

Construction - Germany

Contract Award Process Risk to be Borne by Public Sector Client

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A recent Federal Court of Justice ruling⁽¹⁾ has demonstrated that, in future, public sector clients for construction projects will have to pay any extra costs resulting from an unexpected delay in the award of the contract. The case has major economic significance because public sector orders with a value of approximately €50 billion are awarded each year in the construction sector. An estimated 10% to 15% of contract awards are delayed (eg, due to contract award review proceedings) leading to a calculated theoretical cost risk of up to €1 billion resulting from delays.

In public procedures for awarding contracts, certain legislation (eg, Sections 102 *et seq* of the Restrictive Practices Act) gives a defeated bidder the opportunity to have the (proposed) award of contract reviewed in contract award review proceedings. This generally takes considerable time, and during this time no contract can be awarded. This may mean that the construction deadlines stipulated in the call for tender can no longer be met. In such cases, the bidders are called upon to extend the period for which the bid is binding. If the bidders have extended the period for which the bid is binding, the contract with the original construction deadlines may be awarded at a time when the deadlines can no longer be met. Delays in construction often lead to increases in the purchase price of materials (eg, steel, cement) and contractors often try to claim for the resulting extra costs. Whereas clients reject such claims and argue that a bidder that extends the period for which a bid is binding has thereby accepted the risk of extra costs, bidders argue that the risk of a delay in the award of contract and the construction period falls under the responsibility of the clients, which control the contract award procedure.

Court opinion has varied on the question of who must bear the risk of contract award proceedings for public sector orders. In 2008, for example, two conflicting decisions were issued by the higher regional courts – the Higher Regional Court of Hamm ruled that the costs should be borne by the client⁽²⁾, whereas the Higher Regional Court of Saarbrücken decided against any extra reimbursement of the contractor.⁽³⁾

The Federal Court of Justice has now decided this issue against the interests of clients, and has thus made a landmark decision.

In a case in which a contract was awarded unchanged on the basis of a bid with the underlying deadlines, but compliance with these contractual deadlines was no longer possible, the court ruled that the resulting gap in the contract should be closed in good faith in a supplementary interpretation of the contract. It ruled that the parties were obliged on principle to agree upon a new construction period and on payment for any extra costs (the so-called 'obligation of cooperation'). It stated that the adjustment of the remuneration should be made by analogy with Section 2(5) of Part B of the standard building contract terms, and that the construction period should be adapted according to the principles of Sections 6(3) and 6(4) of Part B. In respect of the remuneration, this means that any price increases that arise after the contractor's calculation of the price which is the basis for the calculation of the new price (eg, increases in the cost of building materials or the price level of individual suppliers) must also be borne by the client. It must be assumed that price increases by a subcontractor listed in the bid are also eligible for reimbursement by analogy under Section 2(5). If no agreement on remuneration is reached between the client and the contractor according to this section, the court will decide. The court held that the same should apply to cases in which the bidder reserves a claim for extra costs resulting from delayed execution periods in connection with the extension of the period for which the bid is binding. This means that an explicit reservation of such costs is not decisive.

The court justified this position by stating that in all circumstances the contractor's declarations of agreement to extend the period for which a bid is binding merely confirm the original bid, and extend the contractual period for which the bid is binding, following Sections 145 and 148 of the German Civil Code. An agreement to extend the period for

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which a bid is binding does not include statements on what should be contractually applicable if the execution deadlines can no longer be met: nor is it possible to extend the period because the special contract award provisions in Sections 21(1)(3) and 25(1)(1b) of Part A of the standard building contract terms state that changes in the contracting documents are forbidden on principle and any bids which violate this requirement must be excluded from consideration. If no explicitly different provisions on the execution deadlines or the remuneration are agreed before or during the award of the contract, the contract comes into force with the original provisions. However, with the agreement to extend the period for which the bid is binding and the award of contract, the parties indicate that they wish to implement the contract even though the deadlines have become obsolete. Nonetheless, the parties are not deemed to assume that the deadlines should lapse or that the performance and the consideration should no longer be balanced.

Therefore, the court argues that the contractual deadlines and the remuneration must be adjusted. In view of the fact that the inclusion of Part B of the standard building contract terms is necessary in a public sector contract, it argues that the parties regard the provisions in Section 2(5) and Sections 6(3) and (4) of Part B as reasonable provisions for any client-induced change in the basic price parameters and any adjustment of the construction period. The delay caused by contract award review proceedings before the conclusion of the contract (ie, award of contract) is comparable with a change initiated by the client after the conclusion of the contract. In both cases, there is no reason to assign the risk of changes in the price parameters and an extension of the construction period to the contractor. Nor is the client placed at an unreasonable disadvantage by taking over this risk. After all, the client has control over the contract award procedure and has the option of cancelling the contract award procedure for serious reasons under Section 26(1)(c) of Part A.

However, the court did not rule on whether pre-contractual 'hindrance costs' resulting from extensions of the period for which a bid is binding should also be reimbursed (eg, costs of the provision of special machines) and whether such costs should also be taken into account by analogy when calculating the new price in accordance with Section 2(5) of Part B, or whether the principles in Section 6(6) of Part B should be applied to an extension of the construction period. The case law regarding the problems related to delayed contract award proceedings remains in a developmental phase.

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Endnotes

- (1) Decision VII ZR 11/08, May 11 2009.
- (2) Decision 21 U 17/08, June 26 2008.
- (3) Decision 4 U 500/07, May 13 2008.

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