

NJORD Estonia: Contracting Authority as an Administrator of Justice

Since January 1, 2019, additional provisions of the Estonian Public Procurement Act are in force, that allow to control and influence contractors' diligence regarding the payments to the subcontractors in case of a construction public works contract and a works concession.



The European Commission's public procurement directives gave the Member States the possibility to allow the contracting authorities to make direct payments to the subcontractors. Instead of this option, Estonia decided to give the contracting authorities the right to withhold payments.

According to the rules in Estonia, if a subcontractor, who participated in the performance of the contract or concession, submits a reasoned application to the contracting authority stating that the contractor has not fulfilled the obligation to pay, the contracting authority will not pay to the contractor in the corresponding amount.

The contracting authority has the obligation to make payments to the contractor only when the contractor has paid the owed sum to the subcontractor or has submitted evidence to the contracting authority that the subcontractor's claim is groundless.

There have not yet been notable disputes, where the contracting authority has withheld the payments, however, the Ministry of Finance is collecting feedback and amendments to the act. The feedback, already received by the ministry, outlines the necessity to amend the present right of the contracting authority to withhold the payments and the decision-making-power on payments. The current regulation places the contracting authorities into a complicated judicial role, adding also additional workload on them and permits them to interfere in the relationship between the contractor and the subcontractors without a valid reason.

At the moment, it is not yet known whether the ministry is planning the amendments and therefore, the possibility of withholding payments must be considered in case of the public works contract and the works concession. The contracting authority must thereby also be very careful and very confident about the right to withhold payments, as incorrect payments' withholding may cause damage to the contractor, which may be claimed from the contracting authority.



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