article 106 of CRB, the Council of Ministers administers the execution of the state budget, whereas the minister of finance is the one who tables the draft budget before the National Assembly, since he or she represents the government as budget/public funds.

The executive branch of government, more specifically the Council of ministers and the finance minister in particular, prepares the draft budget and presents it in the National Assembly. This is specified in Art. 19, art. 20, para 2 and subs. of the Law on the Structure of the State Budget (LSSB)[5].

The minister of finance prepares the final draft of the state budget and presents it to the Council of Ministers together with a report stating the motives. The Council of Ministers discusses the draft state budget and, where necessary, makes amendments therein. The Council of Ministers as the supreme executive branch of government, tables the draft budget before the National Assembly within a two-month period before the start of the fiscal year. The National Assembly passes the final version of the state budget.

In other words, it is the executive branch of government that manages the fiscal policy;

[5] Prom., OJ, No. 67/6 August 1996, as amm. and suppl.

whether or not this management is subject to the agreement with the World Bank, it represents an authoritative activity.

In view of the allocation functions of the budget, the management of the specific budgetary items is provided by bodies that are first and second level spending units of budget loans; these are determined by the Council of Ministers and for lower levels – by the minister of finance.

The budget as a general non-regulatory act[6] creates an obligation for the executive branch of government, and the Council of Ministers in particular, to perform the management of the fiscal policy for the respective year. The Council of Ministers, or the minister of finance, implement this budget-related legislative obligation by developing new administrative acts, whereby the first and second level spending units of budget loans are formed.

Such administrative acts essentially create the power to delegate authority. The former empower the first level budget spending units, the second level and other spending units to manage the budget. By virtue of this delegation of powers in spending public funds, i.e. in effecting fiscal policy management, they represent the government. By virtue of the division of labor, it is impossible that the Council of Ministers appear in person everywhere and manage the budget; hence the functions of budget spending, performed by the first and second level spending units, enable it to manage the budget by establishing specific legal relationships. The Council of Ministers empowers these units to represent the government as owner of these funds in the specific legal relationships they enter in with the other bodies. These units are delegated the powers in compliance with the general non-regulatory act and by the subsequent administrative acts. This delegation of powers is manifested in creating "spending right" in favor of these units, by virtue of the Council of Ministers' decrees or the ones issued by the minister of finance. The term "spending right" is regarded as a conditional and working one. We assign meaning to it, so that the spending units of budget loans can dispose of the latter only subject to the effective legislation and procedures, whereas the government reserves its rights, as owner, to exercise control and sanction the spending units in case they fail to comply with the fiscal policy-related legal requirements.

In fact, the Council of Ministers and the minister of finance, entrusted with the state fiscal activity, act as a key agent in this relationship. Through the respective administrative acts they form the loan spending units, who in the field of public procurement act as contracting authorities that own and spend public funds. In other words, the specific agent in the public procurement legal relationship can be a budget spending unit. In a more general aspect however, this is the Council of Ministers and the executive branch of government as the major agent of fiscal policy management. Therefore the public procurement legal relationship involves a body, empowered to manage the respective part of the budget.

There are other organizations, operating with public funds, such as the NHIF and others. However, the funds they operate with are publicly owned by the general public as a sovereign. These organizations are entitled to spend funds only in the public interest. Through elections, the general public as a sovereign has authorized the National Assembly as the legislative branch of government, to regulate the raising and spending of the public funds. Thus the management of public funds, since it has to be effected in the interest of all citizens, is again organized and

[6] On the legal nature of the budget, see Златарев Е., В. Христофоров, Финансово право на НРБългария, С., 1983, p. 246 and subs.

controlled by the government, in particular by its legislative and the executive branches. Therefore we can claim that fiscal policy management in the public interest is a right and obligation of the state. The government has been entrusted with the function to manage, organize and control the collection and spending of public funds. Therefore the latter is a government activity in its broadest meaning.

Generally speaking, government is viewed as an executive and spending activity regulated by secondary legislation, performed by governmental and public bodies to ensure the general management, organization and control of all spheres of public life. In its narrow meaning, government is viewed as an authoritative activity, regulated in secondary legislation, aimed at organizing public life and carried out by a special group of governmental bodies. This activity involves the practical enforcement and implementation of laws in the process of direct management of all spheres of social life[7]. Authoritative in nature, it is a legally based activity, carried out by governmental bodies to enforce law; therefore it is regulated in secondary legislation[8].

State government is an executive and spending secondary legislation activity, carried out by governmental and public bodies; it is related to carrying out the economic, social, cultural, administrative and political construction in the state. It takes various forms: acts issued by government, measures of an encouraging or coercive effect, activities of a material, technical and organizational nature, entering into transactions relating to the property rights of the respective body concerned of an onerous nature[9]. State government in its broadest meaning encompasses the activity of all governmental bodies[10]. State government is normally defined as a state activity, which transcends its executive and regulatory activities, related to public management in the broadest sense, or at least with the activity carried out by all governmental bodies in the country[11]. State government per se is an executive activity in both purpose and nature. It is a generally held view that state government is manifested in its very content: the implementation and enforcement[12] of laws and other instruments, and the organization of this implementation. In this sense economic management presupposes organizing both the agents and object of management, and their relationships[13].

In other words, being an activity of implementing legislative instruments, state government is to be effected by all governmental bodies and agents, which are authorized on special grounds to carry out such activity. Yet state government is delegated to the bodies of the executive branch of government. Since it is their major function, this is its narrow definition. In case it is performed by other governmental bodies, then we arrive at the broader definition of the concept. Ruling No. 5 of the 6th of April 1993, issued by the Constitutional Court[14] on constitutional case No. 6/1993 states that a core feature of governmental service in the meaning of the Constitution, along with the exercise of state

[7] Государственое управление под ред. Козлова, М, Юрид. лит., 1978, p. 34
[8] Стайнов, П. и А. Ангелов, Административное право НРБ, М., Юрид. лит, 1960, p. 6; Стайнов, П., Административните актове в правната система на НРБ, С, БАН, 1952, p. 28; Козлов, Ю. М., Предмет сов. АП, изд-во Моск. у-та, 1967, p. 13
[9] Якуба, О. М., Советское административное право, Киев, 1975, p.12
[10] Козлов, Ю. М., Органы советского государственного управления, М., 1960, p. 34
[11] Якуба, О. М., Советское ..., op. cit., p.12
[12] Козлов, Ю. М., Административные правоотношения, М., Юрид. лит., 1976, p. 50
[13] Козлов, Ю. М., Вопрос, управления народным хозяйством в материалях XXV—съезда КПСС, ВМГУ, 1986, 6, p.16
[14] Prom., OJ, No. 31/13 April 1993.

power, is the management of the state-owned property. It goes without saying that fiscal management belongs to central government; in our opinion, however, the broader definition of fiscal policy management is relevant; this definition encompasses the management of other public funds, not state-owned, since the general public as a sovereign has no way to control and sanction the misappropriation and mismanagement of public funds, other than to delegate these functions to the government. So, in political representation, or general elections in their broadest sense, there is also an element of delegating authority. The general public delegates authority to the government, related to exercising control and sanctioning the management of public funds. State government is a component of the general public management process; hence it is governed by the general objective laws of scientific public management. In summary, these objective laws are manifested in that state administration steps as a systematic and organized administration, based on the requirements of the objective laws of social development. There is certain distinction between the administration and management of social processes. Administration is viewed as being of a more general nature, whereas management is viewed as being more specific and usually[15] involving the operational and organizational measures imposed by governmental bodies on their directly subordinate enterprises and institutions. Yet in a general aspect management is characterized by its nature conscious will, by the use of specific management methods and tools, by the specifics of the management mechanism[16].

State government is a specific management activity of government aimed at public funds; it always preserves its characteristics of an authoritative, volitional attitude; its core purpose is to create at least the general legal regulation of these funds and establish the general legislative procedure for their appropriation.

Therefore, in our opinion, the management of public funds should be related to state government in its broad sense. And as regards the contracting authorities under Article 7, item 6 of PPL – traders and other persons that are not public enterprises, the latter carry out activities on the basis of exclusive or special rights, i.e. also on basis of special empowerment under the law.

2. Public Procurement Administrative Legal Relationship – General Characteristics

2.1. The public procurement contracting authorities as public funds spending units operate in state government regarded in its broadest sense. Administrative law relationships are established in the field, which is generally subject to administrative law regulation.

In the 2000 administrative law course[17] the administrative legal relationships are defined as public relationships which arise, develop and are terminated in compliance with of an administrative law provisions.

In the 2001 administrative law course[18] the authors assume that the administrative legal relationships are an effect of the implementation of administrative law norms. They can arise, change or be terminated in cases where the juridical facts and circumstances, provided for

[15] Копейчиков, В. В., Механизм советского государства, М, Юрид. лит., 1968, p. 61 and subs..
[16] Ушанов, А. В., Понятие советского государственого управления в науке АП на современном этапе, М, 1970, (PhD Thesis Abstract), p. 9
[17] Лазаров, К., Административно право, С., 2000, p. 29
[18] Дерменджиев, И., Д. Костов и Д. Хрусанов, Административно право на Република България, С., 2001, p. 64

by the legal act, occur. The administrative legal relationships reveal specific features, relating to the nature of the administrative law acts applicable in this field.

The administrative relationship is a public relationship between government as an organization of power, on one part, and the citizens, public organizations or certain officials on the other part; this relationship arises in the implementation of law-based administrative and regulatory activity performed by government[19]. The administrative law relationship is viewed also as a public relationship, where parties are authorized with certain rights and obligations, laid down by the administrative law acts[20]. The authors are unanimous in assuming that administrative legal relationships per se are one form of public relationships. These are relationships arising in the performance of state government functions[21]. According to similar views, administrative legal relationships are public relationships, established in the executive and regulatory field and regulated by the administrative law norms[22].

In other words, the administrative legal relationship per se represents public relationships of a management nature, regulated by the administrative law norms. Administrative relationships are of an authoritative nature; since they are manifested in state government, they are of an authoritative nature. The administrative legal relationships per se can be grouped along different principles; of crucial significance for us, however, is that the management activity is considered in the operations of all governmental bodies and non-governmental organizations. Moreover this management activity is aimed at providing conditions for the successful performance of the functions, carried out by the bodies and organizations, without interfering with their principal business activity. The same is the situation with the state property management[23].

State property management is also authoritative in nature, its authority being manifested in establishment of the general regime of behavior in the state government sphere. It is programmed as a means securing the due order of management relations[24].

When analyzing the legal mechanism[25] of juristic effect in the sphere of administrative legal relationships and particularly the state government in its broad sense, one should take into account that this effect is essentially a legally preconditioned, targeted managerial effect. The main management formula (agent – object) finds its legal substantiation in the state government sphere; the managerial effect coincides with the administrative regulation. It is obvious that the administrative law regulation of management relations is the management effect tool; in other words this means that in order to secure state budget management and/or public funds management, the management effect can be achieved solely by administrative law regulation of the management relationships; thus management effect agent differs from the other agents in these relationships exactly because it is authorized with state authority powers to give

19 Стайнов, П. и А. Ангелов, Административное ..., op. cit., p. 33
20 АП (под ред. Лунева), М., 1970, p. 28, and Администр. право ГДР, М, Прогрес, 1983, p. 31
21 Государственое управение под ред. Козлова, М, Юрид. лит., 1978, p. 109
22 Советское административное право (под ред. В. Попова и М. Студеникина), М, Юрид. лит., 1983, с. 17; Советское административное право (под ред. Студеникина, Власова и Етихиева), М, Юрид. лит., 1950, p. 11; Советское административное право (под ред. И. Т. Василенкова), М, Юрид. лит., 1981, p. 29; Якуба, О. М. Советское ..., op. cit., p. 52 and subs.
23 Козлов, Ю. М. Административные ..., op. cit., p. 108
24 Ibid, p. 104
25 Ibid, p. 64

mandatory juristic prescriptions or to establish mandatory rules of behavior. Therefore, "in the administrative legal relations there is always a need to distinguish an actor that will step in as an agent of state government, called upon so as to achieve the goals of the governmental executive and regulatory activity." [26] In the fiscal management legal relationships, and public procurement, in particular, such a management agent called upon to achieve the objectives of the executive and regulatory fiscal management, is the public fund spending contracting authority.

And that actually means that a major agent of public procurement legal relationship is public fund spending contracting authority, who acts in the name of the state or the general public as sovereign.

2.2. The public procurement procedure is a legal relationship of an administrative type and, as we have pointed out, it comes under the broad term of state government. This is also indicated in art. 17 of PPL stating that: "The minister of the economy and energy shall implement the state policy in the public procurement field" and art. 18 of PPL stating that "A Public Procurement Agency shall be set up with the Minister of economy and energy ... which shall support the minister in implementing the state policy in the public procurement sphere". The state public procurement policy is part of the government domestic policy; its administration and implementation is delegated to the Council of Ministers; in other words this means that the public procurement activity is a part of the executive and regulatory activity of the government, administered by the Council of Ministers.

The main task of public procurement is to provide for the following: the designated contracting authority, acting on behalf of the government in managing the fiscal policy (or on behalf of general public in managing public funds) is to determine public procurement contractor as a party to the future contract. Yet, since all this concerns the management of public funds in the public interest, the government prescribes in law the procedure of determining the contractor. Moreover, art. 2, para 1 of PPL requires that these procedures conform to the principles of publicity and transparency, free and fair competition, equal treatment and non-discrimination, i.e. the best contractor has to be designated in the public interest and the government can ensure this only by establishing clear rules for its award.

Up to the point of determining the contractor, the scope of the public procurement award is the state government in the country, since the Council of Ministers, as the top of state government in the meaning of CRB, is authorized to direct and control the state budget management. This procedure is of an administrative nature. It accounts for a notable share of general state government. It is of an authoritative nature. It is an authoritative relationship because the very government it is a part of is of an authoritative nature. Without authority[27], unless there is a certain level of, it will be impossible to guarantee the cooperation of many individuals in dealing with issues, which require collective effort. Therefore, every management process gives rise to a will to rule, which subjugates the will of all other agents involved in the process. This will to rule as an essential component of management[28] guarantees that there is no mismatch or discrepancy between the will of

[26] Козлов, Ю. М. Административные ..., op. cit., p. 65
[27] Козлов, Ю. М. Административные ..., op. cit., p. 74
[28] Козлов, Ю. М. Административные ..., op. cit., p. 74

those managed and the will of the one who manages. Therefore, authority is an attribute of management. In any social system authority is per se the manifestation of the will of the empowered agent, targeted at regulating the will of the subordinates. The subordination of the object of management is guaranteed by the legal regulation, i.e. power and subordination are inherently connected with state government. In order to perform the functions of government, it is essential that powers of government and authority be delegated to the agents acting on behalf of the government.

In the scope of application of authoritative state government there cannot exist individual parts with other characteristic features.

Therefore, we believe that since the question is about state budget administration, public funds management, since this activity entirely belongs to state government and is delegated to the Council of Ministers, the public procurement legal relationships of determining the contractor (the potential party to the future contract) preserve their authoritative and administrative nature. The parties have not yet concluded a contract. Even if such a contractor is determined, a contract might fail to be concluded; therefore one should clearly distinguish between the **private law** features of the public procurement contract, which are to become obvious at a later stage after the parties to it are determined, and the **administrative law** features of the award procedure, whereby the contractor is actually determined.

The public procurement award procedure is possible after the contractor is determined as an agent of administration (a management agent if we apply the management agent – object formula, typical of management relationships). These relationships arise from an administrative act of the executive branch of government. This proves that these legal relationships arise from an administrative act, which is typical of administrative law relations.

Another typical feature of this public procurement award procedure, which is part of the executive and regulatory activity and differs from the subsequent public procurement contract, is the fact that the state has dedicated a special law (PPL) where it has laid down a complex hierarchical procedure to provide for transparency in determining the other agent.

Another proof of the administrative law nature of the legal relationship is Article 11 of PPL; its analysis clearly shows that the decision for the appointment of contractors is an independent administrative act. The meaning of this administrative act, whereby the procedure is finalized, gives rise to the relationship between a public procurement contractor and agent. This contractor as private law personality differs from a private law debtor subject under a work, supply or order contract. The main difference is in the status of the public procurement contractor – the contractor will receive and spend public funds which have to be used for specific activities in the public interest; hence the contractor remains under the control of the state. This is indicated also in art. 123, Para 1 of PPL stating that the National Audit Office and the bodies of the State Financial Inspection Agency shall exercise control of public procurement award procedures. Besides, according to art. 123, Para 2, 3, and 4 of PPL, all contracting authorities referred to in Art. 7 of PPL are subject to control.

This is so because control is an inherent part of the management activity and is exercised at the discretion of the controlling agent. If the question was not about management authoritative activity, the subjects concerned (the contracting authorities in this case) would have been able to

review these orders. So in this case the private law nature of the legal relationships is excluded altogether.

Finally, the public procurement procedure is an administrative law relationship established between the contracting authority and the contractor (economic operator) in compliance with an administrative law rule specified in Art. 1 and Art. 11 of PPL.

The juristic fact, giving rise to this relationship, is the administrative act of the body of the executive branch of government (or an agent awarded the same status) that determines the public funds spending units; it aims at issuing an administrative act, whereby the status of a public procurement contractor shall be recognized.

This procedure is different from the public procurement contract to be subsequently concluded, after the two parties to the future contract are determined under the terms and conditions prescribed by the PPL. ИА