

THE IMPACT OF LEGAL REGULATIONS ON INVESTMENT PROJECT MANAGEMENT IN CONSTRUCTION

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Introduction/background: The performance of construction work is a process in which the legislator deeply interferes by devoting to it not only a separate act but also by regulating construction issues in several other acts. The management literature does not pay sufficient attention to legal matters, even though that they conclude some traps for the investor or the manager.

Aim of the paper: To indicate and explain the idea and the stages of a construction investment project in light of the law with attention to the risks involved for the investor or the manager.

Materials and methods: Analysis of literature, laws, and judgments.

Results and conclusions: Regulations deeply interfere with the construction process, forcing the execution of subsequent steps in a specific order. Furthermore, every effort needs to carry out some actions. At the same time, there is a risk of failure of the investment for legal reasons during its course despite fulfilling the requirements stipulated at earlier stages. For this reason, it is essential to plan the construction investment and the project manager has to have a legal culture greater than in the case of other projects.

Keywords: construction works, management, law.

1. Introduction

The construction investment process is a special project, for which there are several arguments. First, it involves a large number of materials and labor, which often requires high skills (Levy, 2002; Kaplinski, Dziadosz, Zioberski, 2011). Second, its result is usually of great value and satisfies basic or other important human needs. Third, it is usually costly (Winiarski, 2019). Fourth, there are few investment processes that have such detailed legal regulations (Bizon-Górecka, Górecki, 2017; Kaplinski, Dziadosz, Zioberski, 2011). For this reason, any person managing such a project should be aware of the content of the rules governing this department of social reality. This is undoubtedly an additional and necessary part of her competence (Obolowicz, 2011). Information of this kind is called legal information, and it helps to obtain compliance of actions with the law (Ostrowska, 2010). Ignorance of the law is even

considered an obstacle to the development of construction projects (Belniak, 2010). Hence, the purpose of this paper is to introduce the legal regulation and legal requirements associated with the implementation of a construction project.

In analyzing the legal regulation, it must be noted at the outset that it relates to three areas. First, it will be construction law. Second, civil law regulation. Third, public procurement regulations. This is because these regulations have different purposes.

At first glance, construction law may be associated with the Law of July 7, 1994. - Construction Law, OJ 2021, item 2351 as amended. Nevertheless, the scope of this branch of law is broader and includes other regulations related to the field of construction (Bilinski, Kucharczyk, 2013), such as the Law of March 27, 2003, on Spatial Planning and Development, OJ 2022, item 503 as amended, or the Law of April 27, 2001. - Environmental Protection Law, OJ 2022, item 2556 as amended, or the Act of October 3, 2008, on providing information about the environment and its protection, public participation in environmental protection and environmental impact assessments, OJ 2022, item 1029 as amended (Zwolak, 2016; Grzywinski, 2015). Understood in this way, construction law is part of administrative law (Leoński, 2005), characterized by the state's sovereign and unilateral influence on the individual (Ochendowski, 2005). Placing construction projects under the regulation of a branch of the law of this nature aims to effectively achieve the goals of safety, health, hygiene, environment, energy efficiency, or sustainable development (Prawo budowlane. Komentarz, 2022).

Civil law regulation is mainly contained in the Law of April 23, 1964. - Civil Code, OJ 2022, item 1360. This law shapes a separate type of contract concluded for the purpose of ordering construction work - construction work contracts - recognizing that the specifics of this area of economic turnover require a separate regulation (Kodeks cywilny. Komentarz, 2013). At the same time, this regulation is so fragmentary and general (Nózka, 2013) that in practice it is often supplemented with ready-made forms and model contracts, the most important of which are the so-called FIDIC templates (Wysoczanski, 2018; Kaplinski, Dziadosz, Zioberski, 2011).

The public procurement regulation (Law of September 11, 2019. - Public Procurement Law, OJ 2022, item 1710, as amended), on the other hand, recognizes construction works as one of the categories of public contracts, i.e. contracts paid for with public funds. The contract itself is a construction contract in the civil law or FIDIC sense, public procurement only determines the procedure for selecting the contractor and in certain aspects modifies the civil law regulation of the construction contract (Wysoczanski, 2018).

How do these issues affect the construction project manager? In his case, the issues of the construction contract along with procurement recede into the background, as they have little impact on the construction schedule and thus the project implementation schedule. Besides, this is an issue over which the manager does not usually have much significant influence, since when concluding a contract the parties either use ready-made templates (especially in the public procurement regime) or call on qualified legal assistance. In contrast, the regulation of

construction law is very extensive and significantly dictates the subsequent stages of the project that the manager manages. Hence, it can be concluded that among the various legal issues related to the regulation of the construction process, knowledge of construction law is the most essential for the manager of such a project, and these issues will be addressed in this study.

2. Basic definitions

In the literature on the management of construction investment processes, there are various attempts to stage construction works. For example, J. Grzywinski distinguishes:

- the first stage, which involves determining the legal status of the property, includes acquiring the right to dispose of the property, obtaining the right to dispose of the property for construction purposes,
- the second stage, where development conditions are determined and a construction project is developed, in the form of obtaining a decision on development conditions or determining the use of the land on the basis of the local zoning plan,
- the third stage, where a building permit is issued and construction work is carried out, which consists of obtaining a building permit decision, concluding a contract with a contractor, handing over the construction site to the contractor, providing investor and project's author supervision, developing a safety and health plan, notification of the intended commencement of construction work, obtaining a construction log, and determining the supply of utilities for construction,
- the fourth stage (occupancy permit and commencement of operation), which includes obtaining a decision on the occupancy permit, handing over the construction documentation and as-built documentation to the owner or manager of the facility and establishing and maintaining the facility book (Grzywiński, 2015).

In turn, Z. Dzierżewicz and J. Dylewski divide the construction process as follows:

- stage one (establishing the conditions for development and land use), comprising one phase (preparation of the investment) and the following activities: establishing the conditions for development and land use, drawing up a geodetic survey map, preparing geological documentation, environmental impact assessment, obtaining the right to dispose of the property for construction purposes,
- the second stage (preparation of the investment for implementation), consisting of the design phase, which includes the preparation of documentation and the agreement and opinion of this documentation, as well as the administrative and legal phase, consisting of performing the necessary official actions preceding construction work,

- the third stage (implementation of the construction project), comprising the construction phase and the commissioning phase,
- the fourth stage, i.e. maintenance (operation) of the construction object (Dzierżewicz, Dylewski, 2011).

There are also many other proposals for the division of the construction investment process, discussed by J. Obolewicz (Obolewicz, 2016). They are characterized by the separation of specific activities, their different number, and their different grouping into phases and stages. Some are limited only to the construction of the facility and entry into operation, while others also include the operation and demolition of the facility. Thus, there is a significant difference between them in assessing the duration of investment process, some of them often include several hundred years of the facility lifespan. What is even more important, the literature does not explain what these stages consist of, what requirements, risks, procedures, etc. are associated with them. Thus, it is necessary to base the systematics of the construction investment process on legal regulations and explain its course in a way that is useful to the project manager, for whom these regulations are one of the external factors in planning the project (Gorzelań-Dziadkowiec, 2003). Hence, based on their analysis, at least 12 stages can be distinguished, which will be presented and discussed below. These stages are not consolidated, i.e. the various stages are "handled" by different entities and the investor has to deal with each of them separately (the only exception is the so-called "spec-laws", which, however, will not be presented here for the sake of clarity of the argument).

3. The investment process in the construction industry

3.1. The notion and scope of the investment process in the construction industry

The discrepancies in the understanding of the concept of the "investment process in the construction industry", as indicated above, prompt the notion of the issue of its boundaries and scope. Helpful here will be Article 1 of the Construction Law, which defines the object and scope of this law, i.e. the range of matters that this law regulates. These are:

- matters of design, construction, maintenance, and demolition of construction objects,
- the rules of operation and construction of administration bodies.

As you can see, this law regulates not only the execution of construction works, but also the subsequent maintenance, as well as the demolition of construction objects, and even the rules of construction of administration bodies. Therefore, the investment process in construction should not be equated with the entire life cycle of a construction object. Also J. Obolewicz and M. Okuń distinguish the construction investment process and the operational investment process as stages of the life cycle of a construction object (Obolewicz, Okuń, 2021).

M. Dabrowski and K. Kirejczyk limit investment in construction to the construction and commissioning of a facility likewise (Dabrowski, Kirejczyk, 2001).

Additional arguments are provided by the dictionary of the Polish language, according to which the word 'investment' means 'an economic outlay whose purpose is to create new or enlarge existing fixed assets' (Słownik, 1978, p. 806), or 'the allocation of financial resources for the construction, expansion, modernization of fixed asset objects' (Słownik, 1998, p. 328).

It is clear from these arguments that the investment process in construction is the process from conception to completion of construction work (Grzywinski, 2015). Understood in this way, the investment process according to the detailed regulation of the Construction Law consists of the following stages:

- acquisition of legal title to the land on which the investment will be implemented,
- execution of environmental agreements,
- obtaining confirmation of the use of the land for construction purposes,
- obtaining maps for design purposes,
- obtaining permits, agreements, and opinions required by separate regulations,
- development of the construction project,
- execution of administrative procedures preceding the commencement of construction works,
- notification of the planned commencement of construction works,
- commencement of construction,
- execution of construction works,
- obtaining a geodetic as-built inventory,
- procedures for acceptance of the object.

I must emphasize at this point that these stages will occur in most investments. However, under certain circumstances, some stages may be omitted (as will be discussed). This causes the need to analyse each investment individually in the light to the requirements indicated in the regulations. Hence it is difficult to talk here about creating investment models because these models would have to be dozens if not hundreds. It is better to adopt a single model, indicated above, of the course of construction investment, assuming the possibility of certain exemptions from it. Of course this regulation may be perceived as excessive, especially from the smaller investment point of view, but we have to bear in mind that restrictions imposed by public law aim at security, environment protection as well as the protection of investor's interests.

3.2. Acquisition of legal title to the land

Legal title is the right to dispose of the property in a way including the ability to perform construction work. It can be ownership, a limited right in rem (e.g., usufruct or easement), or even a contractual right, such as a lease or tenancy. It is important that it is shaped in such a way as to create the freedom to carry out construction work, i.e., for example, the theoretically

broadest right to property must not be limited in such a way as to preclude the carrying out of construction work, such as an established easement for the transmission of gas through an underground pipeline (Prawo budowlane. Komentarz, 2022), and in turn, the theoretically narrowest lease or rental right should ensure the possibility of carrying out construction work. This imposes an obligation on the investor to determine the legal status of the property or to appropriately shape the agreement concluded with the owner of the property, for example, providing for the right to build a cell phone mast (Soltysiak, 2019).

3.3. Execution of environmental agreements

In the next step the construction project manager should apply for a decision on the environmental conditions of the investment, if necessary (this means that not every investment project will need this step). This procedure is regulated by the Law on Providing Information on the Environment and its Protection. Its purpose is to limit the significant impact of the project on the environment. The law distinguishes two types of this impact - permanent and potential. In the first case, the assessment is mandatory, and in the second case it is optional, i.e. the project manager must apply for a determination of the obligation to conduct an assessment, and if such an obligation is imposed, an assessment must be applied for (as in the case of mandatory assessment). The criteria for distinguishing between permanent and potential impacts are set forth in the Regulation of the Council of Ministers of September 10, 2019, on projects that may have a significant impact on the environment, OJ, item 1839.

If a decision on environmental conditions is necessary, then an environmental impact report must be prepared and attached to the application. In the course of the proceedings, the authority additionally analyzes whether the project takes place in a Natura 2000 area. In this case, the body conducting the proceedings applies to the Regional Directorate for Environmental Protection (RDEP) to consider the impact of the project on the Natura 2000 area. This authority first analyzes whether there is a need for such an assessment and if there is, it conducts the assessment and may determine that the project has an impact on the Natura 2000 area (which makes it impossible to implement the investment), or that the project has an impact but is important for the public interest (then the investment is possible, but the conditions set by the RDEP must be met), or it may determine that the project does not affect the Natura 2000 area (which makes it possible to implement the investment freely). This is a risk factor, because after the funds have been spent on acquiring the title to the property, it may turn out that the implementation of the planned project turns out to be impossible or unprofitable due to the conditions imposed. This risk can be mitigated by making environmental arrangements before acquiring title to the property, e.g. on the basis of a power of attorney from the property owner, or by entering into a lease agreement subject to obtaining all necessary permits.

3.4. Confirmation of the use of the land for construction purposes

The designation of land for construction purposes is carried out on the basis of the Spatial Planning and Development Act. This law provides two instruments for this. One is the local zoning plan (LZP), and the other is an administrative decision. The plan is a universally binding legal act, passed by the municipal council. It consists of two parts - a graphic one, i.e. a map specifying the designation of individual areas in the municipality - and a text one, indicating the exact conditions for the development of various areas. Covering the area of a planned project with a plan is the most favorable situation because even before the acquisition of legal title, its legality can be verified.

If there is no plan, it is necessary to apply for an administrative decision - either a decision on development conditions (DDC) or a decision on the location of a public purpose investment (DLPPI), which is issued only for public purpose investments, i.e. primarily road infrastructure, transmission networks, environmental protection facilities, etc. The risk factors associated with a DDC are the possibility of suspending the proceedings on its issuance for up to 9 months if the municipality proceeds with the development of an LZP, its expiration if the plan is enacted, and basing the decision on the principle of good neighborliness. This principle requires that, when determining the conditions for new development, reference should be made to the way in which neighboring plots accessible from the same road are developed, which means that at least one of them must be developed, although "neighboring" does not have to mean an immediately adjacent plot, it is enough that it be a neighborhood forming an urban whole (NSA judgment, 2006). In addition, when applying for a DDC, one needs to prepare rather extensive documentation, including a map and characteristics of the investment, which is obviously more cumbersome than reading the LZP (Grzywinski, 2015). These circumstances make it much safer to plan investments in the area covered by the LZP.

3.5. Maps for design purposes

A map for design purposes can be obtained from a surveyor. The surveyor takes a base map of the plot of land, along with the immediate surroundings, from the state geodetic resource, and then superimposes the objects on the plot onto it. This stage is quite time-consuming and can take up to several months, although it will only be necessary if the investment involves the construction of a new building substance, rather than, for example, the reconstruction of an existing building.

3.6. Permits, agreements, and opinions required by separate regulations

The basic permits, agreements, and opinions required by separate regulations include a decision to exclude land from agricultural or forestry production, a water law permit, and permission from the road manager to locate an exit from a public road.

The forest or agricultural use of the land is decided primarily by the land registry, maintained by the district governors. Hence, the factual state of the property should not be suggested. The exclusion of land from agricultural or forestry production depends on the fulfillment of the prerequisites indicated in the Law of February 3, 1995, on the protection of agricultural or forest land, Journal of Laws 2022, item 2409. Agricultural land can be of class I to VI. Land of lower classes, i.e. IV-VI, does not require any special prerequisites, the mere submission of an application is sufficient for their exclusion. In the case of higher classes, there may be a need to pay compensation and annual fees. The exclusion of land from forestry production is similar, with forest land having no classes, so in each case a decision specifying additional obligations related to exclusion is necessary. If there are trees on the land and it is necessary to cut them down in order to implement the project, there may be further fees involved, and, even worse, the decision on this matter is discretionary (NSA judgment, 2013), which may involve the investor not receiving permission to do so (Grzywinski, 2015).

A water permit is a decision issued by the Polish Water Authority. It is necessary for certain water uses. In the context of construction works, this may be water abstraction for the purpose of the facility, sewage disposal, dewatering of excavation, or construction of a water facility, e.g. a culvert over which the entrance to the property will be located (although sometimes a so-called "water right notification" is sufficient for water use, which informs the Polish Water Authority about the intended use and allows raising objections). A necessary attachment to an application for such a decision is a water law operative, describing the manner of water use and analyzing its effects.

In turn, the location of the exit from a public road is the designation of the place where the entrance to the property from a public road is located, as well as the size and shape of the exit. Consent is given by the road manager, which is, with respect to municipal roads, the mayor, county roads - the county board, provincial roads - the provincial board, and national roads – the General Directorate of National Roads and Highways. Importantly, carrying out works in the road lane and placing devices there (e.g., connections) also requires the consent of the road manager and payment of fees.

3.7. Development of the construction project

It is worth noting that the activities described so far sort out the construction status of the property and aim to collect a full set of information necessary for the designer. At this stage, there is no doubt that the investor can dispose of a specific property and that it can be used for the intended construction project, moreover, the investment will not deteriorate the environment (or conditions will be specified), and the designer will be aware of the limitations in the form of the actual status on the plot (survey map) and the location of the exit. The execution of a building project should be commissioned to a designer with the appropriate building license, although such a project is not always required, sometimes a sketch or drawing is enough,

depending on what kind of administrative procedure preceding to begin a construction work is required for a particular investment.

3.8. Administrative procedures preceding the commencement of construction works

In principle, 3 types of investments can be distinguished in terms of the criterion of the administrative procedure preceding them:

- a) investments requiring a construction or demolition permit,
- b) investments requiring notification,
- c) investments for which no administrative procedure is needed.

The fundamental (default) premise for carrying out construction work is the requirement to obtain a construction permit. Other modes come into play only if the planned investment falls within one of the exceptions listed in Article 29 of the Construction Law. These exceptions total nearly a hundred. It is also worth noting that often the same type of work (e.g., insulating a building) will be covered by different procedures depending on the size of the work. These procedures are usually perceived as cumbersome and bureaucratic, however, it should not be forgotten that the protective function of the Construction Law is revealed in them since their fulfillment means that the investor cannot be prevented from carrying out the investment (Zwolak, 2016; Prawo budowlane. Komentarz, 2022).

The difference between a notification and a construction (demolition) permit boils down to the type of response the investor receives from the administrative body to the documentation submitted. In the case of a permit, this response takes the form of a formalized document, the content of which is the approval of the construction project, permission to carry out the work, and often the definition of other conditions for carrying out the work. Notification, on the other hand, results in a form of administrative action that is referred to as a silence of the administration. It implies a lack of response and is tantamount to (tacit) acceptance of the submitted documentation (Zimmermann, 2016). However, this is not the only effect of the notification, as the authority may raise an objection (if it was defectively submitted), or impose an obligation to obtain a construction permit (mostly if the planned project is unsafe or nuisible).

There is a little-known risk factor associated with the notification, and that is the provision of Article 30(6a) of the Construction Law, according to which an objection is considered to have been made at the time it is sent to the addressee (i.e., the investor), and not at the time the correspondence is received from the office. This results in the fact that the seemingly relatively short notification deadline (21 days before the start of work) realistically needs to be extended by a few days for the possible arrival of an objection, in order to avoid so-called "unauthorized construction," i.e., performing work despite objections.

3.9. Notification of the planned commencement of construction works

As mentioned, the successful completion of the procedures discussed allows investor to legally carry out the work. However, it is necessary to perform one more official act – to notify construction supervision authorities, which deal with the control of the work carried out. Importantly, there is no need to meet a deadline here, you can notify even one day before the start of the work (Prawo budowlane. Komentarz, 2022). In addition, there is no need to wait until the building permit becomes final or the deadline for responding to the notification expires - you can start work after notifying the construction supervision authority, but then the investor assumes the risk of possible revocation of the building permit as a result of an appeal or receipt of the authority's response to the notification (Prawo budowlane. Komentarz, 2022).

3.10. Commencement and development of the construction project

The notification completes the stage of construction investment involving the preparation of all the necessary documents and completion of the required official formalities. From this point, the execution of physical activities to achieve the intended purpose begins. Studies in the field of construction investment management state that it is necessary at this point to conclude a contract with the contractor of works (Obolewicz, 2016). Meanwhile, this is only a factual necessity, not a legal one - the Construction Law does not require that the work be performed by a contractor and thus that a contract be concluded with him. In fact, the work can be performed by the investor, acting alone, or by his employees. The necessity of hiring a contractor will occur only when the investor does not want or cannot perform the work himself.

The execution of construction works, despite being the most labor-intensive and costly stage of a construction project, prejudging the realization of the intended object (Winiarski, 2019), is not regulated separately in the Construction Law (Grzywinski, 2015). It treats only duties related to safety, supervision, and reporting in a construction log. The execution acts realizing the construction included in the project, are not regulated, so they remain the area of free action of the investor or the contractor hired by him.

3.11. Obtaining a geodetic as-built inventory

The construction of an object means the creation of a new building substance, which requires inclusion in the surveying documentation. Hence, the next step is to hire a surveyor to measure the factual location of the object on the plot (since during the course of the work there may be an error in the location of the object, the dimensions of the object may change, etc.) and plot the object on the map.

3.12. Procedures for acceptance of the object

The final stage of construction work is the acceptance of the object. Its purpose is to make sure that the completed object complies with the project, and the art of construction, and will be safe to operate. The Construction Law provides for three ways to end construction work:

- notice,
- obtaining an occupancy permit,
- a mode that requires no formalities.

The notification is addressed to the construction supervision authority in the case of such projects as single-family houses and construction carried out under a building permit. Following it, the construction supervision authority may object within 14 days if the construction substantially differs from the conditions set in the construction permit or notification. The substantial difference mainly concerns the dimensions of the object, the number of floors, the way of use, the compliance of the construction with additional arrangements and agreements, and also the change of heating to solid fuel. The effect of an objection is that the object cannot be used and an occupancy permit must be obtained. Importantly, the objection should be sent to the addressee within the indicated period, not received, so from the point of view of project management it is worth waiting a few more days before using the object (like in the case of notification of planned construction works).

An occupancy permit is required for:

- larger investments (e.g., sports facilities, public buildings, hotels, multi-family residential buildings, stores, restaurants, pile stations, hydro technical structures),
- when such an obligation is imposed in the construction permit,
- objections after notification of the end of construction,
- unauthorized construction,
- partial execution of the project (i.e., the investor has completed only part of the work covered by the project and nevertheless intends to proceed with the operation of the object).

Before the issuance of an occupancy permit, an inspection of the facility is mandatory, which should be carried out within 21 days of the application; however, exceeding this deadline does not entitle the investor to operate the facility; he must wait until it is completed (Jarzynski, Szynalska 2022). This stage of a construction investment project is also fraught with risk, as any incompliance with the law found is subject to a penalty. The inspection ends with the issuance of a decision, which can be positive, partially positive, and negative. A partially positive occupancy permit specifies the conditions for use of the facility and indicates what works still need to be done and by what date. Once the works have been completed, the investor notifies the building supervisory authority, under the risk of expiration of the permit. It should also be remembered that use can be commenced only after the permit becomes final (Grzywinski, 2015).

In contrast, all other construction work, i.e., performed on the basis of notification, or not involving the construction of a new facility (e.g., reconstruction), is not subject to any verification, and the operation of facilities so constructed, or on which work has been carried out, can commence immediately after completion of the work.

4. Summary

The analysis of the legal regulation of the investment process in the construction industry, carried out above, made it possible to:

- define the meaning and scope of this type of project,
- showing its specificity in comparison with other projects, expressed in the far-reaching interference of the legislator in its course,
- accurately distinguish its stages and describe them, so that they can be elements of the process in the process approach to management (Ostrowska, 2010),
- paying attention to moments that are particularly risky for the investor.

One more aspect of construction project management should be noted. It is the important role of the conceptual stage, where the decision to start the project is made. This is the most important stage of the project (Winiarski, 2019). This decision should be particularly carefully considered, since the acquisition of title to a property usually involves the expenditure and investing considerable cash, and if it turns out that the acquired plot of land is not suitable for the project, its disposal may not only be time-consuming, but also involve a loss due to the fees incurred in connection with the purchase of the property (customarily charged to the buyer), a possible decrease in value, and income tax on the profit when the property is sold before the expiration of five years after its acquisition. Hence, it is necessary - some time in advance of the legally regulated or literature-indicated stages of the investment process in the construction industry - to make analyses of the legal and factual status of the property, including the property's use and development conditions. Legal restrictions will primarily include established easements, or environmental requirements (especially protection of plantings and the cost of their eventual removal). Technical restrictions, on the other hand, mean the geological conditions of the site and the technical conditions specified in the Regulation of the Minister of Infrastructure of April 12, 2002, on the technical conditions to be met by buildings and their location, OJ 2022, item 1225. It may turn out, for example, that the minimum distance required by them from the object on the neighboring plot (including due to requirements to ensure adequate natural light), or from the forest will prevent the implementation of the planned project.

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