THE MODIFICATION OF A PUBLIC PROCUREMENT CONTRACT UNDER THE NEW EUROPEAN DIRECTIVES ON PUBLIC PROCUREMENT

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Abstract

The modification of a contract is an area presenting a real interest for the practitioners in the field. More and more, the contractors tend to resolve their implementation problems through addendums which, most often, don't respect the publicity conditions imposed by the national and European legislation. OUG nr. 34 and HG nr. 925 don't have provisions regarding contract modifications, the principles being imposed by the European case-law. In present, the single act with a chapter on contract modification is Ordin nr. 543/2013. The real conflict is knowing when a modification can be qualified as substantial or not and which are the elements to be takeni into consideration during the evaluation process. The new Directive 2014/24/CE regarding public procurement goes beyond the case-law and poses new principles.

Keywords: *public contracts, public procurement,* contracting authorities, administrative law

JEL Classification: *K23, K33*

1. Introductory remarks

The modification of a public procurement contract is an area presenting a real interest for the practitioners in the field. Through addendums, the parties try to resolve the technical and financial problems encountered in the implementation period of the contract. Generally, these changes of an existing contract are violating the general principles from European Directives.

The Emergence Ordonance nr. 34/2006 and the Government Decision nr. 925/2006 don't reglement the changes to existing contracts. There are only provisions regarding the negociation without prior publication of a contract notice, procedure which is not the subject of our analysis.

Our attention is focused on the changes to existing contracts. Contracting authorities and private operators often wish to change existing contracts awarded on the basis of a public tender[2]. The Court oF Justice of the European Union settled a numbered of criterias in order to establish if a modification is substantial or not.

This study pursues to analize the most frequent changes in order to qualificate them as substantial or non-substantial. It is important to know the general principals because of the inflexibility of the system. For contracting authorities subject to public procurement rules, the principle of freedom of contract is partially suspended and they are bound by the public procurement rules.

The contracting authorities have to comply with the principles of transparency and equal treatment. As members of European Union, all state members, through their authorities, have to ensure open competition and free movement of services, goods, capital and persons.

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[2] See Cătălin-Silviu Săraru, *Contractele administrative. Reglementare. Doctrină. Jurisprudență*, C.H. Beck Publishing House, Bucharest, 2009, p. 287-301; Cătălin-Silviu Săraru, *Cartea de contracte administrative. Modele. Comentarii. Explicații, C.H. Beck Publishing House, Bucharest*, 2013, p. 175; Oliviu Puie, *Contractele administrative în contextul noului Cod civil și al noului Cod de procedură civilă*, Universul Juridic Publishing House, Bucharest, 2014, p. 141—144.

2. The modification of a public procurement contract in the decisions of the Court of Justice of the European Union

The contracting authorities will know when a change complies with the public procurement rules and when it does not. The Court of Justice has settled in the case-law the general criteria for qualification of a change as substantial or not substantial. The most important decision is Pressetext vs. Austria from 19th Juin 2008.

In consequence, amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract when:

- They are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegociate the essential terms of that contract[3],
- During its currency it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted,
- It extends the scope of the contract considerably to encompass services not initially covered,
- It changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract[4].

Going further, some examples of amendments will be detailed taking into consideration the arguments of the Court of Justice.

Change in the contractual partner. As a rule, the substitution of a new contractual partner for the one to which the contracting authority had initially awarded the contract must be regarded as constituting a change to one of the essential terms of the public contract in question, unless that substitution was provided for in the terms of the initial contract, such as, by way of example, provision for sub-contracting.

In our case, the internal reorganization of the contractual partner does not modify in any fundamental manner the terms of the initial contract. If the shares are transferred to a third party during the currency of the contract, this would no longer be an internal reorganization of the initial contractual partner, but an actual change of contractual partner, which would, as a rule, be an amendment to an essential termen of the contract. Similar reasoning would apply if the transfer of shares in the subsidiary to a third party was already provided for at the time of transfer of the activities to the subsidiary.

Public contracts are regularly awarded to legal persons. If a legal person is established as a public company listed on a stock exchange, it follows from its very nature that the composition of its shareholders is liable to change at any time. As a rule, such a situation does not affect the validity of the award of a public contract to such a company. The situation may be otherwise in exceptional cases, such as when there are practices intended to circumvent Community rules governing public contracts.

Similar considerations apply in the case of public contracts awarded to legal persons established not as publicly-listed companies but as limited liability registered cooperatives, as in the main proceedings. Any changes to the composition of the shareholders in such a cooperative will not, as a rule, result in a material contractual amendment.

Price amendments. The conversion of prices in euro is not a material contractual amendment, but only an adjustment of the contract to accommodate changed external circumstances. The adjustment is minimal and objectively justified tending to facilitate the performance of the contract, such as simplifying billing procedures. In such circumstances, the Court consideres that the reference to a new price index does not constitute an amendament to the contract because it was made in terms of the provisions of the initial agreement[5].

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[3] Case C-337/98 *Commission* v *France* [2000] ECR I-8377, paragraphs 44 and 46, www.curia.eu

[4] Case C-454/06 *Pressetext v. Austria*, paragraphs 34-37, www.curia.eu

[5] Case C-454/06 *Pressetext v. Austria*, paragraphs 40, 45, 47, 48, 51, 53, 57, 61 and 69, www.curia.eu

The renewal of the waiver of the right to terminate the contract by notice. The presence of a waiver of the right to terminate the contract for a period of three years during the period of validity of a services contract concluded for an indefinite period does not constitute a new award of a contract. The time period envisaged by the waiver, namely three years, was not such that it would have been prevented from doing so for an excessive period in relation to the time necessary to organise such a procedure. In those circumstances, it has not been demonstrated that such a waiver of the right to terminate the contract, provided that it is not systematically re-inserted in the contract, entails a risk of distorting competition, to the detriment of potential new tenderers. Consequently, it cannot be held to be a material amendment to the initial agreement.

The change of the sub-contractor during the currency of the contract can be considered as substantial if the public procurement contract has been concluded in the consideration of the sub-contractor[6].

The case-law Pressetext has been taken into consideration in the next cases befor the European courts and each time the analysis has been made in relation with the above-mentioned criteria.

In the national law, as a consequence of the European case-law, the government has adopted a guide related to the principles risks in the public procurement area. This guide allows changes to contracts in strictly conditions, such as variation clauses and "unforeseen expenses". The guide is the only legislative act with provisions related to the contract amendments.

3. Conclusions

The new directive on public procurement adopted by the European Parliament and Conseil have consecrated an entire articol to contract amendments. The Pressetext criteria have been transposed into provisions of the directive.

In the end, it is to be considered the future case-law of the European Court in relation of the provisions of the new directives.

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