

THE SPECIFIC RULES IN THE CONSTRUCTION INDUSTRY – PRICE AND PAYMENT



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The Specific Rules in the Construction were published in 1977 in the "Official Gazette of the Social Federal Republic of Yugoslavia," No. 18. These are federal rules that are still in force, and the same adequately define behaviour of all participants in the realization of an investment project.

Key words: ***building, quality of works, control, collection of payment.***

It is considered that the Contractors agreed to use the Specific Rules on Construction, unless these Specific Rules in the contract are not excluded completely or partially.

The Specific Rules: Latin *Usus* - usage, habit, rules; French *Usance* - a custom that has been adopted in commerce as a law, something that has a commonplace in the trade business.

- A large part of the Specific Rules is related to the price and determination of the same (Article 22-35)

The prices of the works shall be determined in the manner established by the contracting authority for the submission of tenders and the contracting of the works concerned... and expressed in the measurement unit of works subject to the contract (unit price), as well as for the whole value of the building or part of the building or specific works. It is also emphasized that the unit price applies to surpluses and deficiencies, if the same does not exceed 10% of the contracted quantity of works.

Which method of determining prices will be used in a particular case, remains a matter of agreement of Contractors. The work unit price is generally regarded as convenient because it is more easily tailored to the volume of the work actually carried out, and finally the true value of the same. In this way, the customer is secured – in order to avoid to pay the price above the value of the works and the Contractor – in order to avoid suffering any damages, since it is certainly necessary to take into account the possible deviations of the performed works in relation to the works from the pre-calculation (surpluses and deficiencies of works and unforeseen works).

The construction process is a dynamic and generally long-lasting process subject to various influences and opportunities and often does not depend on the will and power of the contracting parties. Quite often, there are some extraordinary events and the same could not be predicted at the time of the conclusion of the contract, the same could not be avoided or their effect removed, but on the other side the same affect the contracting party's position more or less. Extraordinary events during the fulfilment of the contract create new circumstances under which the contract is executed and in that way distort the balance of the Contractors mutual actions, which without their merit and without guilt lead to a better or worse position than the one that would have to be accomplished by the signed contract.

In such situations, the clause "*rebus sic stantibus*" (changed circumstances) allows amendments to the contract and establishes the equivalence of reciprocal grants.

When we talk about the effect of extraordinary circumstances at the agreed price, it is irrelevant which element of the construction is affected with the changed circumstances. Each Contractor has the right to request a change in the contract price in case of occurrences of extraordinary events that affect the price (Article 23 of the Specific Rules).

The Specific Rules number 24 provides a precise definition of the extent to which changes in the price of materials and services on the market should be treated as an extraordinary event for which the contract price of works can be changed:

- 1) If the prices of certain materials/services change for more than 5%
- 2) If the total price of all materials/services change for more than 3%
- 3) If the total price of materials and services change the price of contracted works for more than 2%.

Changing the price of materials and services that range within the above percentages represents the business risk of the Contractor.

The Contractor may not request an increase in the price of contracted works due to extraordinary events during the execution of the works but only after the completion of the facility in accordance with the result of the calculation.

A Contractor who fails to fulfil his contractual obligations in time may not require a change of the price due to the changed circumstances that occurred after the expiry of the deadline for fulfilling his obligations, unless these are the changed circumstances that would occur even if the contractual obligations are met within the agreed deadline (case with unforeseen circumstances underground or in the water). This does not exclude the Contractor's liability for improper performance of the contract - delay.

If it is agreed, that the price does not change due to the changed circumstances, and the change in the agreed price may only be claimed if the price due to the occurrence of the changed circumstances increases or decreases by more than 10%. This refers to the case of contracting the so-called fixed price, i.e. the price that does not change due to the changed circumstances. According to jurisprudence, the fixed price increases the risk of the Contractor, but this increase might range within certain limits. With the Specific Rule number 28 this risk is set at 10% of the contracted price amount.

If a clause on the fixed prices has been entered in the construction contract provided that an increase of the same will not be subsequently accepted, the contracting parties are obliged to comply with that. The stipulation of a fixed price provision means merely taking a normal business risk, and does not mean that the parties have in advance excluded any influence of the changed circumstances.

If the Contractor performs work that was uncontracted but still it was necessary to perform the same to enable the operation of the facility, the Employer is obliged to pay it even if for the construction of the facility the contract price was fixed.

In relation to the effect of the received advance payment on the contracted price, it is important to note that the received advance payment allows the Contractor to timely supply

the material and then exclude subsequent price changes of the same if it is contracted that the advance payment is provided solely for the procurement of the material.

If the Contractor, without the prior consent of the Employer, uses material of higher quality than agreed, the price of the works may be changed on that basis, but with the consent of the Employer (unless the use of better quality was necessary or economically justified). The poorer quality of the work or the material reduces the value of the facility, which gives the Employer the right to reduce the contracted price.

A frequent question in practice and the most common cause of a court proceeding is the impact of surpluses and deficiencies in works, as well as unforeseen works (which are uncontracted but must be carried out), on the price determined as a fixed amount.

According to Article 32 of the Specific Rules, the price determined in the total amount does not change due to surpluses and deficiencies, because in this way the contracting parties excluded the impact of the quantities of works carried out at the agreed price. In such a case, the parties take the risk that the Contractor for a certain price carries out all the work on the facility subject to the contract and that the Employer for that facility pays a certain price, regardless of whether the quantities of works from the pre-calculation correspond to the actual quantities of works required for the final completion of the object.

The "turnkey" rule means that the contracted price includes the value of all unforeseen works and surpluses, and the effect of work deficits at the agreed price is excluded, which does not exclude the possible change of the agreed price due to the changed circumstances and the subsequent payment of works.

Subsequent works (works that are uncontracted and unnecessary for the performance of the contract but the Employer requires the same to be executed) shall be separately contracted and paid in accordance with the contract for the execution of subsequent works.

When a Contractor agrees to make a project for a fixed price under a "turnkey" system, then the same cannot ask for an increase in the price due to the subsequent works that had to be completed and which resulted due to the project's shortcomings.

- Payments for completed works are regulated by the Specific Rules 58-59.

Since works in construction are carried out over a longer period of time, the works are paid based on temporary situations (in order for the Contractor to have the necessary financial resources) that have the character of advance payment because the same represents a temporary but not a final calculation of those works.

Payments based on the completed situation are made upon completion of the works and their final calculation.

Works based on the temporary situations shall also be included in the completed situation overview and their value will be determined only at that moment.

The completed situation cannot be charged before the technical takeover of the construction works is carried out, i.e. prior to confirmation of the technical acceptance in the

sense of the valid building regulations since in this way will be determined whether the facility is constructed in accordance with the approved project and whether it meets the foreseen quality, standards and technical instructions.

For the purposes of Article 63 of the Specific Rules, based on the temporary situation the payment have to be made within 8 days from the date of acceptance of the temporary situation and based on the completed situation, within 15 days from the day of the acceptance of the completed situation.

The client may dispute temporary situations in terms of price, quantity and type of work performed, but not quality, as it is the subject of assessment during handover and final invoicing.

Verifying the situation by the Employer is not a prerequisite for payment based on the same. The Employer has the right to retain a part of the contract price (*mainly 2% of the value of the works*) to remedy the deficiencies found during the handover of the works, even if this right is not stipulated by the contract, unless the constructed facility is de facto taken over. The retained part of the cost shall be paid by the Employer when the purpose of the retention of the same is terminated, i.e. immediately after the removal of the deficiencies found during the handover.

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Our team consists of 19 employees, of which 9 lawyers. Each of us specializes in just a few narrow fields of law, which allows us to provide our clients with high quality, professional service.

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