R E V I E W

From: Prof. Dr. Veselina Kanatova-Buchkova - Institute for the State and the Law at BAS

Regarding: Competitive selection procedure for the Position of Associate Professor in Administrative Law and Administrative Procedure in Scientific Field 3.6 Law at Paisii Hilendarski University, Plovdiv

Basis for submitting the review: participation in the scientific jury for the conduct of a competitive selection procedure for the position of Associate Professor in Administrative Law and Administrative Procedure in Scientific Field 3.6 Law at Paisii Hilendarski University, Plovdiv, in accordance with Order No. RD-21-82/16.01.2024 of the Rector of Paisii Hilendarski University, Plovdiv

Only one candidate participated in the competitive selection procedure, - Assoc. Prof. Dr. Antoniya Ilieva with a habilitation thesis on the topic "Current Issues of the Contract under the Public Procurement Act (Legal Aspects)", as well as a published book based on a defended dissertation for awarding an educational and scientific degree "Doctor", a published chapter from a collective monograph, university textbook, and twenty-four scientific articles.

I. Candidate Information:

The candidate was born in 1984. She graduated in Law from Paisii Hilendarski University, Plovdiv. Currently, she holds the position of Chief Assistant Professor in the Department of Public Law Sciences at the Faculty of Law, Paisii Hilendarski University. She obtained her educational and scientific degree of "Doctor" in 2016. The degree was acquired through a doctoral program in "Administrative Law and Administrative Procedure" in the professional field of Law, fulfilling the requirement of Article 24, paragraph 1, item 1 of the Law on Higher Education.

In the competitive selection procedure, Assoc. Prof. Dr. Antoniya Ilieva participates with a habilitation thesis on the topic "Current Issues of the Contract under the Public Procurement Act (Legal Aspects)". Additionally, she has authored a published book based on her defended dissertation for the award of the educational and scientific degree of "Doctor", a published chapter from a collective monograph, a university textbook, and twenty-four scientific articles.

Furthermore, the candidate is a member of the Union of Scientists in Plovdiv. She has also headed a course on Public Law Sciences at the Faculty of Law, Paisii Hilendarski University, created at the Department of Public Law during the period 2017-2021.

II. General Characterization of the Submitted Work:

The presented work comprises a total of 180 (one hundred and eighty) pages, structured into five chapters, a conclusion, and a list of references containing 39 Bulgarian titles and 1 foreign author. The subject of the research is the public procurement contract as a type of administrative contract, concluded under the special Public Procurement Act, which is distinguished from other contractual institutes. The study also addresses the regulation regarding money laundering through public procurement contracts in the Law on Measures against Money Laundering. The differentiation of the public procurement contract from other contractual institutes, including the general concept of an administrative contract under the Administrative Procedure Code (APC), is a useful focus of the research, with the issues raised and the proposals made having specific practical significance. The topic explored in the monograph is timely, given the changes in the legal regulation of public procurement, with a view to fulfilling the country's obligation to transpose Directive 2014/24/EU of the European Parliament and of the Council on public procurement, Directive 2014/23/EU on the award of concession contracts, and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport, and postal services sectors.

Additionally, 24 scientific publications and a chapter from a collective monograph are presented, which have not been submitted for review in another procedure, thus exceeding the requirements of the law.

In the first chapter, a historical analysis of the regulatory framework of public procurement is conducted. It is pointed out that the reform in public procurement largely adheres to community provisions with the direct incorporation of key elements from Article 3 of the Treaty establishing the European Economic Community. Relevant European and national regulatory acts are listed. The legal essence and features of the public procurement contract are examined. In view of the above on page 32, I believe that currently in administrative law theory, there is no dispute regarding the public procurement contract as a type of administrative contract, not only due to the explicit general regulation in the APC, but also considering the historical nature of the contract under the Public Procurement Act as a result of administrative proceedings conducted by entities with administrative legal capacity (administrative authorities) acting within their jurisdictional powers. I have repeatedly expressed the opinion that the legal relationship is administrative whenever one party is an administrative authority and exercises its jurisdictional powers unilaterally to impose conditions and define its parameters. This applies both to contracts

under the Public Procurement Act, contracts under the Concessions and Concessions for Works and Services Act, and to other types of contracts concluded by the administration. In this sense, contracts under the Public Procurement Act, concluded by sectoral contracting authorities, also have an administrative character, given the status of sectoral contracting authorities as administrative bodies by definition. Sectoral contracting authorities are organizations performing public functions within the meaning of Article 21, paragraph 1 of the APC. Therefore, I do not share the prevailing view in the theory of an administrative contract with private law consequences, as the result of the administrative legal relationship is an administrative act or administrative contract, regardless of the legal sphere in which it operates. In this regard, I support the author's conclusion on page 44 regarding the administrative nature of the public procurement contract.

In the second chapter, differences between the public procurement contract and other institutes of the regulatory framework of public procurement are outlined. The public procurement contract is distinguished from the framework agreement, and it is indicated that the differences between the two institutes necessitate the conclusion that it is not permissible to include a contractor in a framework agreement or to substitute a subcontractor under a framework agreement when the respective participant has not declared the inclusion of a subcontractor in the procedure for concluding the framework agreement (p. 53). Here, it should be noted that there is an ambiguity in the exposition, which is advisable to clarify, regarding the permissible inclusion of a subcontractor in the framework agreement. On page 52, it is stated that the Public Procurement Act does not allow the inclusion of a subcontractor in a framework agreement, only in the case of a specific contract, when fulfilling the conditions under Article 66, paragraph 14 of the Public Procurement Act. At the same time, on page 53, it is summarized that the substitution of a subcontractor is not permissible when the participant in the framework agreement has not indicated that they will use subcontractors, i.e., the inclusion of a subcontractor in principle in the framework agreement is possible, given the allowance for its substitution when the conditions of the law are met.

I agree with the conclusion on page 59 regarding the introduction in the Public Procurement Act of the legal possibility for the contracting authority to be obliged to accept partial performance when some of the contracted activities are to be carried out by subcontractors. The author's proposal to foresee joint liability for non-performance of the public procurement contract for both the contractor and the subcontractor is correctly and fully justified (p. 60). However, I believe that Section 5 regarding the differences between private law contracts and public procurement contracts should not be included in the monograph, as the brief mention of the nature of the private law contract does not contribute to the completeness of the research, especially considering that there are already dedicated monographs on this topic. Similarly, Section 7 concerning the agreement under Article 20 of the Administrative Procedure Code

should be omitted. Overall, the study in the second chapter makes a significant contribution to both theory and practice.

In the third chapter of the monograph, specific issues related to the content of the public procurement contract and the prerequisites for its modification are discussed. It is pointed out that given the administrative nature of the contract, the contracting authority should pre-emptively describe and foresee all circumstances that may occur or may arise during its execution. The public procurement contract cannot be modified by mutual agreement of the parties, but solely on the grounds specified in the law. The grounds for modifying the public procurement contract are subsequently examined. I share the author's conclusion on page 78 that unforeseen circumstances, which are the basis for modifying the contract under Article 116, paragraph 1, item 2 of the Public Procurement Act, should have occurred after the conclusion of the contract, and the failure of the contracting authority to foresee them, if known, cannot be rectified through the contract modification procedure. I am interested in learning the author's opinion regarding the possibility of modifying the contract based on Article 117a of the Public Procurement Act, in cases where the contractor is in delay or acts in bad faith, and whether the requirements for good faith behavior under the Obligations and Contracts Act should be taken into account when the contracting authority decides whether to modify the contract according to the established methodology.

I recommend expanding the discussion in the section regarding the implementation of the public procurement contract and the control over its lawful modification from the perspective of the powers of the administrative court under Article 128, paragraph 1, item 3 of the Administrative Procedure Code, which deals with cases regarding the execution of administrative contracts. Examining these issues will enhance the completeness of the exposition and add additional value to the book with practical significance.

In the fourth chapter, the issue of the delivery of goods and services during an extraordinary epidemic situation, such as the COVID-19 pandemic, and the introduction of an emergency state with special legislation affecting the general legal framework in the Public Procurement Act, is discussed. It is mentioned that if the contracting authority is generally obliged to provide the goods specified in Article 13 of the Measures and Actions during an Emergency Situation Act, it must conduct a public procurement procedure under the Public Procurement Act. The temporary exemption of contracting authorities from conducting public procurement procedures for certain goods and services does not exempt them from the obligation to effectively allocate resources and ensure economy in management. Violation of these obligations leads to administrative, pecuniary, and even criminal liability for the contracting authorities. The concept of force majeure as a circumstance excluding liability for non-performance is briefly mentioned again in view of its justification due to the presence of an extraordinary situation. A specific decision of the Supreme Court of Cassation (SCC), shared by the author, is referenced, stating that an

increase in prices by suppliers is not a force majeure on which the contractor can rely to modify the contract. It should be noted that the cited decision of the SCC is isolated, and a more in-depth examination of the issue raised is recommended. It is concluded that economic intolerance due to an emergency situation does not apply to public procurement contracts under the Public Procurement Act and cannot be a basis for modifying or terminating them. The author's conclusion that the modification of a public procurement contract is permissible only in the cases provided for in Article 116, paragraph 1 of the Public Procurement Act, given the administrative nature of the contract, which excludes the principle of contractual freedom and the application of the general regulations in the Commercial Act, is correct. This conclusion is supported by the explicit legal framework introduced in the Public Procurement Act, which allows for the modification of the contract price according to an approved methodology.

In the fourth chapter, the issue of the responsibility of contracting authorities for unlawfully modifying a public procurement contract is examined, on one hand, and the lack of responsibility for the contractor who agrees to such modification, on the other hand. In this regard, a proposal is made for amendments to the Public Procurement Act (PPA) and the Penal Code (PC) to introduce administrative-criminal and criminal liability for the contractor under a public procurement contract in cases where it is unlawfully modified by the contracting authority. I believe that the proposed suggestion should be reconsidered or elaborately justified, besides mentioning that such a proposal is not prohibited by either national or supranational legislation (page 123), as it does not correspond to the administrative nature of the contract as an expression of unilateral action by an administrative body on one side and, on the other side, to the subjective element of the offense under Article 219 of the Penal Code, the composition of which requires the presence of the quality of "official capacity" of the actor. To the extent that in most cases, contractors under public procurement contracts are traders within the meaning of the Trade Act who are not public officials, their criminal liability under Article 219 of the Penal Code cannot be invoked. In this sense, the proposed introduction of a new paragraph 5 to Article 219 of the Penal Code, punishing the relevant public official of the contractor under a public procurement contract with the penalties under the same article, creates an internal contradiction and does not comply with the principle of personal criminal responsibility.

In the fifth chapter, the issue of money laundering through public procurement contracts is examined, considering the possibility of involvement of third parties and subcontractors in the execution of the contract. The question is raised as to why contracting authorities do not apply the provision of Article 63, paragraph 1 of Directive 2014/24/EU (Article 79, paragraph 2 of Directive 2014/25/EU) instead of the conflicting provision of Article 65, paragraph 2 of the Public Procurement Act (PPA), which they consistently apply in their activities. The answer to the question lies in the indirect effect of the directive, despite the explicit reference in a designated paragraph of the PPA that European legislation is fully incorporated.

Of interest for investigation is the question of the actual scope of activity of the participants in the consortia under the PPA, to whom the execution of the public procurement is entrusted. Often, cases are observed where companies participate in consortia under the PPA, whose scope of activity has nothing to do with the subject matter of the procurement. The PPA does not impose a requirement to verify the experience of the participants in the consortia, which is why precisely such companies, declared as contractors, have the legal opportunity to justify the origin of funds, potentially commit the criminal offense under the Penal Code, and the administrative offense under the Anti-Money Laundering Act.

In the procedure, the candidate has also presented 24 articles related to issues in healthcare, legal problems in patient care, emergency medical services, the COVID-19 pandemic, departmental and professional control of medical activities, legal regime of organ donation, and others.

In summary, a positive conclusion can undoubtedly be made about the scientific capabilities of Dr. Antoniya Ilieva, who meets all the requirements of Article 53 of the Law on the Development of the Academic Staff in the Republic of Bulgaria. Therefore, I propose to the scientific jury to award her the academic title of "Associate Professor" in Administrative Law and Administrative Procedure in the field of higher education 3.6 "Law" at Plovdiv University "Paisii Hilendarski", Plovdiv, Bulgaria.

Reviewer:.....
/Prof. Dr. V. Buchkova/

13.03.2024 г.