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SAFETY OF INVESTMENT PROCESS PARTIES IN THE ASPECT OF CONSTRUCTION WORK CONTRACT

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Summary:

The essential characteristics of a construction investment project include, but are not limited to: individual, comprehensive, specialized, complex and multi-step nature of activities, significant time constraints, demand for different qualifications and resources (material, financial). The above characteristics are a potential source of risk, which makes it necessary to accurately describe the mutual relations of entities involved in the project - primarily in the scope of the content of a construction work contract. Its task is to settle the commitments of the parties, their rights and obligations, and the responsibility for actions taken at the stage of preparation and implementation of the investment, in order to ensure its safe and non-conflicting realization. Signing a construction work contract results in the assumption of specific responsibilities by each party. In practice there are numerous examples of contractual clauses, which constitute a gross violation of the safety and balance of the parties in the area of fair and even distribution of potential risk. Most often two groups of contractual provisions are observed in the content of works contracts. The first one contains an unreasonable limitation of the contractor's entitlements, the other includes the irrational extension of the contractor's obligations and the transfer of numerous consequences of potential risks. The incorrect, i.e. unequal division of risk and its consequences is the most common cause of disputes between parties to a construction work contract. The paper presents the issue of asymmetry in the allocation of risks and limitations in shaping the contents of the public procurement contract, in terms of the safety of parties to construction work contracts

Keywords:

INTRODUCTION

Preparation and implementation of a construction investment project is a highly difficult operation, as it covers a wide range of technical, legal and economic tasks. It is also characterized by the specialized nature of the work, a significant reduction in time and the need for various qualifications and resources (e.g. tangible, financial) [6,9]. The above characteristics are simultaneously potential sources of risk for the entities involved in an investment project [1]. The parties to the contract for construction work are: an investor (i.e. an initiator of the investment process, funding the realization of construction work) and a contractor (i.e. an entity conducting economic activity consisting in the performance of construction work). In view of the above, it is evident that the construction investment process requires precise coordination, also in terms of the contracting parties' obligations. In order to optimize the fair distribution of risks between the parties involved, it is substantial to properly design the content of a construction work contract, including the description of relations between entities, their rights and obligations, as well as responsibilities for activities undertaken at the stage of preparation and implementation of a certain investment. The consequence of concluding such a contract is the acceptance of specific obligations, but also risk and its effects, by each party. The aim of the proportional distribution of risk effects is to ensure the safety of contracting parties [5]. Defining potential threats and opportunities resulting from the content of a contract by the parties to the agreement allows effective mechanisms to safeguard interests of each party and consequently the smooth execution of the subject matter of the contract.

1. ESSENTIAL FEATURES OF CONSTRUCTION WORK CONTRACT

A contract for construction works, constituting an essential element of the construction investment process, is governed by the provisions of Art. 647-658 of the Civil Code (Kc) [10]. By signing a construction contract, an investor is obliged to perform activities necessary for the preparation of works required by the relevant regulations, while a contractor -to deliver the contractual construction carried out in accordance with the project and in compliance with technical knowledge. A construction contract is bilateral, consensual and paid. A construction contract is reciprocal - each party is entitled to a benefit and is obliged to provide services at the same time, supposing that the provision of one of the contracting parties is equivalent to that of the other [8].

It should be emphasized that a contract for construction works constitutes one of the types of interlinkage between the parties and, at the same time, the essential element of a construction investment process. Its scope covers works having clearly construction character, but also preparatory and as-built activities. Co-operation between investment process participants can be carried out under different types of connections. In practice, in the process of realization of construction investments, it is possible to identify specific organizational patterns and their characteristic relations between participants of the investment process reflected in the specific legal solutions contained in contract contents. Relations between entities are regulated by, inter alia, contractual settlements for design works, geological works, geodetic and cartographic works, in-

vestor supervision or author supervision, investment substitution, construction works, subcontracting or partial subcontracting, equipment supply, etc. [5]. During the implementation of a construction investment process, the parties can use the so-called individual agreements (for single actions), comprehensive agreements (which deal with a higher number of operations) or complex of contracts (covering various activities that comprise the building process).

2. SAFETY OF PARTIES TO THE CONSTRUCTION WORK CONTRACT- RISK ALLOCATION

The current legal status provides that the content of a construction work contract is based on the principle of contractual freedom [10]. It expresses, above all, the freedom to decide on the conclusion of a contract and the possibility of shaping its content, but also the free choice of the type of contract, the manner in which it is concluded, the form, the contracting party and the formulation of reciprocal rights and obligations (2]. It should be noted, however, that neither the Civil Code [10] nor other legislation specify the provisions to be applied in the content of a works contract in order to make a fair and reasonable distribution of risks between the parties. Due to the above fact and the relatively high degree of freedom in this regard, it is very difficult to design it properly. In practice, at the stage of formulating the terms of the contract and the content of the Terms of Reference (SIWZ), public procurers use their dominant position. There are examples of contractual provisions, which constitute a flagrant violation of the principle of social coexistence and the balance of contract-parties [3,5].

2.1. Contracting authority's risk

At the stage of preparation of a construction project, a contracting authority does not have a complete set of information on the future investment. There are many unknowns and hazards, which are exactly recognized only during the process of its realization. Identifying and quantifying them, as well as defining how to deal with them allows the contracting authority to increase the effectiveness of the project and increase its organizational security. From the point of view of the ordering party, risk of delays is particularly unfavorable. Factors that may entail them during the preparation stage of the investment are: delay in obtaining necessary decisions and permits, delay in designing, during the investment implementation stage – errors in the design documentation or delay in taking over the investment from the contractor and commencing its use. The unexpected increase in design and construction costs is also significant for the contracting party. It may result, among others, from: unexpected growth in costs of production factors (this is particularly important at the cost estimate form of settlement between the parties), unforeseen geotechnical conditions, archaeological finds. The occurrence of the above risks constitutes a serious breach of the contracting authority' safety. Therefore, the contracting party, in order to stay secured, for example against the significant increase in costs of construction works, applies relevant provisions in contract documents. The most common 'risk management methods' in the area of public procurement include a lump sum form of settlement for constructionworks.

2.2. Risk of the contractor

In practice, two groups of terms usually appear in contents of construction work contracts. The first one contains unreasonable restrictions on the contractor's entitlements (e.g. dependence of the contractor's payment on activities performed by non-contracting parties), the second - unreasonable extension of the contractor's obligations (e.g. imposing the obligation to correct and supplement the project documentation prepared by the contracting authority or carrying out work outside the scope of the basic order). As a consequence, the actions resulting from the above provisions mean the transfer of significant risk to a contractor and significant breach of its security [3,4].

The authors present selected examples of contractual provisions contained in construction works contracts and Functional and Utility Programs (FUP), which constitute a form of transferring to a contractor the risk resulting from improper preparation of construction works to be performed by the contracting authority [5].

- the example of a contractual provision: *'The Contractor declares that he/she has been familiarized with the Design Documentation, Construction Site and verified their completeness, accuracy and sufficiency for the performance of the Contractor's Works and Documents ... The Contractor accepts that he/she will not be entitled to any claims and waves expressly any and all claims against the Ordering Party for any errors, inaccuracy, discrepancy, or defects or other failures in the Design Documentation, including any claims for payment of any incremental Charges or payments in addition to the Contract Price, or for the extension of the Time for Completion due to such mistakes, inaccuracies, discrepancies, deficiencies or other defects in the Design Documentation';*
- the example of a contractual provision:*'The Contractor undertakes to perform for the agreed lump-sum remuneration in the amount of (...) the full scope of the works covered by the design documentation as well as any works not covered by this documentation, which will be required during the execution of the works;'*
- *the example of FUP provision: 'Documentation optimization consists in: (...) making changes to the project documentation resulting from the protocol (...), developing replacement design documentation for inconsistent (technically impossible to implement) solutions between individual volumes of design documentation (...), preparation of replacement documentation in the event of discrepancy between the existing state and the design documentation ';*
- *the example of FUP provision: 'Without being limited to the following Works, but in accordance with all other requirements set out in the Building Permit and this Functional and Utility Programs, the Contractor shall, within the Approved Gross Contractual Amount, perform the following Works, in particular'.*

3. ASYMMETRY OF CONTRACTS – LIMITATIONS ON SHAPING THE CONTENT OF THE PUBLIC CONTRACT AGREEMENT

When analyzing the content of public contract agreements (concerning construction works, supplies or services), the risk level posed to a contractor, the supplier or the provider is significantly higher. The judgments [12,13] clearly indicate that the provisions of the Act [11] modify the principle of equal treatment of parties to contractual relationship (among others, construction work contracts) and constitute a particular limitation on the principle of contractual freedom (Article 353^1 Kc) [10]. According to the aforementioned judgments, in case of public contracts, the inequality of parties to the contract results directly from the provisions of the Public Procurement Act, providing for solutions reserved exclusively for the contracting authority acting in favor of and in the public interest in order to meet public needs. The contents of judgments indicate that the risk of the contracting party exceeds the normal risk associated with carrying out business activity in the case of execution of the contract concluded by the entrepreneurs, and the risk of failing to achieve the intended public purpose leads to lack of satisfaction of the needs of a wide range of citizens.

The judgment [13] indicates that the contracting authority can increase the contractor's liability for the proper performance of the subject matter of the contract and to charge it with additional risk. Such action, in accordance with the judgment, falls within the category of rational entrepreneur's activities and meets the public needs. It is also stated in the wording of the judgment [13] that such action does not prejudice the principle of contractual freedom - unless the content or purpose of the contract precludes the character (nature) of the relationship, the Act or the principles of social coexistence, unless there are preconditions laid down in Art.353^1 Kc [10]. Pursuant to the requirements specified in the Terms of Reference, the contractor is allowed not to take part in the procedure for the award of a public service contract or submit an offer on conditions determined by the contracting authority. However, if the contractor submits a bid, he/she should secure his/her interests by calculating the price at a reasonable level taking into account the risks and consequences arising from the contract provisions. According to the judgment [14], it is a mistake to identify risk with the violation of the principle of equality of parties to a contractual relationship.

In many cases, the natural response of experienced contractors to extremely unfavorable provisions of the construction work contract and SIWZ is to resign from the submission of an offer or to include in the price the additional cost of significant value resulting from real risk assessment.

In other cases, the lack of contractors' experience in incorporating in the offer the long-term risk-sharing effects resulting from the unfavorable provisions of the contractual content in practice results in the loss of stability and security of the implementing body and lays the ground for conflicts and litigation, and impedes the proper contract execution [4]. Occasionally serious disturbances at the stage of investment implementation raise costs significantly on the part of the contracting party and extend the period of the completion of the investment [7].

3.1. The social dimension of disproportionate risk sharing in the content of a construction work contract

In the area of public procurement, distribution of risks between the contracting authorities lies within the sphere of competence of the contracting authority, who, when preparing tender documents, also edits the content of the contract for construction works. Many contracting entities are convinced that the application of the relevant clause in the content of a construction work contract results in an effective transfer of the consequences of the occurrence of a given type of risk to the contractor. In practice, the effect of gross breach of contract parties' balance and depriving contractors of the powers causes a significant increase in prices in tenders submitted. From the point of view of rational and justified spending of public funds, the excessive pursuit of a state or local government unit to limit their own liability may be treated as the infringement of the public interest. Moreover, the excessive transfer of risk to a contractor in some cases is unsuccessful, because the contractor has no influence on some risks (e.g. defects in the design documentation provided by the contracting authority). According to [11], well-defined terms of conduct should allow the conclusion of the most economically advantageous contract, ensuring maximization of effects in relation to expenditures incurred.

In practical terms it is possible to indicate the following actions taken by a contractor due to the necessity to incur additional costs, being the effect of the threat to its safety as a result of the signed construction work contract:

- a contractor demands the termination of the contract (due to the fact that significant risk and its effects have not been included in the amount of its bid);
- a contractor declares bankruptcy (due to the fact that significant risk and its effects significantly exceed his/her financial capacity);
- a contractor pays higher than expected costs during the execution of works, and after his/her work is completed pursues his/her claims at the court.

The socialdimension of the above three situations is very clear. Each of them consequently entails extra expense on the part of the contracting side. For example, if the contract is terminated or the contractor declares the bankruptcy, the contracting authority is obliged to make an inventory of the works performed so far and carry out new proceedings.

CONCLUSIONS

The rational and fair distribution of risks between contract parties should be preceded by the comprehensive identification, analysis and quantification of possible risks and their consequences. Only such an operation allows for safe, optimal and effective localization of risk, determination of real project implementation price and the non-collision award of contract. In order to secure the parties to a construction work contract, the risk should be attributed to the entity that can better manage (control, eliminate and limit) it. This is possible owing to the well-structured content of theconstruc-

tion work contract and the close cooperation of the parties following consistently provisions contained therein.

Bearing in mind the legal provisions in force, it is also necessary to clearly distinguish between actions that show that the contracting authority's care for public interest, and the manifestation of irrational limitation of the contractor's powers or an unjustifiable extension of his/her duties, which sometimes constitutes a clear infringement of the law or an attempt to circumvent it. In some cases, contract terms are an obvious form of risk transfer resulting from improper, unreliable and unprofessional preparation of a construction investment by the contracting authority. The high efficiency of the implemented construction projects is possible only in the case of using standardized contractual forms for construction works. a good example may be the FIDIC conditions, which are models of international standard forms of contract in the construction process. These forms precisely regulate the mutual obligations of contract parties. In the Polish legal system, FIDIC contract designs do not have the power of universally applicable law, but in practice they are widely used. The fundamental idea behind FIDIC forms developed on years of experience is to strike a balance between the parties in the field of consensual co-operation, aiming to achieve a goal, based on fair, equitable distribution of risks.

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BIOGRAPHICAL NOTES

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