



The hybrid side of construction works for states and public entities

Public procurement law and contract law

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Case 1

Contracting entity awards contract to bidder A. Bidder B challenges the award in formal review procedure. Contracting entity and bidder A have already signed and closed the contract before the court renders its decision.

→ Can the review body (administrative court) still annul the award and cancel the (private law) contract?



Conclusion of Contract

- Standstill: Contract may be concluded only after award is enforceable (no review application, no interim measures, no suspensive effect)
- Consequences of a breach of the procurement rules on the contract?
 - Contract not valid?
 - Contract to be annulled / terminated by court?
 - Court to order public authority to terminate the contract?

Case 2

The procurement documents included a project plan with various phases and deadlines for the performance of the construction project. After the award and during the first phase of the project, it becomes evident that the original project plan has to be modified. The contractor requires an increase in the remuneration as a result of the changed project plan.

→ Is it possible to change the contract?



Modification of Contract (1/2)

- Permitted changes:
 - Modifications that have been provided for in the procurement documents (e.g. options, change request procedures, change rights)
 - Situations that would allow a direct award (e.g. additional works or supplies which have to be provided by the same contractor)
 - Minor / not substantial changes

Modification of Contract (2/2)

- Substantial changes that require a new procurement procedure:
 - changes that result in contract that is materially different in nature (e.g. different potential bidders in the tender procedure)
 - changes that would have resulted in a different award (e.g. replacement of contracting party)

Case 3

In tender procedure, contracting authority required appropriate service organisation with a sufficient number of qualified staff. All bidders fulfilled this selection criteria. During performance of awarded contract, employees of selected supplier leave the company and the selection criteria of tender would no longer be fulfilled.

→ Can the contracting authority terminate the contract?



Termination of Contract

- Non-fulfilment of selection criteria of tender (e.g. technical and professional ability)?
- Exclusion grounds (e.g. corruption)?
- Grounds for withdrawal of award?
- Contractual termination rights!



Design of the Tender

- Provide room for contract changes
- Integrate procurement rules and tender terms into binding contract terms
- Pay attention to contractual termination rights



Q&A

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