

CONTRACTOR'S OBLIGATIONS AND LIABILITIES UNDER CONTRACT FOR WORK AND SERVICES AS PER NEW TURKISH CODE OF OBLIGATIONS

RATE OF URBANIZATION AND THE NUMBER OF investments by private entrepreneurs in diverse areas have increased dramatically over the last decades as a natural consequence of economic growth in Turkey. Correspondingly, the significance of the contract for work and services has enhanced since the entrepreneurs need the contractors for performance and completion of the projects. In this sense, the contract for work and services has a wide field of application and therefore various disputes arise between the employers and the contractors in connection with such wide application.

A basic contract for work and services comprises two parties one of which is called the "employer" while the other one is referred to as the "contractor". In this regard, the

contract for work and services may be defined as "a contract for work and services is a contract whereby the contractor undertakes to carry out work and the employer undertakes to pay for such work".

Contract for work and services has been regulated under both Turkish Code of Obligations numbered 6098 ("TCO"), entered into force as of July 1st, 2012 and Code of Obligations numbered 818 ("CO"). TCO has abrogated CO upon enforcement thereof. TCO does not include substantially different provisions for the contract for work and services when compared with the CO provisions. The main renovation provided by TCO is simplifying and correcting the wording of the contract for work and services provisions.

When compared with respect to allocation of obligations and liabilities of the parties to the contract for work and services, most of the disputes occur due to the contractors' failure in duly performing their contractual obligations. For the afore-mentioned reasons, this article aims to deal with and examine the contractor's liabilities and obligations under the contract for work in the light of TCO.

Contractor's Liabilities and Obligations

Duty of Care and Loyalty

Contractor shall perform the works carefully and loyally. In principal, the contractor should direct its care to the works which it undertakes to perform and direct its loy-



alty to the employer as observing the employer's interests.

Duty of loyalty requires the contractor to act for the interest of the employer within the scope of contractual relation whereas the contractor should refrain from acting against the employer's interest. In this sense, as an example of such duty, the contractor should warn the employer with respect to the employer's instruction which may endanger the performance of the duly completion of the works under the contract¹.

On the other hand, the scope of duty of care under TCO depends on the objective criteria where CO used to refer to the subjective criteria. CO had referred to employee's duty of care under an employment relation in order to determine the contractor's duty of care. However this reference was not appropriate for reflecting the ideal term of duty of care since a contractor and an employee were of different natures. Therefore, TCO provides that the determining the scope of the duty of care shall be based on the appropriate performances of a prudent contractor acting in the similar fields.

It should be noted that the duty of care and loyalty have a close relation such that the duty of care is a natural result of the duty of loyalty.

Manner of Performing

Principally, the contractor has to perform the work personally or cause the work to be performed by a third party under its control. However, the contractor may only subcontract the work unless its personal abilities are required for the performance thereof.

Besides, even the work is subcontracted to a third party, the contractor shall remain liable in case the work is not performed or completed as agreed by the parties. Also the contractor may be required not to have anyone else to perform the work and may be obliged to do it personally by an agreement².

Equipment & Materials

The contractor has to provide all equipment necessary for the performance of the work unless it is stated otherwise by an agreement or customary law; however the contractor's obligation to provide the materials is open to interpretation under Turkish Law. Provisions of TCO remain silent for this issue and solely set forth the results as to whether the materials are provided by the contractor or the employer. The issue of "which provisions will be applied to the case if there is no agreement with respect to the matter of materials' supply" is controversial in doc-

trine³. Therefore the parties are well recommended to clarify which party will provide the materials required for the duly execution of the work under the contract.

If the materials are supplied by the contractor, the contractor shall be liable as a seller towards the employer for the defects of such materials. In such case, the liability of the contractor will be evaluated under the provisions of "liability of the seller for the sale of defective goods". For the avoidance of doubt, the seller shall be liable towards the buyer when the goods sold (i) has economic, material or legal defects or (ii) is not in conformity with the qualifications which the seller acquainted to the buyer in any way. In addition, United Nations Convention on Contracts for the International Sale of Goods dated 1980 ("CISG") may be applicable with regard to the seller's liability for defective goods provided that the parties are from different countries which are parties to CISG and such sales transaction is not one of the exceptions listed in CISG.

The materials may also be supplied by the employer. In such case, the contractor has to (i) control the materials, (ii) evaluate whether such materials are suitable for performance of the work and (iii) notify the results of his control and evaluation to the employer. If the contractor fails to do so, it shall be liable towards the employer for the results thereof. For avoidance of doubt, the contractor's obligation to notify the suitability of and defects in the materials to the employer is not its sole notification obligation. The contractor is also required to notify any situation to the employer which poses risk or is of material importance for the performance of the work.

Obligation to Commence and Carry out the Work

The main obligation of the contractor is to commence and carry out the work. This obligation should be evaluated differently as to whether a specific completion date is determined or not.

If the parties to contract have not determined a specific completion date, the "objective criteria" referred in section Duty of Care and Loyalty shall be applicable to the case. In this regard, the contractor shall be expected to start, carry out and complete the work in a similar way that a prudent contractor commences in due course and carries out regularly also with considering the nature of the work.

On the other hand, when the parties have determined a specific completion date, that date shall be taken into consideration and timing of the work shall be based on such specific completion date.

Under either options mentioned above, if (i) the contractor does not commence on due time or (ii) the contractor delays its performance of the work in breach of the contract or (iii) it is obvious that the contractor may not achieve timely completion of works due to a delay not attributable to the employer, the employer shall be entitled to revoke⁴ the contract without waiting for the delivery date. When interpreted the wording of "a delay not attributable to the employer", the employer shall be entitled to use its rights if the delay occurs due to either force majeure or the contractor's default.

Additionally, if it is obvious that the work will be completed not in full compliance with the contract due to the reasons attributable to the contractor, the employer may notify the contractor to rectify such defaults stating that otherwise, it shall have the works rectified and completed by a third party at the contractors' risk and expense.

Defects Liability

According to TCO, the employer should examine the work in due course following the delivery and if there is a defect in the work the employer should inform the contractor within a reasonable time.

Either party, at its own cost, may request an expert to examine the work and prepare a report with respect to such examination.

In case the work is defective, the employer may exercise his optional rights which are: (i) to revoke the contract provided that the completed

and delivered work is not compliant with the contract or the employer may not be expected to accept the work, (ii) to accept the work as requesting proportionate discount from the contract price or (iii) to request the rectification of the defective work at the contractor's expense unless the cost of such rectification is unreasonably excessive.

It should be noted that in addition to the above-mentioned optional rights, the employer's right to claim compensation from the contractor in accordance with general rules is reserved. If the work is performed on employer's immovable property and removal of such work will cause significant damages, the employer cannot revoke the contract. Considering the effects thereof, revoking a construction agreement under which the most of the works have been achieved may lead the parties to sustain excessive damages. In such case the contractor should have been obliged to displace the work and leave the site with its beginning situation. For this reason, the lawmaker does not let the employer to revoke the contract under such circumstances.

The contractor shall remain liable for two years as of the completion date of the work having a movable qualification. This liability shall be for five years for the works with immovable qualification. Notwithstanding anything herein to contrary, the contractor shall remain liable for 20 years if such defect arises from the contractor's gross default.

By H. Alp İlker | hailker@goksusafiisik.av.tr

¹ Supreme Court, 15th Chamber, dated 13.04.1978, numbered 822/778.

² Supreme Court, 15th Chamber, dated 06.03.2003, numbered 524/1113.

³ TANDOĞAN, Haluk, Borçlar Hukuku, Özel Borç İlişkileri, Volume II, Ankara 1987, p.104.

⁴ For avoidance of doubt, the termination of a contract and the revocation of the contract are different terms. In case a contract is terminated, the contractual relation between the parties shall be invalid as of the date of termination. However, in case of the revocation of a contract, the contractual relation between the parties shall be invalid as of the date of execution of the contract.