

Article on Public Contracts following the Cassation Judgement of 03.09.2009

“Implementation of Public Contracts: the Importance of a Proper Communication between Contractor and the Awarding Authority”

In case the awarding Authority is confronted with failures of the Contractor upon implementation of the assigned command, this Authority shall be entitled to use the prerogatives it disposes of based on ‘the presumption of legality’, by imposing sanctions or official measures, without having to refer the matter to court first.

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The means of action it disposes of to reprimand the failures, are subjected to the consideration of a prior procedure with the objective to protect the Contractor against possible arbitrariness.

Article 20 of the General Conditions of Contract of the Belgian Royal Decree of 26/9/1996 for establishment of the general rules of execution for Public Contracts includes the rules of procedure.

The Contractor is in default upon implementation of a Public Contract in case, for instance, the works are not fully completed within the completion deadline or by the various due dates for partial completion; also when the works are not progressing as such to be completed on the set dates or finally when the Contractor does not observe the legal written commands of the awarding Authority or when the performances are not implemented in accordance with the specifications set in the assignment.

Upon establishment of these failures, they should be communicated in a report by the awarding Authority, whereof a copy should immediately be sent to the Contractor by registered mail.

The Contractor should immediately remedy his failures.

However, the Contractor can send a statement of defence to the awarding Authority by registered mail, within fifteen calendar days from the posting date of the sending of the report.

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Belgian legislation explicitly states that silence after that period shall be considered as recognition of the stated facts.

This might imply extensive consequences for the Contractor. Hence, it remains appropriate to, upon receipt of a report of failure, send a registered letter of defence to the awarding Authority in due time and therefore within fifteen calendar days from posting date.

Nonetheless one could say that the Court of Cassation has mitigated this stipulation in its judgement of 3 September 2009.

In the above-mentioned judgement, the Court of Cassation has declared that the legal effect that the silence of the Contractor is considered as a recognition of the established facts does not occur in case the Contractor has contested all failures mentioned in the report of verification before this report was sent and provided that the awarding Authority was aware of this contestation.

The Court of Cassation states that the strict application of the presumption is contrary to the purpose set by the regulator, which is to grant the Contractor a guarantee for the right of defence as well as to enable the administration to take the required measures in case the failures of the Contractor remain unchanged.

For Public Contracts strict terms apply that deviate from the (limitation) periods in common law. Moreover, these periods also apply under penalty of debarment.

The Cassation judgement of 3 September 2009 slightly softens the consequences of this severity. Nonetheless, when implementing a Public Contract one should act accurately.

Therefore, a proper and written communication with motivated justification of the positions remains essential at any time.

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