

ÚJ SZÉCHENYI TERV



Nemzeti
Fejlesztési Ügynökség



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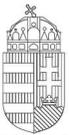
Amendment of contracts

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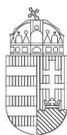
Public Procurement Supervisory Department



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Regulation by the Directives



Directive 2004/18/EC

- Equal treatment
- Transparency
- Comparability of tenders

The legal institution of contract amendment is not designated.



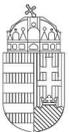
The need for the conduct of a contract award procedure and for the respect of the provisions of the Directives shall be assessed in all cases.



Negotiated procedure without prior publication of a contract notice

- Article 31(2)(b), (additional supply)
a partial replacement of normal supplies or installations or the extension of existing supplies; incompatibility or disproportionate technical difficulties in operation and maintenance.
- Article 31(4)(a), (additional services, works)
not included in the original contract, unforeseeable, cannot be separated without major inconvenience, OR strictly necessary for the completion of the contract.

⇒ **ADDITIONAL WORK**



Regulation by the Directives



- ⇒ The characteristics of the additional work
 - ❖ Unforeseeable nature (it shall exist on both Parties' side)
 - ❖ Not included in the technical specifications, designs (e.g. an obstacle encountered when earthwork is carried out)
 - ❖ Cannot be separated without major inconvenience (a work not affecting responsibilities, carried out within the construction site)
 - ❖ Necessary for the completion of the original contract (prescribed by the authorities)

As regards its content, it amends the original contract, as regards its form, it can also be a separate contract. The procedure shall be conducted in the case of existence of reserve funds as well.



National regulation



- Civil Code
- Public procurement principles
- PPA Article 303

The parties may only amend parts of the contract drawn up on the basis of the invitation, the terms and conditions of the tender documentation and the contents of the tender if a circumstance violating a material legitimate interest of either party arises after the conclusion of the contract, due to a reason unforeseeable at the time of the conclusion of the contract.

2. If during the performance of the contract an object is found that is presumably a cultural heritage treasure based on the measure specified in a separate act of legislation of the National Office of Cultural Heritage, it shall also be considered a circumstance founding the amendment of the contract. (15/ 09/ 2010)



Public Procurement Supervisory system

4/2011 Gov. Decree:

- in the case of works contracts equalling or exceeding community threshold, equalling or exceeding HUF 300 million ⇒ *ex ante* control, countersigning
- in the case of works contracts below community threshold or not reaching HUF 300 million ⇒ *ex post* control



New PPA ⇒ On the basis of the relevant case law of the Court of Justice of the European Union

Article 132

1. The parties may not amend the elements of the contract concluded as a result of the contract award procedure determined on the basis of the invitation, the terms of the tender documentation and the contents of the tender, if
 - (a) the terms affected by the amendment had allowed the participation of other tenderers (candidates) as well in addition to the original tenderers (candidates) or the success of another tender instead of the successful tender, would those terms have been indicated in the contract award procedure preceding the conclusion of contract; or
 - (b) the amendment shifts the economic balance of the contract in favour of the successful tenderer; or
 - (c) the amendment extends the subject-matter of the contract over a new element compared to the tenderer's obligations imposed by the original contract.
2. The fulfilment of the condition specified in paragraph 1(a) shall not be verified if the amendment of the contract was made necessary by any circumstance which occurred due to a reason unforeseeable at the time of the contract conclusion and arising thereafter and the contract jeopardizes a substantial legitimate interest of one of the parties. Where a contract element serving as the basis of the evaluation of tenders [Article 63 (4)] in the contract award procedure has been changed as a result of the amendment, the contracting authority shall be bound to inform all the tenderers participating in the procedure of the amendment and the detailed reasons therefor.
3. For the purposes of paragraph 1(b), an increase of the amount of the consideration specified by the contract by more than 5% shall be considered in all cases as a circumstance shifting the economic balance of the contract in favour of the successful tenderer.



Current problems, typical cases



Archeology

Act LXIV of 2001 on the protection of cultural heritage

- *Ex lege* protected areas
- endangered archeological site ⇒ preventative excavation
- an archeological relic is detected outside an archeological excavation ⇒ rescue excavation

Decree 5/2010 (18.08) of the Ministry of National Resources

- The archeological excavation work may only be commenced after the taking over of the site. After completion of the archeological excavation, it is the task of the contractor to make the construction site suitable for carrying out execution works. The authority has the right to provide for a complete excavation.



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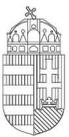
Amendment of time limit

- Where there is no technical content associated, the conduct of a contract award procedure is conceptually impossible.
- Amendment of time limit \leftrightarrow amendment of the financial schedule
- Amendment of time limit \leftrightarrow delay in performance



Some cases of *force majeure*

- Carrying out of work in winter (special circumstances and costs, not included in the contract) ⇒ in the case of lump sum contracts, incurred costs and delay in execution may only be referred to in case of specific weather conditions. (it depends on the given contract)
- unusual precipitation, inland waters - only if it differs significantly from the average multi-annual amount
- Amendment of legislation (e.g. official requirements by the authorities)



The relevant case law of the European Court of Justice



C-454/06 „Presstext Nachrichtenagentur”

Question: Whether subsequent amendments to certain terms are to be classified as a new "contract award"?

ECJ: it shall be classified as a new contract award, if

- the new terms are substantially different from the terms of the original contract, and, consequently, confirm that the Parties intend to renegotiate the basic terms of the contract. The modification is substantial where the terms affected by it had allowed the participation of other tenderers as well in addition to the original tenderers, would those terms have been indicated in the original contract award procedure
- the amendment extends the contract to a significant extent over new services compared to the services included in the original contract.



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The relevant case law of the European Court of Justice



- furthermore, it shall be considered as substantial if it shifts the economic balance of the contract in favour of the successful tenderer and it was not provided for in the original contract.

The elements of the decision:

The conversion of the amount of the price into euro and its adjustment resulting in a decrease shall not be considered as a substantial amendment.

It may not be established whether the contracting authority intended to terminate the effective contract and conduct a new contract award procedure in the period 2005-2008, which is subject to the exclusion of the right of termination. Three years would not prevent the contracting authority from that action for a long period, taking into consideration the time needed for the termination and the organisation of the new contract award procedure. In such circumstances, it is not proved that such exclusion of the right of termination entails the risk of distortion of competition to the detriment of potential new tenderers, on condition that such an exclusion is not incorporated systematically into the contract. Consequently, it may not be considered as a substantial amendment of the original contract.



The relevant case law of the European Court of Justice



C-496/99. "Commission v Succhi di Frutta Spa."

The contracting authority violated the principle of equal treatment and the principle of transparency by making it possible to purchase other types of fruits in place of apples and oranges, contrary to the provisions set out in the invitation to tender.

The contracting authority should have indicated already in the invitation to tender that it would make it possible to purchase other types of fruits if there is not enough apple or orange available on the intervention market, furthermore, the exchange ratio shall have also been set in the invitation to tender.

Otherwise, a new tender should have been launched when the situation in which there was not enough purchasable fruit on the intervention market arised.

Conclusion: The foreseeable risks shall be taken into account in advance!



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The relevant national case law



⇒ D. 77/7/2010

Where the delay is predominantly caused by the omission of the contracting authority, unforeseeability may not be cited as a reason.

⇒ D. 102/19/2009

Amendment ↔ breach of contract

⇒ D. 598/10/2009

Amendment ↔ new need for procurement



Thank you for your attention!

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