

A court-ordered price change of the EBRD-financed procurement in Ukraine

Introduction

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The European Bank for Reconstruction and Development (the EBRD) offers many opportunities for Ukrainian suppliers, contractors, and consultants to participate in procurement activities. Most of these opportunities are associated with the EBRD-financed projects in Ukraine. All procurements shall be made under clear regulations on a single platform.

In the context of the Russian Federation's aggression in Ukraine, many participants in the EBRD-sponsored procurement activities face economic and logistical difficulties. Such difficulties may lead to the need to renegotiate the prices of the previously concluded contracts.

1. Regulation of public procurement in Ukraine

The procurement of goods and services for the funds provided by the EBRD shall be carried out following the rules and policies established by the bank. If such rules are not established, the procurement activity shall be proceeded according to the regulations of the Law of Ukraine "On Public Procurement".

The EBRD rules and policies, which are governing the procurement of goods and services, are set out in the EBRD Procurement Policies and Rules (as amended on 01 November 2017).

According to these rules, the form of a contract used shall comply with the objectives and specifics of the project. The terms of a contract shall provide for an objective diversification of the risks related to the contract. The main objective of ensuring the economic value and the most efficient performance of a contract shall be fulfilled. A contract shall clearly define:

- the scope of goods or works or services performed/provided;
- the rights and obligations of a client, suppliers, and contractors;
- provisions on the contract security and warranty periods, terms of the contract;
- provisions on the liability, insurance, acceptance, payment terms, and procedures;
- provisions on the price adjustment procedures (if necessary);
- provisions on the liquidated damages and bonuses, changes and claims;
- provisions on the force majeure circumstances, the contract termination, dispute resolution, and governing law.

Where required by the bank, the standard forms of a contract, which contain internationally accepted terms and conditions, are used.

The standard forms of a contract usually contain several interrelated documents:

- a contract (contractual) agreement;
- a notification of the acceptance of a tender application;
- entry form for the participation in a tender;
- special terms of a contract;
- specifications, annexes, and additional documents (if any) are listed in the contractual agreement or notification on the acceptance of an entry form for the participation in a tender.

The general terms in the standard form of a contract stipulate that all the documents forming a part of the contract (including all their sections) shall be of an interrelated, supplemental, and mutually explanatory nature. The contract shall be considered as a single and coherent document.

If the special terms of a contract stipulate that the governing law is the substantive law of Ukraine then the possibility of a price change in a contract after its conclusion should be estimated from the perspective of Ukrainian law.

2. Regulation of the alterations in the standard contracts

Ukrainian legislation thoroughly regulates the procedure for changing the price of a contract after its conclusion. According to the provisions of the Civil Code of Ukraine, the price in a contract shall be determined as the parties agree. A price change after the conclusion of a contract is allowed only in the cases and under the conditions established by a contract or a law.

At the same time, a price change in the contract after its fulfilment is not allowed.

According to the provisions of the Commercial Code of Ukraine, when entering into an economic agreement, the parties have to agree on the price of a contract, in particular.

Thus, Ukrainian law defines the price of a contract as a material term of the contract, which is subject to alterations under the requirements of a contract or a law.

If the general or special terms of a standard contract provide for the possibility and procedure for changing a price of a contract after its conclusion then such a change should be made by the procedure determined by the contract. However, most often, the general terms of a contract stipulate that its price is rigid and fixed for the duration of its performance.

In addition, according to paragraph 3.31 of the EBRD Procurement Policies and Rules (as amended on 1 November 2017), clients shall obtain a "no-objection" from the EBRD regarding the proposed changes before agreeing to any alterations to the terms of a contract. Requests for such changes shall be considered by a bank before a "no objection" decision regarding the utilization of the funds can be issued.

Under Ukrainian law (in particular, as provided by Article 188 of the Commercial Code of Ukraine), the alteration and the termination of economic contracts on a unilateral basis are not allowed, unless otherwise provided by law or by a contract. A party to a contract that considers it necessary to amend or terminate the contract shall submit propositions to the other party on the matter following the contract. In response, the party that has received a proposition to amend the contract shall inform the other party of the results of its consideration within twenty days after the receipt of such a proposition.

If the parties do not reach an agreement on changing the contract, or if no reply is received within the specified period, taking into account the delivery time of the appeal by post, the party concerned is entitled to refer the dispute to the court.

If a contract has been amended or terminated by a court decision, it is considered amended or terminated as of the effective date of the decision, unless a different condition of entry into force is specified by the court.

The Civil Code of Ukraine allows a contract to be amended or terminated only if mutually agreed by the parties unless otherwise determined by a contract or a law. A contract can be amended or terminated by a court decision at the request of one of the parties in the cases determined by a contract or a law.

According to the provisions of the Civil Code of Ukraine, in the case of a substantial change of the circumstances that guided the parties when concluding a contract, the contract may be amended or terminated, if mutually agreed by the parties, unless otherwise provided by the contract or derived from the essence of the obligation.

At the same time, a change of the circumstances is substantial if the latter has changed by that much that, if the parties could have foreseen it, they would not have entered into a contract or would have entered into it on the different terms.

If the parties have not reached an agreement regarding the amendments to a contract, then the latter may be amended by a court at the request of the party concerned. This procedure can be implemented under the following conditions:

- at the moment of the conclusion of a contract, the parties assumed that such a change in the circumstances would not occur;
- a change in the circumstances is due to reasons that the party concerned could not have eliminated despite all the efforts and foresight expected from it;
- fulfilment of a contract would violate the balance in the property interests of the parties and deprive the party concerned of what it had expected when concluding the contract;
- it does not follow from the essence of a contract or the usual business practice that the risk of a change in the circumstances is borne by the party concerned.

In addition to the indicated conditions, the Civil Code of Ukraine stipulates that an amendment of a contract due to a significant change in the circumstances by a court decision shall be allowed in exceptional cases, as follows:

- when the termination of a contract contradicts the public interests; or
- when the termination of a contract would cause losses to the parties that significantly overgrow the costs required to perform the contract on the terms changed by the court.

3. Changes of a contract in the courts

An analysis of the court practice on this issue shows that the courts generally conclude that a contract may be amended or terminated, if there has been a material change in the circumstances that guided the parties when entering into the contract. Moreover, such a change is substantial if the circumstances have changed to such an extent that had the parties been able to foresee that, they would not have entered into the contract or entered into it on different terms.

At the same time, according to the courts, significant changes in the circumstances compose an evaluative category. A change in a contractual obligation shall occur in a way that makes it more onerous and complicated for one of the parties to the contract and significantly alters the balance of the contractual relationship.

If the parties fail to agree on bringing the contract into conformity with the circumstances that have significantly changed, the contract may

be amended by a court decision at the request of the party concerned on the grounds established by the provisions of the Civil Code of Ukraine. In addition, this requires a single occurrence of the conditions outlined in this Article.

It shall also be taken into account that a contract price may be changed in any case only in terms of still outstanding obligations (undelivered volumes of the goods under the contract and unaccepted payments for the goods).

Courts also focus on the fact that an amendment to a contract due to a significant change in the circumstances by a court decision is allowed in exceptional cases. Such cases are, as mentioned above:

- where the termination of a contract contradicts the public interests;
- where termination of a contract would cause losses to the parties that significantly overgrow the costs required to perform the contract on the terms changed by the court.

Accordingly, concerning the analysis of Ukrainian legislation, the EBRD procurement rules, and the court practice, it is legally possible to increase a contract price by changing the terms of a contract concerning the price by judicial procedure.

A price change of a contract by judicial procedure stipulates that a party to a contract (usually, a seller) applies to an authorized court with a claim for changing the contract due to a substantial change in the circumstances that guided the parties when entering into the contract.

Upon that, a claimant shall provide the court with evidence confirming that:

- at the moment of the conclusion of a contract the parties assumed that the circumstance affecting the price of a contract would not occur;
- a claimant, as a party to a contract, could not have overcome such a circumstance despite all the efforts and foresight expected from it;
- the performance of the contract at the prevailing price would break the balance of the property interests of a buyer and a seller and deprive the seller of what he had expected when entering into the contract;
- according to the essence of a contract or the usual business practice, the risk of a change in the circumstances is not borne by a seller;
- the termination of a contract contradicts the public interests or will result in losses that substantially overgrow the costs required to perform the contract under the terms changed by the court.

The basic risk related to a price change of a contract by judicial procedure lies in that the court practice in Ukraine has not developed a system of objective criteria for the "significance" and "materiality" of the changes in the circumstances and other components of the conditions required for a court-ordered change to a contract yet. The assessment of the significance of the reasons is subjective. The Ukrainian court practice has not developed common criteria for the sufficiency of the evidence on the significance of the changes in the circumstances for

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amending a contract by the court yet.

The conflict between the judicial procedure for amending the contract terms and the requirement of the EBRD procedures to obtain a "no objection" from the bank in advance is unresolved. To meet this requirement, it may be necessary to engage the EBRD as a third party for and on behalf of a defendant.

In the above circumstances, a price change procedure in a standard contract concluded during the EBRD procurement activity depends on the factual circumstances of a transaction. Only a detailed analysis of such circumstances in each case will allow us to effectively assess the possibility and prospectively of the implementation of a contract change procedure in a legal way.