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Rental of Public Property Assets

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Abstract: In this article, using the logical interpretation, the jurisprudence study, but also the comparative analysis, we have proposed to analyze the rental of public property assets from the perspective of the provisions of the Administrative Code. We have considered aspects related to the parts of the contract for the rental of public property assets, the administrative act by which the lease is approved, the procedure for awarding the lease, the actual conclusion of the lease, the effects of the lease. In contrast to the administration of public property assets, concession and their free use, renting it is not a real right. This is a way by which the holders provided by the Administrative Code can make revenues at local or state budgets, the rent being determined by the parties, based on the legal obligation report that is born at the conclusion of the lease.

Keywords: public property; rent; assets; contract

1 Introduction

The Constitution of Romania, in art. 136 para. (4), provides for the possibility of renting public property. Until the entry into force of the Administrative Code, the Law on local public administration no. 215/2001 established, in art. 123 of para. (1), the right of local councils and county councils to decide that the assets belonging to the public or private domain, of local or county interest, as the case may be, be given in the administration of autonomous utilities and public institutions, to be concession or *rented*.

Also, the Civil Code mentions in art. 861 para. (3) the possibility of renting, in accordance with the law, the public property assets. Unlike the concession and administration of public property, the Civil Code does not contain special regulations on the rental of public property. In this regard, the doctrine of civil law shows that the reason for not including in the fundamental civil law the lease in the category of ways to enhance the right to public property seems to be the difference between the concession contract and the lease.

Thus, while the first leads to the birth of a real right over the leased property, having as owner the concessionaire, “the lease contract leads to the birth of an obligatory legal relationship” (Bîrsan, 2013, p. 193; Stoica, 2012, p. 285; Puie, 2014, pp. 186). It is also clear from the analysis of the two administrative contracts that both are onerous contracts, but the concessionaire will pay a royalty proportional to the profits from the operation of the concession property, as opposed to the one who rented the property, who will pay a sum of money as rent, established by agreement of the parties (Bîrsan, 2013, p. 193).

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In accordance with the provisions of the Administrative Code¹, the local councils *decide to give in administration, concession, rental or free use of the public property of the commune, city or municipality, as the case may be, as well as of the public services of local interest, according to the law. The county councils also have the competence to decide on the administration, concession, rental or free use of the public property of the county, as the case may be, as well as of the public services of county interest, under the conditions established by the Administrative Code*².

The specialized literature shows that in the case of renting public property are applicable the rules of the Civil Code (art. 1777-1850) on location (rental)³, but the Administrative Code does not make such a specification (Ciobanu, 2015, p. 289).

Regarding the rental of public property, the Administrative Code contains provisions regarding: the parties to the lease contract (art. 332); the administrative act approving the lease (art. 333); granting documentation (art. 334); the transparency stage (art. 335); rules regarding the offer (art. 336); data protection (art. 337); evaluation commission (art. 338); participants in the public auction (art. 339); the criteria for awarding the lease contract (art. 340); determining the winning bid (art. 341); cancellation of the tender procedure (art. 342); conclusion of the contract (art. 343); non-conclusion of the contract (art. 344); sanctions (art. 345); the evidence of the procedure documentation (art. 346); rights and obligations (art. 347); cancellation of the lease (art. 348).

2 Parties to the Lease of Public Property

In accordance with art. 332 of the Administrative Code, the contract for renting public property is concluded only by the authorities provided in art. 287, or by the holder of the right of administration, as the case may be, with any natural or legal person, Romanian or foreign. The authorities provided by art. 287 para. (1) are: a) Government, through the line ministries or through the specialized bodies of the central public administration subordinated to the Government or to the line ministries, as the case may be, for the assets belonging to the public domain of the state; b) the deliberative authorities of the local public administration, for the goods belonging to the public domain of the administrative-territorial units. These authorities will decide, in accordance with the law on the administration, concession, lease, free use of public property. According to art. 297 para. (2), if the contract is concluded by the holder of the administration right, the initiation of the rental procedure is established by the autonomous utilities, the central or local public administration authorities, as well as by other institutions of national, county or local public interest. In this situation, the holder of the administration right has the right to collect from the rent a share between 20-50%, established, as the case may be, by the decision of the Government, the county council, the General Council of Bucharest or the local council of the commune, of the city or municipality through which the lease was approved [art. 333 para. (3)]. This provision does not apply if the activity of the holder of the administration right is subsidized from the state budget or from the local budget⁴.

¹ Article 129 para. (6) letter a).

² Art. 173, para. (4), letter a).

³ According to art. 1777 of the Civil Code “*the lease is the contract by which a party, called lessor, undertakes to ensure the other party, called lessee, the use of a good for a certain period, in exchange for a price, called rent.*”

⁴ Art. 333, para. (4), letter a) of the Administrative Code.

3. The Administrative Act Approving the Lease

As in the case of the concession, the administrative act approving the lease differs depending on the owner of the public property. Thus, in the case of state public property, the lease is approved by Government decision, while the lease of public property of administrative-territorial units is approved, as appropriate, by decision of the county council, the General Council of Bucharest or local council¹. Regardless of the owner of the public property, the administrative act approving the lease, respectively the decision of the mentioned public authorities, must include the following elements²: a) the identification data and the inventory value of the good that is the object of the lease³; b) the destination given to the good that is the object of the rent; c) rental duration; d) the minimum rental price.

4. Procedure for Awarding the Lease

The public property assets of the state or of the administrative-territorial units are rented on the basis of a public auction, according to art. 333 para. (5) of the Administrative Code. The award procedure includes, as in the case of the concession, rules regarding: the award documentation; the transparency stage; supply rules; data protection; evaluation commission; participants in the public auction; the criteria for awarding the lease; determining the winning bid; cancellation of the tender procedure.

Regarding the award documentation, the Administrative Code establishes that the provisions of art. 310 para. (1) and (2) letters a) and b), art. 312 para. (2) - (4), (6) and (7) and of art. 313 regarding the concession of public property shall apply accordingly.

Within the *granting documentation*⁴, the contracting authority has the right to impose special conditions for fulfilling the contract which aims to obtain social effects or in connection with environmental protection and the promotion of sustainable development, insofar as they are compatible with the object of the contract. It is also mandatory to provide a guarantee at the level of the equivalent value of two rents.

The *transparency rules* take into account: the publication of the tender notice⁵ in the Official Monitor of Romania, Part VI, in a national newspaper and in a local newspaper, on the website of the contracting authority or through other media or public electronic communications channels; the modalities of

¹ Art. 333, para. (1), letter a) of the Administrative Code.

² Art. 333, para. (2), letter a) of the Administrative Code.

³ The inventory of the goods from the public domain of the state and of the administrative-territorial units is achieved in accordance with the provisions of art. 288-289 of the Administrative Code. Until the entry into force of the Administrative Code, the inventory was carried out in accordance with the provisions of Law no. 213/1998 regarding the public property goods, with the subsequent modifications and completions and of the Government Decision no. 548/1998 on the approval of the Technical Norms for drawing up the inventory of goods that make up the public domain of communes, cities, municipalities and counties. Recently, the Government issued Decision no. 392/2020 on the approval of the Technical Norms for drawing up the inventory of assets that make up the public and private domain of communes, cities, municipalities and counties, which repealed Government Decision no. 548/1998.

⁴ According to art. 334 para. (1) of the Administrative Code, the granting documentation includes the specifications, the data sheet of the procedure, the framework contract containing mandatory contractual clauses, forms and model documents.

⁵ The tender notice must contain: a) general information on the contracting authority, such as: name, tax identification code, address, contact details, contact person; b) general information on the object of the public tender procedure, in particular the description and identification of the property to be rented; c) information on the granting documentation: the manner or ways in which the interested persons may enter into possession of a copy of the awarding documentation; the name and contact details of the service / department within the contracting authority from which a copy of the award documentation may be obtained; the cost and payment conditions for obtaining the documentation, if applicable; deadline for requesting clarifications; d) information on tenders: deadline for submission of tenders, address to which tenders must be submitted, number of copies in which each tender must be submitted; e) the date and place at which the public opening meeting of the tenders will take place; f) the court competent in resolving any disputes and the deadlines for notifying the court; g) the date of transmission of the tender notice to the authorized institutions, in order to be published [art. 335 para. (2)].

obtaining the awarding documentation by the interested persons¹; the fact that the tendering procedure can only take place if at least two valid tenders have been submitted following the publication of the tender notice.

The rules on supply are not very different from those established in the case of the public property concession contract. Thus, the bidder must prepare the bid in Romanian, in accordance with the provisions of the award documentation. Only bids that meet the validity criteria set out in the tender specifications will be considered valid. If, following the publication of the tender notice, at least two valid tenders have not been submitted, the contracting authority is obliged to cancel the procedure and to organize a new tender, in compliance with the procedure provided by art. 336 para. (1) - (13).

At the same time, the contracting authority is obliged to ensure *the protection of information* communicated to it by natural or legal persons in a confidential manner, in so far as, objectively, its disclosure would harm the legitimate interests of those persons, including as regards trade secrets and intellectual property.

According to art. 338 para. (1) of the Administrative Code, the composition of *the evaluation commission* organized at the level of the contracting public authority shall be approved by ministerial order, respectively by order of the mayor or, as the case may be, of the president of the county council. The Commission will take decisions autonomously, based on the selection criteria set out in the instructions on the organization and conduct of the auction.

He has the right to participate in the auction, according to art. 339 para. (1) of the Administrative Code, *any natural or legal person*, Romanian or foreign, who cumulatively meets the conditions: he has paid all the fees regarding the participation in the auction and the guarantee of participation; submitted the tender or request to participate in the tender, together with all the documents required in the award documentation, within the deadlines mentioned in the award documentation; has up-to-date all the obligations due to the payment of taxes, fees and contributions to the consolidated state budget and to the local budget; is not in a state of insolvency, bankruptcy or liquidation. On the other hand, the person who was designated the winner of a previous public auction on state property or administrative-territorial units in the last 3 years and did not conclude the contract or did not pay the price, through no fault of his own, is not entitled to participate in the auction. This restriction will apply for a period of 3 years, calculated from the designation of that person as the winner of the tender.

The *criteria for awarding* the lease contract, provided by art. 340 para. (1) of the Administrative Code, are: a) the highest level of rent; b) the economic-financial capacity of the bidders; c) environmental protection; d) specific conditions imposed by the nature of the leased property.

The *winning tender* is established by the contracting authority on the basis of the award criterion (s) specified in the granting documentation. The contract award notice is published in the Official Monitor of Romania, Part VI, within 20 calendar days from the end of the award procedure. Tenderers will be informed by the contracting authority, obligatorily, of the decisions regarding the award of the contract, in writing, with acknowledgment of receipt, no later than 3 working days from their issuance.

The procedure for awarding the lease contract may be canceled by the contracting authority in case serious deviations from the legal provisions affecting the tender procedure or making it impossible to conclude the contract are found. It is considered that the tender procedure is affected if the conditions

¹ The contracting authority has the right to choose either to ensure direct, unrestricted and full access, by electronic means, to the content of the award documentation, or to make available to the person concerned who has submitted a request to that effect a copy of the award documentation, on paper and / or on magnetic media [art. 335 para. (3)].

are cumulatively met: a) in the award documentation and / or in the application of the tender procedure there are errors or omissions that have the effect of violating the principles set out in art. 311; b) the contracting authority is unable to adopt corrective measures, without these leading, in turn, to the violation of the principles provided in art. 311 of the Administrative Code.

5 Concluding the Lease Contract

Under the sanction of nullity, the lease contract is concluded in written form, within 20 calendar days from the date of fulfillment of the term provided in art. 341 para. (26)¹. As in the case of the public property concession contract, the written form is a condition for the validity of the rental contract. Failure to conclude the lease within the said period may result in the payment of damages by the guilty party. They shall be determined by the court in whose territorial area the seat of the contracting authority is situated, at the request of the interested party, unless the parties decide otherwise.

In case of non-conclusion of the lease contract by the refusal of the successful bidder, the tender procedure will be canceled, the contracting authority will resume the procedure, in accordance with the law, the opportunity study maintaining its validity. In the situation where the contracting authority cannot conclude the contract with the successful bidder as he is in a situation of force majeure or in the fortuitous impossibility to execute the contract, according to art. 344 para. (5) of the Administrative Code, the contracting authority has the right to declare the second ranked bid the winner, if it is admissible. If there is no such offer, the procedure will be resumed under the conditions established by art. 344 para. (3) of the Administrative Code.

The lease must contain clauses that ensure the use of the leased property, according to its specificity, as well as compensation clauses, in case of termination of the contract before the expiration of the term. The good will be handed over based on a report, within a maximum of 30 days from the date of establishing the guarantee at the level of the value of two rents, as provided by art. art. 334 para. (5) of the Administrative Code.

Unlike the concession, the Administrative Code does not establish the causes that may lead to the termination of the contract for the lease of public property before the expiration of the term for which it was concluded. But from the provisions of art. 343 para. (3) and 348 of the Administrative Code show the right that the authorities provided in art. 287 / the holder of the administration right to terminate the contract before the expiration of the term (Vedinaş, 2018, p. 385). In this case, the holder will be notified of the termination of the contract. Also, if the lease contract has been noted in the land book, the deletion of this notation is made based on the act issued by the authorities provided in art. 287 or by the holder of the administration right, as the case may be, by which the termination intervention is communicated.

6 Effects of the Lease Contract

In view of the effects of the contract for the lease of public property, we have in mind the rights and obligations of the parties, which arise from the contract (Trăilescu, 2019, p. 66).

The rights and obligations of the authorities provided in art. 287, as well as of the holder of the administration right are established by art. 347 of the Administrative Code.

¹ According to art. 341 para. (26) of the Administrative Code, “the contracting authority has the obligation to inform the tenderers about the decisions regarding the award of the contract, in writing, with acknowledgment of receipt, not later than 3 working days from their issuance”.

Thus, the authorities provided in art. 287 or the holder of the administration right have the following rights: *to collect the rent*, in accordance with the provisions of the lease contract; *to benefit from the guarantee* constituted by the holder of the rental right under the conditions of art. 334 para. (5); otherwise, the authorities provided in art. 287 or the holder of the administration right, as the case may be, are obliged to return the guarantee upon termination of the contract; to control the execution of the obligations of the lessee and the observance of the lease conditions, having the right to ascertain, whenever necessary, without hindering the use of the good by the lessee, the state of integrity of the good and the destination in which it is used.

The *obligations* of the authorities provided in art. 287 or of the holder of the administration right are the following: *to hand over* the good on the basis of minutes, within the term provided in art. 343 para. (4); *to maintain the property* in a proper state of use throughout the lease, according to its destination, and to bear the costs of repairs necessary for this purpose; *to ensure the undisturbed use* of the property throughout the rental.

The *rights and obligations* of the holder of the rental right, established by art. 347 para. (2), are the following: not to prejudice the right of public property through the deeds and legal acts committed; to pay the rent, in advance, in the amount and within the terms established by the contract; to constitute *the guarantee* in the amount, in the form and at the term provided in the specifications; to request the authorities provided in art. 287 or to the holder of the administration right, as the case may be, the repairs necessary for maintaining the good in a proper state of use or the equivalent value of the repairs that cannot be postponed; to execute on time and in optimal conditions the current maintenance works and normal repairs incumbent on it, in order to maintain the rented property in the condition in which it was received at the time of concluding the contract; to return the property, based on the minutes, upon termination, for any reason, of the lease, in the technical and functional condition of the date of takeover, less the wear related to normal operation; not to exploit the leased property in order to collect natural, civil, industrial or product fruits.

The authorities provided in art. 287 of the Administrative Code or the holder of the administration right, as the case may be, have the right to withhold the value of the rent from the guarantee, if the holder of the rental right does not pay the rent or violates any other provision regarding contractual obligations. In this case, the holder of the rental right is obliged to replenish the guarantee.

7. Conclusions

The leasing of public property assets represents, together with the administration, concession, rental and transfer for free use, the ways of exercising the public property right of the state or of the administrative-territorial units. However, unlike the other listed modalities, the rent is not qualified by the Civil Code as a real right, the rental contract giving rise to an obligatory relationship, which generates a right of claim. The rental of public property is also a means of generating revenues to the state budget, respectively to local and county budgets.

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