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Management contract in public procurement

Summary

Doctoral dissertation prepared at the

Department of Civil Law

under the supervision of

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in the field of Legal Sciences

Łódź 2024

The management contract is a contract of direct factual and theoretical significance and functions successfully not only in business transactions involving entrepreneurs, but also in the public procurement sphere. And with respect to certain public entities (e.g., companies with state treasury majority shareholding), it has an obligatory character. Its fragmentary regulation in public procurement supported by the experience of official practice proves that it does not differ significantly, especially in terms of its construction, from the models formed in private business relations. The clear specificity of the management contract, above all with regard to its legal nature, is - unfortunately - not sufficiently supported by the normative. This has been the main reason for increasing doubts and vacillations in interpretation and qualification difficulties. Therefore, empirical arrangements reflecting the actual functioning of the management contract, especially in public procurement, under the influence of various official guidelines are helpful. These findings prove decisive for its legal qualification and placement in the typology of bond contracts. Conclusions from the comparative law analysis of legislative solutions and accompanying interpretative views operating in other EU countries, especially in Germany, Italy and France - countries with a long tradition of outsourcing the management of a company or institution to a qualified manager - were also of significance. The French solutions may serve as a model to set the direction of the Polish Code regulation and those contained in separate provisions[1]. In Germany, the position that management services are subordinate to the employment contract has prevailed, while in Italy the discussion is still ongoing, although the concept of a civil law contract of mandate (Italian mandate model) is gaining more supporters than the employment contract. The evolution of Polish separate regulations and practice patterns tends to strengthen the concept recognising the managerial contract as a sub-type of mandate contract.

Currently, there is no longer any doubt that the management contract practised in the public sector is a civil law contract of an obligatory nature, developing under the influence of official guidelines, having a clear property specificity, subject to the regime of public procurement law, also in the sphere of sector contracts. The improvement of its functioning in public procurement may be significantly influenced, in addition to the improvement of statutory regulation, by the dissemination of models and good practices especially by the Public Procurement Office.

[1] These regulations are from 2016 and therefore take into account the current economic situation.

Because of the specific nature of a management contract justified by the protection of mutual trust between the parties, it would seem advisable to introduce legislative solutions stimulating greater interest in negotiated procedures and competitions when contracting for the management of a company or public institution. In particular, the normative prerequisites of Art. 153 and Art. 170 of the Public Procurement Law which condition the permissibility of the above procedures should be appropriately developed to make the matter more obvious. The same applies to competitions organised in accordance with separate provisions, where the concept of repairing a public undertaking or institution proves to be important. Nor is there any obstacle to introducing certain more effective competition solutions into constitutional, statutory or even general provisions on the management of state property, along the lines of the 1997 Ordinance of the Council of Ministers on the procedure for holding a competition for the purpose of selecting the manager to whom the management is entrusted. This should be done against the omission of the applicable procedures in favour of the direct involvement of the manager, as well as against the various practices of organising fictitious or person-oriented competitions.

The management activities that constitute the process of managing the entrusted enterprise or institution, including representation, are diverse, all the more so because their catalogue is not closed. However, the vast majority of management actions within the scope of management tasks are legal actions in the broader sense (juridical), while factual actions, also quantitatively numerous, are relegated to the background as less important, often of an accessory nature. This is indicated, not only by observations of the practical functioning of the contract in question, but also by its clauses and the purposes for which it was concluded, often under the influence of difficulties and the need to repair the organisational structure of a company or institution. The recurring rights and obligations of the parties to the management contract are already so stable that its subordination to the contract of mandate within the framework of the sub-type of contract advocated for some time now has to be considered. The leading role of legal transactions is discernible even in such contracts, in which the management duties are summarised in a simplified task-oriented form with special attention paid to the achievement of assumed effects in terms of the smooth functioning of the organisational structure.

By means of a management contract, the manager-contractor undertakes to perform in the name of and on behalf of the principal certain management activities, as legal and factual activities, directed at improving the operation and business (efficiency) of the entrusted enterprise or institution. The management contract qualifies under a contract of due diligence, payable, two-

sided obligation and consensual. These elements are taken into account when looking for the appropriate construction (type) of contract with the corresponding legal regulation. In the absence of an unambiguous definition of the scope of the subject matter of management activities, the management contract creates the basis and authorisation to perform all necessary activities on behalf of and for the account of the principal for a specified period of time. Hence, the obligation arising from the management contract is considered to be continuous. Sometimes performance measures are additionally indicated for the manager's performance and, in the absence of such measures, it is assumed that the performance should be at least satisfactory. The manager's remuneration is usually set as a fixed (lump sum) and exceptional variable remuneration is linked to an increase or decrease in effects (performance). In light of the nature of the relationship of trust, the right of the manager to demand the necessary advance payment and to be reimbursed for the costs incurred, justified by the circumstances of the performance of the contract, the duty of cooperation and loyalty, as well as the mutual right to terminate the contract for important reasons, which include the breakdown of trust, are considered self-evident.

When looking for the appropriate place for a management contract, it is necessary to use empirical findings and general theoretical premises for the qualification of obligation contracts. A management contract within the scope of manager's performance combines two types of contracts covering provision of services, namely: when it comes to legal actions - a contract of mandate, in the case of factual actions - a contract for provision of services referred to in Article 750 of the Civil Code. Taking into account the degree of ‘intensification’ of the features characteristic for a contract of mandate, it has to be stated that the majority of the manager's obligations are legal actions, and their practical significance is also essential. For these reasons, a contract of mandate *sensu stricto* was considered to be the leading type of agreement within the framework of the managerial contract. For factual actions, it was deemed necessary to apply the legal regime applicable to a contract for the provision of services on the terms of mandate in terms of Article 750 of the Civil Code. Therefore, for the purpose of simplification of the whole issue, taking into account the results of the empirical analysis, reinforced by legal and comparative findings, a *de lege ferenda* postulate should be expressed concerning the need to promote the management contract to the group of named contracts and locate this complex construction within the subtype of contract of mandate. This proposal is in line with the outcome of the work of the Codification Committee for Civil Law Reform. Professor Z. Radwański, in his preliminary draft of the systematic approach to the special part of contract law, already

envisaged separating the management contract as a sub-type of contract of mandate, within the group of contracts pertaining to the provision of services and consisting in diligent performance. The contract of mandate for its possible subtypes would constitute an overarching construction, although its scope needs to be adjusted to cover not only legal acts, but at least the factual acts related to them.