Chapter IV

Contracts of Public Works

Introduction

4.1 Definition of Public Works

Art. 3244 (1)

- "A contract of public works is a contract whereby a person**, the contractor, binds himself in favor of an administrative authority to construct, maintain or repair a public work in consideration of a price**".
- **Unlike concessions, the specific service to be provided is described in contracts of public works.** This undertaking on the part of the contractor is either to construct, maintain or repair a public work. Accordingly, **when the undertaking is to simply supply materials for the purpose of carrying out a public work, then the contract will not be that of public works. (3244/2/).**
- Generally **contracts relating to the construction and development as well as the maintenance and repairing of buildings, housing, bridges, highways, water supply and sewerage disposal facilities, dams and other power supply facilities form part of contracts of public works**. What makes the contracts that of public works is their widespread affective dimension in the sense that their availability, use and administration involve the public at large.
- The history of contracts of public works tells us one thing. That the contracts are made not only to enable the construction, maintenance and repair of the works, but also to generate employment prospects to the unemployed section of the society. This was partly the construction history of United States. It is now part of the contemporary history of Ethiopia.

4.2 Formation of the Contract

- Administrative contracts highly involve the public interest. Quality of the service that we have to provide to the public really matters. The inverse relation often times, between quality and price makes attaining quality a difficult task. **The basic consideration of our law is quality**. That is why under **Art**. **3246 competition will be waged among skilled persons** or **among specialized undertakings**.
- **Skill and specialization are therefore the ground rules to pick-up possible contractors.**
- Still, Art 3246 is cognizant enough of the role of competition. In normally operating economy, competition leads to efficiency. It is even possible to reverse the relationship between quality and price. This is so because Art 3246 authorized administrative authorities to **"put up for competition the working out of a project of a work…"**
- The possible **competitors will be screened out and the authorities will "freely choose the persons whom they admit to take part in the competition." (3247/3/).**
- The **administrative authorities must have an express standard to adjudge a competitor as fit and unfit**. By doing so, the authorities will comply with one of the constitutional principle called **transparency**. This is a logical continuation of Art 3248 under which administrative authorities are obliged to be strictly bound to respect the rules of the competition made by them.
- Try to justify how Art 3249, second sentence, is a logical continuation of Art 3248?
- The contract will be concluded only after application of Art. 3249.

4.3 Performance of the Contract

- The normal **performance of contract of public works involves three elements** on the part of both parties. Generally, **direction of work, payment of price** and **acceptance of work are the elements**. Some correspond to administrative authorities and others to the contractor. Let us begin with the first.

4.3.1 Rights of Administrative Authorities

- In aggregate the basic rights take two shapes. One is the **right to direct** the work. The other is the **right to supervise** the contractor. **Art 3250 (1)** establishes this right of supervision as "The administrative authorities may supervise the performance of the works".
- As to the direction right, **Art 3250 (2)** says"they may also prescribe to the contractor the manner of performance of his work".

4.3.1.1 Right to Supervise

- This right **involves two things** on the part of the contractor and also the administrative authorities. **Administrative authorities may directly supervise the works of the contractor**. To this end, they may **enter the yards at any time** and **require the contractor the information necessary** for their control. 3251(1)
- The consequent **obligations on the contractor** are **observing the regulations made and furnishing the necessary information to administrative authorities**. (32512).
- The **supervisory role** of administrative authorities is **not limited to supervise only works and yards but also the personnel** of the undertaking.

- In addition to this, **materials may also be supervised**. The **quality of materials shall also be controlled** by administrative authorities.
- With relation to personnel, **the authorities may require that employees be changed or dismissed.**

4.3.1.2 Right to Direct

- This **right to direct involves regulating the development of the works** and **prescribing to the contractor the manner of performance** of such works.
- To this end, **administrative authorities may give plans and models**. Not only this, administrative authorities **have the right to arrange the rhythm of works**. This is to mean that the authorities **may fix the period of time for the performance of the work.**
- Fixing a general period by administrative authorities entails another responsibility of "specifying the time at which the works shall begin."
- But arranging the rhythm of the work is not only about fixing general and special periods. It is also about **"regulating the order, sequence and the rhythm of the works within the general period laid down in the contract".**
- On default of fixed periods indicating the starting point, the law provides us with one:

    A. Periods shall run **from the date of notification of the contract**. (See Art. 3254(1) cum 3249).
    B. Periods shall run **from the materialization of a condition**.

4.3.1.3 Right to Demolish (3256)

- Administrative authorities have this **right of ordering the demolition and the reconstruction of any defective work at the expense of the contractor**.

4.3.2 Rights & Duties of the Contractor

- It will not be a hard remark to say **contractors have very limited right with relation to administrative authorities.** Even the way in which the article is devised to confer rights on contractors is negative. It magnifies than ever the administrative prerogatives of administrative authorities.
- As such, **contractors are prohibited from demanding compensation from administrative authorities save for the fault** that the latter might commit. **(3259(2)).**
- What rights do contractors have? **Art 3259 gives them the right to demand compensation, but only after observing certain legal considerations**.
- Under normal course of things compensation cannot be demanded as of right (see Art.3259 (1)).

Compensation however is due when:

A. **Damage is caused due to the fault of administrative authorities** by either making abusive requirements or by postponing the performance of the contract (3259(2)).

Contractors in need of compensation must establish many things.

I. The **existence of damage**
II. The **existence of fault**: The usual types of faults are those related with abuse of power.

III. **Violation of the contract**

B. **Damage is caused, regardless of fault, by the aggravation of the normal conditions of performance of the contract. (3259(3))**

4.3.3 Payment: Modalities and Time

4.3.3.1 Modalities

- Different types of payment are recognized. We have contract with a **fixed price** under which contractors will get their **payment in a lump sum**. **(3261)**
- On the other hand, we have **contract with series of prices**. Here without determining the extent of the work, price is fixed based on the different types of work that the contract envisages. We have **different prices for different works. (3262).**

Do you see the difference between Art 3262 and Art 3263? Can you appreciate the relevance of each? Which one is more important? On what basis?

- Parties are given the mandate to fix by their contracts the manner in which payment of price is to be undertaken. That is what we can gather from the provisions that we previously considered and others which generally relate to the manner of effecting payment.
- The freedom of parties on the modality of effecting payment is not without any control. Art 3267 comes up with a standard. No contract will arrange a clause of deferred payment. Even so, it can be only by bills of exchange or by annual installments.

4.3.3.2 Time of Payment

- The time fixed by parties and conditions fixed by them as well are crucial to determine time of payment. Art.3268 (1) says "where the ascertainment

of the services performed constitutes a preliminary condition for the determination of the price, such ascertainment shall be made within the periods specified in the contract".

4.3.4 Acceptance of Work

- As the contractor has a right to payment, the administrative authorities have the right of taking possession of the work done.

4.3.4.1 What is Acceptance?

- Acceptance is not merely taking possession of the work. Rather it is the delivery of the work. **Acceptance is "a joint ascertainment of the works made immediately after the completion of the works"**. As such it is an examination of the works by the contractor and the administrative authorities.
- Generally, we have **two types of acceptance- Provisional acceptance and final acceptance**. Even though both involve in the ascertainment of the works, there are areas of departure between the two ways of acceptance.

Provisional Acceptance

- This involves the ascertainment of the works both by the contractor and the authorities. What makes provisional acceptance special, among other things, is that it is **made under reservation**. Though it involves the effective taking of possession, the acceptance is made under reservation.

A/ Effects

- On the other hand, the effects of provisional acceptance are different from that of final acceptance. The **effects of provisional acceptance are twofold**.

- In the first place **provisional acceptance does not imply the exoneration of the contractor from any defect** (Art 3275(1)).
- In the second place, **it shall amount to a tacit acceptance of the modifications there under.(**3275)2(2).

- More informally, provisional acceptance marks the beginning of the period of warrant whose expiry marks the final acceptance of the work. (3275(3)).

B/ Risks

Provisional acceptance is a critical decision which will help us determine transfer of risk.

Final Acceptance

- This is the definite appropriation of the works after ascertaining that the contractor has performed his obligations in their entirety (Art. 3279(1)).
- Final acceptance involves both parties in the ascertaining procedure. Art.3279 is strict in this sense. It requires the joint presence of the parties and the making of record as well. Therefore, the issue is clear with regard to the absence of the administrative authorities during the acceptance.
- Just like any other rule of payment on the event of contestation or doubt as to the creditor (see Art.1744), Art 3280(1) authorizes the contractor to require the court to ascertain that the works are in a condition to be accepted.
- Unlike the situation under Art.1744, ascertainment by the court will not automatically result in a conclusive acceptance of the work. **If a period of warranty is fixed, the expiration of such period marks the final acceptance of the work.** Otherwise, final acceptance will be deemed to have taken place when the day fixed by the court arrives.

4.3.4.2 Effect of Acceptance (Art.3281)

- **Final acceptance relieves the contractor from his obligation of maintaining the works.**
- Before the final acceptance of the work, the contractor has the obligation of maintaining the work.

4.4 Revision of Contract

4.4.1 Unilateral Modification: The Contractor

- The right to unilaterally modify the contract is not a privilege operative in favor of the contractor. Even under normal course of things, a contract can be varied only by a court of law (Art 1763).
- What we have under **Art 3286 is not unilateral modification of the contract. Rather the contractual right extends only to *requiring* the revision of the contract.** Even this right of requiring revision is conditional upon other issues mentioned under Art. 3286(1). Hence, the contractor should encounter material difficulties of an absolutely abnormal nature, unforeseeable at the time of the contract.
- If the difficulty is not that much material or of an abnormal nature i.e. if it simply compels the contractor to perform a **supplementary work** not mentioned in the contract, in this case he may initiate the work after having obtained **a requisition order**.
- However, **if the supplementary work is very necessary in the absolute sense, and of an urgent nature, the contractor should initiate the work without a requisition order**. In this case, administrative authorities will not have the chance of canceling the contract. They would rather simply compensate the contactor.

4.4.2. Unilateral Modification: The administrative Authorities

This right of administrative authorities makes them special parties to a contractual arrangement. This is a prerogative in two senses.

1. "During the currency of the contract… the **administrative authorities may impose unilaterally upon the contractor changes in the original conditions of the contract"** (Art 3283 (1). They may even order the contractor to perform works not even mentioned in the contract. There **however reservations held by the law with this respect**. Accordingly:

    1.1. the changes under Art.3283(1) may **affect only the provisions which affect the arrangement of the public works**,

    1.2. those changes under Art.3283(1) **may not affect the financial position of the contractor,**

    1.3. new works under Art.3284 **involve payment of compensation and they are conditioned on the same**

    1.4. **new works may not imply imposing tasks which completely differ in terms of object** from the work mentioned in the contract,

    1.5. **new works may not dictate new ways of performing them**,

    1.6. **Unilateral revisions may entitle the contractor to cancel the contract "where the increase or reduction of the work required by the administrative authorities involves a variation of more than one-sixth of the cost mentioned in the contract**."

2. The imposition by the administrative authorities is irrevocable even by an otherwise stipulation in a contract. The contracting parties may not agree to the effect that the administrative authority cannot unilaterally modify the contract.

4.4.3 **Revision by a Court**

- Courts may vary a contract based on different considerations. **For equity considerations variations may be made.**
- On the other hand, **courts are entitled to vary administrative contacts**. This is an exception to the rule under Art 1764(1). Thus, a contract cannot be varied simply because it has become more onerous. The law holds "A contract shall remain in force notwithstanding that the conditions of its performance have changed and the obligations assumed by a party have become more onerous than he foresaw." Furthermore, the law is explicit with regard to the limitations that we have against courts with relation to contracts. As such courts shall not make contracts for parties under the guise of variation. The effect of economic changes must be regulated by the parties and not by courts. However, under Art.1767 (1) an administrative contract may be varied even when it is made more onerous than before. But, the court may vary the contract only when the contract was made onerous because of an official decision. This "official decision" should not be any type of official decision. For sure, an official decision is a measure taken by a grant of compensation. Does this mean that the official decision may not entitle the court to vary the contract? See Article 1767 (2) with Art 3193 (1) and Art 1767 (1) with Art.3193 (1). It is wise to consider the reference Art. 1767(2) makes to Articles 3191-3193. These three articles further elaborate on the exception under Art.1767. Read the articles and discuss whether they return us back to the rule under Art.1764?

4.4 Non-performance of Contracts of Public Works

Effects of Non-Performance

- The general effects of non-performance are dealt with when we discussed generally "non performance of administrative contracts".
- **The section dealing with non-performance in our civil code magnifies the contractor as the only defaulting party.**
- Non-performance ensues **when the contractor fails to undertake the obligations that he assumed under the contract**. Basically, the obligation of the contractor is to construct, maintain or repair a public work. If he/she fails to do one of the things he undertook to do under the contract, we say there is non-performance.
- **Non-performance has two special consequences.**
    - In the first place it **results in the state control of the project.**
    - On the other hand, it may **result in re-allocation of the work to another contractor.**

State Control- It is possible to infer this from **Art 3288 (1) which says partly "… declaration of state control may be made where the contractor fails to perform his obligation."**

- It is a declaration to the effect that contract of public works shall become under state control. **Mostly order of state control presupposes failure to carry out obligations as a result of lack of resource**. Inadequate resource to carry out the works within a given time is a ground for authorities to assume the full responsibility of carrying out the work.
- What comes under state control is the project. The ground of making the declaration on the other hand is the non-performance evidenced by the contractor.

- **Declaration of state control must be made after putting the contractor in default.** After ten day's of summoning the contractor to perform his obligations, administrative authorities may make the declaration.
- **The effects of state control are twofold**.
    - From the start, the declaration will **temporarily deprive the contractor of contract.** What does this mean? The effect of depriving one's contract may even be prohibition of exercising one's rights in a contract. Is this fair?
    - On the other hand, the declaration will **force the contractor to bear the expenses of control.** What possible expenses can you guess? Such expenses may include **costs of administering the remaining work, cost of preservation or any other related cost**.
- State control is not permanent. Especially Art.3289 (1) which explains on the effects of state control tries to tell us that the declaration is temporary. This nature however is conditional on one thing:

"[Showing] that he has the necessary means to resume the works and to carry them out to completion." (Art 3290).

Under such a condition, the **contractor may be allowed to resume the work.** Such a decision by the administrative authority is called an order of ***cessation***.

The Allocation -The other effect of non-performance is **re-allocation**. As the name itself implies, reallocation is **giving the work away to other person than the contractor**.

- As to Art 3291, **reallocation presupposes different conditions**. One such prerequisite is the **foreseeability of the matter**. This is to mean that the contract should expressly foresee the possibility of reallocating the contract.

- Foreseeability may involve the situation in which the authorities are in. For example, **the conditions may convince the authorities that they should not put the contract under state control**. This again may be based on a cost-benefit analysis that a rational authority will make. Secondly, **reallocation presupposes cancellation**. It is only contract that is cancelled that can be reallocated (Art. 3291 (1)).
- Another condition which is worth considering is **the "new contractor" requirement.** The purpose of reallocation is to allow new contractors to take the work and act accordingly. **Reallocation should not be in favor of the old contractor. The possibility of participation in the reallocation is barred by Art 3291 (1).**
- **Reallocation may be made in two ways.**
    - **Auction may be one option**.
    - **Agreement on the other hand is also possible to effect reallocation**.