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### CERTAIN METHODS OF RISK REDUCTION

*The article examined selected methods that allow to optimize the risk - the reduction or complete elimination. The presented methods are certainly helpful particularly for the investor that is involved in the construction process. Knowledge of procedures and responsibilities is also required in relation to contractors. Presented tools are useful particularly in the initial stage of construction projects, when appropriate conditions are created and the formal relationship between investor and contractor is fixed. The proper attention to them will in the future allow to avoid adverse and unforeseen situations, which often carry a high risk of loss.*

### PEWNE METODY REDUKCJI RYZYKA

*W artykule przedmiotem analizy są wybrane metody, które umożliwiają optymalizację ryzyka – jego redukcję lub całkowitą eliminację. Prezentowane metody są z pewnością pomocne szczególnie inwestorowi zaangażowanemu w proces budowlany. Znajomość procedur i odpowiedzialności niezbędna jest także w stosunku do wykonawcy robót. Przedstawione w artykule metody przydatne są w szczególności na początkowym etapie realizacji inwestycji budowlanych, kiedy tworzone są odpowiednie warunki formalne oraz relacje między inwestorem i wykonawcą. Poświęcenie im należytej uwagi pozwoli w przyszłości na uniknięcie niekorzystnych i nieprzewidywanych sytuacji, które często obciążone są dużym ryzykiem straty.*

#### 1. INTRODUCTION

Parties to the contract for construction works usually begin to work with the best intentions to complete the work on the satisfactory quality, on time, with the least expenditure of the investor, including a reasonable profit for the general contractor, subcontractors and suppliers. In the course of execution of work there are often disputes, delays, interruptions of continuity, which can destroy even the best intentions. Disputes and conflicts usually result from:

- inadequate and deficient contract documentation,- inappropriate contractual arrangements,
- improper methods of tendering,- unreasonable distribution of the burden of risk on one of the parties,

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- mismatched personnel for the type of project,- breakdown in personal relationships and communication,
- imposition of contractual risk weight on a party that is not properly equipped or able to bear such risks,
- insolvency of either party,- the problems with communication and coordination in the situation involving more than two parties,
- ambiguity in the contract or other document leading to problems of interpretation,- ambiguous clauses, leaving a discretionary decision of a party,
- incomplete drawings or project with the contradictions between architectural drawings and industry regulations.

## **2. RESPONSIBILITY FOR DAMAGE**

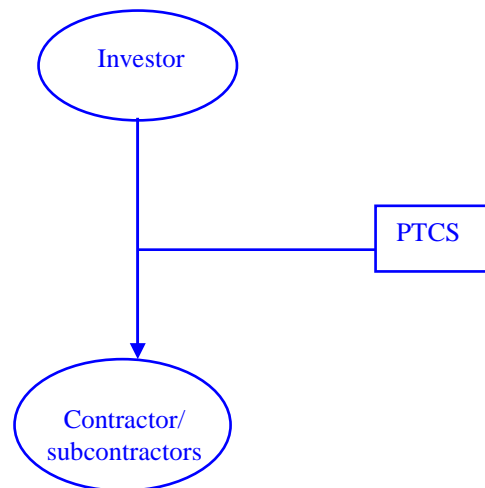
Issues of liability for damage on the site have always aroused much controversy [1] and were the source of disputes between participants in the construction process. According to the author of this paper the reasons for this lie in the complexity of the construction process, the specifics of the participating entities, often representing, to some extent, conflicting goals and turbulence process related with a large degree of dynamic actions.

Damage on the building site are often complex in nature, both in fact and law. The wording of the provisions of the Civil Code and the Construction Law does not always indicate a solution to these problems. So let's make a deeper analysis, not only language, of regulations of liability for damages on the site.

In accordance with article. 652 of the Civil Code, if the contractor took over by protocol the site from the investor, he held up to the moment of putting an object on the general principles of liability for damage caused on the site. The construction site is defined by the provisions of Article. 3 point 10 of the construction law as a space in which the works are carried out together with the space occupied by the base unit construction. The provision of Art. Kc 652 is not a spontaneous rise to liability for damages on the site. He refers in this regard to general principles, and so tort and contractual liability regimes (Fig.1.).

Liability in tort is governed by the provisions of Article. 415 et seq. Kc. They are used in the event of damage caused on the site to third parties who have not binding relationship with the entities of the construction process. Premises of liability in tort are: injury, unlawful act giving rise to injury, the causal link between the act and the injury and the fault of the perpetrator. The term action means both action and omission when the perpetrator could and should have acted. Fault of the perpetrator may be either intentional or not. For the adoption of tort it is sufficient to determine even the slightest degree of unintentional fault in the form of negligence. In practice, this particular form of fault occurs most often in the case of damage at the site. All premises of tort liability must be proved by the victim when it comes to trial. In practice, the most common third party claims are these for personal injury to health or property damage due to improper protection of the construction site by the contractor.

Liability for failure to perform or improper performance of obligations (contractual liability) is regulated in art. 471 et seq. Kc and is applicable in cases where the victim at the site and the perpetrator have a contractual relationship such as liability of contractor to its



*Fig.1. Responsibilities for damages on site - protocols*

employees, liability of contractor to the investor. Contractual liability prerequisites are: damage, failure or improper performance of obligations arising from the contractual relationship existing between the parties, the causal link between injury and negligence in performing or defaulted and the fault of the perpetrator. In the case of contractual liability the existence of fault on the side of the perpetrator is assumed, which results in shifting the burden of proof of lack of self-inflicted harm on the offender. The situation of the victim in the case of evidence of any judicial process is so much easier than in the case seeking damages in tort.

Protocol transmission of the construction site as a whole occurs when one contractor (the general contractor) is obliged to execute all the works that make up the whole of the proposed facility ("turnkey"). Contractor retains the site in its possession, under which he undertakes various activities related to the conduct of works, ensuring their accuracy and safe and order [2]. The purpose of these activities is to achieve the desired result - the execution of object and giving it back together to the investor with the previously transmitted area.

When there are a few contractors and each of them has to do only a certain part of the work or only work of a certain specialties (eg, sanitation, electricity), and investor has partial agreements with such contractors, he remains host to the construction site. Investor should only provide the appropriate part of the facility and the site (front works) to partial contractor. Responsibilities of the contractor in part is limited to damage caused to the transferred part of the construction site. This part, for reasons of clarity, should be in detail separated in the statements made by the investor and the contractor in partial transfer protocol. A similar problem is now the responsibility of subcontractors for damages on the area of construction. The agreement concluded by the contractor and a subcontractor,

requiring investor's approval, should include appropriate provisions for the introduction of a subcontractor at the construction site and extent of his liability provided by place or the time of performance of his work in the area.

There is no general principle of shared responsibility of the investor and the contractor for damage caused by tort to a third party by contractor in the performance of works commissioned by the investor. An investor who entrusts the execution of the works specialized construction company, is not responsible for damage caused by its servants in the performance of commissioned works (Art. 429 CC). He is however responsible for his own negligence. This view was reflected in the jurisprudence of the Supreme Court. Security systems and equipment, located in the site vicinity, against the possibility of damage from construction works (road) is part of the direct obligations of contractors and monitoring obligation in this regard rests with the investor. If, therefore, as a result of works carried out have been damaged in the vicinity of culverts and drainage ditches, the obligation to repair the damage lies with the contractor and jointly with the investor, if he did not conduct a proper and effective control (cf. Supreme Court verdict of 20 June 1977., ref. II CR 210/77, OSNC 1978/4/72).

The subject of the controversy was a case of liability against third parties for damages caused by collapse of buildings or removing a part of it. In accordance with Article. 434 Kc responsible for such damage is the holder of the building per se, unless the collapse of the buildings or the separation of its parts did not result either from lack of maintenance of buildings in proper condition, or from defects in construction. So it is a strict liability, without fault. Consider the predominant views of the general contractor for construction of the holder within the meaning of art.434 Kc. The provision of Art. 652 Civil Code - as a unique - unlike art. 434 Civil Code specify the responsible person. You need to have both in mind that the dispositions of Article. 652 and 434 Civil Code do not converge, because the responsibilities of art. 652 Civil Code are much broader and apply to any damages, and not only related to the collapse of the buildings or the detachment of its parts. When an investor entrusts the whole of the works of several contractors (or subcontractors), while retaining the right to coordinate their actions, liability from Article 434 Civil Code lies with the investor as a holder of an autonomous building [3]. A similar solution will be justified if the investor leaves the contractor a free hand, although protocol transmission of the area is redundant, because of the nature of the work or did not take place for any other reason [4].

The experience of the author related to embodiments of buildings shows a low awareness of the responsibility for damage of participants in the construction process. This is particularly evident in the care for the safe performance of work, whether in connection with the general tort provisions or contractual considerations. Workers are still not enough equipped with appropriate personal protective equipment. Notoriously are not sufficiently protected places of work of jobs, such as welders, fitters, etc.

In this context, crucial to minimize the risk of damage at the site is compliance of construction safety and health by all participants in the process.

Health and safety inspector works under the applicable law, including the Labour Code, Construction Law, laws related to human safety in the workplace. He is obliged to take action to eliminate accidents at the site. He prepares and issues opinions on formal and legal documents: a plan of safety and health prepared by the construction manager, manual of safety on activities, on-site training book. He defines the hazards on the site, assesses the risk. Health and safety inspector conducts on-site safety training, including Job Training

and briefing to acquaint employees with occupational hazards. He also participates in coordination meetings with OSH on site. Health and safety inspector controls the state of OSH in construction and takes other steps to reduce the risk of accidents. He checks documents stating suitability for the use of tools and equipment on site. He monitors compliance with the workers at the construction site health and safety rules and the use of their clothing, footwear and personal protective equipment, helmets, reflective vests. Health and safety inspector has the right to issue instructions to improve working conditions and compliance with safety regulations and rules, stop the machine or device in the event of an imminent threat to life or health of the worker or another person. He can also check whether the construction workers have the required permissions qualification. He controls building security against unauthorized access, proper marking passages, crossings and dangerous places, job security in the vicinity of the power line, correct storage of excavated material and other materials, labor standards on construction, use of safe materials for construction.

In the event of an accident at the construction site it is required to notify the accident and conduct post-accident and occupational disease reporting suspicions.

Issues of liability for damages on the site belong to the more complicated, both factually and legally. The exact determination of the scope of liability of the parties in the protocol forward the construction site where there is no general contractor in the building process can greatly remove the controversy in this regard. Compliance with safety rules certainly can reduce the number of accidents on the construction site.

Minimizing the risk of damage at the site during the implementation of investment requires a lot of awareness, responsibility and commitment from the investor and the contractor's work.

### **3. PROCEDURES OF SELECTION COUNTERPARTY**

In the process of building the most important link in the chain steps to eliminate the risk of the project is selecting the right contractor for the purpose of the task carried out in conditions of turbulence. Contractors are required to have scenario in the event of uncertain circumstances related to the implementation of the investment. In fact, every industry, including construction, is susceptible to so-called "butterfly effect". Regardless of the size of the economic intrusions end result can lead to failure of the investment, including the collapse of the company.

The right choice of counterparty is a difficult task and should be carried out according to procedures, taking into account the turbulent conditions of the project.

There are many different procedures leading to the conclusion of the contract [5]. Often the process of concluding a contract alternately uses different procedures. The most common ways to contract, which included provision in the Civil Code are: acceptance of an offer, negotiations and tender (which is a modification of the concept of the offer and its acceptance) [6].

#### **3.1. Acceptance of the offer**

The conclusion of the contract occurs when one person (bidder) submits an offer and the other person (oblate) accepts it. The offer is a declaration of will to conclude an agreement which contains at least its relevant provisions (*essentialia negotii*). It must express the strong wish of the conclusion of a definitive specific content. The degree of detail of an offer depends on the kind of the proposed agreement, the degree of its

complexity. Bidder is bound by the tender, which means that the addressee can lead to the conclusion of the contract of specific content through adoption of the offer, as bidder no longer has any effect. In the period of the tender offer or must remain in a kind of "readiness", as the possibility of reaching an agreement as a result of their offer [8]. This condition is usually cumbersome, because it is associated with uncertainty. For these reasons, binding offer lasts only for a specific period after which the offer expires. The term of the bid is marked by the same bidder. In the absence of such designation, the provisions of the Civil Code come into force. The tender submitted between simultaneously present (either directly physically or by means of direct communication at a distance) ceases to be binding, if not adopted soon. The tender submitted in any other way ceases to be binding associated with time, in which a person who made an offer could in the ordinary course of operations receive a reply that was sent without undue delay. The tender submitted in electronic form shall be binding if the other party shall immediately acknowledge its receipt [9]. When the declaration of acceptance of the offer came late, but its content or the circumstances indicate that it was sent at the right time, the contract takes effect, unless the tenderer shall forthwith notify the other party that due to the delayed response a contract is deemed to be null (Fig.2.).

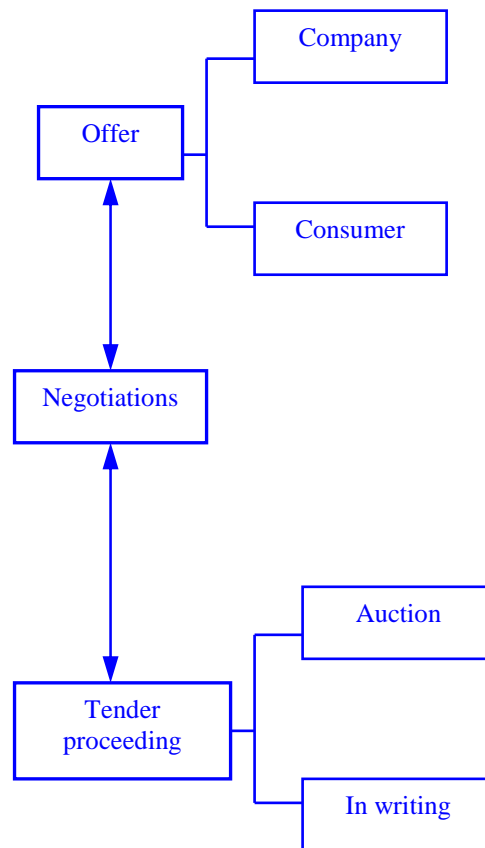


Fig.2. Responsibilities for damages on site - protocols

Generally, to conclude a contract an activity of the offeree as acceptance of the offer is required. If, however, according to data specified in the habit of relations or according to the content of an offer access to the offeror a statement of offeree's acceptance is not required, particularly if the tenderer requests the immediate execution of the contract, the contract takes effect, if oblate at the right time will proceed to its implementation. Otherwise, the offer ceases to be binding.

Offer can only be adopted in full, without any modifications and then it comes to the conclusion of the agreement, that content is consistent with the offer. Acceptance of the offer made subject to amendments or additions to its content does not lead to the conclusion of the contract, but is believed to be a new offer, which, like the original offer, can be fully accepted or rejected.

In relations between entrepreneurs, there are some modifications [10]. If the trader makes an offer in an electronic form he is required prior to entering into an agreement to inform the other party clearly and intelligibly about the technical operations that make up the procedure for concluding the agreement, the legal effect of the confirmation by the other party receiving the offer, the principles and methods of preservation, protection and sharing by the entrepreneur the other side of the concluded contract, the methods and technical means to detect and correct errors in the data entered, which he is obliged to provide the other side, the languages in which the contract may be concluded as well as ethical codes that apply, and their availability in electronic form.

In relations between entrepreneurs offer may be withdrawn before the conclusion of the contract, if the statement of appeal was filed to oferee before sending his letter of acceptance of the offer. Offer can not be revoked if it is clear from its content or the date specified in the acceptance. In relations in which both sides may be called professional "tacit acceptance" of an offer is possible. If the trader has received from the person to remain in permanent economic relations, the contract offer as part of his activities, the lack of immediate response is deemed to be acceptance of the offer. It is also possible to modify the offer by the offeree in the relations between businessmen. The answer to offer, subject to changes or additions to the content of unchanging indeed offer leads to a conclusion. In this case, the agreement binds with the content specified in the offer, subject to the caveats contained in the response to it. Agreement has not come to fruition, however, if the content of offer indicated that it can only be adopted without reservations, or if the bidder immediately objected to the inclusion of any objections to the contract, or when the oblate's response to an offer conditioned its acceptance of the tenderer's agreement to include objections to the agreement and consent that has not received immediately [11]. Approval by the Polish legislator of modifying the offer is accepted as another legal instrument, leading to the conclusion of the agreement is undoubtedly the answer to the needs of a changing, turbulent business environment of the organization. Ever faster changing market conditions forced a relaxation of rigor mode by allowing the recipient of an offer to enter the changes or additions to adjust the content to individual needs, without causing prolongation of the period spent on the exchange of legal documents.

### **3.2. Negotiations**

If the parties conduct negotiations to conclude an agreement, it shall be concluded when the parties reach agreement on all of its provisions, which were the subject of negotiations. The parties may, at the beginning of negotiations, establish detailed rules for their conduct,

on the time of the negotiators, confidentiality, the distribution of costs. Concluding a contract preceded by the negotiations conduct occurs when contractors submit consistent statements covering at least its essential elements. Occasionally, however, the parties continue negotiations on other issues not previously considered as significant. In this case, the contract shall be deemed concluded only when the parties reach agreement on all issues that were the subject of negotiations. Party, who started or has negotiated in violation of good manners, and in particular without the intention of concluding the contract is liable to compensate the damage suffered by the other party that it had not to conclude the agreement.

If during the negotiation a party has provided information in confidence, the other party is obliged to disclose and not to share with other people and not to use this information for their own purposes, unless the parties otherwise agreed. In the event of a breach of those obligations the party may be entitled to demand from the other party damages or issuing benefits gained by it.

### **3.3. The tender or auction**

Tender and auction, which is its oral variation, are very common ways of concluding the contract. This mode basically consists of three elements: an invitation to tender, tender, choice (adoption) of an offer [12]. The announcement of the auction or tender is to determine the time, place, object and conditions of the auction or tender, or indicate how to obtain these conditions. Announcement, as well as auction or tender conditions may be amended or revoked only if stipulated in their content. Organizer after the time of making conditions available, and the bidder after the bid announcement in accordance with the auction or tender are required to comply with the notice, as well as conditions of the auction or tender [13].

The tender submitted in the course of the auction ceases to be binding, if another bidder made a better deal. Conclusion of contract occurs when nailing the award [14]. If the validity of the contract depends on meeting the specific requirements provided for by law, such as deed forms, both the auctioneer and the participant whose bid was accepted, may enforce the contract.

The offer submitted in the course of the tender ceases to bind if another bid is selected or when the tender was closed without selecting any tender, unless indicated otherwise the tender conditions. Tender organizer is obliged to immediately notify bidders in writing of its outcome, or to close the tender without a choice.

Conditions of the auction or tender may stipulate so called bid bond [15]. Then joining the auction or tender shall, under pain of being refused to them, pay a specified sum to the organizer, or to establish adequate security for its payment. If a participant of the auction or tender, despite his tender was selected, refuses to conclude an agreement, the validity of which depends on meeting the specific requirements provided for by law, the organizer of the auction or tender may retain deposit. In other cases organizer must immediately return any deposits paid. If the auctioneer fails to conclude the contract, the participant whose bid was selected, may require payment of double deposit or damages.

Organizer and participant of the auction or tender may request the cancellation of the contract, if a party thereto, another participant or a person acting in concert with them, influenced the outcome of the auction or tender in a manner contrary to law or morality. This authorization shall expire one month from the date on which the holder has knowledge



of the existence of reasons for the cancellation, but no later than one year following the date of the contract.

#### 4. CONCLUSIONS

In the paper the basic elements for reduction or complete elimination of the risk existing in the implementation of construction projects are discussed. Paper focuses on responsibility for damages generated on construction site. Awareness of the parties - participants of the construction process in relation to their activities allow to avoid conflicts. At the early stage of the selection procedure of the contractor the key elements for future cooperation can be identified. The article presented and concluded some principles related to the stage of acceptance of the offer and stage of negotiations. They are the elements of proper management of the construction process.

#### 5. REFERENCES

- [1] Karnicka-Kawczyńska A., Umowa o roboty budowlane, Pr.Spółek 1999/7-8/56
- [2] Strzępka-Frania E., Przekazanie i udostępnienie terenu budowy przez inwestora wykonawcy budowlanemu, cz. I, Pr.Spółek 2007/6/25
- [3] Szpunar A., Uwagi o odpowiedzialności cywilnej za zawalenie się budowli, KPP 1995/2/149
- [4] Naworski Jerzy P., Wpływ istnienia wad na obowiązek odbioru robót budowlanych przez inwestora, PPH 1998/8
- [5] Boratyńska M., Nowe przepisy Kodeksu cywilnego dotyczące trybu zawierania umów: rokowania, oferta, przetarg, NPN.2003/3
- [6] Machnikowski P., Kierunek zmian w przepisach o zawieraniu umów, TPP.2003/2
- [7] Radwański Z., Jeszcze o charakterze prawnym oferty, PiP.2005/3
- [8] Giaro M., Zawarcie umowy za pośrednictwem internetowych platform aukcyjnych, PPH 2008/4
- [9] Jasiakiewicz M., Natura prawna oferty odwołalnej w stosunkach między przedsiębiorcami, PPH 2007/7
- [10] Sobolewski P., Modyfikujące przyjęcie oferty, PPH 2004/11
- [11] Gęsiak J., Zawarcie umowy w drodze przetargu, Rejent 1999/9
- [12] Wójcik A., Charakter prawny przetargu - głos w dyskusji, PPH 1999/3
- [13] Stapała B., Aukcje internetowe - wybrane zagadnienia prawne, PUG 2003/2
- [14] Drozd E., Z problematyki zawarcia umowy w formie aktu notarialnego, Rejent 1996/4-5