



# CERHA HEMPEL

CONSTRUCTION PAPERS



## **Opportunities to realise additional profits in fixed-fee arrangements**

*or value engineering in Hungarian judicial practice*

### **1. Value engineering**

- [1] There are two ways in which contractors are generally paid: time and materials or fixed-fee arrangements. In the case of a fixed-fee contract, the contractor bears the risk of whether it can achieve the agreed result with the quantities and at the cost calculated before the contract is signed. It is considered to be the contractor's risk if it can only achieve the agreed result with more work and at greater cost than originally expected. Under Section 6:245(1) of the Hungarian Civil Code, a contractor may not seek to recover the costs of additional work, except if these costs were not foreseeable on the date of the contract. However, the recovery of such costs is only possible in exceptional cases, such as in the case of additional work required due to unexpected ground conditions. For a more detailed discussion of this matter, please see our [article](#) on ground risks.
- [2] However, fixed-fee arrangements represent not only risks but also opportunities for contractors. If a contractor successfully achieves the agreed result and quality with less work and at lower cost through technical innovations or some lucky circumstance, the cost saved will increase its own profits and its fixed fee may not be reduced. The approach employed to take advantage of such opportunities is known as "*value engineering*". It is important to point out that this only works if the contractor performs in accordance with the terms of the contract; it may not earn additional profits through faulty performance or non-performance.



- [3] Hungarian judicial practice is also clear on this matter: a contractor will be entitled to the full amount of the fixed fee even if it needs a smaller expenditure of labour, time and/or materials to complete the project.

## 2. Judicial practice

We discuss a few real-life examples below to illustrate how Hungarian courts view value engineering. Although these are cases where the courts applied the provisions of the Civil Code that was in effect until 2014, we believe that their findings may still be relevant under the rules of the current version of the Civil Code.

### 2.1. No scaffolding [Pfv. 20.791/2018/8]

- [4] The parties concluded a fixed-fee construction contract. The contractor agreed to perform the following renovation works: thermal insulation of the façade, insulation of the basement ceiling, replacement of windows in apartments, modernisation of the heating system and installation of sun collectors. An itemised budget was attached to the contract as an annex. The contract also stated the cost of the scaffolding.
- [5] However, the contractor achieved the desired result with suspended scaffolding, a cheaper solution. It installed the thermal insulation layer on the facade, but it did not perform any surface preparation, because it judged the wall surface to be fit for adhesion for the insulation. The employer wanted to reduce the contract fee on the basis of these variations.
- [6] The Curia, Hungary's highest court, argued in its judgment that performance at a lower cost could not result in the reduction of the contract fee, because the result stipulated in the contract had been achieved.

### 2.2. Regulatory fees [Curia, Pfv. 20.103/2013/4]

- [7] This case concerned a design contract between the parties, where the contractor agreed to perform environmental reviews, prepare designs and obtain regulatory permits.
- [8] The contract called for a fixed-fee arrangement. Additionally, the parties agreed on the fees for each specific task. The contractor performed all of its tasks. The employer then requested it to confirm the costs it had actually incurred as regulatory fees in connection with the relevant permits and licences. The contractor did not do so, and the employer refused to pay HUF 4,500,000 of the contract fee in response.
- [9] The Curia held that the contractor was not required to confirm its actual costs, because contractors could not have such an obligation in the case of fixed-fee contracts. This held true even if the contract between the parties stated the fees for specific tasks.



- [10] The Curia argued that in fixed-fee arrangements, the parties agree on a fixed fee, and no deviations, whether positive or negative, are allowed from that fee.

## **2.3. Variations to sidewalk and geothermal heating system [Curia, Pfv. 20.236/2020/4]**

- [11] This lawsuit concerned a fixed-fee general contract for the construction of a building with five apartments and one shop.
- [12] The employer wanted to reduce the contractor's fee on the grounds of faulty performance. According to the employer, the issue was that four of the eight temperature sensors included in the designs were installed in boreholes at a depth of 65 metres rather than 100 metres. The employer also argued that the use of asphalt instead of paving stones for the sidewalk constituted faulty performance.
- [13] The Curia ruled that these matters had not amounted to faulty performance. The contract did not specify a depth for the sensors, and the permit issued by the relevant authority referenced 100 metres as a maximum rather than as a required depth. The geothermal heating system operated properly and, in the Curia's opinion, the contractor's "variation that matched the employer's requirements" did not constitute grounds for a reduction of the contractor's fee.
- [14] The court arrived at the same conclusion with regard to the sidewalk. The Curia also held that "work performed in partial deviation from the designs does not constitute grounds for payment on a time and materials basis", and therefore the contractor's fee could not be reduced by the difference between the cost of the two paving materials.

## **2.4. Less stone, same result [Curia, Pfv. 20.690/2019/10]**

- [15] This case concerned a fixed-fee supply contract under which the contractor agreed to supply stone slabs for the main staircase of a building, without any specification of quantities.
- [16] The staircase was listed as a protected structure, and therefore the employer requested that it should primarily be renovated by reusing the existing stone slabs.
- [17] The original slabs were removed without any damage to them, and therefore there was no need for the supply of new slabs. The original slabs were reinstalled, as the employer had requested.
- [18] However, the employer wanted to reduce the contractor's fee on the grounds that the contractor had to deliver fewer slabs than what was originally called for.
- [19] The Curia ruled in its judgment that the fixed fee could not be reduced, because the contract had been performed, albeit to partly different specifications.

**2.5. No three-point turn but the fee is payable [Budapest Court of Appeals, Gf. 40.221/2014/8]**

- [20] The parties concluded a fixed-fee construction contract concerning infrastructure development in a village and the reconstruction of a highway section. This included the construction of a paved area where vehicles could execute a three-point turn.
- [21] While the contractor, in a deviation from the designs, did not actually build a three-point turn area, the facility was suitable for vehicles with 15 tons in weight and 10 metres in length to turn around.
- [22] The employer wanted to reduce the contract fee on the basis of the deviation. However, the Budapest Court of Appeals concluded that this was not possible, because the desired result had been achieved despite the different solution.

**2.6. Archaeological excavation [Curia, Pfv. 20.243/2017/5]**

- [23] The parties concluded a fixed-fee contract in this last case as well. The contractor was required to perform masonry restoration and masonry work on a Renaissance loggia.
- [24] Archaeological excavations were also underway in the area at the same time. The parties concluded the contract in the knowledge that the findings of the archaeological excavations might have an impact on the composition and extent of the contractor's masonry restoration works.
- [25] The masonry restoration plan and the relevant regulatory permit were indeed modified after the conclusion of the contract due to the excavations, which also meant a reduction in the extent of the work on the Renaissance loggia. Therefore, the modification was due to a cause beyond the parties' control.
- [26] The contractor proceeded as instructed by the employer and carried out the works in accordance with the modified plan, but this also meant that the parties did not modify the contract implicitly. The subject matter of the contract remained the performance of various masonry restoration works. The composition of these works changed, and so did certain tasks that they involved, but this could not serve as grounds for a modification of the fixed fee. This is explained by the fact that while the work performed did not match the original plans exactly, there was not a single specific job that did not have to be performed. Therefore, the employer could not reduce the fee or refuse paying it on this basis.

**3. Summary**

- [27] The cases cited above show that the courts reached the same conclusion: the fixed fee cannot be reduced if the contractor produces the desired result with less work



or at a lower cost. The fee cannot be reduced even in cases where the contractor employs a different solution or partly deviates from the designs.

- [28] In the majority of fixed-fee arrangements, the contractor assumes a greater risk than the employer. This is so because the fixed fee cannot be increased, and therefore, if there is a need for additional work, the contractor will have to perform it without any additional remuneration. On the other hand, fixed-fee arrangements can also represent opportunities for contractors if they can achieve the agreed result with smaller expenditure through the application of innovative and cost-effective solutions.

\*\*\*

*Authors: Virág Kiss and Bence Rajkai*

If you are interested in more articles on construction law, please visit our website:

[Construction Papers](#)

Copyright © 2025 CERHA HEMPEL Dezső Partners – all rights reserved.

**Our mailing address:**

CERHA HEMPEL Dezső & Partners  
1011 Budapest  
Fő utca 14-18  
Hungary

**E-mail:**

[bence.rajkai@cerhahempel.hu](mailto:bence.rajkai@cerhahempel.hu)