

Adapting public procurement contracts to the rising cost of energy and raw materials

The french example

Abstract: In his article, the author examines the provisions of the French Public Procurement Code regarding the modification of the price in public contracts. Analyzing the doctrine of intangibility, which was repeated from 1938 to 2022, the author provides us with the three possibilities for the amendment of the price: the unforeseeable circumstances, the small changes and the non- substantial changes. Finally, in the article, the theory of “imprevision” which implies the compensation of the company given the refusal of the contracting authority to renegotiate the contract is analyzed. The author concludes that the detailed review clauses constitute the only suitable solution.

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Περιεχόμενα

I. THE MODIFICATION OF THE PRICE OR THE REVISION CLAUSE

II. IMPREVISION

A problem has arisen in all European countries in the wake of the war in Ukraine: the impact on public contracts of the rising cost of raw materials and energy.

This is not the first time that public procurement has suffered from unforeseen events: war, financial crisis, oil crisis, pandemic, etc. The solutions should be known.

And yet in 2022 the adaptation of contracts has given rise to a legal debate in France.

As a preliminary point, it is necessary to present the hierarchy of rules applicable in France to public procurement contracts, i.e. public contracts of works, supplies or services (“marchés publics”) and concessions.

Public procurement contracts are governed by the *Public Procurement Code*, which contains both the rules transposing the European directives and the national rules.

Some of the articles in the Code have legislative value, others have regulatory value.

But in addition to the Code, rules laid down by the case law are applicable which are valid for all administrative contracts, beyond “marchés publics” and concessions.

Moreover, the Government intervenes to guide guidelines or recommendations by means of circulars.

With regard to the consequences of the war in Ukraine, we are going to focus on the Government’s interventions during the year 2022 because these interventions have raised interesting legal problems relating to two questions that were being debated:

- can the contract price be changed?
- can the theory of “imprevision” survive the 2014 directives?

I. THE MODIFICATION OF THE PRICE OR THE REVISION CLAUSE

The *Public Procurement Code* provides that the contract must set the price. The price may be firm or re-

visible depending on the importance of the economic hazard.

And since 2008 it has been compulsory to include a revision clause for:

- contracts with a performance period of more than three months
- which include a significant proportion of supplies (particularly raw materials) whose price is directly affected by fluctuations in world prices.

Failure to include a clause when the conditions are met constitutes a breach of the competitive tendering obligations.

Despite these provisions, the rise in the cost of raw materials and energy can lead to a serious imbalance in contracts, particularly

- when the price is firm
- when the increases are very rapid, which means that the updating of indices is too late
- when the indices are inadequate because they do not incorporate certain cost components.

Hence the legal debate that has taken place in France concerning the possibility of modifying the price of public contracts and the revision clause to adapt it to rising costs.

The Doctrine of Intangibility

According to ministerial doctrine until 2022.

“The contracted price is intangible, as well as the conditions of its evolution provided for at the signing of the contract, and none of the parties to the contract can modify them”

This doctrine was repeated from 1938 to 2022 by circulars, guides, technical sheets published by the Ministry of Economy and Finance.

Rulings of the Council of State were invoked even though they dealt with other matters and had never affirmed a principle of price immutability.

Each time there was an economic crisis, the circulars took the same two-step approach: the price cannot be affected, the only solution is an indemnity for “imprévision”.

This put companies in serious difficulty, as the conditions for obtaining an indemnity for “imprévision” are very strict.

Everything changed in 2022.

The abandonment of the doctrine of intangibility

The context has changed. The Ministry’s services have a less bureaucratic approach to public procurement,

more open and in a sense more legal. They have taken account of the position of professional organisations and this has led to a request for an opinion from the Minister to the Council of State.

The opinion of 15 September 2022 answered very clearly that it does not follow from the Public Procurement Code, the Directives or the case law of the ECJ that *“amendments to contracts and concessions [...] may relate only to the characteristics or conditions of performance of the services originally agreed, and not to the financial clauses, nor must they necessarily relate to those characteristics and conditions, so that an amendment to the financial clauses alone (a “dry” amendment to the price) would be prohibited”*.

Thus, the modification of the price and/or the revision clause is subject to the general rules on modifications. A ministerial circular of 29 September 2022 noted this: the general rules on contract amendment apply.

Application of the general rules

As a result, an amendment of the price is possible in three cases: unforeseeable circumstances, small changes and non-substantial changes.

First case: The amendment is made necessary by unforeseeable circumstances.

This is the provision that is most often invoked following the 2022 increases.

The Council of State recalls that this increase has a numerical limit: each modification must be less than 50% of the initial amount.

It adds that this limit applies even if the modification is not substantial (whereas in the case of non-substantial modifications outside unforeseen circumstances the limit does not apply).

This implies *a contrario* that in the case of unforeseen circumstances the modification may be substantial - subject only to the condition that the nature of the contract is not changed.

This is a contribution of the opinion of the Council of State because in practice many public purchasers thought that they could never make a substantial modification.

Finally, the Council of State gives a restrictive indication as to the importance of the modification: these provisions do not have the purpose and cannot have the effect of ensuring that the co-contractor is covered for risks which he has taken into account or should have taken into account in his forecasts. This is particularly true in the case of lump sum contracts or concessions:

the modification must leave a certain amount of uncertainty to be dealt with by the company.

Second case: Small modification (below the thresholds and less than 10% - or 15% in the case of works)

This modification is always possible; it may be sufficient to compensate for the increase in charges in certain cases, but the Council of State points out that the companies must be left to bear the risks that they had foreseen or should reasonably have foreseen.

Third case (not subject to the 50% threshold):
Non-substantial modification

It is a modification which does not change the nature of the contract, modification which does not introduce conditions which would have attracted other candidates, modification which does not change the economic balance of the contract.

This case should remain marginal, as there is a high probability that the price change is substantial!

It is therefore mainly the first two cases of modification that can be used.

But this method of adapting contracts has a flaw: the consent of both parties is required.

If the granting authority refuses the modification, the contracting party has two solutions, one illegal, one legal.

Illegal solution: interrupt the performance of the contract.

Such an interruption is only justified in law if the economic circumstances have the characteristics of force majeure.

This has not prevented some companies from using it as a means of pressure to force contracting authorities to negotiate.

Legal solution: invoke the right to compensation for “imprévision”.

II. IMPREVISION¹

Changes to the contract require agreement between the parties, but if the contracting authority refuses, the company may be entitled to compensation on the

1. the word *imprévision* is ambiguous in French; it refers in Greek to *Απρόβλεπτο* -“imprévisible”- and not to *Απρονόητος* “imprévoyant”.

basis of a theory specific to French law, the theory of “*imprévision*”.

This theory is specific in that it is based on equity and not on the will of the parties or on good faith. In many legal systems it is accepted that in the event of an unforeseeable event the parties have an obligation to renegotiate their contract, but this is not what results from the theory of “*imprévision*”.

This theory was initiated by a famous judgement during the first World war: 30 March 1916 *Cie générale d'éclairage de Bordeaux* (“*Gaz de Bordeaux*”).

It was “codified” in 2018 by the article 6 of the Public Procurement Code:

“When an event external to the parties occurs, unforeseeable and temporarily upsetting the equilibrium of the contract, the other party, who continues its performance, is entitled to compensation”.

Elements of the theory of “*imprévision*”

The *Gaz de Bordeaux* judgement concerns a concession contract.

The Council of State recalls that, in principle, economic risks are to be borne by the concessionaire,

But in certain exceptional circumstances, the risk can be shared.

The conditions are the following:

- 1° the increase in costs “certainly exceeds the extreme limits of the increases that could have been envisaged by the parties
- 2° the company has continued to perform the contract
- 3° “the economy of the contract is absolutely disrupted” by a deficit²

When the conditions are met, the co-contractor is entitled to aid with two characteristics::

- temporary aid
- partial aid (5 to 25% to be paid by the company depending on the measures taken to protect itself from hazards and the size of the company).

2. Since 1938, ministerial circulars have summarised the case law by saying that this condition is only fulfilled when the extra-contractual costs have reached approximately one-fifteenth of the initial amount excluding tax of the contract. Example: increase in the price of fuel = an increase of more than 7% in the cost of performance was considered to upset the financial equilibrium of the contract (CAA Marseille, 17 January 2008, *Société Altagna*, No. 05MA00492) but an increase of around 3% was deemed not to have upset the equilibrium of a contract (CE 30 November 1990, *Société Coignet entreprise*, No. 53636).

At each period of crisis this theory is invoked and recalled by ministerial circulars and gives rise to some decisions by the administrative judge.

Unpredictability and contract modification

Since the 2014 directives provided a framework for contract modifications, uncertainty has reigned; many lawyers thought that the theory of “imprévision” was doomed, or at least that it could only operate within the limits imposed by the directives.

The opinion of the Council of State puts an end to these uncertainties.

It considers that “*the contractor’s right to compensation for unforeseen circumstances is not called into question by the provisions resulting from the directives of 26 February 2014*”.

How is this possible?

The explanation lies in the legal nature of the “imprévision” indemnity.

The Gaz de Bordeaux ruling does not clearly specify the legal basis of “imprévision”; it was only in 1919 in his conclusions under the ‘Gaz de Nice’ judgment (CE 27 June 1919 Société du gaz et de l’électricité de Nice) the Government Commissioner Riboulet explained that “imprévision” is based on a special legal construction, which is that of the ‘extra-contractual situation’.

In this conception exceptional circumstances lead to the suspension of the contract, a ‘derivation’ is created and a ‘superstructure’ is installed (Riboulet conclusions).

It follows that the compensation for “imprévision”, both when it is granted by the administration and when it is granted by a judgement, does not result from a modification of the contract, it is an external aid.

Therefore, the provisions on modifications - and in particular the 50% ceiling - do not apply.

This is accepted by the Council of State in its opinion.

This looks like a sleight of hand.

Indeed, despite the ‘suspension’, ‘derivation’, ‘bracketing’ of the contract, the service continues to be performed and this can only be on the basis of the contract, which is therefore only partially neutralised, in its financial aspects. The temporary agreement therefore replaces certain clauses of the contract with others. The modification is certainly temporary, but it is still a modification.

The position of the Council of State therefore seems bold and it is not certain that it would be accepted by the ECJ. The ECJ has, for example, held that the rules on modification apply to a transaction concluded to settle a contract dispute (ECJ 7 September 2016 Finn Frogne A/S, Case C-549/14).

The solution accepted by the Council of State may be seen as an advantage to companies, but it should not be forgotten that the case law on “imprévision” is very strict, particularly in the field of public contracts of works, services and supplies (“marchés publics”). Invented for concessions, the theory is difficult to adapt to other contracts.

The theory of “imprévision” is therefore not a solution for the future.

The future solution lies elsewhere, in the drafting of detailed review clauses.

It may be objected that such clauses presuppose that both parties agree first on the content of the clause and second on its implementation.

But it will be answered:

-It is in the interest of both parties to provide for a review, otherwise candidates will increase their prices from the outset;

- that it is possible to draft these clauses in such a way that refusal to implement them may incur contractual liability.