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CONSTRUCTION PAPERS



New cases where construction contracts in government projects can be modified to recover cost increases induced by war inflation

In Government Decree No. 13/2023. (I. 24.) on the modification of contracts concerning construction projects ("Decree"), the Hungarian government, in order to bring clarity with regard to the recoverability of extra costs incurred by contractors due to war inflation, has added new cases where contracts concerning government construction projects can be modified.

The Decree essentially states that contractors can request the modification of contracts that were concluded before the start of the war in order to recover inflation costs that exceed the levels of normal business risk. Whether such requests are justified will be evaluated by the competent government Minister in an official opinion. Depending on the outcome of the evaluation, contracting authorities can agree to reimburse up to 50% of the inflation costs. The parties will have to agree on the reimbursement in a modification of the relevant contract on the basis of the Minister's evaluation. The absolute ceiling of reimbursable extra costs is 15% of the contract price.

The Decree can also be applied to contracts that were concluded before the Decree took effect on the basis of contract award procedures that started before the Decree took effect.

Contracts signed on or before 24 February 2022

- [1] A company that signed a construction contract as a winning bidder may request the modification of the contract if it was signed on or before 24 February 2022 and all of the technical handover procedures specified in it have not yet been completed. The Decree states that a modification can be requested if the increase in costs exceeds the level of normal business risk.

Limitation to increases in costs of materials

- [2] The Decree defines what cost increases qualify as being within the realm of normal business risks. The degree of such cost increases may not be greater than the aggregate increase in the market prices of construction materials and products (“products”) used in the project that the contractor could have reasonably anticipated with regard to the total price at the time when the contract was signed. It is important to note that only increases in the market prices of products that are affected by the Russia-Ukraine war can be taken into account for this purpose. The products that are affected by the war will be listed, presumably in an itemised form, in a decree to be issued by the Minister responsible for the construction industry.

Special powers of the Minister

- [3] If requested, the Minister responsible for the construction industry will issue an official opinion on what cost increases fall within the category of normal business risks and the price of the relevant products. In the preparation of the opinion, the Minister must take into account the unique features of the relevant contract, if any.
At the request of a contractor, the Minister will issue an official opinion and determine the rate of cost increases that are within the realm of normal business risks as well as the cost of products as at the time when the underlying bid was made, if the same cannot be otherwise confirmed.

Contents of a modification request

- [4] A request for the modification of a contract must include the following mandatory elements: the type and quantity of construction materials and products for which compensation is sought, the price of the same used in the calculations during the bidding process, and the amount of compensation sought.
The price of materials and products used in the bidding process must be determined on the basis of the priced bill of quantities that was included in the bid or, if this is not possible, in another credible manner.

Relationship with the Act on Public Procurement

- [5] A request for the modification of a construction contract under these rules essentially means that the contracting authority should assume some of the contractor’s risks. Therefore, the Decree expressly states in view of Section 142(3) of Hungary’s Act on Public Procurement that such an assumption of risk is not unreasonable if a contracting authority pays not more than 50% of a cost increase that exceeds the levels of normal business risk, as confirmed by an official opinion, and not more than 15% of the original contract price. This is the maximum value at which the contract modification will not qualify as null and void under Section 142(3).

Payment

- [6] If a contracting authority agrees to pay some of the increased costs, the relevant amount can be paid to the contractor in the arrangement specified in the Decree. In the case of

contracts where the completion deadline is 30 June 2024 or earlier, payments may be made on one occasion, when the final invoice is issued. In the case of contracts with a completion deadline of 1 July 2024 or later, the payment may be made on the basis of one partial invoice or the final invoice. In that case, the partial invoice can be issued if the project is at least at 50% completion.

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