ÇETİNEL

VOLUME 1

2021 CONSTRUCTION LAW WRAP UP

TURKISH CASE-LAW

2022

ÇETİNEL

VOLUME 1

We advise on construction projects worldwide; but we are based in Istanbul, Turkey. As of this year we aim to provide a general overview of the relevant case-law in Turkey on several construction law matters. We therefore compiled a bunch of interesting Court of Appeal and/or Supreme Court decisions as well as State Council decisions issued throughout last year of 2021. Let us briefly note that Court of Appeal and/or Supreme Court have jurisdiction over private law side of the disputes whilst State Council deals with administrative law part on public procurement projects. All are relevant for good practice!

We hope you enjoy the read.

2022

COURT OF APPEALS / SUPREME COURT DECISIONS

TERMINATION OF CONSTRUCTION CONTRACTS: WHAT IS THE RELEVANT COMPENSATION (IF ANY)?

6. HD., E. 2021/335 K. 2021/640 T. DATED 6.10.2021

The lawsuit is about the compensation of the positive damage suffered due to the unilateral unjust termination of the construction contract in return for flat for, and the collection of the work cost if the court agrees otherwise. In the decision of the Court, the definition of positive and negative damage was made. According to the Court, in order for the contractor to claim loss of profit due to the termination of the contract, contractor must be completely flawless in the termination, **and if the parties are at fault together, it is not possible to demand loss of profit,** penalty clause due to delay within the scope of positive damage, and it is not possible for the employer to record the letter of guarantee as income. If both parties are at fault (common fault), they cannot claim compensation from each other and can only claim the added value they have brought to each other's assets in accordance with the provisions of unjust enrichment.

6. HD., E. 2021/27 K. 2021/876 T. DATED 14.10.2021

This Court's decision states that in the event of termination of the contract, the contractor is entitled to the cost of the works performed, regardless of whether it is at fault or not. It does not matter whether the termination is justified for the work price that the Claimant contractor entitled to. **The Claimants will be able to demand the manufacturing price they deserve even if the Municipality is right in the termination.** For this reason, the Court's reasoning stating that "the Claimant contractor has the right to request the manufacturing cost from the Respondent since the Municipality is wrongful in terminating the contract" is not valid.

COURT OF APPEALS / SUPREME COURT DECISIONS

NON-CONTRACTUAL WORKS: HOW CAN THEY BE CALCULATED?

6. HD., E. 2021/999 K. 2021/1034 T DATED 21.10.2021

The dispute arises from the contract for work. The Claimant contractor demanded the collection of the non-contractual work cost, without prejudice to the unfairly deducted delay penalty and the rights of lawsuits and claims regarding the price difference. In the annulment decision which was abided by, although it was stated that a report should be obtained from the expert panel to be reconstituted and there was also electrical works in the subject of the lawsuit, the procedure for establishing a judgment according to the expert report given by an expert panel which does not include an electrical engineer was contrary to the principle of vested rights. As a result of its examination, the Court formed a new Expert Committee consisting of electrical engineers, civil engineers and mechanical engineers who are qualified to work as experts in the present case. Projects, changes in the delivery report, work increase and decrease report and all tender documents are evaluated by the Committee and it was determined whether there is non-contractual work and what happens if there is, whether the works within the scope of project change and decrease in work increase are paid, and if there is non-contractual work and not progress payment, the growth rate of over-manufacturing in the scope of the works calculated.

According to the provisions of Articles 21 and 22 of the General Specification for Construction Works, the annex of the contract, the cost of the works that fall within the scope of 10% increase in work is determined by the contract prices, and for the works that do not have a price in the contract, using the determination method in the Article 21 of the specification, the cost of the works exceeding 10% at the date of their completion is determined by the local freelance fee. **It was decided that it should be calculated with market prices and since VAT is included in the calculation with local market rates, the amount determined according to the free market value should be decided without adding VAT separately.**

COURT OF APPEALS / SUPREME COURT DECISIONS

UNEXPECTED INCREASE OF WORK AND ADDITIONAL COSTS: WHAT DOES THE SUPREME COURT SAY?

E. 2021/3845 K. 2021/1935
T. DATED 26.4.2021

The principal case relates to the request for the collection of the remaining work cost of receivables arising from the contract for work, which is about the construction of a mosque and the counterclaim concerns the claims for the refund of the overpaid work fee and the collection of receivable generating from the penalty clause. **According to the definition of the court, non-contractual manufacturing is work and manufacturing that is not determined in the contract for work, but is performed by the contractor as a requirement of the work, with or without the instruction of the employer, during the performance of the contract** and for the benefit of the employer. In order for the non-contractual surplus production cost to be requested from the employer, it is not obligatory for them to be made by the order of the employer. If there is a provision in the contract in this regard, **the overproduction cost should be calculated according to the contract provisions, if not, according to the local market rates of the year it was made, in accordance with the provisions of non-assignment business regulated in Articles 526 and the following of the Turkish Code of Obligations.**

E. 2021/236 K. 2021/1782
T. DATED 19.4.2021

In the lawsuit regarding the contract for work, the contractor as the Claimant claimed that the construction, mechanical and electrical works carried out within the scope of the contract signed for the construction work of the District Police Department Service Building and Residence were increased and a consensus was not reached between the parties regarding the additional work cost, and the work costs were under-calculated and short payment was made. Claimant also objected to the progress payment and demanded the collection of the additional work cost, and the respondent administration requested the rejection of the case. The Supreme Court, taking into account the minutes signed between the parties, **determined what the excess production consists of by evaluating the work increase rate, and the contract unit prices of the works that are within the scope of 10% work increase in accordance with the Articles 22 and 23 of the General Specifications for Construction Works, which are annexed to the contract.** On the other hand, **using the determination method in the Article 22 of the Specification, the calculation of the cost of the works exceeding 10% with the free market prices at the time of execution, despite complying with the annulment notice, and the Court did not find it accurate to decide with incomplete examination and inadequate evaluation,** and reversed the decision in favor of the Respondent.

COURT OF APPEALS / SUPREME COURT DECISIONS

INVOLVEMENT OF THE EXPERTS ARE QUITE IMPORTANT!

15.HD. E. 2020/3148 K. 2021/1596
T. DATED 12.4.2021

The case is related to the mutual demands arising from the construction contract in return for flat and established between the land owner and the contractor, resulting from the defendant company's making an extra block out of the scope of the project. The Court stated that the parties did not argue about making an extra block in accordance with the contract between them and that the wills of the parties were not compatible with each other, therefore it was possible for the claimants to claim rights from the flats built in the third block (C block) that came out extra. **Considering the additional report to be received from the expert committee and the share rate in the contract drawn up between the parties, it has been decided that the amount of pecuniary compensation that the claimants can claim should be calculated and a decision should be made in accordance with the result.**

E. 2021/417 K. 2021/1676
T. DATED 14.4.2021

The main lawsuit was filed with the demand for the collection of the deficient and defective production cost and the delay compensation, the reimbursement of the duplicate collection and the decision of the key exchange fee in accordance with the contracts for work. In its decision, the court stated that since the solution requires special or technical knowledge outside of the law, according to Article 266 of the Code of Civil Procedure, **a justified and auditable report should be obtained from the technical expert committee of three experts in the fields of work contracts, cooperatives and tax legislation, and a decision should be made in accordance with this result.**

COURT OF APPEALS / SUPREME COURT DECISIONS

APPLICATION OF INTEREST IN CONSTRUCTION CONTRACTS

15. HD., E. 2020/1803 K. 2021/617
T. DATED 3.3.2021

The case is regarding the negative declaration arising from the construction contract in return for flat and the counterclaim is regarding the claim for deficient and defective work cost, delay compensation and unfavorableness. The court ruled that, since the relation between the parties stems from the contract for work and all kinds of manufacturing and construction works are considered commercial works according to Article 12/3 of the Turkish Commercial Code in force at the date of the case, pursuant to Article 2/II of the Law No 3095 on Legal Interest and Default Interest, **advance interest can be demanded in case of disputes arising from the contract for work and since the counter-claimant landowners are entitled to request interest at a rediscount rate, which is less than the advance interest rate,** and it has decided that **it is not appropriate to apply a legal interest while the rediscount interest should be applied to the receivable accepted by the court from the date of the lawsuit.**

WHAT MAKES A PARTY ENTITLED TO TERMINATE A CONSTRUCTION CONTRACT?

15. HD., E. 2021/3506 K. 2021/1626
T. DATED 13.4.2021

The case is related to request of negative and positive damages resulting from the delay and the termination of construction contract in return for land share. As a general principle of law of obligations, **the party that does not fulfill its own performance does not have the right to request counter performance.** Therefore, the Court decided that, it could not be stated that the contractor did not fulfill the contract requirements due to his fault, since the landowner held the respondent on the contract for an indefinite period due to the uncertainty in the zoning status of the land. It was understood that the claimant landowners did not deliver the land suitable for construction in accordance with the construction contract to the defendant contractor in return for their land share, therefore, it was accepted that the land owner was entitled to request the termination of the contract but not entitled to request penalty because there was no default of the contractor.

COURT OF APPEALS / SUPREME COURT DECISIONS

REGARDING THE CORRECTION OF THE DEFECTIVE WORKS

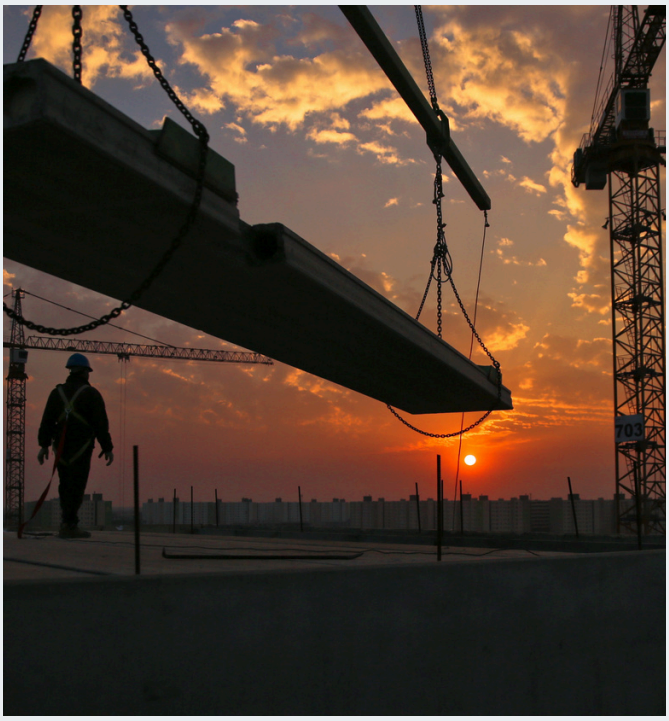
15. HD., E. 2020/1619 K. 2021/1730
T. DATED 15.4.2021

The case is related to contract for work and the collection of remaining work costs, the collection of the work cost arising from the contract, the costs of the work performed out of the contract, and the collection of the defective manufacturing cost in the original and combined counter lawsuits. As it is stated in the decision of the Court, the **unit prices should be calculated according to the method specified in the contract for the works within the scope of the contract, by obtaining an additional report from the panel of experts**, which was the basis for the decision in its decision, and **the cost of additional works claimed to have been done outside the scope of the contract should be calculated according to the local market rates including VAT in the year they were performed.** If the cost of the defective work is demanded in the counterclaim, it is considered that the work claimed to be defective should be deducted from the price to be found without deducting the cost of the defective work, again without proportioning, and the remaining work cost, if any, is considered to be defective, considering that there is no need for a notice of defect in the warranty periods regulated in the contracts. It is also stated that **the cost of removing the defects should be determined by determining the fair prices of the free market on the date of emergence of the defect, provided that the demand is not exceeded, and that if there is an overpayment made by the employer by means of the calculation in the same way, it should be deducted from the calculated work cost and the deserved work cost should be determined.**

MULTIPLE DECISIONS ON HOW THE REMAINING WORKS SHOULD BE TREATED

E. 2021/3130 K. 2021/2836
T. DATED 17.6.2021

The case is related to the collection of the remaining work cost arising from the contract for work and the request for the return of the performance bond and pecuniary guarantee recorded as revenue. The Court ruled **that if the contractor determines that the projects given are faulty, contractor will have to notify the Administration regarding the situation in accordance with the Article 12/6 of the General Specification for Construction Works (an which is annexed to the contract for work in this case), and since such notification cannot be proven, the Claimant will be responsible for the situation that arises due to the projects in default,** and reversed the decision in favor of the Respondent.



COURT OF APPEALS / SUPREME COURT DECISIONS

E. 2020/3247 K. 2021/2834
T. DATED 17.6.2021

The dispute arises from the contract for work and is related to the claimant subcontractor's remaining work fee, the cost of re-closing the snail caps, which is non-contractual work, the exchange rate difference within the scope of hydro mechanical works, the price increase in the material list, the delay interest due to the prolongation of the work. The court examined the **determination of whether the extra materials are included in the prices in the additional unit price descriptions if requested under the contract, and whether they are included in the lump-sum price within the scope of the contract.** Pursuant to Article 413 of the Turkish Code of Obligations No. 818 (Articles 526 and the following of the TCO No. 6098, which was in force at the date of the lawsuit), it was decided that **a judgment should be made according to the result by having it calculated with the market prices on the date it was made or by determining whether the calculated price is in line with the market value.**

ON THE LIABILITY OF THE JOINT VENTURES TO THIRD PARTIES

E. 2020/2350 K. 2021/2161
T. DATED 25.5.2021

The case is about the construction contract in return for flat signed between the joint venture and the landowners. The case was filed due to the external sale of the independent sections which will fall to the contractors in the construction in accordance with the construction contract to the claimants and termination of the contract due contractors' failure to fulfill their obligations. The Court ruled that the joint venture is jointly liable to third parties for the work they performed regarding the responsibility of the partners. For this reason, although the joint venture has ended, the liability borne due to the sale and non-delivery of the apartments which were constructed in accordance with the construction contract in return for flat belongs to the partners of the joint venture who are jointly and severally liable.

STATE COUNCIL DECISIONS

WHEN DO WE CONSIDER "GOOD FAITH RULES" BEFORE TERMINATING A CONTRACT SIGNED WITH A STATE ENTITY?

13. D., E. 2016/4835 K. 2021/630 T. DATED 23.2.2021

It is stated by the Claimants that the works cannot be carried out before the application projects are submitted to the contractor, the delays in the consultancy firm and license issues are caused by the Respondent administration, the two-page article named as the termination report in the 8th paragraph of the expert report is the cover of the due diligence report, the responsibility for obtaining the EIA report belongs to the employer administration, it is established that the tender for the construction of a 50-bed hospital cannot be made, the construction cannot be started, and a building permit cannot be issued without receiving the contract, and that according to the General Specifications for Construction Works, **the building inspectors should keep track of the work and correct the deficiencies from the site delivery until the work is completed,** although this determination and application is delayed, as a result, the projects are defective and they are tried to be revised, the administration wants to have the project revisions done by themselves and there is no clear provision that this will be carried out by the contractor, as a direct extension of 57 days between the date of 03/02/2014 when the site delivery was made and the date of 01/04/2014, which is the beginning of the workable period, where the right of extension is not left to the end of the work, and the contractor has the right to plan the works to be performed within the time given to him and to see the future.

In the letter dated 26/08/2014 written by the consultant firm to the contractor, it is requested that the project revisions be forwarded to them for approval after the project author has been made, that the administration has not approved the revised projects on 21/10/2014, **the date of termination notice, and the delivery date of the revised projects to the contractor. It is claimed that the termination of the contract only six days after the 31/10/2014 date is incompatible with the good faith rules.** As a result of the examination of the Court, the decision, which was examined by appeal, was found to be in accordance with the procedure and law, and the State Council rejected the Claimant's appeal.

STATE COUNCIL DECISIONS

IMPORTANCE OF SENDING NOTIFICATION PRIOR TO THE TERMINATION

13. D., E. 2015/3290 K. 2021/1548 T. DATED 22.4.2021

It was stated by the Claimants that the decision is not in compliance with the procedure and the law, and that the seizure of pasture areas without expropriation or making savings on them is considered a crime according to the Turkish Penal Code No. 5237, despite the fact that the company that will make the expropriation maps for the immovable in the area subject to the contract is submitted to the approval of the administration by the Claimants, it is not possible to start the construction of expropriation plans and projects since no notification has been made. Pursuant to Article 20/a of Law No. 4735, if the contractor does not fulfill his commitment in accordance with the tender document and the provisions of the contract, a notification should be sent, the Respondent administration's 10-day notification recognized in the relevant Law, that the contract was terminated when there are 413 days with the time extension gained due to the delivery of the project 50 days late, without complying with the condition and without expropriation procedures. It was also stated that claimant was forced to work illegally, that the Respondent administration went out to tender without doing the expropriation procedures, that this faulty behavior made production impossible, and that the contract period and price were increased in the tender held on the same subject, by considering the expropriation price and delays.

If it is determined as a result of the examination that the business partnership, which is under the responsibility of the tender, has not **fulfilled its commitment in accordance with the tender document and the provisions of the contract, it is taken into account that the contractor business partnership is duly sent a notification and no time is given to correct the said deficiencies, and it is stated that the aforementioned contract has been unfairly terminated, without the conditions of force majeure.** It has been decided by the Court that there is no lawfulness in the action subject to the lawsuit regarding the prohibition of the Claimants from participating in tenders for a period of 1 (one) year, pursuant to Article 26 of the Law No 4735.

STATE COUNCIL DECISIONS

DETERMINING THE JURISDICTION OF PUBLIC PROCUREMENT AUTHORITY BOARD

13. D., E. 2021/1054 K. 2021/1835 T. DATED 20.5.2021

According to the Respondent administration, since the administrative supervision of the Board is limited by the second paragraph of Article 56 of the Public Procurement Law No. 4734 and so **the Board was not authorized to examine ex officio, the administrative jurisdiction authority must necessarily exercise the powers of the Board when supervising the Board's decision at the judicial stage.** Considering the present case within this framework, the Claimant claims that the work experience certificate of the bidder, does not comply with the similar job definition. The examination made by the Board is limited to whether the document subject to the objection is in accordance with the similar job definition, and in the petition. Whether the work experience certificate belongs to a similar job or not, that it replaces the case with completely different claims that are not included in the complaint and objection petition, therefore, the examination to be made by the court is limited to the legality audit regarding the issues examined in the Board decision, and the Board. While it should be decided to reject the claims that were not examined in the decision of the court and that were put forward for the first time in the petition, it is not lawful to examine the merits of the claim.

It is stated that the decision of the Board is in compliance with the procedure and the law, relating to both the work that is the subject of the tender and the work that is the subject of the work experience document are for the supply/completion of the hospital construction whose construction has not been completed. The productions carried out within the scope of the work subject to the work experience document submitted by the intervening party are suitable for the work that is the subject of the tender. Since there is none of the grounds for reversal listed in Article 49 of the Administrative Procedure Law No. 2577, it was decided to uphold the aforementioned Court decision and reject the appeals.

PUBLIC PROCUREMENT AUTHORITY'S DECISIONS

LOW BIDS

2021/UY.I-1847 DATED 06.10.2021

The claims of the applicant are that the explanations of the **extremely low bids submitted by the bidder who was awarded the tender are not appropriate,** the analysis, calculations and prices offered are advantageous by showing them on different inputs, and there are divergences with Article 45 of the General Communiqué on Public Procurement. The Board evaluated the allegations according to the Article 38 of the Public Procurement Law No. 4734 titled "Extremely low bids", Article 41 of the Construction Contracts Implementation Regulation titled "Documents regarding plant, machinery, equipment and other equipment", Public Procurement No. 4734 As it has been evaluated within the scope of Article 54 of the Law titled "Applications for Tenders" and it has been determined that **the violations of the legislation can be eliminated by corrective action.** It ruled that t**he Joint Venture's extremely low bid announcements should be rejected and the tender procedures after this stage be re-executed in accordance with the legislation.**

PUBLIC PROCUREMENT AUTHORITY'S DECISIONS

CORRECTION OF VIOLATIONS MADE DURING THE TENDER STAGE

2021/UY.I-2241 DATED 08.12.2021

In the petition of objection, the applicant stated that the tender was initially cancelled on the grounds that the regulation on the authorization certificate specified in Article 46 of the Administrative Specification restricts competition, and upon the application made by another tenderer, the tender was cancelled on the grounds that there were no valid offers this time, but their proposals were left out of the evaluation. It was also claimed that the Akmercan Authorization Certificate, which was given as the reason, was not a certificate of competence required in the tender, it was stated in the Administrative Specification that the said document would be submitted at the stage of signing the contract, that it was not appropriate to exclude the proposals from the evaluation for the aforementioned reasons, and that the cancellation of the tender should be decided. The Board accepted these allegations in Article 5 and 52 of the Public Procurement Law No. 4734 titled "Basic principles", Article 2 of the Administrative Specifications titled "Information on the subject of the tender" and 18 of the Regulation on Applications for Tenders. The violations detected as a result of the examination in terms of Article 8 and the related examination and legal assessment.

Pursuant to the conclusion reached, since **it has been determined that the transactions that are in violation of the legislation are those that can be corrected by corrective action,** the applicant's **proposals should be evaluated and the procedures after this stage should be carried out again in accordance with the legislation, and that it should be determined as a corrective action in accordance with subparagraph (b) of the eleventh paragraph of Article 54 of the Law No. 4734.**