ADMINISTRATIVE CONTRACT IN LEGAL SYSTEM OF THE REPUBLIC OF SERBIA

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Abstract:
An administrative contract, as a special type of contract, which represents a bilaterally binding contract by the nature of its conclusion, represents one of the administrative matters provided for by the Law on General Administrative Procedure. The administrative contract, as a specific legal institution belonging to administrative law, was introduced into the legal system of the Republic of Serbia by the adoption of the Law on General Administrative Procedure ("Official Gazette of the RS", No. No. 18/2016 and 2/2023 - Decision of the RS RS. See: Authentic interpretation - 95/2018), and in accordance with the tendency of harmonizing our legislation with the legal system of the European Union. The law itself (Art. 22-26), through five articles that were determined for this institute, regulates the concept and permissibility in terms of conclusion and content, the method of modification, the authority's right to terminate the contract, the right to object and the application of other regulations. as well as the law regulating obligation relations. This type of regulation of contractual relations, which act erga omnes (toward all - contracting parties), with the aim of representing a means by which a certain public interest will be achieved, has its specificity in relation to other contracts of the civil law system, which is reflected in the fact that one the contracting party is always a subject under public law. Bearing in mind that the administrative contract represents a novelty in the legal system, the effects of its application in practice will be subject to consideration and further improvement of the normative framework for its practical application.
Keywords: *administrative contract, Law on General Administrative Procedure, concept, definition, conclusion, changes, termination, objection, Law on Obligations, European Union.*

Introduction

The administrative contract, as a specific type of contract concluded by the administration, which is concluded in administrative matters, represents a special type of

contract that belongs to administrative law, which regulates the performance of administrative activities, and was introduced as a special institution in the legal system of the Republic of Serbia, by the adoption of the Law on General administrative procedure (hereinafter ZUP), which was published in the Official Gazette of the Republic of Serbia No. 8/2016 dated March 1, 2016. year, which entered into force on 09.03.2016. year, and applies from 01.07.2016. year, with the exception of the provisions of art. 9, 103 and 207 of this law, which began to be applied after 90 days from the date of entry into force of this law [1].

The administrative contract is governed by the provisions of the ZUP (Art. 22-26), and the legal provisions themselves begin with its definition, after which the conditions for the permissibility of the conclusion are prescribed. From the legal definition of the administrative contract, which defines it as an administrative matter, i.e. an individual situation in which the authority directly applies laws and other acts, which legally and factually affect the position of the party, it follows that it creates, changes or terminates legal relations. This makes a difference in relation to the administrative act, which according to the legal definition is an individual legal act, by which the authority directly applying the regulations decides on the right, obligation or legal interest of the party or on procedural issues. Therefore, the basis of the differences is that the administrative contract represents a bilateral binding legal act, and the administrative act represents unilateral administrative action. The main difference between these two institutes is in the way they were created.

Term and definition of administrative contract

The term administrative contract comes from the French legal system (contrat administratif), which means specific contracts concluded by the administration, which in translation would mean "administrative contract", because in France the term "administration" is used for administration, while in our language the term is used "administration", which belongs to the German legal system [2].

The administrative contract, as an entity, is prescribed by the ZUP "(1) The administrative contract is a bilaterally binding written act which, when determined by a special law, is concluded by the authority and the party and which creates, changes or

terminates the legal relationship in the administrative matter. (2) The content of the administrative contract must not be against the public interest or the legal interest of third parties" [3].

From the very definition of this institute in our legal system, it follows that the subjects of the conclusion of the administrative contract are, on the one hand, public subjects - state administration bodies or other public bodies entrusted with public authority, while on the other hand, legal or natural persons who meet the conditions prescribed by law can performance of certain work in the public interest. Therefore, the basic purpose of administrative contracts is to realize the public interest. The subjects of the conclusion and the purpose of the conclusion represent the basic difference between an administrative contract and a civil law contract. Administrative contracts create, change or terminate a legal relationship in the area of public law, while civil law contracts achieve the same goal in the area of private law. The common feature of all contracts is the agreement of the wills of two or more subjects on the essential elements of the contract. As for the conclusion procedure, administrative contracts are represented by a public competition or written offer, and civil contracts by consent of the will. In terms of effect, administrative contracts work inter partes and towards third parties, while civil contracts only work inter partes.

ZUP defined the term "organ" in the article of the law defining administrative procedure "Administrative procedure is a set of rules that state bodies and organizations, bodies and organizations of provincial autonomy and bodies and organizations of local self-government units, institutions, public enterprises, special bodies through which regulatory function and legal and natural persons entrusted with public powers (hereinafter referred to as authorities) apply when acting in administrative matters" [4]. Considering the context of the term "organ", it can be concluded that a wide range of subjects can be found as one contracting party.

The authentic interpretation of the National Assembly of the Republic of Serbia, which was published in the "Official Gazette of the RS", no. 95/2018 from 08.12.2018. year, in order to interpret the provisions of Article 22 of the ZUP, it was stated: "These provisions should be understood so that contracts concluded in accordance with special laws, if those special laws are not expressly provided as administrative contracts, are not

considered administrative contracts in the sense of the Law on general administrative procedure and the legal regime of the Law on General Administrative Procedure cannot be applied to them" [5].

Bearing in mind that the legal definition of an administrative contract does not provide fully and precisely what is considered or can be considered under that institute and in which spheres of public interests the same can be concluded, a special emphasis is given with regard to the further elaboration of this institute on the existence of special laws , which are needed in this situation, because, as can be concluded, if administrative contracts are not expressly prescribed as such by a special law, they will not be considered contracts within the scope of the ZUP application.

The main goal of concluding an administrative contract is reflected in the spectrum of ensuring the functioning of the body - public service, that is, the conclusion of a certain public job in the public interest. The authority concludes an administrative contract acting in the public interest, in the area of public-private partnership, concessions, public works, public services, as well as in other areas provided by law [6].

Conclusion of administrative agreement

The administrative contract is concluded in mandatory written form between the "authority" and the "party", which regulates the administrative and legal relationship of the signatory parties. According to subjects who conclude an administrative contract, two situations can occur, i.e. two models, one of which is concluded by an authority and a party and the other which is concluded by two or more public law subjects-authorities in the process of regulating mutual relations of public importance (e.g. an administrative contract between two local self-government bodies regarding the regulation of the construction of a local road).

The most important elements of the administrative contract are the contracting parties (subjects), cause, subject, content, execution, possibility of modification and termination and legal protection [7].

The administrative contract is concluded in individual situations, i.e. in administrative matters. The term administrative matter is defined by the ZUP "(1) An administrative matter, in the sense of this law, is an individual situation in which an

authority, directly applying laws, other regulations and general acts, legally or factually affects the position of the party by passing administrative acts, passes guarantee acts, concludes administrative contracts, undertakes administrative actions and provides public services. (2) An administrative matter is also any other situation that is determined by law as an administrative matter [8].

An administrative contract creates, changes or terminates relations in an administrative matter. According to the above, the conclusion of the administrative contract is preceded by an administrative procedure in which it is assessed whether the conditions of legality and expediency for the conclusion of the administrative contract have been met. Bearing in mind that the administrative contract is concluded in the public interest, the question arises of the framework of freedom of contract and equality of the contracting parties, given that the authority has special powers established by law (authoritative). The specificity of the administrative contract is reflected in the deviation from the general regime of contract law, because it strengthens the powers of the public-law entity in relation to the other contracting party, in order to achieve public interest. The public interest is placed before the individual interest, and for what reason there is a prevailing position of the public law entity that represents that interest.

The content of the administrative contract must not be against the public interest, nor the legal interest of third parties. The administrative contract, which is in written form, is signed by the contracting parties or their representatives. An administrative contract is void if it was not concluded for the purpose of achieving public interest, as well as in a situation where other conditions for its validity prescribed by law are not met. The nullity of the administrative contract can also be foreseen in other cases that are defined by law as a basis for the nullity of the administrative act. This is a general principle that applies to all types of contracts [9].

Public interest refers to the common good that forms the basis for making decisions that are in the interest of society as a whole, not individuals or groups. It covers various fields, such as economy, politics, justice, health, education, environment and the like. Public interest is important for maintaining general welfare, equality and stability in society. Decisions made in the public interest must be objective and transparent.

As stated, the cause of the administrative contract refers to the achievement of some public interest, such as, for example, highway construction through a concession contract, performance of public works through a public procurement contract, provision of public services, such as public transport, water supply, electricity through a public-private partnership contract. For the specificity of certain types of administrative contracts, appropriate special (special) laws, which are referred to by the ZUP, are authoritative. If certain segments of the application of administrative contracts are not regulated by the ZUP, as well as by special laws, they will be applied by subsidiary application of the rules of the Law on Obligations [10].

Amendment and termination of the administrative agreement

The administrative contract, as a special category of contract, represents a type of contract in which subjects, as signatories, looking at the nature and purpose of only the contract that aims to achieve the public interest, can be viewed in the context of unequal subjects, as indicated by the provisions of the ZUP- and which refer to the amendment of the administrative contract. Therefore, if circumstances occur after the conclusion of the contract that could not have been foreseen at the time of the conclusion of the contract, and which make the execution of the contract difficult and which would make the fulfillment of the obligation for one contracting entity (contracting party) difficult (an event of an economic, political or social nature occurs - a flood , monetary crisis, confiscation of property, shortage of raw materials, landslides and the like), she can ask the other contracting entity (contracting party) to amend the contract and adapt it to new circumstances. In that situation, the authority can reject the request of the other contractual party by decision, if it considers that the conditions for amending the contract have not been met or if such a modification of the contract would cause damage to the public interest, which would be greater than the damage that the party would suffer, which is prescribed by the article 23. ZUP. This formulation of the legal norm clearly indicates the importance of the public interest, which is placed before the interests of the contracting parties. Looking at legal protection, the question arises as to what legal means can be used by the other contracting party when the authority rejects its request to amend the contract due to changed circumstances for it [11].

The aforementioned norm refers to legal consequences and represents the traditional "rebus sic standibus" clause, which refers to circumstances that arose after the conclusion of the contract, which could not be foreseen at that moment (force majeure and case), and which are of essential importance for fulfillment of contractual obligations [12].

The authority, as one contracting party, can unilaterally terminate the administrative contract: "1) if there is no consent of the party to amend the contract due to changed circumstances; 2) if the party does not fulfill contractual obligations; 3) if it is necessary to eliminate a serious and immediate danger to the life and health of people and public safety, public peace and public order or to eliminate disruptions in the economy, and this cannot be successfully eliminated by other means that are less harmful to the vested rights. The authority terminates the administrative contract with a decision in which it explicitly states and clearly explains the reasons for termination" [13]. Considering the mentioned legal norm, it can be concluded that in the event that the authority does not fulfill its contractual obligations, the party cannot terminate the administrative contract, but has the legal possibility to file an objection, as a legal means of protection. On the occasion of the stated complaint, a decision is made which must be explained, along with a legal remedy - the right to appeal, which is regulated by Article 151 of the ZUP.

The body, that is, the administration as the bearer of the public interest, has powers that can be used when performing contractual obligations, but also when the situation arises that the contract is not performed.

The party's objection due to failure to fulfill contractual obligations

The legal remedy that the party can use in case of non-fulfillment of contractual obligations by the authorities is the declaration of custody, as a remonstrative legal remedy, whereby the party thus struggles to realize its rights and interests in order to fulfill the contractual rights and obligations, because the party does not have the right to terminate the contract. The right to object is prescribed in Article 25 of the ZUP.

Objection can be declared within six months from the failure of the authority to fulfill the obligation from the administrative contract. The complaint is submitted to the head of

the authority whose action it refers to, who decides on the complaint within 30 days of receiving the complaint. The head of the body decides on the objection with a decision against which the party can file an appeal. Regarding the merits of the reported appeal, the authority that decides on the appeal has the same powers as the authority that decided on the complaint. The decision made by the authority that decided on the appeal can be challenged further in an administrative dispute, by filing a lawsuit with the Administrative Court [14].

By introducing a complaint, as a legal remedy, the authority is given the opportunity to, in the event of irregularities in the fulfillment of the contract for which the authority is responsible, correct them and avoid the initiation of an administrative dispute, which would make the procedure more economical and faster than if regarding that situation, led a dispute before the Administrative Court.

Subsidiary application law on obligation relations

The ZUP stipulates that both the provisions of this law and the subsidiary provisions of the Law on Obligations [15]. This norm is applied in all legal systems that recognize the institution of the administrative contract.

The administrative contract, by its legal nature, represents a type of specific form of activity of the administrative body, which primarily relies on the general administrative legal system and at the same time refers to the subsidiary application of the regulations of the law of obligations. According to the ZUP, special laws more closely regulate the matter of individual administrative contracts, which provide for the specificity of certain types of administrative contracts, and which cannot be in conflict with the basic principles of the ZUP.

However, as can be seen from the legal wording, the law did not more precisely define the scope of application of the provisions of the obligation law to the administrative contract.

The Law on Obligations regulates the obligations arising from contracts, damage caused, acquisition without grounds, management without warrant, unilateral declaration of will and other facts established by law [16].

Therefore, a certain problem presents the way in which the institutes of private law will be applied to one institute of public law. Also, the method of obtaining legal protection in terms of compensation for damages to the contracting parties is under a dual legal system, because the administrative bodies they exercise this right before the courts of general jurisdiction, while the other contracting party can exercise this right before the administrative court [17].

Institute of administrative contracts in France and of the German legal system

If we were to draw a parallel between the French and German legal regime of administrative contracts, their source can be singled out as a basic difference. In France, the foundations of administrative contracts were laid by judicial practice, while in Germany, administrative contracts are established by law. In addition to the mentioned difference, there is one very important similarity between the French and German legal systems when it comes to administrative contracts, which similarity is reflected in the fact that in both legal systems administrative courts are competent for disputes arising from administrative contracts.

The above is a basic indicator that the legal regime of administrative contracts is separated from the legal regime of private law contracts.

For the legal regime of administrative contracts in the French legal system, it is characteristic that the rules developed by administrative judicial practice, i.e. primarily the practice of the State Council, but also of administrative courts, as well as the Tribunal des Conflicts, which resolves conflicts of jurisdiction between courts of general jurisdiction, have the main influence and administrative courts.

In French legislation, the basic criteria of administrative contracts have been established, and they represent - first the criteria of the parties, then the criteria of the objective and the criteria of special powers. The criterion of special powers represents the basic difference between civil law contracts and administrative contracts.

According to the main element of the administrative contract, which represents the realization of a broader social interest, in French law any dispute regarding administrative contracts is exempted from the scope of the courts of general jurisdiction and placed under the jurisdiction of the administrative courts. The basic division of administrative

contracts in France is carried out according to the object of the contract into: 1) Contracts on public procurement and 2) Contracts on concessional public service. In addition to these two most important types of administrative contracts, there are also some others such as: the contract on the registration of public loans, the contract on public-private partnership, the contract on the occupation of public goods and others.

French administrative contracts are an expression of the aspiration that public administration is not exclusively served by an administrative act, as well as not being served by a classic private law contract. This represents a kind of environment, because it ensures a certain subordination to the public law of competent authorities, but not in such an explicitly one-sided and authoritative way as is the case with administrative acts.

In German law, the administrative contract was regulated in 1976 under the Administrative Procedure Act, which is defined as a special type of contract that creates, changes or terminates public law relations. This institution is defined by Article 54 of the aforementioned law as follows: "A legal relationship within the framework of public law can be established, changed or terminated by contract to the extent that it does not contradict the Law."

Looking at the aforementioned norm in the context of the application of the German Law on General Administrative Procedure, an administrative contract is considered to be a contract: 1) which is regulated by the regulations of administrative law, 2) the subject of which is the regulation of legal relations, 3) which is based on administrative law powers and obligations, 4) of which one contracting party is a subject of public authority. It is important to note that the German Law on Administrative Procedure regulates the form of the administrative contract, the situation when the consent of third parties and the consent of other persons of public law bodies to the administrative contract is required, regulates the nullity of the contract, regulates the amendment or termination of the contract due to changed circumstances, regulates the execution of the contract, as and subsidiary application of other regulations. The German theory of administrative law divides administrative contracts into coordinated (administrative) public law contracts and subordinate (administrative) public law contracts. Coordinated public law contracts are those concluded between equal or nearly equal public authorities, on the other hand,

subordinate public law contracts are those in which one contracting party has a stronger legal will, i.e. acts with authority, because it is the holder of public powers [18].

Institute of administrative contract of the Republic of Croatia

The goal of the comparative legal method must not be simple "legal tourism", as explained by Prof. Ratko Marković. In this context, the choice of countries, which will be the subject of study and research, as well as the legal systems, must be rational and measured, and above all based on their influence on the matter that is the subject of study. Looking at the comparative legal presentation of the administrative contract subject, the authors who deal with this topic from the perspective of theory point to the fact that two legal systems - French and German - have the greatest influence on the entity of the administrative contract. Also, it is pointed out that the biggest example, as part of the reform process, of our legal system in the segment of the introduction of the administrative contract was Croatian law [19].

From the aspect of this work, which is not thematically concerned with comparative legal research of the administrative contract, but bearing in mind the influence that the Law on General Administrative Procedure of the Republic of Croatia had on the introduction and definition of the administrative contract in the ZUP ("Official Gazette" No. 47/ 09), which was adopted on March 27, 2009. year, a short analysis of the regulation of this institute in the Croatian legal system will be carried out.

The Law on General Administrative Procedure of the Republic of Croatia standardized the basic issues of administrative contracts, while their detailed regulation is left to special laws and administrative court practice. According to the aforementioned law, instead of passing an administrative act, an administrative authority can conclude an administrative contract with a party in relation to which it would otherwise pass an administrative act, if such a contract is expressly permitted in a certain type of administrative matter. The legal relationship of administrative law can be contractually established, modified or annulled, if this does not contradict the legal order.

The Law on General Administrative Procedure of the Republic of Croatia distinguishes two types of administrative contracts: 1. coordinated administrative contracts (contracts between public authorities of equal or almost equal status) and 2.

subordinated administrative contracts (contracts between parties in a superior or subordinate position).

Administrative contracts can be concluded when there is an express authorization or in the case of decision-making based on the principle of discretionary evaluation, in a situation where it is not necessary to pass an administrative act to solve a certain issue. The law stipulates that the administrative contract must not be contrary to the wording of the decision and compulsory regulations, it must not be concluded against the public interest or to the detriment of third parties. If the contract acts towards third parties, i.e. creates certain rights or obligations, the consent of those persons is necessary for its validity.

The administrative contract is concluded in written form. The lack of any of the mentioned conditions results in the nullity of the administrative contract. The Law on General Administrative Procedure of the Republic of Croatia provides for unilateral termination of the contract by the administrative authority. Termination is carried out in the form of a decision, against which an administrative dispute can be initiated. Termination of the contract is possible in the following cases: 1) when the administrative authority and the party do not agree on the amendment of the contract or if the administrative authority or a third party does not agree to the amendment, 2) if the party does not fulfill the obligations of the administrative agreement, with the fact that if the failure to fulfill the obligation damage caused to the administrative body from the contract, the body has the right to claim compensation from the party and 3) when it is necessary to remove a serious and immediate danger to the life and health of people and public safety, if it could not be removed by other means that would less affected the acquired rights [20].

Due to non-fulfillment of obligations by the administrative body, the other party can file a complaint and has the possibility of claiming damages caused by non-fulfillment of contractual obligations. The objection is submitted to the authority that, according to the law, supervises the administrative authority with which the party concluded the contract. The settlement of disputes arising from non-fulfillment of obligations from administrative contracts is entrusted to administrative courts.

According to the provisions of the Law on General Administrative Procedure of the Republic of Croatia, an administrative contract is void (alternatively): 1) if it is contrary to

the decision for the purpose of execution of which it was concluded (administrative legal presumption) and 2) for reasons of nullity prescribed by the law regulating general obligation relations (general contractual presumption) [21].

Administrative contract in european legislation

Administrative contract in the European Union (hereinafter: EU) is a legal instrument used to regulate relations between EU bodies or institutions and other parties. An administrative contract is a contract concluded between an EU body (e.g. European Commission, European Parliament, European Court) and an individual, organization or other state.

A certain number of principles and methods of administrative law fall under the general principle of "reliability and predictability", which is also called "legal certainty" of procedures and decisions of state administration. These numerous principles are intended to eliminate arbitrariness from the conduct of public affairs [22].

A management contract in the EU can be concluded in different contexts, such as the award of financial support, cooperation or partnership agreements or service contracts. Examples of contracts in the EU may include project finance contracts, research and development contracts, public procurement contracts or service contracts. Administrative contracts in the EU must be concluded in accordance with the relevant EU legal regulations. It is also important to ensure transparency, equality and non-discrimination in the process of concluding an administrative contract.

The procedure for concluding an administrative contract in the EU may differ depending on the institution or body that concludes it. In general, the procedure includes the following steps: identification of contract needs, preparation of tender documents or bids, publication of tenders, evaluation of bids, negotiation of contract terms, conclusion of contract and verification of contractual obligations.

It is important to note that information on administrative contracts in the EU is available to the public, taking into account the principle of transparency and access to information within the framework of European legislation.

The criteria that affect the development of the administrative law of the member states of the Council of Europe are formed through the judicial practice of the European

Court of Human Rights. For administrative law, the most significant standards are those derived from the interpretation of Article 6, Paragraph 1 of the European Convention on Human Rights: "Everyone, during the decision-making process on his civil rights and obligations or on criminal charges against him, has the right to a fair and public hearing in a reasonable deadline before an independent and impartial court, formed on the basis of the law..." [23].

The impact of the postulates of the European Administrative Area on the administrative law of Serbia is manifested in the established right to "good administration" found in Article 41 of the Charter of Fundamental Rights of the European Union, which became a legally binding document with the Lisbon Treaty of 2009. In this context, the European Code of Good Administrative Behavior (2001),199 which, based on a special report of the European Ombudsman and on his initiative, was adopted by the European Parliament by Resolution of September 6, 2001, is of particular importance. years. The European Parliament invited the European Ombudsman to apply the Code on a daily basis, when examining the regularity of the work of Union bodies, in order to strengthen the right of citizens to good administration [24].

Conclusion

By reforming the administrative procedure through the adoption of the Law on General Administrative Procedure in 2016, which applies from July 1, 2016. year, it was aimed at improving legal certainty and improving the relationship between administrative bodies and citizens, and the operationalization itself was focused on certain goals in terms of the modernization of the procedure, realization of the public interest and the interests of citizens and other legal entities, efficiency and simplicity, establishing the principle of "good administration" in providing services in accordance with needs. The administrative contract, as a new institute in the legal system of administrative law, becomes part of administrative matters that affect the party's position through the application of regulations and other acts. However, after a full six years since its introduction, through the standardization of the administrative contract in five articles of the ZUP, through practice, questions are raised regarding definitions that are not regulated by law regarding the area of its application. Bearing in mind that the cause of the administration of the contract is

public interest, the question arises of the possible inequality of the contracting parties, which is the essence of the contractual relationship in terms of freedom of contract when concluding the contract. This conclusion is also indicated by the norms related to the termination of the contract, in which case only the authority has the right to terminate, while the party has the right to object due to non-fulfillment of contractual obligations. The party has the right to request changes to the contract, but cannot terminate the contract, in which case a situation may arise where the authority decides to stick to the agreed norms and does not want to change them, and What changed circumstances have arisen. A complaint is not an adequate legal remedy for non-fulfillment of contractual obligations, because it is about protecting the rights of one of the contracting parties, which should be equal in the contractual relationship. The reference to special laws, without some clear guidelines in defining this institute, is a significant doubt in its application. It is necessary to define the scope of the application of obligation relations to the administrative contract. Many authors dealing with the subject of administrative contracts write about the experience of the French legal system.

The administrative contract is of great importance for the legal system of state administration, because it represents the best possible way to achieve certain goals, which will justify its existence and importance by a quality way of meeting public needs. For these reasons, it is necessary to provide legal and other prerequisites for this institute to be improved and formally and legally regulated more precisely, which will facilitate its application to specific situations, prevent conflicting interpretations and improve the institute of legal protection of the contracting parties, which will be a joint task legal theory and practice, as well as comparative legal analysis, while giving appropriate proposals to the legislator.

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