

Working paper: case study 4 and 5 Belgium

Steven Van Garsse, Ilenia Vandorpe and Yseult Marique

(Project: The impact of competitive tendering on the execution of public contracts and concession contracts)

Belgium

0. Preliminary remarks: the law applicable to (disputes regarding) the execution of public contracts and concession contracts under the scope of application of EU Directives 2014/24/EU and 2014/23/EU

As is the case in several EU Member States, the way in which Belgian law deals with (disputes in the execution of) concession contracts and public contracts is not clearly directed towards public or private law. This is obvious when one takes a closer look at which court is competent to adjudicate disputes regarding (the execution of) public contracts and concession contracts, as well as when one examines the applicable regulatory framework.

As regards the competent court(s), a distinction should be made depending on whether the facts that form the basis of a dispute are related to the award or the execution of the public or concession contract. Depending on the concrete situation, a dispute arising from the award procedure can be brought before both ordinary courts (judiciary) and the administrative court (i.e. the Council of State which is competent for award decisions of administrative authorities). For disputes regarding the implementation of such contracts, only the ordinary courts (judiciary courts) are competent.

As far as the applicable law is concerned, the Belgian legislator opted to provide separate regulatory frameworks both according to the different (life) stages¹ of public contracts (i.e. the award stage on the one hand and the execution stage of the contract on the other) and according to the nature of the contract in question (i.e. a public contract or a concession contract). These regulatory frameworks are of a public law nature, but are complemented by private contract law where appropriate. The (private) contract law in Belgium is governed by Civil Code.

The Law of 17 June 2016 on public contracts provides a global legislative framework for **public contracts**, both within the classical² and special³ sectors (hereinafter referred to as: the Law on Public Contracts). The focus of this law is on the award phase. The implementing provisions on the award of contracts in the classical sectors are included in the Royal Decree of 18 April 2017 on the award of public contracts in classical sectors (hereinafter referred to as: RD Award). A separate regulation concerning the execution of public contracts is provided in the Royal Decree of 14 January 2013 laying down the general rules of implementation for public contracts

¹ And the problems/disputes that can be traced back to a particular phase.

² Transposition of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

³ Transposition of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

(hereinafter referred to as: RD Implementation).⁴ This regulation applies to public contracts as defined in Article 2 of the Law on Public Contracts. The Royal Decree regulates various issues that may arise during the execution of public contracts in a (mostly) mandatory manner. Despite the fact that the RD Implementation regulates the execution of the contract in a fairly comprehensive manner, ordinary civil law remains additionally applicable.

To summarize, three regulatory frameworks apply to public contracts in the classical sectors: the Law on Public Contracts, the RD Award and the RD Implementation. However, the civil law remains applicable to regulate issues by default.

As regards **concession contracts**, the overall legal regulation is contained in the Law of 17 June 2016 on concession contracts (hereinafter referred to as: Law on Concession Contracts). The focus of the law is also on the procurement (award). The relevant legislative provisions on the award and execution of concession contracts are combined in a single decree, namely the Royal Decree of 25 June 2017 laying down the award rules and general rules of implementation for concession contracts (hereinafter referred to as: RD Concession Contracts). Unlike the legal regulation concerning execution disputes in public contracts, as contained in the RD Implementation, the Royal Decree of 25 June 2017 does not contain a comprehensive regulation, but rather provides a framework leaving a great deal of freedom to the parties.

For a good understanding of the case studies discussed below, attention should be drawn to the fact that a public contract or concession contract under Belgian law can be concluded in various ways.

The most common way concerns the notification by the contracting authority of the approval of the "winning" tender. The contract will then consist of the tender of the chosen tenderer and the contract documents, both of which are supplemented by the provisions contained in the RD Implementation or the RD Concession Contracts (if there is no deviation) and Civil Law. In other words, the RD Implementation or the RD Concession Contracts act as default regulations, as will the Code Civil.

In other cases a separate agreement between the contracting authority and the chosen tenderer is concluded. In that case the rules of the Code Civil also remain relevant. In large projects or PPP projects drafting and signing (extensive) contracts is current practice.

⁴ Nevertheless, provisions from the regulatory framework concerning the award phase of public contracts (i.e. RD Award) may be applicable, e.g. with regard to disputes concerning the contract documents which can occur in the execution phase.

Case study 4: Parties hold differing meanings as to the interpretation of an ambiguous term in the contract

4.1. Description of the case study

Contracting authority A undertakes a tendering procedure. Subsequently, A concludes a contract with B. In the course of the performance of the contract, it becomes clear that A and B hold differing meanings as to the interpretation of an ambiguous term in the contract.

A dispute arises between A and B on the question whether the contract is to be performed by the parties in accordance with A's interpretation. If so, the result would be detrimental to B. In the event that the contract is to be performed- according to B's interpretation, this would be detrimental to A.

4.2. General law: overview of the law on interpretation of contracts

Since, under Belgian law, the way in which a **public contract** is concluded is situated within the stage of the award of the contract, this is regulated by the RD Award. As a result, this same regulatory framework must also be examined with respect to the interpretation of the concluded contract.

The way in which disputes concerning the interpretation of the contract should be dealt with is only regulated to a very limited extent in the RD Award, namely in articles 80 - 82.

Article 80 of this RD provides for a priority rule if there is a contradiction in the contractual documents. In such a situation, this provision gives priority to the (1) plans, then to the specifications (2) and finally (3) to the summary measurement or the bill of quantities. If the plans do not contradict other contract documents, but rather each other, the principle applies that the tenderer may rely on the reading that is most favorable to him (= common principle of civil law). However, the contracting authority still has the possibility to deviate from this provision in the contractual documents.

Article 81 of the RD Award stipulates that errors or omissions that render price calculation or bid comparison impossible must be immediately reported by the tenderer to the contracting authority in writing. An example of such an error or omission is a substantial difference in translation between a French and a Dutch version of the contractual documents, which sometimes occurs in multilingual Belgium. The notification of such matters by the tenderer must be made at least 10 days before the deadline for receipt of tenders, unless this is impossible because of a shortened deadline. It is then up to the contracting authority to decide whether or not it considers the errors or omissions indicated to be of sufficient importance to justify a rectification. Rectification may take the form of a rectification notice or any other appropriate form of publication. An extension of the deadline for the submission of tenders is also a possibility.

If the tenderer fails to notify the contracting authority of errors or omissions in the summary measurement or the bill of quantities before the deadline for submission of tenders, the tenderer will be deprived of the right to invoke those errors or omissions in accordance with Article 82 RD Award. This also applies to formal defects, errors or

omissions in his own tender. The purpose of Article 82 is to avoid the risk of speculation and to ensure equal treatment and normal competition between tenderers.

With regard to **concession contracts**, the applicable legal framework contains even fewer provisions for the settlement of disputes concerning the interpretation of the contract. This is of course related to the great freedom that parties have when concluding concession contracts. The only relevant provision here is Article 22, §2 RD Concession Contracts, which regulates the situation in which concession documents are drawn up in more than one language. In such a case, these documents must be interpreted in the language of the request for participation or the tender, provided that the concession documents are drawn up in that same language.

However, the above regulations are in addition to civil law that may be applied (in a supplementary manner) (see *infra*)

4.3. Application of general law to the case study

In practice, however, some of the above-mentioned provisions are not applied as literally as they are stated. For example, reference can be made to Article 81 RD Award, which despite the obligation on the part of the tenderer does not relieve the contracting authority of its information obligation. Article 81 RD Award, therefore, does not affect the obligation of the contracting authority to provide tenderers with correct and useful information. Moreover, this article cannot result in all consequences of errors of interpretation caused by the erroneous drafting of the contract documents by the contracting authority being borne by the tenderer. In practice, therefore, the tenderer will only have to bear the negative consequences of failing to comply with his duty to warn if there is a clearly detectable error or omission which a normally diligent tenderer should have discovered. In all other cases, errors or omissions not detected or not reported remain the responsibility of the contracting authority.

Given the limited nature of the regulation provided for by the RD Award on interpretation disputes in **public contracts**, the contracting authority will oftentimes provide specific clauses. This will be all the more the case when the contract in question is of greater importance in value.

Also concerning **concession contracts**, where, in any case, greater freedom is left to the parties, contracting authorities will provide for specific clauses related to interpretation.

For example, in a PPP project, a specific priority rule, which has to be applied to the relevant documents in the event of contradiction, can be provided. For example, the specifications could then be given priority, followed by the provisions of the PPP agreement and finally the provisions of the tender of the chosen contractor.

In addition to the above private contract law and therefore common rules on interpretation of contracts will be applied.

Case study 5: Contract does not provide for a particular matter and may need supplementation with an additional term

5.1. Description of the case study

Contracting authority A undertakes a tendering procedure and decides to award the contract to tenderer B. Subsequently, A concludes a contract with B. In the course of the performance of the contract, it becomes clear that the explicit terms of the contract do not provide for a particular matter.

A dispute arises between A and B on the question what should be the content of the additional term to be implied in the contract in order to deal with the matter not provided for in the contract.

5.2. General law: overview of the law on the modification of contracts

In the event that the terms of the contract do not provide for a certain matter, the contract will have to be “amended”.⁵ Both the RD Implementation, which applies to public contracts, and the RD Concession Contracts, which regulates disputes about the execution of concessions, contain a provision about the modification of the contract.

Attention has to be drawn to the fact that these possibilities are without prejudice to the tenderer’s duty of notification of omissions as stated in Article 81 RD Award.

In the RD Implementation, the possibilities for amendment are included in several Articles: 38, 38/1, 38/2, 38/3.... - 38/19. Depending on the case a specific article shall be applicable.

For instance, in case of a non-regulated matter in the contract Article 38/11 of the RD Implementation could be a solution. The contracting authority is obliged to include this possibility of modification in the contractual documents. However, if the contracting authority fails to do so, this Article shall nevertheless apply ipso jure to the contract in question. Contrary to some other possibilities for amendment, both the contracting authority and the contractor may request an amendment on the basis of this Article, provided that the conditions laid down in this article are met. One of the possible modifications that this Article allows and that is relevant for the solution of this case study is the possibility to modify the contractual provisions, including the extension or reduction of the execution period. In order to use this possibility of modification, some conditions must be met.

- The party wishing to invoke this Article must first demonstrate that it has suffered a disadvantage or delay.
- The said disadvantage or delay must be the result of negligence, delay or any other act which can be attributed to the other party. There must therefore be a causal link with the disadvantage or delay suffered by the party seeking to rely on this Article. Such negligence or acts may also consist of pre-contractual errors, such as the contracting authority's erroneous failure to include certain provisions in the contract documents that were nevertheless necessary. The contracting authority has a duty to provide information and should have noted these missing provisions during the preliminary study of the contract. The

⁵ Of course one need to be very careful that changes do not trigger a requirement to conduct a fresh tender process

contractor can also be negligent within the meaning of this Article, for example, if he fails to fulfil his duty to investigate in accordance with Article 81 RD Award.

- The party (both the contracting authority and the contractor) that wishes to invoke the possibility of amendment contained in Article 38/11 RD Implementation must disclose the facts or circumstances that justify the application of the said Article in writing within 30 days after these facts/circumstances occurred or after the date on which the contractor or the contracting authority should normally have known about them.
- If the contractor wishes to invoke Article 38/11 of the RD Implementation, it must also submit the actual request for compensation, in addition to the notification of the relevant facts/circumstances. This concerns a quantified justification of the request to invoke, for instance, article 38/11 RD Implementation.

If a modification of the terms of the contract is not necessary as a result of any negligence or other fact that can be attributed to a party, but is the result of unforeseeable circumstances, Article 38/9 RD Implementation can be invoked, provided the relevant conditions are met. As with Article 38/11, the contracting authority is obliged to include this possibility of amendment in the contract documents. If the contracting authority fails to do so, the regulation contained in Article 38/9 RD Implementation applies automatically. Contrary to Article 38/11 RD Implementation, only the contractor can rely on the possibility provided for in Article 38/9 RD Implementation. In order to be able to use the possibility to amend the contract on the basis of Article 38/9 of the RD Implementation, the following conditions apply:

- Firstly, there must be an unforeseeable circumstance on the part of the contractor. This is the case if the contractual balance of the contract is disrupted to the disadvantage of the contractor⁶. However, “unforeseeable circumstance” is a broad concept, the existence of which must be proven by the contractor. An example could be that the condition of the soil causes unexpected problems in the execution of the contract and that the contract does not provide for this.
- The requirement of unforeseeable circumstances implies that neither the contractor nor the contracting authority should have any part in the creation of these circumstances.
- If the contractor wants a modification of the contract other than an extension of the deadline or a termination, he must demonstrate the existence of a "very serious disadvantage". This disadvantage is objectified. For such disadvantage to be present, certain thresholds must be exceeded.⁷
- As is also the case with the application of Article 38/11 RD Implementation, the contractor who wishes to invoke Article 38/9 RD Implementation must describe the facts or circumstances on which the invocation of this Article is

⁶ Equilibre contractuel bouleversé au détriment de l'adjudicataire: L'adjudicataire doit démontrer que la révision du marché est devenue nécessaire à la suite de circonstances qu'il ne pouvait raisonnablement pas prévoir lors du dépôt de son offer, qu'il ne pouvait éviter et aux conséquences desquelles il ne pouvait obvier, bien qu'il ait fait toutes les diligences nécessaires.

⁷ “Pour les marchés de travaux et les marchés de services (...) s'élever au moins à 2,5 % du montant initial du marché”. However in some cases a lower threshold applies.

based, in due time and in writing. In addition, the contractor must also submit a quantified justification.

As far as **concession contracts** are concerned, the RD Concession Contracts does not contain the above-mentioned possibilities for modification. This does not, of course, alter the fact that, given the greater contractual freedom available to them, the parties can incorporate these possibilities. The reason for the absence of such possibilities for modification in the RD Concession Contracts lies with the nature of the instrument of the concession, which is very different from that of a public contract (i.e. putting the risk of exploitation on the chosen tenderer). It is submitted that most concession contracts contain specific clauses to regulate amendments.

5.3. Application of general law to the case study

Whether, and if so which, legal provision on amendments can be applied will depend on the exact circumstances of the case.

Depending on which possibility of modification of **public contracts** is concerned, the RD Implementation does or does not allow for a deviation from the relevant modification possibility in the contract documents. Article 9 of the RD Implementation determines from which articles of this decree a derogation may or may not be made in the contract documents. With respect to Article 38/9 RD Implementation, deviation is possible as far as the content of this provision is concerned, but not as far as the mandatory inclusion in the contract documents. With respect to Article 38/11 RD Implementation, Article 9 RD Implementation determines that no deviation is possible from this modification possibility. Thus, the application of Article 38/11 is, in principle, mandatory. However, the prohibited deviations referred to do not apply to DBF(M) projects. Article 9 RD Implementation provides an explicit exception to this.

The RD Concession Contracts does not contain a list of restrictions on possible deviations in the contractual documents. Therefore, contracting parties are free to include or not clauses on amendments. In most concessions contracts the matter is heavily regulated by specific contractual terms.

In the event of a dispute about whether a party is justified in invoking a certain possibility of amendment, the ordinary courts will have jurisdiction.

In addition to the above private contract law can also be relevant for solving the case. performance of duties in good faith, a general principle in Civil Law, could also become useful when complementing the contract.

