ÇETİNEL

VOLUME 2

2022 CONSTRUCTION LAW WRAP UP

TURKISH CASE-LAW

2023

ÇETİNEL

VOLUME 2

The time has come for the second edition of Cetinel's annual Construction Law Wrap-up covering the year 2022!

We are proud to present our construction wrap-up, covering the most remarkable case law and legal updates related to construction law in Türkiye. This exercise also aims to contribute to the development of construction law understanding in Türkiye by picking up the legal and technical decisions given by the relevant Turkish authorities. You will find certain remarkable and recent legal developments affecting the construction industry in Türkiye; along with all significant decisions given by the Turkish high courts with regards to construction and infrastructure practice.

We hope you all enjoy the read!

2023

LEGISLATION NEWS

Last year we witnessed the aftermath of a global pandemic which triggered a global inflation in material prices. This had consequences in Turkish legislation and construction sector as well. Additionally, we also noted Turkish legislation made steps in professionally regulating the contractors which, when put in practice, will undoubtedly contribute in prevention of catastrophic consequences of earthquakes.

At the very beginning of 2022, a much-debated Presidential Decree has been introduced. The new Interim Article 5 to the Public Procurement Contracts Law No. 4735 ("PPCL") aimed to eliminate the negative implications of disruption to supply chains (including the supply of raw materials) and the unexpected increases in input costs in Türkiye and around the world. Following this, its code of practice, which explained the implementation of Interim Article 5 has been published to give a solid background to the industry. In addition to the mentioned regulations, the Interim Article 6 included to PPCL regarding the additional price difference or termination of the contract. Its code of practice has also been regulated respectively.

At the very end of 2022, Regulation Amending the Implementing Regulation on Construction Tenders was also published. Within the new amendment, the information declared in the qualification information table and the certifying documents submitted for the information cannot be queried through EKAP or the websites of other public institutions/organizations can now be completed within the scope of Article 37 of the Law, provided that they meet all the essential elements required for the validity of the document.

In March 2023, the General Communiqué on the Application of the Rebar Monitoring System was published., The purpose of the Communiqué is to determine the procedures and principles for the monitoring of all stages from the import of iron to be used in construction to the delivery of the building contractor (the stage included in the Law No. 4708 on Building Inspection), including laboratory testing processes.

CASE LAW UPDATES

We gathered in this section noteworthy decisions rendered by the Turkish courts and authorities with regards to construction law's several different aspects in practice.

SUPREME COURT DECISIONS

ASSIGNMENT OF THE IPCS: TO WHOM WILL THE PAYMENT BE MADE?

6 HD, E. 2021/2710 K.2022/491,T. DATED 2.2.2022.

In one of its recent decisions Supreme Court evaluated a case regarding assigned payment rights of the contractor and a payment surrounding such assignment.

In this case, it is stated that if the (defendant) assignor proves with a written document or conclusive evidence that it made a payment to the plaintiff instead of the assigned receivable, it is certain that the payments will also be taken into consideration in accordance with the principle that a debt cannot be paid twice. Supreme Court ruled that pursuant to Article 186 of the TCO, after the notice of assignment, interim payments of the contractor (IPCs) should be made to the assignee but not to the contractor.

In brief, court shall determine the progress payments arising before the contractor and the employer after the date of notification of the assignment to the defendant institution and then; to determine the total of TRY 384.537,84 made by the defendant assignor due to the assignment and the "payments proved by written evidence" for the amount only assigned to the plaintiff. If this is less than the amount assigned, it is necessary to collect TRY 2,500.000,00 from the defendants in a way to be bound by the request by completing and taking into account the amendment petition.

WHO IS THE DEBTOR?

HGK, E.2019/303, K.2022/18,T. DATED 22.2.2022.

Another recent elaboration by General Assembly of Court of Cassation responsibility on a specific payment obligation in multi partite arrangements when the construction contract execution involves building control entities, landowners, and contractors.

In its decision, the court ruled that the payment made by the landowners to the building control company is a payment which should be made solely on the landowner's behalf. The building control service fee is a price that is promised to be undertaken within the scope of the contract, annexes, and legislation. It is not an equivalent of a deficient or defective work which exists in the building.

In addition, in this case it was ruled that the contractor who has obtained the occupancy permit in accordance with the contract must pay his premium debts and must obtain a clearance certificate ("no debt" statement) from the Social Security Institution ("SSI") to fulfill his obligation under the contract. The contractor is obliged to submit such a certificate to the municipality and obliged to obtain a habitation permit afterwards.

Consequently, as mention above, landowners are responsible for the building supervision fee arising from the Law, and the building supervision service fee cannot be considered within the scope of performance in rem.

SUPREME COURT DECISIONS (CONT'D)

PROCEDURAL RULES DO MATTER

6HD, E.2022/628, K.2022/4258,T. DATED 21.9.2022.

In another Supreme Court decision rendered last year, the subject of the dispute was a verbal agreement which was concluded between the parties regarding business development, project design and license services, and a lawsuit was filed regarding the determination of the services provided.

Court of First Instance rejected the case due to the existence of an arbitration agreement. The plaintiff, on the other hand, claimed that the decision was made at the end of the arbitration proceedings which were held later, that there was no valid arbitration agreement between the parties, that the defendant did not even have the title of being a party but also he did not have a legal personality, that the arbitrators exceeded their authority and the Iraqi courts were authorized in the dispute in question and that Iraqi laws should be applied. The plaintiff therefore requested the annulment of the decision of the arbitral tribunal dated 19 December 2017.Istanbul 15th Regional Court of Justice decided to reject the lawsuit filed for the annulment of the arbitral award. Upon the appeal of the decision, the 6th Civil Chamber of the Supreme Court evaluated the claims of the plaintiff regarding the title of party to the contract in its examination. Foreign Trade Ltd. Şti. is a foreign trade company with a legal entity established in Mersin free zone.

In short, the arbitral tribunal focused on public order and the title of party and did not focus on the legal personality of the respondent and whether the respondent signed the contract on behalf of this company or not, moreover, it is against public order to accept that a company does not have a legal personality.

VARIATION OR ACTING WITHOUT MANDATE

6 HD, E.2022/2671,K.2022/3752,T. DATED 29.6.2022.

In this case, the concept of works rendered outside of the contract scope was elaborated. The case in question stemmed from the rehabilitation project on the provincial road between Çorum and Ortaköy, with a contract dated 05.08.2008. Plaintiff made "non-contractual" productions as part of the ongoing work at the defendant administration's request, but the costs of these were not covered. In order to request a decision to collect such funds, the plaintiff reserved their rights with regard to the surplus.

The Contractor, alleged that the claim should be evaluated according to the provisions of the General Specification for Construction Works annexed to the contract. The Court of First Instance ruled that since the contract has a lump sum price, the excess productions stated to have been made at a rate of 10% should be determined in a way open to inspection and their prices should be calculated with the contract prices. In addition, if it is determined that the production exceeding this rate has been made, the prices should be calculated according to Article 410 of Turkish Code Obligations which provides that the calculation should be made according to the local market prices of the year.

SUPREME COURT DECISIONS (CONT'D)

After the reversal decision of the Supreme Court, the Court is obliged to take action and render a judgment in accordance with the reversal decision. Thus it cannot be said that the requirements of the reversal have been fulfilled. In the reversal decision of the Chamber, "(...) according to Article 9 of the contract, the additional work cost should be calculated by considering the methods in Articles 21 and 22 of the General Specification for Construction Works annexed to the contract" and it was pointed out that it was necessary to obtain an expert report on the calculation method. The additional expert reports obtained after the Court of Cassation reversal order do not contain calculations in accordance with the procedures and principles set forth in the reversal order. Failure to fully fulfill the requirements of the reversal is contrary to the procedure and the law and for these reasons, the judgment must be reversed.

In brief the Court ruled that the work to be done by the court is (in accordance with the provisions of Article 266 of the law No. 6100),to submit the file to the board of experts specialized in the work and contract, to make 20% work increase within the scope of the contract and to make the work increase be paid in the 3rd progress payment. According to the principles determined in the previous decision of reversal in which the work increase was paid in the 3rd progress payment, the prices of the productions exceeding the work increase are to be determined according to the local market prices of the year.

OBJECTION MADE AGAINST THE INTERIM INJUNCTION DURING THE INTERNATIONAL ARBITRATION PROCEDURE

6. HD., E. 2022/3529 K. 2022/4699 T. DATED 12.10.2022

In this decision, The Court answered the question “should the objection made against the interim injunction decision must be evaluated by the court of first instance who gave the decision or by the foreign arbitration committee who treats the main dispute?”

According to the Court of Cassation, although it is essential to obtain the right with the lawsuit to be filed on the merits; due to the long duration of the proceedings in some cases, waiting for the outcome of the proceedings may result in the loss of certain rights or irreversible damage to arise during the proceedings. Therefore, it is necessary to take certain precautions before and during the proceedings. is required to be taken. Interim injunction measures provide this protection needed by the parties.

SUPREME COURT DECISIONS (CONT'D)

The Court referred to the article 6 of Law No. 4686 of June 21, 2001, on International Arbitration which states “It is not inconsistent with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure or interim attachment and for the court to grant such measures or attachment.”

The 6th Civil Chamber of the Court of Cassation held that the Turkish courts are competent to hear the objection to an interim legal protection order issued by the Turkish courts in relation to a dispute involving a foreign element after the commencement of the arbitration proceedings regarding the dispute.

DUTIES OF THE COURT IN DISPUTES REGARDING THE BUILDING REGISTRATION CERTIFICATE

6. HD., E. 2021/6142 K. 2022/5546 T. DATED 29.11.2022

In this case, the starting point of the dispute is related to the construction contract in return for land share.

The Contractor, as the claimant, claims that, he delivered the construction on the land belonging to the defendant in accordance with the contract, but the amount of the sum has not been paid even though the independent sections have been started to be used. He filed a lawsuit seeking the determination of the invalidation of the dissolve.
The inferior court gave the parties the authorization and time to obtain a building registration certificate within the scope of the provisional Article 16 of the Zoning Law No. 3194, and correctly determined that the building registration certificate did not result in the contractor's fulfilment of the performance obligation under the contract.

However, it is understood that the necessary authorization and time was not given for the construction to comply with the zoning legislation and to be connected to the project and license in accordance with the reversal decision.

The Supreme Court has determined the works to be carried out by the court; the preparation of the necessary projects and legalization of the constructions, authorizing the contractor company and giving appropriate time for obtaining the license. If the constructions are not legalized despite the authorization to be given and the appropriate period, it should be decided to dismiss the main lawsuit filed by the contractor, since the economic value of the constructions cannot be mentioned. If the constructions are legalized, it is necessary to conduct on-site discovery with a technical expert committee of three experts in accordance with the CCP.

SUPREME COURT DECISIONS (CONT'D)

CONDITIONS FOR REQUESTING A CONTRACTUAL PENALTY ATTACHED TO PERFORMANCE

6. HD., E. 2022/309 K. 2023/342 T. DATED 31.1.2023

The Employer, as the claimant, stated that it was agreed to carry out all kinds of roofing and panel coating works of the warehouse and workshop buildings on turnkey basis, that the defendant did not perform the contractual obligations as required, and did not comply with the provisions of the contract and the periods committed in the work program, and therefore the contract was terminated for just cause, and requested compensation for its damages with a 15-day delay penalty and commercial advance interest for the time being, without prejudice to all claims and litigation rights regarding the excess.

The defendant, on the other hand, stated that the contract was terminated unfairly, that the works were completed, that the deficiencies were only in terms of accessories, and that he could not receive any payment from the plaintiff despite the works performed and the invoices issued in accordance with the contract. In addition, due to the failure to deliver the warehouse clean and empty, according to the penal clause provisions the claim for compensation should also be rejected.

The dispute arises from the dissolution of the contract between the parties. According to the Supreme Court, for the penalty to be claimed, the contract must not have been dissolved or, even in the event of dissolution there must be a clear provision in the contract that the penalty can be requested.

SUPREME COURT DECISIONS (CONT'D)

WORKS SHOULD BE CARRIED OUT IN COMPLIANCE WITH ADMINISTRATIVE SPECIFICATIONS

13 D, E. 2021/4689, K. 2022/682, T. DATED 24.2.2022.

Another decision of Council of State is related to a dispute which is about similar work groups works performed in the concrete case fall within after the amendment made in the annex of the "Communiqué on Similar Work Groups". An examination was made regarding whether there are A / III group works in the work experience certificate, and if so, whether the examination of the amount of the amount requires technical and special knowledge and the specification criteria.

The Public Procurement Board (Board) decision on "Sewerage and Package Wastewater Treatment Plant Construction" was put to setting aside process. t was requested to cancel the decision of the Public Procurement Board[1](Board) regarding the rejection of the objection complaint application made by the plaintiff business partnership about the tender of " Sewerage and Package Wastewater Treatment Plant Construction". In the examination made by the court of first instance, the fact that all of the irrigation works include pipe laying works of different diameters and quantities and that these works constitute and carry the main element of the irrigation work, therefore, it is not correct to refer to another work experience certificate by separating it from it and to write the code of another group of work experience certificate group on the work experience certificate, this situation is contrary to the procedures and principles of the legislation and the Communiqué on Similar Work Groups in Construction Works.

Additionally, considering the allegations that the document in question should be examined together with the project, specifications, investment program code, progress payments or lists showing the manufacturing items and the purpose of the construction of the work, the respondent administration, which is obliged to carry out the necessary research and examination in full in accordance with the relevant legislation, did not carry out any detailed technical examination or research related to the dispute, without any detailed technical examination or research ... date and ... numbered letter and the information and documents sent in the annex of the letter, and it is understood that the General Directorate of State Hydraulic Works has taken action on the basis of the determinations made by the General Directorate of State Hydraulic Works, it has concluded that there is no compliance with the law in the decision of the Board subject to the lawsuit.

In its decision the State Council briefly ruled that several works carried out within the scope of the work experience certificate (submitted by the partnership) are related to the A/III group works. Therefore, the amount related to this group should be separated and considered in the work experience calculation and the productions should be similar in terms of quality, construction technique, production, and technology. For this reason, the submitted work experience document is parallel with the job description in the Administrative Specifications and no permission is needed for the public interest.

STATE COUNCIL DECISIONS

LIBERTY DURING THE PERFORMANCE OF A PUBLIC SERVICE

6 D, E.2021/1229, K.2022/5681,T. DATED 6.5.2022.

In this case, his lawsuit was filed upon the establishment of the Istanbul Metropolitan Municipality transaction regarding the imposition of a fine.

In the dispute it was determined that unlicensed structures were built in the "park area" of the immovable property located in Ankara Province, Çankaya District and it was stated that if the said structures were not demolished or rehabilitated, legal action would be taken according to Articles 32 and 42 of the Zoning Law No. 3194. It is understood that the structures determined to have been built without a license on the immovable in question were built in the part that was abandoned to the public as a green area with the zoning plan amendment, which of the aforementioned structures were demolished by the ... Municipality on ... date and ... date ... No. It was concluded that there was no compliance with the law in the action subject to the lawsuit, which was established based on an incomplete examination, on the grounds that all of the aforementioned structures were built without a license, without an evaluation by the defendant administration staff as to whether they were built in accordance with the building license numbered, and that there was no legal accuracy in the decision of the Administrative Court subject to appeal regarding the dismissal of the lawsuit.

According to the State Council, the subcontract agreement signed between the plaintiff and the partnership (party to the public service agreement) is an ordinary contract that can always be arranged between the parties. It is understood that the plaintiff, outside the scope of the contract, stored excavation soil in an area and used it as construction site even though the permission for a temporary usage was previously rejected by the administration. Carrying and storing excavation soil, which would normally be carried out during the performance of a public service, does not result in pollution of the environment. Therefore, there is no need to obtain permission for exercises during the performance of a public service. However, the plaintiff undertook actions against the Regulation on Control of Wreckage Waste by causing overflow to the river outside the construction site.

STATE COUNCIL DECISIONS (CONT'D)

RABBIT IN A RACE: SAME COMPANY, DIFFERENT BIDDERS

13 D, E. 2021/4496, K. 2022/73, T. DATED13.1.2022.

In this decision, this lawsuit was filed with the request for the annulment of the part regarding the exclusion of the bid of the business partnership formed by the plaintiffs.

It is stated that the formats of the explanations in the cover letter titled "General Explanations" made by a construction company which is not a party to the legal proceedings- and the business partnership formed by the plaintiffs, within the scope of submission of an excessively low bid, were very similar to each other but also the sentences therein were very close to each other and the same unit prices were used in the same way when using the unit prices of public institutions and organizations in the analyses. Although there were no regulations in the legislation stipulating that price offers cannot be received from the same companies(in practice), when all the determinations made are evaluated together, it was concluded that there is no violation of law in the Board decision regarding the exclusion of the bid of the business partnership formed by the plaintiffs, which is understood to have an attitude that distorts competition and affects the tender decision, and there is no legal accuracy in the decision of the Administrative Court given in the opposite direction.

Moreover, even though it was stated by the Court that the numbers of the sales amount determination reports submitted by the aforementioned tenderers within the scope of submission of the excessively low bid are different, it was not possible for the number of the sales amount determination reports issued for the price offers received from the same companies on the same date by the tenderers and bidding independent of each other to be the same; even if it was stated that the decision of the 13th Chamber was given in this direction, the decision in question states that although the dates and numbers of the reports based on the price quotations received were the same, they were received from different companies and signed by different professional members.

In brief, Council of state stated that the construction company which is not a part to the legal proceedings and the business partnership formed by the plaintiffs received price quotations from the same companies and the price quotations were signed by the same professional member. In this respect, the defendant's intervener was accepted; and in accordance with Article 49 of the Administrative Procedure Law No. 2577 consequently the decision of the relevant Administrative Court was thereby reversed.

STATE COUNCIL DECISIONS (CONT'D)

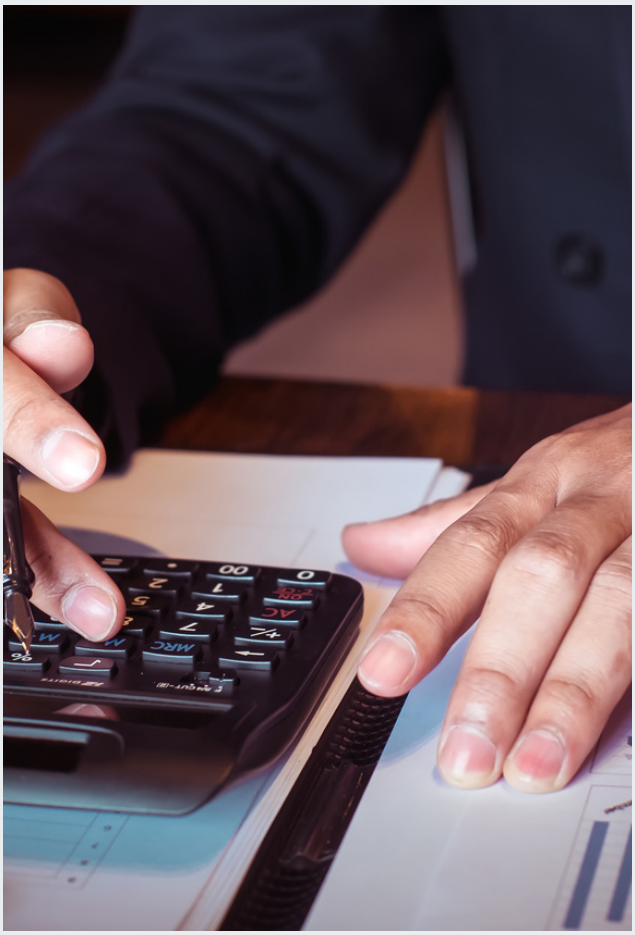
EXPENSES TO BE COLLECTED FROM THE BUILDING OWNER

6. D., E. 2022/1031 K. 2022/8037 T. DATED 22.9.2022

Regarding the property subject to the dispute, there is a decision of the Municipality Council regarding the collection of the expenditures made by the Municipality Presidency due to the works carried out to prevent the danger, jointly and/or severally from those responsible, including the plaintiff, who is the building contractor, in accordance with Articles 39 and 40 of the Zoning Law No. 3194.

Pursuant to Article 39 of the Law No. 3194, in the event that the municipality determines that the buildings, some or all of which are dangerous to the extent that they will be demolished, are not removed by the building owner by repairing or demolishing the danger; it is regulated that these works will be carried out by the municipality and the expenses incurred in this regard may be collected from the building owner with 20% addition. Moreover, Pursuant to Article 40 of the Law, in the event that the debris or accumulations that violate the health and well-being of the public in lands, houses and other places and are deemed hazardous are not removed despite the notification made, it is stipulated that the hazard will be removed by the municipality and the expenses incurred in this context will be collected from the landowner with 20% addition.

According to the Council of State There is no certain regulation that allows the collection of such costs from the building contractor. The action subject to the lawsuit to collect the amount calculated by adding 20% more to the costs incurred from the plaintiff, who is the building contractor, is contrary to the law. The decisions of the Administrative Court and the Regional Administrative Court to reject the lawsuit were found to be illegal.



STATE COUNCIL DECISIONS (CONT'D)

FAVORABLE RESULTS HAVE ARISEN FOR THE AUDITOR

6. D., E. 2022/912 K. 2022/8145 T. DATED 27.9.2022

In the concrete case, administrative fines were imposed on the grounds that the buildings which were under the responsibility of the plaintiff's supervision, were not inspected in accordance with the provisions of Law No. 4708 on Building Supervision. In this point, plaintiff was asked to cancel the plaintiff's auditor certificate in accordance with Article 8 of the Law and not to take any administrative or technical duty in any building supervision or laboratory organization, on the grounds that the plaintiff caused three administrative fines to be imposed on the audit organizations in which the plaintiff worked as a responsible auditor.

The court of first instance decided to cancel the subject to the lawsuit on the grounds that there was no conformity with the law in the transaction subject to the lawsuit, since the provisions in favor of the changes made in the legislation regarding criminal sanctions should be applied. The Regional Administrative Court, on the other hand, ruled that the Court of first instance decision was in accordance with the law and procedure.

In its examination, the Council of State first drew attention to the amendments made to the Law on 23/04/2015 and 20/02/2020. For the amendment made in 2015, the Council of State emphasized that architects and engineers who violate the law in question will be subject to administrative fines and the certificates of architects and engineers who cause the building supervision organization to receive three administrative fines will be canceled.

While for the amendment dated 20/02/2020, it emphasized that architects and engineers who cause the building supervision organization to receive three administrative sanctions will not be able to take technical duties in any building supervision or laboratory organization for three years.

According to the Council of State, after the amendments to Law No. 4708, in cases of violation regarding the fourth paragraph of Article, favorable results have arisen for the auditor regarding the administrative sanction decisions. However, it is understood that the contradictions determined in the structures took place before the amendment of the Law dated 23/04/2015, and that the sanction to be applied by the defendant administration as of the date of the action is unfavorable compared to the provisions in force on the date of the action, and sanctions are applied according to the provisions in force on the date of the action.

PUBLIC PROCUREMENT AUTHORITY DECISIONS

ECONOMIC CRISIS IN TURKIYE AND ITS EFFECTS ON THE CONSTRUCTION PROJECTS

2022/UY. II-87, T. DATED 12.01.2022.

In this case, the dispute was the allegation that the economic policies on the basis of production, employment and exports were changed by the Presidency on and after the tender date, and in this context, the foreign exchange rates increased suddenly and unexpectedly in the face of the decrease in the policy interest rates of the Central Bank. It was claimed that the component costs of the construction work subject to the tender have increased in a manner contrary to the ordinary course of life since the tender date, and that the tender should be canceled in order to eliminate the contradiction between the articles of the Draft Contract due to the extraordinary change in economic conditions after the tender date.

In the examination carried out, it was stated that there was a mobility in the exchange rates as of the tender process, it was very likely that this situation would increase the construction costs, moreover, the administration foresaw this situation and made the approximate cost calculation in this direction. The tenderer, who operates in the tender is expected to have experience in this field and should create a bid price by considering this issue and should consider the current market conditions. However, tenderers are also free to participate into the tender. The approximate cost amount determined by the administration to participate is TRY 20. 813.987,97 while bid amounts submitted by other bidders participating in the tender ranges between TRY 19.021.590,90 TRY 24.998.231,40. The bid amount is determined as TRY 17.350.350.619,27 by the applicant bidder.

On the other hand, the duration of the work is 300 days from the delivery of the workplace, there may be changes in construction costs during this period, the applicant tenderer, who should be a prudent merchant, should create the bid price by considering all these variables and considering the regulations in the tender document (no price difference will be given).

According to the Procurement Authority In the event that the costs of the work subject to the tender increase to the level that the work subject to the tender cannot be fulfilled after the signing of the contract, it can make the necessary applications in accordance with the relevant provisions of the Public Procurement Law and the Code of Obligations. In this respect, it has been understood that there is no issue that requires the cancellation of the tender at this stage, and that changes in economic conditions will not cause any contradiction in the articles of the Draft Contract, and it has been concluded that the applicant's claim is not appropriate.

PUBLIC PROCUREMENT AUTHORITY DECISIONS (CONT'D)

THE TENDERERS ARE REQUIRED TO PREPARE AN ANALYSIS; BUT HOW?

2022/UY.II-408,T.DATED 23.3.2022.

In this decision, the dispute was related to whether the tenderers are required to prepare an analysis in accordance with Article 45.1.5 of the General Communiqué on Public Procurement if they offer the current year unit prices published by public institutions and organizations for the work items / work groups or prices higher than these prices and for the work items / groups in question; which public institution and organization's unit price they use, by writing the unit price pose number and submit it as a list within the scope of their explanations.

In this context, bidders do not need to submit the documents specified in Article 45.1.13 for the work items/groups in question for which analysis is not required. It has been determined that Gökalp Proje Müşavirlik Anonim Şirketi has given a lower price than the amount (excluding profit) obtained from the transportation formulas published by public institutions and organizations as seen in the table above for the analysis inputs 07.006/K: excavation surplus material transportation (M=10 km, d=2), 07.006/10: sand gravel transportation (M=25, d=5), 07.006/09: stabilized transportation (M=25 km, d=5).

The Procurement Authority determined that the tenderer did not make an explanation for these inputs with another method explained in the Communiqué, it was concluded that the prices of the tenderer for the said inputs should not be accepted, and its offer should be rejected. As a result, since it has been determined that the above-mentioned transactions contrary to the legislation are transactions that can be eliminated by corrective action; excessively low bid explanations should not be accepted, and its bid should be rejected as well as the transactions after this stage should be carried out again in accordance with the legislation.