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Specific performance of public procurement contract

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SUMMARY

This dissertation is dedicated to the principle of specific performance of a public procurement contract, and it explores legal solutions found in the fields of public procurement law and the law of obligations. The solutions presented have been selected and presented from a specific perspective: as legal instruments demonstrating the existence of the principle referred to in the title and as tools affecting the obligation which is key to it: the obligation to perform a public contract *in specie*. The analysis is constrained to the specific performance of a public contract by a contractor. The contracting authority's obligation to pay for the non-monetary performance is of secondary importance, as the terms are determined by law (currency, forms of settlement). The basis for payment and the deadline for payment are the only remaining considerations.

A public procurement contract is defined as a civil law contract for pecuniary interest concluded between a contracting authority and a contractor, the subject of which is the purchase by the contracting authority of construction works, supplies or services from a selected contractor. In the context of public procurement, the primary objective is to address the collective (public) needs and the functional elements of the interest of the contracting authority. This interest may be thus distinguished from a conventional contractual interest; there is also a specific creditor.

The dissertation's objective is to verify three theses. 1) Within the context of public procurement law, the principle of specific performance of a public procurement contract, resulting from application of article 354 of the Civil Code, is oriented towards the satisfaction of collective (public) needs. 2) The principle of specific performance of a contract is subject to stricter requirements in public procurement law through numerous normative solutions and their appropriate interpretation, each time focused on the objectives (purpose) of the services, supplies and construction works purchased. 3) The obligation of specific performance of obligations in the sphere of public procurement contracts is subject to specific safeguards through the limitation of the autonomy of the contracting authority's will, as well as the contractual freedom of the parties, as a result of numerous mandatory and unidirectionally mandatory provisions. The preparatory

obligations under public law (analysis of needs and requirements of contracting authority, adequate description and proper estimation of the subject of a public procurement contract), the duty to pursue claims to which a contracting authority is entitled, and the preparation of a report on the performance of a public procurement contract are also important. The dissertation is divided into six chapters and a conclusion.

Chapter One: The problematics of the contract performance in comparative legal context

This chapter begins with presentation of the specific features of public procurement contracts. It then offers a historical perspective, which allowed to trace the evolution of the *pacta sunt servanda* principle and the obligation to perform a contract. Then the chapter explores the obligation to perform non-monetary obligations *in specie*, as well as its limits, from the perspective of the CISG, PECL, DCFR, as well as German and Dutch law. The chapter concludes with a presentation of Polish legal solutions regarding performance of contract *in specie* before the World War II and after it - under the Civil Code.

Chapter Two: The scope of the requirement for specific performance of public procurement contract.

The opening section of this chapter delineates the fundamental assumptions, encompassing pivotal concepts such as the performance of a contract, the proper performance of a contract, making performance, making the proper performance. In the following section, the criteria for the proper performance of a public procurement contract by the contractor and the limits of the obligation to perform the contract *in specie* are presented. These include subsequent impossibility of performance, extraordinary changes in circumstances, and economic irrationality of performance. At the conclusion of this chapter, the principle of specific performance is matched with the principle of effectiveness of public procurement. This facilitates the verification of the thesis regarding the key importance of the former.

Chapter Three: The conditions for the principle of specific performance of public procurment contract.

This chapter conducts an analysis of the contracting authority's fundamental obligations with regard to ensuring correct performance. The presentation commences with an exposition of the function of analysing needs and requirements of the contracting authority. This is followed by a presentation of the statutory rules for describing the subject matter of the public procurment contract, in which the obligation to provide an exhaustive description is of fundamental importance. In the following section, the significance of employing rational criteria when evaluating tenders is presented. The subsequent subchapters focus on the stimulatory effects created by the performance security and the provision of an advance payment to facilitate the fulfilment of the contract.

Chapter Four: The verification of the credibility of contractor.

This chapter presents an analysis of legal solutions related to the selection of a credible and reliable debtor who will perform the public procurment contract properly. The presentation commences with an examination of the significance of trust in the contractor, subsequently progressing to a discussion of the issue of exclusion from the public procurment proceedings. This is followed by presentation of the mandatory and two optional grounds for exclusion from the public procurement procedure. The latter are closely and directly related to the breach of key obligations under the public procurement contract. In the following section, the "positive" requirements for the contractor's capabilities are presented. These requirements are focused on proper performance of public procurement contract, and the selection criteria, which enhance the conditions for participation in the contract award procedure, are also outlined. The chapter concludes with a presentation of ways to increase the contractor's potential, including joint bidding for the contract, relying on the third-party resources, and subcontracting. This section contains an analysis of the admissibility of the requirement for the contractor to personally perform the public procurment contract.

Chapter Five: The solutions enhancing the obligation of specific performance of public procurment contract.

The fifth chapter commences with an examination of the public law duty of the contracting authority to pursue claims, including the ones of the civil law nature. Subsequently, the chapter highlights the obligation of the parties to cooperate in order to ensure the proper performance of the public procurment contract, a fundamental obligation under the public procurement regime. The subsequent subchapters present the analyse a number of legal solutions important for the proper performance of the public procurment contract, including the obligation of the contracting authority to supervise and control whether the public procurment contract is being performed properly, the obligation of the contracting authority to properly accept the contractor's proper performance, restrictions on changes and termination of public procurement contracts, which serve to reinforce the obligation to perform the contract *in specie*.

Chapter Six: The certain solutions stimulating the specific performance of public procurment contract.

The sixth chapter is dedicated to the analysis of certain legal constructions that offer a substantial incentive to fulfil a public procurement contract *in specie*. The chapter opens with the issues of severe liability under the statutory warranty for the required quality of the subject of the public procurment contract. The subsequent focus is on the stimulating function of liquidated damages. This progression enabled the subsequent subchapter to address the topic of receiving a substitute performance as a consequence of statutory or contractual provisions. The analysis in this chapter concludes with issues related to the inevitability of satisfying the contracting authority's claims from the security of the proper performance, including performance bond. The contracting authority's public law obligations with regard to the analysis of a completed public contract justified the inclusion of these issues in the last subchapter of the dissertation.

The Conclusion of the dissertations presents the findings that have been shown to confirm the questions theses that were proposed in the introduction.