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Modifications of the public contracts on construction works in the light of Polish and European law

Summary of doctoral dissertation

The main research objective of the dissertation was to analyze and present the scope of permissible changes to contracts for public works contracts as well as the nature of the legal regulation underlying them. The issue of changes to contracts for public works has been presented against the background of EU law. It plays a fundamental role in defining the legal framework for the application of Polish regulations. EU regulation is particularly important in relation to the title issue, as art. 72 of Directive 2014/24/EU which refers to it, has been covered by the overall implementation.

Separating as a subject of analysis, contracts for works is intentional due to the specificity of this type of orders and typically occurring during their implementation factors that can significantly affect the manner of its implementation and the need to make changes to the contract. The special character of construction contracts manifests itself in many aspects - both in the sphere of reference legal requirements related to the award of the contract, which the object is to constitute, and in terms of circumstances related to their implementation – i.e. the real conditions of construction works.

The assumption of the dissertation's research was to provide its results with practical overtones. It is therefore a combination of scientific considerations regarding the principles of amending contracts with practical aspects, which were collected on the basis of case law analysis as well as observation of practices used by awarding entities. At the same time, preventing the casualty overtone of my considerations, I also formulated summary conclusions, which are intended to serve public procurement participants as a guide in the assessment of future facts subject to the discussed regulations. One of the chapters of the dissertation has been devoted entirely to the important issue of review clauses, which, in accordance with the art. 144 para. 1 point 1 of the PPL, constitute one of the conditions for amending contracts. In the dissertation, an authorial classification of the review clauses was elaborated. The most general category of such provisions are “change clauses” (“klauzule zmiany

umowy”) - it was proposed to use this term in relation to the provisions enabling the contract to be amended under the general public procurement rules. The next category of clauses falling within the former are “adaptation clauses” (“klauzule adaptacyjne”). This is how I define the clauses that have specific effect in the obligation relationship between the parties and at the same time enable the change in accordance with public procurement law. Within the adaptation clauses, I distinguish: renegotiation clauses, automatic adjustment clauses, and *sensu stricto* adaptation clauses, while the latter group covers: (1) clauses assuming taking a decision by the parties themselves and (2) clauses providing for entrusting decisions to a third parties (engineer or dispute adjudication board).

The sixth chapter of the dissertation contains considerations on legal regulations regarding the possibility of modifying the content of the contractual relationship under contracts on public procurement during their implementation. This analysis led to the observation of structural defects in this regulation. Therefore, I proposed a way to interpret these provisions in such a way as to minimize the effects of the said defect. On the other hand, in the context of the inconsistency in the use of the term of “the nature of the contract” by the legislator and “the general nature of the contract”, the *de legeferenda* application was drawn up, in order to increase the transparency of art. 144 of the PPL, to resign from using the premises of character and general character and to simply indicate that the change in no case may violate the general nature of the contract. As demonstrated in the presented considerations, the intention of the legislator was to set the limit of permissible contract changes by referring to the nature of the contract. Regulating in the provisions that the “change of the nature of the contract” is the main limit of change admissibility in all cases would facilitate the application of the relevant group of provisions.

Summarizing the considerations of the dissertation, it is first of all necessary to pay attention to the wide spectrum of possibilities to change public procurement contracts based on the current legal status. Restrictions related to the change of public procurement contracts limiting the principle of freedom of contract applicable to obligatory relationships originate from the public-law nature of the regulation of public procurement contracts. Therefore, in various parts of the dissertation, public law conditions for the need to regulate modifications in public contracts are emphasized. They are i.a. the relationship between modifications and the outcome of the procurement procedure or the need to respect the basic principles of competition protection and equal treatment of contractors. The main research goal was to determine the admissibility, i.e. the limits and scope of changes to public works contracts. This has been achieved by compiling detailed regulations being the prerequisites for contract changes, with the general principles of public procurement law, as well as the realities of construction works whose specificity (as demonstrated in the dissertation) affects the conclusions in the area under consideration.

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