ALTERATION OF THE ON-GOING PUBLIC PROCUREMENTS CONTRACT

Eugenia IOVĂNAŞ*

Abstract

Without having the purpose to perform an exhaustive analysis of the legal dispositions identified in the normative act subject to analysis, we resume to the capitalization of the law issue. which wc consider to be relevant for our study. anThe administrative contract has been defined as that "agreement of will, between a public authority, found on a ie «al superiority position, on one hancl, and by public law subjects on the other hand (iadividuals, companies or other state organs. subordinated to the other party), by which it is followed the satisfaction of a general interest, by providing public services, performing a public work or improving a public asset, subject to a public power regime.

Regarding the nature of the public procurement contract as being of administrative nature, still in the doctrine, through particular features of this contract mainly it was considered the special procedure wh»ch is being realized, foreseen by the Uovernment Emergency Ordinance 36/2006, regarding public procurements, correlated to the Government Emergency Ordinance 60/2011, which regulated the competence to trial the litigations arose based on it, commissioned to the courts of administrative legal departmentd which generates divergent interpretations in practice.

Key Words: *public procurement contract, material competence, nature contract, divergent interpretations, special procedure.*

l. Incident legal dispositions. Relevant jurisprudence.

Article 1 paragraph 1 of the emergency ordinance nr. 36 from 2006, regulates the proceedings for assigning the public procurement contract, of the public works contract and of the services concession contract, as well as the ways to solve the contestations filed against the acts issued in regard to these proceedings.

On the other hand, according to the administrative law doctrine, the administrative act in general, implicitly the administrative contract, as its species, has certain characteristic features and is governed by a specific legal regime, fundamentally different than those of the private law contract, as the civil contract and the commercial contract are.

Thus, the administrative contract was defined as being the *„agreement of will, between a public authority, found on a legal superiority position, on one hand, and by public law subjects on the other hand (individuals, companies or other state organs, subordinated to the other party), by which the satisfaction of a general interest is*

* Assistant Professor Ph.D., „Aurel Vlaicu" University, Faculty of Umanities and Social Sciences, Public Administration, Arad, Romania.

pursued, by providing public services, performing a public work or improving a public asset, subject to a public power regime[1]".

Regarding the nature of the public procurement contract as being of administrative nature, as an example, considering the provisions, namely the dispositions of the article 2 paragraph (I) letter c) of the Law nr. 554/2004 of the administrative court, related to the definition of the administrative act, according to which: „c) the unilateral act, with an individual or normative feature, issued by a public authority, as public power, for organizing the actual enforcement of the law that generated, alters or extinguishes legal reports; are assimilated to the administrative acts, in the respect of this law, and the contracts concluded by the public authorities have the object to highlight the assets in public property, execution of the works of public interest, performance of public servuces, public procurements; through special laws other categories of administrative contracts may be foreseen, subject to the jurisdiction of the administrative courts".

The public procurement contract is concluded following the use of special proceedings, such as public bidding, expressly foreseen by the Government Emergency Ordinance 66/2001, regarding public procurements[2].

Without having the purpose to perform an exhaustive analysis of the legal dispositions identified in the normative act subject to analysis, we resume to the capitalization of the law issue, which we consider to be relevant for our study, and which generates divergent interpretations in practice.

Through the action in administrative court the petitioner – contracting company has requested to compel the contractual authority to pay the amount of 12.658.597,8 lei, representing the value of the works performed according to the works contract nr. 14573/08.11.2010 and based on the invoices issued by the company.

In grounding the action, the petitioner has shown that the invoices issued were refuted to payment by the beneficiary, on the ground that "The amounts that are the object of these invoices represent the value of additional work not comprised in the initial contract, as well as the fact that the value of these additional works were not expressly approved by the contractual authority".

The petitioner also showed that the contractual procedure imposed the approval of the Engineer regarding the correctness and the opportunity of the calculations forwarded by the Association, approval that was obtained prior to forwarding the relevant variation orders (OV1 and OV2) by the Engineer to the beneficiary, thus the procedure being fulfilled and not being necessary further approvals to certify the correctness of his procedure.

Furthermore, the previously mentioned variation orders have been issued by the Engineer of the project (contractual staff of the beneficiary) and forwarded to the beneficiary for approval.

Also, the petitioner has stated that the contractor, prior to this moment, has permanently notified the beneficiary and the engineer about the existence of certain additional costs, quantities and works. Thus, the company has informed the beneficiary that following the minute of the emplacement and of the topographic measurements

[1] V. Verdinaş, *Administrative Law*., Universul Juridic Publishing House, Bucharest, 2007, p. 106.

[2] D. Dragoş, *Law of administrative courts, Comments and explanations*, All Beck Publishing House 2005; p. 103.

additional works were found, which determined additional costs, requesting the beneficiary to analyse and approve the documentation, both quantitatively, as well as value worth.

Provided the actual start of the works and the ascertainment of the contractor, the fact that the technical information presented by the purchaser do not correspond to the reality on site, the builder has systematically informed and transmitted to the engineer and to the beneficiary all the justifying documents and the factual findings that determined, in the end, the existence of some additional quantities, costs and/or works.

If while the contract is on-going, it is found that certain works, that were not included in the initial contract, are now necessary for the fulfilment of the contract, due to unforeseeable circumstances, this may lead to the increase of the initial contractual value.

Thus, it was ascertained that, in compliance to O.V nr. 001/ November 2011 "for the execution of the additional works described by the mentioned site dispositions …and that were assumed by the Builder, Engineer and designer", according to the sub-clause 13.6 associated works of the Contractual Conditions, the petitioner was trained to execute such works.

To this OV nr. 1 the Site Dispositions, ascertaining minutes with recommendations, Attachments Sheets related to the Site Dispositions, Financial Proposal of the Builder, Technical Report of the Engineer, Technical Sheets of the unit prices calculated by the Engineer based on the rates of the contract and of the price offers presented by the builder, Table with the transportation prices calculated by the Engineer, Variation order – cumulative and for each position, Letter to present the variation order to the Beneficiary were attached.

According to O.V. nr. 002/ November 2011, with the purpose "additional quantities according to the topographic documents", the same Engineer, representative of the respondent, in compliance to sub-clause 13.3. of the Contractual Conditions stated that the petitioner is trained to execute additional works.

This O.V. was justified based on sub-clause 20.1. of the Contractual Conditions: "*The builder has forwarded the documents regarding the topographic measurements made when the emplacements of the works to open the non accordingly waste storages were taken, requesting their authorization as a site reality and the proposal to payment to the Beneficiary, for the value of the manipulation of the additional quantities of the Contract*".

The works were notified as additional and not unforeseeable; that the Engineer made the proceedings to the beneficiary – respondent, for him to pay these works, in which respect their authorization by the ANRMAP was requested; that the issue of the additional quantities of waste handled made the object of a variation order, which the engineer approved, but which is still awaiting for the beneficiary's approval to payment.

It was also mentioned that the engineer transmits to the respondent that the additional works that were the object of the Variation Orders that were transmitted to the respondent beneficiary for approval and payment; that in compliance to the Government Emergency Ordinance 34/2006 the works can only be paid by the Beneficiary following certain bidding procedures, through negotiation without the issuance of an advert,

according to the dispositions of the article 122 letter i, following the proof that these works were unforeseeable and absolutely necessary for the realization of the project.

The jurisprudential exam reveals the opinion according to which the representative of the contractual authority is the one that did not comply to the obligations assumed towards the Contractual authority and not the Contractor, and for this default, the Contractor must not be in any way sanctioned, namely the respondent, by not paying the works executed according to the Variation Orders, mandatory for the petitioner, hypothesis in which the petitioner is fully entitled and justified for payment. The additional works that are the object of the petitioner's claims, weren't approved by the petitioner – Employer, in compliance to sub clause 3.1. letter d of the contract, whose approval could only have occurred after the negotiation procedure, without the issuance of an advert was ran, as the dispositions of the article 122 letter I of the Government Emergency Ordinance 34/2006 foresee, but this situation is due strictly to the default conduct of the representative of the contractual authority, which can't invoke the fault of its representative in order to benefit from the executed works, but refusing to pay them.

Thus, through the Civil sentence nr. 3245 from 03.2013, given by the Court of Arad in the file, the court found that in the file nr. 678/108/2013, peremptory and irrevocable through the Decision nr. 732 from 11th February 2014 given by the Timisoara Court of Appeal in the file nr. 678/108/2013 the court found that the petitioner, as Contractor – performer was compelled to execute the works mentioned in the two Variation Orders, given his duties stated in the contract, namely clause 13.1 paragraph 2 "The contractor will execute, and will be compelled by each Variation".

Consequently, the works being executed according to the Variation Orders and holding their costs, it finds that the petitioner's claims, according to the tax invoices issued by the builder are fully justified and entitled to payment.

Concretely, the law issue that is subject to debate is if the variation orders are capable of leading to the alteration of the on-going public procurement contract, provided the issue of an additional cost of the on-going contract considering that there was the issue of an additional cost of the contract for the execution of certain unforeseen and works, that were not contracted.

In principle, the additional costs generated by the finalization of the projects must be the result of the variation orders issued according to the works execution contracts and/or the addendums to the works execution contracts, concluded in compliance to the law, and must be mutually agreed by the Management authority/ Implementing authority/ Contractual authority.

The variation orders represent those known NRs and NCSs in construction field: waiving notes and notes of additional order.

The additional order notes (NCS) are lists of works, similar to estimations.

The articles of NCS represent:

Works that weren't foreseen in the offer estimation attached to the contract (therefore works foreseen in the contract), but for which the execution of some additional quantities was registered,

Works that were not foreseen in the contract, but that were executed due to some alterations of the solutions occurred after the contract was concluded, usually directly on

site. Various articles for similar works; for the articles foreseen in the contract waiving notes were issued.

The additional order notes (NCS) are issued on demand of the performer, with the approval of the initial designer, also signed by the site master and by the contractual authority[3].

The contractual authority, after signing the works contract and after the actual start of the works, may obviously face a series of situations unforeseen when signing the contract, reason for which the reality proves that the builder finds himself in the situation of drawing up variation demands, variation consisting in the execution of either additional or unforeseeable works.

The works for which the Builder has requested the issuance of certain variation orders represent additional works in respect to those initially considered when concluding the works contract and for which the initial contractual price was set. The necessity of these works appeared after the construction works started and they appeared as absolutely necessary for the realization of the Project. In case of lack of these works the project could not have been made in compliance to all the requirements and quality standards imposed by the assignment documentation in the development of the project, the issue of the necessity of certain additional works was presented from the beginning to the petitioner – as beneficiary and all the documents related to the nature and necessity of the said works were transmitted to it. It is relevant that during the development of the contract the petitioner never questioned the necessity or the value of the said works. The only aspect invoked by the petitioner is that it did not express the consent related to the alteration of the price from the works contract.

In respect to the legal nature of the "variation order" it is relevant to remember that the action of issuing of a legal act by definition means that the act considered issued is considered a valid legal instrument. Concretely, the act itself must comply to all the legal and contractual terms in order to produce the legal effects for which it was issued.

Thus, the issuance of the variation orders is made at the end of a procedure, the builder is the one requesting the initiation of this procedure, according to the sudden aspects which finds during the execution of the works and which may determine him to request alterations of works.

The project engineer subsequently analyses the technical justifications enunciated by the builder, sets the file of the variation order and further transmits to the contractual authority the acceptance or rejection proposal of the alterations of works requested by the builder.

The result of the engineer's analysis is concretized in the issuance of a variation order that both the beneficiary and the builder are due to respect, and if they are not satisfied, to apply the contractual remedies foreseen for such in the contracts of public procurements of works, given their nature, the classical variation procedure is being completed, in certain situations, with a series of specific elements that foresee, for the legal validity and effectiveness of the variation orders issued by the engineer, the cumulative conditions of their approval by the beneficiary contractual authority. Once the

[3] Law no. 10/1995 regarding the quality in constructions, published in the Official Gazette nr. 12 from 24 January 1995.

variation orders approved, the public procurements legislation establishes the necessity to conclude an addendum to the contract, operation subsequent to the development of certain previous procedures by the beneficiary contractual authority[4].

As for the issuance of the variation orders, the Works Contract involves a series of limitations mainly deriving out of its nature of public procurement contract. The necessity to go through the procedures of public procurement, reported to the incurrence of unforeseeable works results from the Order 543/2013 regarding the approval of the Guide for the main risks identified in the field of public procurements and the recommendations of the European Committee, that must be followed by the management authorities and by the intermediary organisms in the verification process of the public procurements procedures, issued by the Ministry of European funds.

The alteration of the Works Contract in the sense of those above implies though the previous fulfilment of two conditions:

First, there must exist variation orders validly issued, able to cause legal effects;

Second, after the issuance of the variation orders, it was necessary to fulfil the specific procedures of public procurements, which precedes the conclusion of the addendum.

In our opinion, we think that in the absence of accomplishment of one of the previously mentioned conditions, namely no conclusion of an alteration addendum was agreed nor a procedure of public procurement in this respect was developed, we consider that the variation orders do not case legal effects which are to alter the stipulated contractual provisions, especially since by the increase of the contract value with additional works essential alteration are made to the contract concluded between the contracting parties.

This due to the fact that, as already stated, the issuance of variation orders which produce effects involves cumulatively the technical approval of the substantiation documentation and the issuance of the proposal of variation orders, as well as the ulterior approval of the said proposals by the contractual authority.

The final decision related to the approval or the rejection of the variation order always devolves upon the contractual authority.

Considering the type of the public procurements contract, is obvious that the builder is due to correctly qualify the necessity of the works requested as additional, or unforeseeable works, because he is the one that registers them after the variation procedure.

In compliance to the ORDER 1441 from the 1st of July 2013 for the approval of the Guide regarding the main risks identified in the field of public procurements and the recommendations of the European Committee that must be followed by the management authorities and by the intermediary organisms in the process of verification of the public procurements procedures which capitalize considerations of the European Committee (through DGMarkt) in the Official Letter Ares (2012) 601434 – 21/05/2012 is stated that:

The essential alteration of the dispositions of a public procurement contract during its validity is considered a new assignment and needs the development of a new

[4] Article 122 letter i) and article 252 letter j) of the Government emergency ordinance nr. 34/2006, approved with alterations and completions by the Law nr. 337/2006, with the ulterior alterations and completions.

procedure of public procurement, in compliance to the legislation in the field of public procurements[5].

According to the jurisprudence of the European Court of Justice, as the European Committee specified (through DGMarkt) in the Official Letter Ares (2012) 601434 – 21/05/2012, the alteration of a contract while it is still valid is considered essential when, by this alteration, the contract becomes essentially different than the one initially concluded.

An alteration is considered essential when one of the following conditions is accomplished:

a) The alteration introduces conditions that, if they would have been included in the initial purchase procedure, would have allowed the participation and/or the selection of other economical operator than the ones initially selected or that would have permitted the assignment of the contract to another bidder.

b) The alteration changes the economical balance of the contract in favour of the contractor.

c) The alteration considerably extends the covering area of the contract, such that it includes assets, services or works that were not initially included.

The variation orders may determine the most, according to the law text found in the content of the article 122 letter I of the Government Emergency Ordinance 34/2006, the conclusion of an addendum to the initial contract, in which case the alteration, according to the variation orders concretized in the addendum becomes mandatory to the contractual authority.

The works can only be paid by the beneficiary following certain bidding procedures, through negotiation, without the publication of an advert, in compliance to the dispositions of the article 122 letter i, following the prof of the fact that these works were unforeseeable and absolutely necessary to realize the project.

Referring to this aspect, we evince that, according to the Works Contract (which precisely transposes the provisions of the legislation in the matter of public procurements), if a variation instruction will determine the essential alteration of the Works Contract (so, including an increase of the Accepted Value of the Works Contract), the variation should have been approved and concretized in an addendum to the Works Contract.

Withal, the nature of public procurement contract of the Works Contract imposes a series of specific procedure rules, assuming the possible conclusion of the addendum is made subsequently to the development of a specific procedure of public procurements. As for the issuance of the variation orders, the Works Contract involves a series of limitations, mainly deriving from its nature of public procurements contract. The necessity to go through the procedures of public procurement, reported to the incurrence of unforeseeable works thus imposes the mandatory character to develop a new purchase procedure if the alteration made to the contract involves the increase of the contracted

[5] Order nr. 543/2013 regarding the approval of the Guide for main risks identified in the field of public procurements and the recommendations of the European Committee, that must be followed by the management authorities and by the intermediary organisms in the process of verifying the public procurements procedures, issued by the Ministry of European funds.

value, which had as consequence the implicit alteration of the result of the procedure of initial assignment by the contractual authority.

Thus, the interpretation and application of the legal frame that was the object of the debate entitles us to judiciously conclude that the variation orders issued as legal ground to justify the claims are conditioned by the approval of the beneficiary – contractual authority involved in the execution of the contract financed our of European funds for the payment of additional works and, furthermore, when we are talking about a contract financed out of European funds for the payment of additional works the express approval of ANRMAP is also imposed, for the identification of the financial sources for the payment of the additional works executed. Withal, we must underline that if the contract is financed out of European funds, in compliance to the provisions of point 1.3 of Appendix to Government Emergency Ordinance 66/2011 regarding the prevention, ascertainment and sanctions of the irregularities occurred in gaining and using the European funds and/or the national funds related to it,

"The assignment of purchase contracts for works, services or assets additionally assigned without the application of a competitive procedure, without the compliance to the conditions foreseen by the national and community legislation, including in the absence of an extreme emergency determined by the incurrence of certain unforeseeable events or in the absence of certain unforeseen circumstances, is sanctioned with the application of a financial correction, of 100% out of the value of the addendum".

Bibliography

1. V. Verdinaş, *Administrative Law*, Universul Juridic Publishing House, Bucharest, 2007;
2. D. Dragoş, *Law of the administrative court*, *Comments and explanations*, All Beck Publishing House, 2005;
3. Law no. 554/2004 of the administrative legal department, with the ulterior alterations and completions, published in the Official Gazette nr. 1154 of 7th December 2004;
4. Government Emergency Ordinance nr. 34 of 19th April 2006 regarding the assignment of the public procurement contracts, of the public works lease contracts and of the services lease contracts, published in the Official Gazette nr. 418 of 15th May 2006;
5. Decision of the Government nr. 28/2008 regarding the approval of the frame content of the technical – economical documentation for public investments, as well as of the structure and method of drawing up the general estimate for investments and intervention works, published in the Official Gazette nr. 48 of 22nd January 2008;
6. Order nr. 1441 of the 1st of July 2013, issued by the Ministry of Labor, Family, Social Protection and Elders, for the approval of the Guide regarding the main risks identified in the field of public procurements and the recommendations of the European Committee, which must be followed by the management authorities and by the intermediary organisms in the process of public procurements procedures verification, published in the Official Gazette nr. 481 of the 1st August 2013;
7. European Committee – Domestic Market and Services General Direction, Official letter MARKT/C3/EP/kr (2012) 677516 from 21.05.2012, the Opinion of the Committee's services related to the conditions in which the contracting authorities may

authorize variation orders in the public works contracts, implemented through the general estimation, without rebidding the initial contract, available on: www.anrmap.ro/sites/default/files/notificari-1506.doc;
8. Civil sentence nr. 3245 from 03.2013, pronounced by the Court of Arad in the file nr. 678/108/2013, remained final and irrevocable through the Decision nr. 732 from 11th February 2014, pronounced by the Court of Appeal in Timisoara in the file nr. 678/108/2013;
9. Civil sentence nr. 2726 from 19th February 2013, pronounced by the Court of Arad in the file nr. 6066/108/2013.

References

1. V. Verdinaş, *Administrative Law*, Universul Juridic Publishing House, Bucharest, 2007, p. 106
2. A. Iorgovan, *Treaty of administrative law*, volume I, Nemira Publishing House, 1996, p. 306;
3. Law no. 10/1995 regarding the quality in constructions, published in the Official Gazette nr. 12 from 24th January 1995;
4. Article 122 letter i) and article 252 letter j) of the Government emergency ordinance nr. 34/2006, approved with alterations and completions by the Law no. 337/2006, with the ulterior alterations and completions;
5. Order no. 543/2013 regarding the approval of the Guide for main risks identified in the field of public procurements and the recommendations of the European Committee, that must be followed by the management authorities and by the intermediary organisms in the process of verifying the public procurements procedures, issued by the Ministry of European funds.