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Contracts in Public Administration

Agnieszka GRZESIOK-HOROSZ[1], Piotr HOROSZ[2]

Abstract: **Objectives**: The present makes a contribution to the discussion on contracts in administration under Polish law. It concentrates on theoretical issues, but ones of considerable practical significance. **Prior Work**: The problems of contracts in administration form an interesting, though relatively poorly explored, field. This paper is a result of academic considerations on the classical institution of civil law, namely a bilateral juridical act - a contract, applied in public law. The significance of this area may be demonstrated by the fact that one scientific conference and a collection of papers have been devoted to contracts in administration. **Approach**: The authors apply, as research method, the analysis of jurisprudence and doctrinal writings referring to the provisions of law currently in force. The paper discusses as well the draft of the *Act on general provisions of administrative law*, and includes comparative remarks. **Results**: Our investigations have inclined us to put forward certain comments pertaining both to opinions presented in academic writings, and to legislation. The authors formulate as well *de lege ferenda* proposals. **Implications**: The paper is to outline theses interesting but complicated matters. As a voice in the doctrinal dispute it can also be useful for law students. **Value**: The advantage of the paper is its transparent construction and logical composition. Starting from general questions, the authors proceed to discuss the problems referring to the binding law and proposed amendments. The article is also enriched by a presentation of rules functioning in foreign countries and proposals of regulatory solutions.

Keywords: forms of administrative activity; private law contract; public law contract

1. Introduction

Over the last 30 years one of the characteristic features of administration has become the growth in number of acts of contractual character, frequently referred to as mediatory, consensual, conciliatory or expressly contractual. It could be concluded in a figurative manner that “the administration has descended from the

[1] Assistant Professor, PhD, Silesian University of Technology, ul. Akademicka 2A, Gliwice, Poland, postal code**:** 44-100, tel.: +48(32)2371000, fax**:** +48(32)2371655. Corresponding author: a.grzesiok@vp.pl.
[2] Assistant Professor, PhD, Silesian University of Technology, ul. Akademicka 2A, Gliwice, Poland, postal code**:** 44-100, tel.: +48(32)2371000, fax**:** +48(32)2371655. E-mail: Piotr.Horosz@polsl.pl.

pedestal of authority." The sphere of non-authoritative acts is broadening and public tasks gradually become privatized (Biernat, 1994), both economic ones, as e.g. management of public utilities, and non-economic ones, as social aid, health protection, culture and employment promotion. The *New Public Management* emphasizes that reforms of public administration should be oriented towards market solutions and make avail of the economic model in this respect. In turn, *Public Governance* puts emphasis on the change of way of exercising administration by the broadest possible participation of citizens in the operation of the public sector[1] (Poulsen, 2008, pp. 163-165)

The subject relates to an interesting and relatively unexplored area in Polish law. To some extent it is the case because of a certain terminological opposition present in the title itself. According to the division proposed by Ulpian, the characteristic feature of civil law is that persons independently shape their legal position. Administrative law is classified as public law. In accordance with the old approach it is called the law of organizing authority which subdues its subjects. For private lawyers the notion of contract in administration sounds a bit obscure, and the situation has not been made clear by the legislator, who seems inconsistent in the choice of method which is to be applied.

The problem of contracts in administration was the subject of the scientific conference which resulted in the publication of a post-conference volume (Boc & Dziewiecka-Bokun, 2008). The present paper is a voice in the discussion concerning contracts in administration in Polish law, matters still unregulated and rarely discussed by academics.

The structure of this paper is suited for the established goals. After the initial outline of forms of administrative activities, the authors concentrate on the character of contracts, and compare these two eventually. Subsequently, the authors present the draft of the act which is to regulate these issues in Polish law, and familiarize the reader – within the scope of the paper – with solutions accepted in other legal systems. For the purposes of the present investigations it has been accepted that contract in administration is a contract the party to which is the State Treasury, a unit of territorial self-government or other juristic person whose activities comprise the exercise of authoritative measures.

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The subject matter of this paper has awaited legal regulation for many years. The development of administrative law leads in the direction of bilateral, conciliatory forms of activity. Legal regulation appears sometimes in sector solutions. Proper rules are also to be found in legal systems of other states. The main motif of the present considerations is the question whether the total of the regulation should be defined by the legislator or legal practice.

2. Public Administration. The Notion, Spheres and Forms of Activity

Public administration in the subjective (organizational) sense is a structure composed of administrative bodies and other administrative entities, and in the objective (functional) signifies administrative activities carried out by the state or entities designated by the state.

A characteristic feature of administration is its immense activeness, management of elements of the social reality, initiation and organization of social life. These various means and legal implements make for the so called forms of activity, namely types of a particular act of an administrative body designed by the provisions of law.

One can distinguish between two spheres of functioning of administration: *imperium* and *dominium.* Basically speaking, administration may act authoritatively, for instance by issuing administrative decisions or performing enforcement acts. Administrative bodies may also participate non-authoritatively in legal transactions, as persons on equal footing with other parties to private law relationships. This is also connected with the fact that administrative bodies are equipped in juristic personality, enjoy their own property, capacity to be a subject of rights and obligations in the area of civil law, to acquire rights and incur obligations by means of their personal acts. In this area, the most frequent form of activity is a contract, on the basis of which the contracting parties establish a particular legal relationship, transform their relationship, or lift it. At this point it should be noted that the Acts on territorial self-government delimitate the rules of establishment and competences of public entities, which allows drawing the conclusion that they are not “simple” entities of civil law.

Traditionally, forms of administrative activity are divided into several categories (Ochendowski, 2006; Boc, 2008; Zimmermann, 2006). The first line of distinction lies between authoritative powers, giving the administrative body a position

superior to the other entity, and non-authoritative entitlements, where the administrative body operates on equal footing with others. Authoritative acts make an element of the classical model of application of law by the administration, under which authorities solve legal problems by unilateral and authoritative embodiment of the solution in an administrative ruling. Among non-authoritative forms the doctrine enumerates usually: settlements, administrative agreements, civil law juridical acts, factual acts. It has been demonstrated that the object of the contracts are obligations (not in the civil law understanding of the word) pertaining to the realization of tasks in the area of public administration. Non-authoritative acts should be the preferred mode of operation of administration, since they open up to the needs of a citizen.

Taking into consideration legal effects of administrative activities, one can distinguish legal acts which lead to the emergence, termination or transformation of a legal relationship, and factual activities. Taking into consideration the relation to the binding law, one can speak of law-making actions and application of law, where the legal ground follows from the provisions of substantive law. Another criterion – of the legal character of the activity – divides administrative activities into administrative law civil law juridical acts. Taking into account the criterion of the sphere of legal effects, one can differentiate between internal and external acts. By considering the criterion of addressee of the legal effect, one can differentiate between individual and general actions.

As a consequence of the lack of a stable catalogue of the forms of administrative activities, various classifications may be encountered in the literature (Ochendowski, 2006; Boc, 2008; Zimmermann, 2006). Frequently, various authors invoke the division into administrative rulings, acts relating to enforcement, directly binding acts, bilateral administrative acts and factual activities of the administration. Among bilateral acts one can enumerate civil law contract and administrative – agreement, promise, contract and settlement. The doctrine distinguishes between administrative and civil law juridical acts and other administrative activities, which do not consist in issuance of legal decisions and are not juridical acts at the same time. These comprise factual, social and organizational actions, and certificates.

Another encountered solution divides the forms of activity into: administrative rulings, normative acts, factual actions and civil law contracts (concluded where the administration deals with economic questions, provides services for the society

or in makes transactions regarding goods), administrative agreements, voivodship contracts, as well as contracts covered by the regulation of public-private partnership.

3. Contracts as a Form of Administrative Activity

While discussing contracts in administration, one should discern civil law contracts governed by the rules of civil law and public law contracts, which can be divided into administrative agreements which serve the purpose of carrying out the objectives and addressing questions of public administration, where both parties are units of public administration, and administrative contracts, where one of the parties is a unit of public administration and the other one is not (private person).

Contracts are concluded in administration for two essential purposes. The first goal is to acquire assets (goods and services) for the maintenance of the system of administration and provision of necessary renditions to the society. Moreover, it has been emphasized that no other legal entity acquires as many goods and services as administrative bodies. The second goal is connected with the duty on the part of administration to assure different types of services and renditions of fundamental social significance, for instance the supply of water, electricity, disposal of rubbish etc. The contracts concluded may either fall under a named type (e.g. sale, lease, consignment), or unnamed and possibly mixed types.

It has also been widespread to indicate three areas of activity where administrative bodies use the form of contract. The first sphere concerns direct performance of tasks of administration providing services. For instance, these could be contracts with providers of services – for the supply of water and energy, maintenance of cleanliness, social aid renditions, disposal of communal property. The second sphere includes the necessity to create and establish public access facilities, installations and objects necessary for the operation of offices and administrative institutions (e.g. purchase of office materials). The third sphere concerns fiscal activities, namely the acquisition of pecuniary incomes necessary to cover the costs of functioning of administration, management of property, e.g. collection of levies of public law character and contracts connected with property transformations (Kijowski, 2005).

Communal economy, understood as economic activity connected with carrying out tasks of public utility, the goal of which is to satisfy collective needs of the society, may be conducted in the form of factual actions, which does not, however, exclude

legal measures in this area (Grzesiok&Horosz, 2009). In consequence, units of territorial self-government can entrust performance of such objectives, by way of contract, to natural persons, juridical persons and organizational units that do not enjoy juristic personality, which has been regulated in detail in the Act of 20 December 1996 on municipal services management (Dz. U. of 1997, no. 9, pos. 43 as amended).

Performance of various tasks of the public sector can be vested in private entities on the basis of contract of public-private partnership, in accordance with the Act of 19 December 2008 on public-private partnership (Dz. U.2009, no. 19, pos. 100 as amended). In the contract, the partner undertakes to carry out a project for remuneration and to incur expenses for the realization of the project, and the public entity undertakes to cooperate in order to achieve the goal (Grzesiok, 2009; Horosz 2009).

3.1. Characteristic Features of Civil Law Contracts

Most generally speaking a civil law contract is a juridical act comprising at least two concordant declarations of intent, whose goal is to establish, transform or terminate a legal relationship. Its characteristic features include the equal status of the contracting parties and freedom to frame the contractual content according to the principle of freedom of contract expressed in article 353^1 of the Civil Code. Since the topic of this paper are contracts, it would be impossible not to mention *synallagma* as an expression of mutual character of the concluded contract. In a situation where the contract is to embody dialogue between the parties of varying interests, there is an element of contingency pertaining to the realization of one party's rendition in the context of loyal mutual performance of the other party. By regulating ways of formation of contract, the Civil Code envisages the possibility of choice of the offer and acceptance, auction and negotiations. In this place dissimilarities become apparent relating to the conclusion of contracts whose party is to be an administrative body, since they must be concluded in a manner strictly determined in legal provisions. Without detailed considerations, one can point to the statute providing for specific modes of public procurement, namely the Act of 29 January 2004 Public Procurement Law (Dz.U.2010, no. 113, pos.759 as amended).

In the case of contracts in public administration we have to do with restrictions of the civil law principle of party autonomy of will, present already at the stage of

contract conclusion. These are: the choice between the modes of contract conclusion stipulated by the legislator and the obligation on the part of the administrative body to perform additional actions, on which the conclusion of contract becomes dependent. One should emphasize as well the fact that a potential contractor cannot effectively initiate the procedure of contract conclusion, since the initiative of contract conclusion rests on the administrative authority. It should also be stressed that a characteristic feature of these contracts is the lack of freedom of choice of the contractor. In the case of certain contracts concluded with public administration, only an administrative body may be a partner for the business providing services of certain types.

Academic writers emphasize as well restrictions of the autonomy of will of the parties as far as the possibility to frame the content of contact is concerned. The most important restrictions include the specification of content of already existing contracts by introducing a list of obligatory clauses which the parties are obliged to include in their contract. In consequence, the question arises if we can speak of free framing of the content of legal relationship if one of the parties imposes the content on the other? Moreover, one should consider provisions on the basis of which administrative bodies may unilaterally shape the contract by issuing general contract terms, rules, model contracts. Basically, it is inadmissible to modify the content of already concluded contracts. Scholars point as well to the statutory framework of rights and obligations of the parties to the contract which seems favourable to the public authority (Stec, 2009).

Academic authors emphasize the compulsory character of contract conclusion, special entitlements for the public utility enterprise, for example to apply penalties for non-performance, to exercise controlling powers and restrict compensatory duties (Wrobel, 2010). Where an individual receiver concludes a contract with the use of model agreements with the municipal enterprise, e.g. municipal waterworks and sewage utility or cleaning enterprise, it is a so called adhesive contract. Opponents of the adhesive character of the agreement point to degeneration of consensus and contractual cooperation. In practice, such contracts contain illegal abusive contractual clauses which fulfil the criteria of abusive provisions, which means that they blatantly violate the interests of the consumer and remain contrary to principles of fair dealing. In contracts for the provision of services of public utility these might be for instance clauses restricting compensatory liability for the results lowered quality of services or the duty on the part of dwellers to dismantle TV and radio aerials from the roof and pay additional fees to the provider of cable

television for the installation of collective aerials (Czarkowska, 2008). Moreover, it has been spotted that the possibility exists to compel the other party to the contract to perform his or her obligation without judicial proceedings in the mode of administrative enforcement.

3.2. Public Law Contracts

Broadly speaking, these are contracts covered by the provisions of administrative law. Scholars accept that public law contracts consist in common performance of tasks, referring or entrusting performance of tasks in the area of public administration to another entity. The distinctive criterion is the direct emergence of effects in the sphere of administrative law where the objectives are implemented in authoritative forms. In the case of non-authoritative forms the decisive criterion is the administrative law (executory and general) character of the task, subject to the contract, following from statutory provisions (Boc, 2008; Zimmermann, 2006).

At the beginning, one should point to characteristic features of administrative law contracts. First, the contract is concluded by an administrative body with a legal entity not subordinated to the body, in relation to which entity the administrative body would otherwise have to issue a ruling within the sphere of law application. Another vital question is connected with the fact that the contract may result in the emergence, transformation or termination of an administrative law relationship. Legal grounds of this type of contracts are to be found in the provisions of administrative law. It is important that compliance with contractual provisions is guaranteed by administrative measures.

Polish authors emphasize that this kind of agreements have not been thus far regulated by statute. A certain "substitute" of the administrative law contract are contracts concerning construction and exploitation of motorways concluded between the particular company and the General Directorate for National Roads and Motorways, in pursuance of the Act of 27 October 1994 on payable motorways and the National Road Fund (Dz. U. 2004, no. 256, pos. 2571 as amended), and contracts concluded with regard to services, consignment or building works regulated in the cited statute Public Procurement Law.

An attempt to regulate the discussed questions are the provisions on administrative contracts included in the draft of the Act of March 2008 – on general provisions of administrative law. The draft envisages that such contracts could be concluded in

all questions within the scope of public administration which are generally decided by an authoritative ruling, unless special provisions should provide otherwise. However, there are several critical points about the draft raised in the literature. It makes a fragmentary and dubious regulation (Zimmermann, 2010).

3.3. Differences between Civil and Administrative Law Contracts

As we compare civil and administrative law contracts, the first difference pertains to the fact that it is admissible to conclude a civil law contract where provisions of law oppose to such a solution, whereas administrative contracts require an express statutory empowerment. There must be explicit statutory ground to conclude the act on the part of the administrative body, according to the principle of the administration's adherence to law.

For the second thing, in the case of administrative contract one of the parties is always an administrative body or an entity entrusted with the authority along with the obligation to provide particular renditions. The parties to such a contract are administering entities, i.e. administrative bodies in the functional sense: organs of governmental administration – central and local, self-governmental authorities and other public entities within the tasks entrusted to them on the basis of a statute or agreement. One should emphasize the double nature of units of territorial self-government, since they embody both an element of public authority in the area of their competence and remain at the same time juristic persons which conclude civil law transactions by means of declarations of intent made by the bodies as representatives of self-government.

As far as civil law contracts are concerned, the parties may be natural persons, juristic persons and other organizational units equipped in legal capacity. In the case of juristic persons the legislator determines a catalogue of entities equipped in legal personality, by pointing to the type of an organizational unit (companies, units of local self-government, foundations), or by pointing to the particular entity (State Treasury, National Bank of Poland). It should be also emphasized that the legislator generally does not point directly to the particular institutional unit (*statio fisci*), but describes tasks and competences of given class of institutions.

When it comes to control, it should be emphasized that parties to a civil law contract exercise direct control over performance of obligations, whereas in the case of administrative contracts control and supervision rests on the part of the

administrative body. Moreover, differences concern conditions that contents of civil and administrative law contracts should meet if the object of the transaction is to remain within the sphere of administration. Administrative contracts must additionally guarantee that the entity which takes on administrative objectives is going to provide the contracted renditions to general public. Moreover, provisions are to be assured in a constant and durable manner, and all users are to be treated equally. One should emphasize that civil law contracts are related solely to the external sphere of administrative activities; they do not make administrative law acts, while administrative contracts produce direct effects in the area of administrative law. Their legal character is that of public law.Another important question pertains to ways of deciding disputes in order to assure objectivity and effectiveness – in the case of civil law contracts the disputes are heard by civil courts, and in the case of administrative contracts cases are decided by administrative courts.

Possible similarities may concern conclusion of contracts by way of negotiations, i.e. concordant declaration of intent of the parties, where the content of the contract is a result of compromise.

4. Comparative Law Remarks

Regulation of contracts as forms of administrative activities has been included in certain foreign legislations.

In the German legal system it is an institution known since the XIXth Century, and enacted upon in 1976 in the Act on administrative procedure. German doctrine differentiates between two basic types of administrative contracts. The first one is coordinative contracts concluded between legally equal parties, which correspond to Polish administrative agreements. The other type is subordinating contracts, concluded between entities remaining in the relation of dependence, which replace administrative rulings. In principle conclusion of the contract is preceded by negotiations, but practice and mass character of administrative contracts have led to the emergence of contracts drafted on forms prepared in advance. Similarly in Austria, one can differentiate between the indicated types. Conclusion of a contract is admissible where a clear statutory empowerment exists. It has been emphasized that the admissibility of conclusion of this type of contracts cannot be inferred from the civil law principle of freedom to contract. We are confronting a situation in

which the law neither allows precisely nor forbids the conclusion (Stefanska, 2008).

The French model is completely different. Here, the administrative contract construction has been established by the judicature of administrative courts and doctrine of administrative law. The area is excluded from the scope of application of civil law; it refers to contracts concluded by the state and other state juristic persons of the public law with private entities, whose purpose is to acquire goods and services of public utility by means of a juridical act (Sledzinska, 2008).

In Spain the questions of contracts have been regulated in a manner similar to France. The requirements concerning administrative contracts are that at least one of the parties should be a public administrative body, the contractual object is to pertain to public interest, the goal of the contract should be to implement a particular work, public service or delivery. Moreover, administration is equipped in prerogatives connected with performance of the contract which becomes effective with the omission of negotiations (Stefanska, 2008).

In Italy, such contracts are covered by the 1990 Act on procedures in administration. In an initial agreement the parties determine content of administrative ruling which the administrative body becomes obliged to issue, and the substitution agreement makes an alternative form of concluding the proceedings. The Civil Code applies only duly. The equality of parties is missing, the position of the party which represents public administration is stronger (Szymecka, 2008).

5. Conclusions

Undoubtedly, the very notion of contracts in administration, as well as their classification makes a difficult task for the future. The opinion seems reasonable (Mozdzen – Marcinkowski, 2008) that it would be justified to establish – instead of "contracts in administration" – the category of "common activities in administration", which would encompass factual actions in administration and non-authoritative forms of activity. Non-authoritative forms of activity comprise: named civil law contracts concluded by administrative entities with external subjects for the sake of acquiring goods necessary for the operation of administration, named civil law contracts concluded between administrative entities, and unnamed contracts concluded between administrative entities, as well

as civil law contracts regulated outside the Civil Code and public law contracts. The last can be divided into contracts of internal character (e.g. administrative agreements) and external ones, among which one can enumerate contracts concluded to ensure particular provisions to the society as a part of privatization of public objectives.

An undoubted advantage of civil law contracts is their elasticity, expressed in the possibility of cooperation between subjects concluding the contract, transparency of contracts and acceptance of the negotiated terms. One of the arguments justifying non-authoritative acts in administration might be the possibility to accelerate, simplify and assure more flexibility of administrative activities. This is obviously connected with the expansion of economic activities of public administration and the consequent expectations of citizens relating to satisfaction of public needs. It is emphasized that forms characteristic of private law are less formalized and more effective. Partial restriction of freedom is understandable as far as broadly conceived public affairs are concerned, which is motivated by the urge to narrow the scope of potential corruptive possibilities. There may, however, arise the question whether approaching consensual forms from the perspective of administrative procedures and the situation where the administration unilaterally shapes the content of contractual relationships to which an administrative body is a party, does not lead to fluctuations concerning the principle that civil law regulates legal relationships between equal entities.

It is worth making a postulation that the legislator, while enacting on the questions of contracts in administration, should envisage direct application of the Civil Code to such contracts.

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