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# Public Procurement in Serbia as the Special Regime of Contract Law

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### **Abstract**

The administrative and civil jurisprudence in Serbia and comparative legal systems do not concur on the nature of public procurement. While the literature on administrative law posits this emerging body of law into the public administrative law, many scholars of civil law in continental law systems subsume it under traditional law of obligations. This essay examines undefined systemic connections of the Public Procurement Act (PPA) with the law of obligations in the legal system of the Republic of Serbia. It suggests that the PPA norms, although do not explicitly refer to it, belong to a new special regime of contract law, which defining trait is the public personality of a procurement entity as one of the contracting parties. Therefore, it is proposed to consider rules of administrative decision-making on the contract awarding and its execution to be a new special regime of the contract law. Also, it is proposed to limit the superior position of the procurement entity in this relationship, for the sake of the preservation of basic civil law values.

*Keywords:* public procurement, obligations, contract, culpa in contrahendo

## Public Procurement in Serbia as the Special Regime of Contract Law

Public bodies necessarily address private businesses to provide goods and services for the optimal performance of their functions. Public procurement in contemporary legal systems is one of the new emerging bodies of law, and it cannot be classified inside public or private law. A demarcation between these subsystems of the dichotomously structured legal system is blurred (Vodinielić, 2016, pp. 67–161) and in this case, we face the dilemma between two contradictory conclusions. In short, the contract is of public, i.e. administrative nature, because one contracting party holds public authority, although the relationship between contracting parties remains private, i.e. contractual.

Therefore, there is no universally accepted theoretical stance on the legal nature of the contractual relationship between public administrative authorities and private providers of goods and services. This dilemma is evident in the example of the leading legal and economic powers of the European Union (EU): while in France contracts on public procurement are considered administrative contracts, in Germany they are classified inside commercial law. This dilemma is also present in the Serbian *lege lata* and administrative and civil law jurisprudence. Unfortunately, it is not tackled by the provisions of the extant Public Procurement Act (Narodna skupština Republike Srbije [Narodna skupština], 2019).

Contrary to the prevailing subsumption of the public procurement norms under administrative law, this paper suggests an integral contractual nature of the relationship between the contracting authorities and private suppliers. This approach should enable coherent interpretations of all applicable norms of public and private law, from invitation to tender to the termination of a public procurement contract, i.e. before and after the contract award.

The paper consists of four parts. The first part deals with some theoretical arguments that underpin this approach and identifies and assesses systemic links between Serbian positive contract law and public procurement norms in the second part. In the third, the administrative evaluation and selection of the most favourable bidder are placed in the broader framework of civil contract negotiations, and the conclusion discusses the advantages of the civil courts' scrutiny of the public procurement procedures and decisions.

## Contracts Between Public Institutions and Private Persons in Continental Civil Literature

Public procurement arrangements can be described in terms of legally

prescribed administrative procedures conducted by superior public authorities, which exercise their discretion to choose a private business that delivers goods and services that optimally suit the public interest. The more developed civil law literature offers a wider perspective because the discipline of administrative law is embedded in the continental *ius civile*; actually, it separated in the 17th century (Vodinelić, 1989, pp. 82–83). Since then, the concept of the state as a legal entity has been developing to explain the rights and obligations of individuals authorised to act as its organs (Troper, 2014, p. 204). This development resulted in the doctrine that a state, when being a party of private relations, poses legal personality equal to the personality of private persons (Kelzen, 2010, p.296).

Especially in German literature, the dominant view is that the state administration has the freedom to choose between ways of private law and public law. Furthermore, the state administration often opts for private law mechanisms because they allow more freedom of action. According to this point of view, the state administration "runs away" into the private law to the extent that it is called "administrative private law" that accrues the private law norms applied by public administration. These private law norms must be supplemented, modified or limited by the principles and rules of public law because public law is the *lex superior* that binds the holder of public authority more strongly than private law. Some even believe that in fiscal activities, the administration is not bound by public law norms at all, because that would hinder its mobility and efficiency. However, it is least disputed that the public administration must apply constitutional norms to their relations that are regulated by private law, whether by a direct application of constitutional norms or indirectly, through the interpretation of broad and undefined terms of private law in accordance with constitutional values. To clarify this public-private confusion, scholars suggest a unique legislative qualification for a relationship as public or private. Others propose the two-phase approach, which distinguishes an administrative decision on entering into a private law relationship according to the rules of administrative law and the execution of that administrative decision according to the rules of civil law (Vodinelić, 2016, pp. 396–397).

Furthermore, the private-law approach to public procurement is established in the German *lege lata*, by placing these norms in competition and commercial legislation. Even before-until 1993, the law of public procurement was classified as budgetary law, and the protection of bidders was made possible by the institution of pre-contractual liability of the contracting authority (*culpa in*

*contrahendo*), i.e. by tort claims before civil courts. This means of civil law remained today as a mechanism of secondary protection, while the administrative scrutiny of the non-discriminatory treatment and valid administrative treatment became primary after the implementation of the EU law (Koch, 2007, p. 3).

In short, the following arguments support the civil qualification of public procurement contracts: contractors in public procurement are equally responsible for a contract, there is no subordination between parties, both parties are free to regulate their rights and duties, disputes are solved by civil courts under rules of tort law, the principles and norms of the law of obligations are applied to the public contracts, etc. (Drmić, 2014, p. 502).

### **The Intertwining of the Obligations Act and the Public Procurement Act**

In this part, the connections between the norms of the positive contract law and PPA are identified and assessed. Although the provisions of PPA do not contain any express referral to the Obligations Act (Narodna skupština, 2020), they do contain concepts and institutions of civil law that implicitly refer to the application of the rules of OA. For instance, the PPA's Art. 229 envisages the procedure before "regular courts" for tort claims under PPA, implicitly referring to civil courts to deal with issues of material compensation under routine rules of civil procedure.

In addition to the aforementioned referral, the applicability of the OA norms is also indicated by the compatibility of the definitions from PPA's Art. 2 with the OA's contract law concepts. First, in PPA's Art. 2 the notion of the contract is omitted, implicitly referring to its general meaning given in OA. Likewise, the notions of "procurement of goods, provision of services and performance of works" from para. 2 to 6 of the same article equally apply to OA's articles that regulate the sale contracts (Art. 454–451), lease (567–599), service (600–629), construction (630–647), transportation (648–685), etc. Furthermore, the terms that define persons involved in public procurement also have their counterparts in OA: the term "customer", which indicates public procurement body from PPA's Art. 2 para. 1, is also found in OA's Art. 600 – 647, which regulate service and construction contracts. Finally, this applies to the same term "bidder" from PPA's Art.2 para. 8 and OA's Art. 26 – 45 that regulate the conclusion of contracts.

These compatible notions and PPA's vagueness shape a wider picture of the PPA norms within the contractual context. Some arguments in this

respect can be found in OA as well. First, OA's Art. 23 posits its norms as *lex generalis* for all matters of obligations law that are not regulated by other positive laws. This relationship *lex generalis* – *lex specialis* between the OA and PPA might be confirmed on the issue of the nullity and voidability of contracts: while the OA prescribes the general regime, PPA envisages special reasons and special administrative jurisdiction for such acts. In a similar vein, a compelling argument is given regarding damages caused by illegal actions of the contracting authority or other parties: the legislator omitted to tackle this issue in the special regime of PPA, and thus the general rules of OA should apply (Kozar, 2013, pp. 488–489).

From this point of view, the purpose of the PPA would be the establishment of a special contractual regime between public customers and commercial entities, which supplements and modifies the general contract law. Such new regimes are not novelties. For instance, similar special regimes are established between commercial entities in the OA's Art 25 and Art. 18, para. 2, which intensifies the delivery of goods and services and the liability of commercial entities. This point of view should be equally pertinent to the theoretical classification of public procurement contracts in commercial law. The similarities between the special regime of relations between both commercial entities, on the one hand, and the regime of relations between the public contracting authority and commercial entities, on the other, would be reflected in the factual inequality of the contracting parties and increased civil liability. However, two important differences between these two regimes should not be underestimated. First, it would be wrong to equate public-law customers with commercial entities, because the supremacy of one party in this relationship is not only factual but also of a legal nature. Second, the risks, motives, and decision-making methods of the parties are different: public customers mainly do not act for lucrative purposes, they decide according to strict coercive procedural rules and are not burdened with the risk of failure. On the other hand, private business is focused on profit, enjoys contractual freedom and bears full risk for it. Therefore, the special contractual regime established under PPA should not be subsumed under those prescribed in OA.

The main traits of this special regime might be seen through the application of certain AO provisions. First of all, calls for bids and notices of public customers from numerous PPA provisions can be placed in the context of the general offer, formulary contracts and their general conditions from AO's Art. 100, 142 and 143. In short, public customers, just like commercial entities

that dictate the contents of formulary contracts, are in a superior position because they can limit the contractual freedom of the other party. That is why bidders should be granted concessions that the inferior party should enjoy, such as the interpretation of unclear provisions of the contract in their favour, the right of cancellation due to non-compliance with the purpose of the contract or good business practices, etc. In this vein, the AO stipulations on formulary contracts that treat general terms of business as supplements to a contract might be analogously applicable to customers' public acts. Secondly, in PPA's Art. 94, the contracting authority is granted a superior position by being the only one authorized to demand from the bidder certain special means of securing the contract under this law, which deviate from the general rules on a down payment, waiver and a contractual penalty in AO's Art. 79–83 and 270–276. Thirdly, the supremacy of contracting authorities is expressed by their powers for unilateral modification and termination, as well as for annulment of public procurement contracts in PPA's Art. 154–163, 187 para. 8 and 226. These norms derogate or change the principle of equality between parties in AO's Art. 103–153 that regulate the invalidity of contracts, bilateral contracts and the effects of contracts, especially regarding the rules of assignment, modification and termination of contracts, including *rebus sic stantibus* under AO's Art. 133. According to PPA, the public customer is entitled to unilaterally change the contract if it was agreed upon or if it is necessary for the procurement of additional goods, services or works, due to unforeseen circumstances, change of contracting party, increase in the scope of procurement or replacement of subcontractors. The public customer is also authorized to unilaterally terminate the contract if circumstances arise that would significantly change its content if the contracting party should have been excluded from the procurement procedure, or because of violations of the EU norms. Fourth, the PPA norms enable a new ground for annulment of the public contract and the administrative jurisdiction that complements the applicable AO norms: Under PPA's Art. 226 para. 2, the Republic Commission is authorized to annul the public procurement contract because of significant violations of PPA's procedure. Such authority of the administrative organ is narrower in scope than the authority of civil courts to cancel a contract that is contrary to compulsory norms, public order and good customs, under OA's general rule under Art. 103 para 1. These three grounds of cancellation apply to any violation of law and any breach of good faith in public procurement contracting as well.

## **Public Procurement Procedure as the Special Regime of Negotiation and *culpa in contrahendo***

If the OA is *lex generalis*, then the PPA's contracting award procedure should fit into the wider framework of negotiations that precede the conclusion of contracts. Therefore, the norms of administrative procedure that regulate contract awards should be placed in the context of the OA provisions on pre-contractual relationship and pre-contractual liability (*culpa in contrahendo*). In other words, the administrative process of selection of best bidders should be equated with negotiations between private persons, and the public contract award with the consensual statement of mutual wills that concludes the contract.

Such assumptions that converge public and private law are easy to prove because the PPA provisions do not seem complete without OA's Art. 26 – 45 on the general regime of concluding contracts. A few examples confirm this conclusion. First, PPA's Art. 66–84 and 85–87, which define special techniques, instruments and deadlines in the contract award procedure, regulate only the powers and responsibilities of the contracting authority in terms of the form of negotiation. But the OA norms are still inevitable for the regulation of the relationship between a public customer and a bidder that might end with the conclusion of the contract. Second, OA's Art. 27 para. 2 stipulates that the regulations that determine the content of the contract are their integral part, which enables the incorporation of all applicable PPA norms into the procurement contract. Third, the OA's Art 28 para. 2 stipulates that declarations of will to conclude a contract must be free and serious, and thus the evaluation of a certain offer is wider than executing formalities prescribed in PPA. Fourth, OA's Art. 33 (general offer) extends the meaning of the term "offer" from Art. 32 to all proposals to conclude a contract addressed to an undefined number of persons if they include essential contractual elements. This provision thus implies that all invitations for bids and public customer notifications from numerous provisions of PPA can be subsumed under the OA's wider term of "general offer."

Finally, the PPA's Art.229 on material compensation for PPA's beaches is consistent with OA's rules on the civil liability for non-conclusion of the contract, which is theoretically shaped through Ihering's doctrine of *culpa in contrahendo*. In OA, this doctrine is established in Art. 30 para. 1–3, in form of the exception to the general rule that the conduct of negotiations does impose a duty of possible tort compensation. The alternative conditions for this exception

are the lack of intention to conclude the contract or the lack of valid reasons to justify the loss of such intention during negotiations. In the OA's Art. 35, a similar exception applies in negotiations through media communications. In contrast to the OA, the scope of this exception is stupendously broader in the modern continental theory of civil law, covering a plethora of situations that involve every breach of the good faith principle. In short, one is responsible not only for the initial or later absence of the contractual intention but for all harmful consequences of his/her behaviours that amount to a breach of duty to the counterpart, from the first business contact. These duties toward a counterpart include warnings about risks, caring for his/her property, and not thwarting well-founded expectations and beliefs that the contract will be concluded (Vodinić, 2012, p. 493). The civil literature of *acquis communautaire* supports this broader understanding of *culpa in contrahendo*: The service provider is under a pre-contractual duty to warn the client if the provider becomes aware of certain risks regarding the service that is requested (von Bar et al., 2009, Art. IV:C:-2:102). Furthermore, a contract cannot exclude or limit the duty of good faith and fair dealing (2009, Art. II-3:301). This duty includes care for the counterpart's expectations, his/her trust and a fair allocation of negotiation risks (Cartwright & Hesselink, 2009, pp. 458-462).

This harmonised interpretation of the PPA and OA provisions sketches a public procurement procedure as a special regime of *culpa in contrahendo*: In addition to the PPA's administrative control of a contract award legality, activities of both public customer and private supplier are subject to broader control of compliance with principles and rules of civil law.

Theory and jurisprudence of civil law can determine the results of civil courts scrutiny although dilemmas about the nature of *culpa in contrahendo* may lead to contradictory conclusions. According to the objective conception, mere causality between the act of a negotiator and the harmful consequence is enough to prove liability for negligent negotiation. On the other hand, the premise of the subjective approach is culpability, and the assumed culpability for intent and gross negligence is the prevailing doctrine (Salma, 2010, p. 59). One is not liable for ordinary negligence, while a higher standard of liability is set in business contracts (Stefanović, 2020, p. 329). The nature of public procurement contracts is the closest to commercial contracts and thus the issue of culpability is not significant or even irrelevant, because administrative organs are not human beings endowed with consciousness and free will. Besides, the outcome of civil litigation between negotiators should be compensation (Ćosić, 1998, p. 19),

because the reparation judgements would deprive a customer of contractual freedom to choose a bidder.

Therefore, a bidder harmed in the public procurement process can ask for pecuniary and non-pecuniary compensation for costs and lost profit (Kozar, 2011, p. 35) including any type of damage to his/her rights or legitimate interests (Vodinečić, 2012, p. 494). In other words, negotiators in public procurement are protected by civil law not just against the harm caused by another party, but against any his/her behaviour contrary to the principle of good faith.

## Conclusion

The OA's norms must be an inevitable means of regulating both pre-contractual and contractual relations between a customer and a bidder, although their application was not expressly prescribed by PPA. Two reasons support this conclusion. First, the provisions of PPA contain quite a few terms whose meaning is determined by the OA's norms, and second, the OA establishes the general contractual regime that is also applicable to public procurement.

The OA norms have a broader substantive scope than PPA norms, and their application enables broader scrutiny before civil courts than the administrative litigation of limited jurisdiction. Furthermore, the rules of OA supplement the provisions of the PPA on torts compensation. OA also enables the contract cancellation on several grounds, i.e. if they are contrary to "compulsory regulations, public order and good customs", while PPA's scrutiny is limited only to non-compliance with the provisions of that law. Finally, the AO norms under consideration above also have a broader personal scope because they equally authorise and oblige both parties, while the PPA provisions contain only a customer's powers. This broad application of the AO norms in public procurement cannot harm the public interest, because the PPA norms have priority in the application, either as *lex superior* or as *lex specialis*.

The OA principles and norms enable the quest for a fair balance between a private bidder and a superior public customer. This equalisation is important because a public bidder, in contrast to a private bidder, has no free will and is not concerned about business risks. In short, PPA norms pursue distributive justice, defining procedures that oblige a superior public authority to choose a private bidder, among many, that optimally contributes to the public interest, and OA norms make possible commutative justice between contractual parties only.

In other words, the public customer duty is not just to ensure equal treatment of all bidders under PPA`s Art. 9; it must avoid utilising its superior public position under the principles of equality and good faith and honesty under OA`s Art. 11 and 12. The legal supremacy of a public customer is thus only an exception from the general contractual regime, which is established by the compulsory PPA norms. Such an exception is necessary for the public interest. In these cases, norms of civil law determine only the scope of ordering and unilateral imposing (Vodinečić, 2012, p. 400).

In sum, the lack of norms in PPA that expressly address the application of OA norms is probably not a problem that should be overestimated. However, one has to be aware that this vagueness might contribute to interpretations contrary to the basic values of civil law. In short, there is a high risk that public customers' negotiation and contracting with private bidders might be contrary to principles of good faith and fair dealing. For that reason, a provision in PPA is proposed to remind public procurement servicemen, besides the requirements of administrative legality, of the broader context of civil law.

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## Javne nabavke u Srbiji kao poseban režim ugovornog prava

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### Sažetak

Nauke upravnog i građanskog prava, kako u Srbiji tako i uporednopravno, nisu saglasne o prirodi javnih nabavki. Dok se u literaturi upravnog prava ova narastajuća pravna grana i disciplina smiješta u upravno pravo, u kontinentalnim pravnim sistemima mnogi ih podvode pod tradicionalno obligaciono pravo. U ovom ogledu se ispituju nerazjašnjene sistemske veze Zakona o javnim nabavkama (ZJN) sa obligacionim pravom. Ukazuje se da norme ZJN, iako ne upućuju eksplicitno na to, pripadaju jednom novom posebnom režimu ugovornog prava, čija je osnovna specifičnost javnopravni subjektivitet naručioca kao jedne ugovorne strane. Zato se predlaže kvalifikovanje normi upravnog odlučivanja o ugovoru i njegovog izvršenja kao *lex specialis* ugovornog prava, kao i ograničavanje nadmoći naručioca u svrhu očuvanja osnovnih vrijednosti građanskog prava.

*Ključne reči:* javne nabavke, obligacije, ugovor, *culpa in contrahendo*