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Dr hab. Ryszard Szostak, prof. UEK

Cracow University of Economics
ORCID: 0000-0002-1364-3772
e-mail: szostakr@uek.krakow.pl

Substitute performance in public procurement

Wykonanie zastępcze świadczenia w zamówieniach publicznych

Abstract

The admittance of substitute performance of a contracted service by a third party at the contractor's expense, as a type of fulfilment of the debtor's financial liability, especially in the event of falling into delays or the defective performance of a public contract, constitutes the reinforcement of the principle of real performing a contract, which is important from the point of view of the effective satisfaction of public needs. The alternative form of liability being the rescission of the contract by the contracting authority, while retaining the right to compensation or demanding the payment of a contractual penalty does not always sufficiently satisfy its interests. The authorization of the contracting authority to apply substitute performance can arise directly from the Act, although it only applies to rare, exceptional situations, or a court order. The significance of an authorization arising from a previous contractual provision has recently been increasing. However, this basis poses difficulties of qualification, primarily of a structural nature. The principle of the real performance of a contract can also be implemented by filing an action against an unreliable contractor for a performance in kind, although enforcement difficulties can be avoided by a court order authorizing substitute performance by a third party at the contractor's expense.

Keywords: public procurement, contract, substitute performance

JEL: K20, K23

Streszczenie

Dopuszczenie wykonania zastępczego zamówionego świadczenia przez osobę trzecią na koszt wykonawcy, tytułem swoistej realizacji odpowiedzialności majątkowej dłużnika, zwłaszcza na wypadek zwłoki lub wadliwego wykonywania zamówienia publicznego, stanowi umocnienie zasady realnego wykonania zamówienia, doniosłej z punktu widzenia efektywnego zaspokojenia potrzeb publicznych. Alternatywna forma odpowiedzialności w postaci odstąpienia od umowy przez zamawiającego z zachowaniem prawa do odszkodowania lub żądania zapłaty stosownej kary umownej nie zawsze zaspokaja dostatecznie jego interesy. Upoważnienie zamawiającego-wierzyciela do zastosowania wykonania zastępczego powinności wykonawcy może wynikać wprost z ustawy, choć dotyczy tylko sytuacji nielicznych, o charakterze wyjątkowym, albo z orzeczenia sądowego. Ostatnio wzrasta znaczenie upoważnienia wynikającego z uprzedniego zastrzeżenia umownego. Ta ostatnia podstawa nastręcza jednak trudności kwalifikacyjnych, przede wszystkim natury konstrukcyjnej. Zasadę realnego wykonania zamówienia można też urzeczywistnić w drodze wytoczenia powództwa przeciwko niesumiennemu wykonawcy o spełnienie świadczenia *in natura*. Trudności egzekucyjnych można uniknąć poprzez sądowe upoważnienie do wykonania zastępczego egzekwowanego świadczenia przez osobę trzecią na koszt wykonawcy.

Słowa kluczowe: zamówienie publiczne, umowa, wykonanie zastępcze świadczenia

General remarks

In accordance with the content of the contractual obligation, in a manner reflecting its socio-economic objective and the principles of social co-existence, as well as established customs, the principle of real performance of a contract is of paramount importance in public procurement (Art. 354 of the Polish Civil Code, hereinafter as CC). The specific purpose of the supplies, services or works ordered to satisfy public needs means that almost every infringement of the contractor's debt obligations adversely affects the performance of the public tasks assigned to the contracting authority, which are usually of a continuous nature, often leading to serious damage and various economic disruptions. The principle of the real performance of a contract is reinforced by the prohibition

on making material amendments to the final contract, especially in breach of the public interest (cf. Art. 454–455 of the Public Procurement Law, hereinafter as PPL), and its premature termination (Art. 456 of the PPL), as well as the public-law obligation to assert claims to which the contracting authority is entitled under the sanction of personal liability of the managers. The contractual tightening of the contractor's liability in casu, especially from contractual penalties or warranty for defects, is also of significance. These solutions are supplemented by the possibility of the contracting authority entrusting a third party with the performance of obligations at the contractor's expense in the event of difficulties with performance (falling into arrears, actual obstacles or a loss of the ability to perform). However, substitute performance has the role of a specific form of the contractor's financial liability, so it can only be applied in cases of a failure to perform or the improper performance of the contract. It is true that, instead of substitute performance of obligations, the contracting authority can assert forced performance in kind from the contractor (cf. Pajor, 2010, p. 261; Zoll, 2014, p. 83), but this would be more onerous or even doomed to failure in the event of enforcement difficulties that could not be remedied or technical and implementation limitations. Therefore, contracting authorities still rescind the contract too frequently in practice, usually because of delays, while retaining the right to compensation, in accordance with Art. 491–492 of the CC (cf. resolution of the Supreme Court, hereinafter as SC, of 20 March 1978, III CZP 10/78 and judgment of the SC of 7 June 2000, III CKN 441/00). Meanwhile, the traditional grounds for applying substitute performance can be significantly expanded through additional contractual reservations. However, the problem lies in the determination of the appropriate legal structure which sufficiently reflects the specifics of public contracts and does not conflict with the statutory limitations on contractual freedom.

The legal construction of the substitute performance is determined by national law, but the content and interpretation of its provisions cannot prejudice the provisions of Article 72 of Directive 2014/24/EU on public procurement (EU Official Journal L 94, p. 65) indicating the limits of permissible modifications of the conditions for the performance of the contract, whether by means of an amendment to the agreement or a settlement, the exercise of an option right or the application of a substitute performance of the contractor's duty (see CJEU judgment of 7 September 2016, C 549/14, Finn Frogne AS, as well as Caranta *et al*., 2014, pp. 112 *et seq.*). The dispositions of Article 72 of the Directive are reflected in the whole of Articles 454–455 of the PPL. So far in Poland, there has been — unfortunately — no success in extending the scope of the contracting authority's application of substitute performance under a warranty for defects, particularly with respect to defectively performed services or construction works, on the basis of direct code authorisation (*ex lege*), contrary to legislative trends increasing in other European countries (see, e.g., amended § 637 BGB, art. 366.2 OR and also commentary by J. Busche (2018) and P. Gauch (2019)). The individual authorisation resulting from an express contractual reservation therefore remains.

Acquisition of the subject of the contract at the contractor's expense

According to Art. 479 of the CC, if the subject of a performance is a specified number of items identified only by their type, in the event of the contractor/debtor falling into arrears, the creditor may purchase the same number of items of the same type at the contractor's expense, or demand the payment of their value, in both cases, retaining a claim for compensation for the remedy of damage arising from the delay. This solution has a long tradition, including in public procurement; the same solution was contained in Art. 246 of the Code of Obligations of 1933 (cf. Longchamps de Berier, 1948, p. 373). However, currently, in the conditions of developed trade in goods, it is more attractive for the contracting authority to rescind the contract and quickly purchase the goods that are needed on the market, without becoming involved in troublesome settlements with the contractor. Goods identified by type are widely available, have established standards and a stable price. Therefore, unlike in the case of items identified by their identity, there are favourable conditions for sensibly applying substitute performance (cf. Dabrowa, 1981, p. 817). As for public procurement, substitute 'acquisition of items' only applies to supplies involving the transfer of ownership of items identified by type (sale, supply in the meaning of Art. 605 of the CC, contracting), while contracts for the use of someone else's property (rental, tenancy, lease) as well as the acquisition of rights to intangible property are ruled out. On the other hand, the above provision is applicable to contracts for the supply of energy, gas and water as a result of the reference from Art. 555 of the CC. The only premise for applying Art. 479 of the CC is that the contractor falls into arrears, the concept of which does not differ from the traditional approach and applies to arrears for which the contractor is responsible. Other circumstances for which the debtor is responsible are irrelevant, such as bringing about an impossibility of performance. The application of substitute performance of supply lies entirely at the discretion of the contracting authority; there is no need to cooperate with the contractor. The same applies to the choice of the method of substitute performance of the obligation, between purchasing the goods and claiming the payment of their value. The first of these is more attractive in public procurement for obvious reasons, but not very convenient for the contractor, as the contracting authority can purchase certain items at the debtor's expense and risk (cf. Gutowski, 2016, p. 88, in the light of the judgment of the SC of 14 April 2014, II CSK 540/12, Legalis). In the first case, the contracting authority may demand the reimbursement of expenses only after acquiring specific items, because there the Act does not contain any grounds

for demanding an advance, whereas in the second case, it may demand payment of the equivalent of the items ordered from the moment the arrears arise and it does not need to explain itself by the fact that the late performance will lose its significance for it (Dąbrowa, 1981, p. 817; Popiołek, 2021, p. 79). There is also no need to seek any court authorization, because the contracting authority has the right to choose the method of substitute performance *ex lege*, as a *sui generis* right, which is separate from the *facultas alternativa* structure. According to the prevailing view, the contractor should at least be notified of the atypical way of ending the obligation. Although substitute performance of a delivery is only a surrogate for performance, its implementation has the objective of cancelling a third party's debt. Therefore, it seems that the concept of notification is insufficient here, because of the uncertainty about the final content of the contractor's obligation. A better approach is therefore the design of a unilateral, right-forming declaration of intent, the submission of which by the contracting authority leads to a permanent change in this obligation (cf. Dąbrowa, 1981, pp. 816–817; Zagrobelny, 2014, p. 958).

A contracting authority should conclude a contract with a third party for the same performance as that to which the contractor was originally obliged under the underlying relationship; otherwise there is no question of it being a surrogate (cf. Podrecka, 1994, p. 115 *et seq.* and judgments of the SC of 9 June 1953, I C 468/53, and of 8 August 2008, V CZP 28/08). The admittance of a variance would lead to forcing the renegotiation of the contract in the direction of *datio in solutum* under Art. 453 of the CC, although this is not always permissible in public procurement (Art. 454 of the PPL). In principle, the size and nature of the substitute performance should be such that nothing needs to be agreed upon with the contractor, while the costs of acquiring the substitute items must not deviate from market realities, as only market prices are deemed reliable for establishing the justified costs covered by a claim for the reimbursement of spending (cf. judgments of the SC of 22 September 2011, V CSK 420/10, and of 16 May 2013, IV CSK 717/12). Possible allegations of excessive costs burden the contractor with the need to demonstrate that they exceeded the level of costs needed to effectively satisfy the interests of the contracting authority, which in turn may force the counter-party to prove the legitimacy of the higher expenditure in individual circumstances. Furthermore, a claim for the reimbursement of expenditure may be reduced by the amounts saved by the contracting authority (cf. judgments of the SC of 8 August 2008, V CZP 28/08 and of 11 April 2013, II CSK 540/12). In public procurement, a reimbursement of expenditures does not really pose any difficulties in settlement because a third party is entrusted with supplying the missing items using a procedure provided for by the PPL, under a transaction conducted in writing, whereas the alternative claim under Art. 479 of the CC (with respect to the reimbursement of expenses) for the payment of a specified amount by the contractor loses its significance because of the objective of the public procurement related to the need for the effective and punctual satisfaction of specific collective needs.

Substitute performance of an obligation to act

According to Art. 480 of the CC, if the debtor falls into arrears in performing an obligation, the contracting authority may request authorization from the court to perform the required activity at the debtor's expense, while retaining its claim for damages. However, if the performance involves inactivity, the creditor may request authorization to remove everything the debtor has done in breach of its obligation at the debtor's expense. It may only initiate substitute performance of an obligation on its own without authorization from the court in urgent cases. This provision, which is the equivalent of Art. 247 of the CC, only applies to obligations 'to perform' in the traditional sense ('*facere*'), and does not include services involving the handover of goods ('*dare*'), or making a binding declaration of intent in accordance with Art. 64 of the CC (Podrecka, 1994, p. 108; Popiołek, 2021, p. 82; Gutowski, 2016, p. 91). It can be applied in public procurement to most services and construction works, although significant doubts arise in the case of the performance of a physical work or a building/structure, if such a result is deemed to be an item specified by its identity. However, the prevailing view is that, since a work, including construction work, is the result (outcome) of specific service or construction works, it should be consistently considered within the framework of 'obligations to perform'. However, the opposite view would lead to the unnecessary differentiation of works with regard to the admissibility of substitute performance, in breach of the interests of the contracting authority, all the more so that the legislator itself allows a third party to be entrusted with the correction of a defective work or the completion of a work by way of a *lex specialis* in Art. 636 § 1 of the CC. Substitute performance of a work is only exceptionally ruled out when the proper performance of an obligation depends on the contractor's personal qualities (creative, artistic or other works requiring the contractor's personal involvement).

The protection of the debtor's interests dictated making the substitute performance of an obligation in the meaning of Art. 480 of the CC conditional on a court authorization, both with regard to examining the justification itself and the method of substitute satisfaction of the creditor, as well as its profitability (costs) and the assessment of the degree of risk of performance (cf. Dąbrowa, 1981, p. 818; Popiołek, 2021, p. 82; Gutowski, 2016, p. 92, also judgments of the SC of 7 June 2000, III CKN 44/00 and of 15 July 2004, V CK 2/04). The receipt of the court's consent requires an action to be filed to form the obligating relationship, because the ruling is constitutive in nature, as it not only

authorizes the creditor to conduct the substitute performance of the debtor's obligations through a third party, but also defines the scope and method of performance in a binding manner. Even so, it does not release the contracting authority from the need to submit an executive right-forming declaration to the debtor (Podrecka, 1994, p. 97; Popiołek, 2021, p. 83; Gutowski, 2016, p. 93), regardless of whether or not an order for substitute performance is placed with a third party. In accordance with the second sentence of Art. 1049 § 1 of the Civil Procedures Code, hereinafter as CPC, the contracting authority that obtained the court authorization for substitute performance of specified services or works at the debtor's expense may also request the court to award an appropriate sum of money that is needed to cover the costs of the substitute performance (cf. resolution of the SC of 10 May 1989, III CZP 36/89). The authorization of the contracting authority, as well as the award to it of an appropriate sum of money to cover the costs, may, but need not be included in a single decision. Although the solution from Art. 480 of the CC is competitive with the action obliging the debtor to perform an obligation in kind, the need to maintain sufficient efficiency and speed of performance of the contract argues for the substitute satisfaction of the contracting authority's interests.

The court authorization to perform activities at the debtor's expense is unnecessary in urgent cases, and it is the contracting authority itself that decides on whether to apply such a method of fulfilling the obligation. This does not apply to all unexpected events, but only to those related to the immediate or at least urgent need for performance. If the debtor's arrears encompass several activities of varying importance, the independent activation of substitute performance may only apply to the 'urgent activities', while a broader interpretation is ruled out (see in particular Dąbrowa, 1981, p. 818; Popiołek, 2021, p. 83). Alongside the overriding condition of the debtor's arrears, essentially, only 'emergency' situations threatening human life or health, security or the emergence of substantial damage to property are important (cf. Gutowski, 2016, p. 93 and the judgment of the Court of Appeal in Warsaw of 6 May 2005, VI Aca 1087/04). The burden of proving the 'urgency of the situation', as well as the risk related to this is borne by the contracting authority initiating the substitute performance of the obligation on its own, without court authorization. However, in practice, the amount of costs incurred is usually the subject of a dispute, as only costs justified by the circumstances of the individual case are taken into account. The same applies to the reimbursement of costs 'of removing what the debtor has done in breach of the obligation'. When settling the demand for the reimbursement of costs, the contracting authority may, in particular, offset the amount of expenses incurred against the payment of the fee due to the contractor for a part of the obligation that was properly performed (judgment of the SC of 16 August 1972, III CRN 202/72).

Right to entrust a third party with the correction or completion of a work

According to Art. 636 of the CC, if the contractor defectively performs the work or performs it in conflict with the contract, the contracting authority may require it to change the method of performance setting an appropriate deadline for this, and after the unsuccessful passage of that deadline, it may rescind the contract or entrust the correction or further performance to another person at the contractor's expense and risk. If the contracting authority provides the material itself, it may require the return of this material and the handover of the commenced work. This regulation is a faithful reflection of the solutions of Art. 497 of the Code of Obligations, which, in turn, is modelled on Art. 366 of the Swiss Code of Obligations, whereas in the German CC (Art. 637 BGB) the creditor's right to apply substitute performance is only limited to a case of a delay in fixing a defect in the work, for which a claim is filed after it is handed over. The provision of the second sentence of Art. 636 § 1 of the CC is related to control exercised by the contracting authority over the way the ordered work is performed, including in the case of construction work, which is of great importantance in public procurement (cf. resolution of the SC, bench of 7 judges, of 11 January 2002, III CZP 63/12). Meanwhile, it is not applicable to personal service contracts or the conditions of personal service contracts, or even to transport contracts. In the case of obligations based on trust, the very loss of trust authorizes the rescission of the contract (for important reasons), whereas in the case of transport, handing over a defectively performed service to a third party is not an effective solution. The view has developed in the line of judgments that, likewise, the provision of the second sentence of Art. 636 § 1 of the CC does not apply to the authorized party's initiation on its own of substitute performance of a delayed cure of a defective work under warranty (cf. resolution of the SC of 15 February 2002, III CZP 86/01, with critical commentaries by E. Łętowska, (2002, p. 66) and E. Rott-Pietrzyk (2003, item 1)), despite the similarity to the situation explicitly encompassed by the German Art. 637 BGB. This is because, according to the SC, the realization of liability for the improper performance of an obligation (that is fulfilled) is at stake and not liability for a delay or for defects discovered during its performance. Priority was therefore given to arguments in favour of the literal interpretation, with the exclusion of inference *per analogiam*.

The contracting authority is entitled to activate substitute performance at the contractor's expense as an alternative to the right of rescission of the contract. By submitting an appropriate declaration of intent to the contractor, the choice of one of these rights is deemed definitive, and therefore irrevocably excludes the application of the other right, even if the choice of substitute performance proves to be wrong in terms of

performance. The solution of the second sentence of Art. 636 § 1 of the CC is undoubtedly a *lex specialis* with respect to the general Art. 480 of the CC (cf. Drapała, 2017, pp. 704–706). Apart from its narrower scope of reference, it is also connected with at least a two-fold limitation. Firstly, the contracting authority is entitled to entrust the correction or completion of the work to a third party, regardless of whether the contractor is in arrears, although this is conditioned by the need to set an appropriate deadline for it to fix the defect or change the method in which the work is being performed. Defective performance of a work usually involves a breach of objectified quality requirements or the failure to observe the qualities that are necessary for the individualized objective of the obligation, so that the risk arises of issuing a work of a diminished value or utility (Drapała, 2017 p. 703, citing the judgment of the SC of 12 March 2002, IV CKN 803/00). Meanwhile, performing a work in a manner that is in conflict with the contract is already a different type of shortcoming (e.g. deviating from the agreed manner of performance, admitting an unreliable subcontractor without the contracting authority's necessary approval or disregarding its instructions, cf. e.g. judgment of the SC of 14 November 2008, V CSK 182/08, as well as the inadmissible involvement of a subcontractor, as in the case settled by the judgment of the Court of Appeal in Kraków of 30 July 2015, I ACa 626/15 cf. Drapała, 2017, p. 703), which can only exceptionally justify entrusting a third party with fixing or continuing to perform the work. Of course, this does not apply to a delay, for which Art. 480 of the CC may be applicable (cf. judgment of the Court of Appeal in Białystok of 14 February 2013, I ACa 836/12). Secondly, the contractor has a chance of avoiding the effects of substitute performance by simply complying with the requirement contained in the contracting authority's demand that was previously served to it, with an appropriate deadline set under the sanction of the ineffectiveness of the whole right. Regardless of this, there may be a need to previously dismantle the defective results of the contractor's work, the costs of which are covered by the reimbursement of the costs of substitute performance (cf. judgment of the SC of 6 June 2014, CSK 388/13). The situation only becomes more complicated when the work was not performed with materials supplied by the contracting authority and the contractor refuses to hand over the unfinished work for 'correction' or 'completion' by a third party. Given the irreversible effect of the contracting authority's declaration on the application of substitute performance of specified obligations, it should therefore be admissible to allow the whole of the work to be entrusted to a third party, 'from the beginning', which, after all, arises from the statutory reservation of the possibility of such entrustment 'at the contractor's expense and risk' (cf. Szczerski, 1972, p. 1398; Brzozowski, 2004, p. 416; Drapała, 2017, p. 706). However, if the contractor hands over the unfinished work to be corrected or completed by another person, it retains the right to an appropriate part of the fee, although the prevailing view in the literature is that it is only entitled to an allowance for groundless enrichment (cf. especially Szczerski, 1972, p. 1398; Drapała, 2017, p. 705). The contracting authority's right under Art. 636 of the CC is limited in time, or in other words it can only be exercised before the work is completed, and therefore up to the moment the work is offered to the contracting authority in accordance with the contract. Then, the contracting authority is at most entitled to refuse to accept an incorrectly performed work (argument from Art. 643 of the CC), especially a work with quantitative shortcomings or physical defects. This is because there is a public law obligation in public procurement to assert claims, while payment is only justified after the acceptance of a non-monetary service performed in accordance with the contract. After the possible acceptance of the work, the contracting authority is still protected by the provisions on warranty for defects in the work.

According to the CC, a work may be entrusted to a third party for correction or completion 'at the expense and risk of the person accepting the order', which means that it is responsible for the accidental loss of or damage to the commenced work and bears the risk of a possible increase in the costs of its fulfilment. However, it does not seem reasonable to hold the contractor liable for the consequences of a careless choice of a third party (that is incompetent), or even for the damage caused by a reliable substitute engaged by the contracting authority (Brzozowski, 2004, p. 357), although on the other hand, since substitute performance of the work constantly takes place under the same obligation, the contracting authority cannot be put in a worse position than in the case of its normal performance (Szczerski, 1972, p. 1398). Therefore, the risk and the accompanying responsibility need to be appropriately distributed. They must be disabled with respect to the contractor, at least with regard to damages that are causally related to the contracting authority's negligent conduct. As for the settlement of the costs of substitute performance, the prevailing view is that the contracting authority is only entitled to a reimbursement of costs that are justified by the circumstances of the specific case, and therefore excluding any 'excessive' or 'excessively' incurred costs (cf. in particular Drapała, 2017, p. 706). Therefore, it is not always the case that a contracting authority that has properly engaged a substitute, even in a tender procedure, can count on the full reimbursement of the costs incurred on the substitute contract, especially if its scope or method of performance differs from the terms of the previously awarded main contract.

Admissibility of the contractual reservation of the right of substitute performance of an obligation

Various practical inconveniences, primarily formal requirements for applying for court authorization, and the relatively narrow framework of the *ex lege* authorization for

the substitute performance give rise to the question of whether it is permissible to reserve the contracting authority's right to unilaterally initiate substitute performance in advance in the contract, if only in the event of a delay on the part of the contractor. The answer to this question and the related doubts are generally avoided in the literature. Meanwhile, in public procurement, especially regarding more complex services or works, what matters more than in ordinary trade is the actual provision of services in kind, because of the need for the uninterrupted satisfaction of the collective needs encompassed by a specific material and financial planning regime. The matter of whether the creditor can be contractually authorized to unilaterally apply substitute performance of an obligation at the debtor's expense without the need to obtain court approval was explained by K. Mularski, rightly linking it to the principle of contractual freedom (Mularski, 2006, p. 758; cf. also Zoll, 2014, p. 83 *et seq*.). While referring to the doctrinal legacy regarding the criteria of recognizing regulations as being dispositive, including the presumption of the dispositive nature of code regulations, as well as the rules on the functional interpretation of the principles of performing obligations, Mularski unequivocally supported the possibility of effectively reserving the right of the contracting authority to unilaterally apply substitute performance at the debtor's expense in advance in the contract, not only in the case of a delay, but also in the case of actual obstacles or the subjective inability to perform. This concept enables the acceleration and streamlining of the performance of the contract in accordance with its socio-economic purpose (Art. 354 of the CC), but also promotes protection against difficulties with performance and unnecessary disputes related to the settlement of the contract. For these reasons, the admissibility to contractually reserve substitute performance has also been supported by the recent case law (cf. e.g. judgments of the courts of appeal in Katowice of 20 October 2015, ACa 169/15, in Warsaw of 18 October 2016, ACa 429/15 and in Białystok of 12 February 2018, ACa 8/18), provided, however, that specific circumstances justifying the application of this special right of the creditor are reserved each time, out of concern for the protection of the contractor's interests. However, public procurement law, which is full of unconditionally binding provisions limiting contractual freedom, expressly provides for the possibility of 'substituting the contractor with a new contractor' on the basis of 'clear and unambiguous contractual provisions', respecting the general requirement that the substitute is sufficiently reliable (Art. 455, para. 1, items 1–2 of the PPL).

However, the contracting authority's authorization to unilaterally activate substitute performance of the contracted service in specified circumstances encounters difficulties of a structural nature. Recourse to general contractual freedom, including the possibility of enhancing the contract with a reservation of a condition *sensu stricto* in the meaning of Art. 89 of the CC, or even just the conditions for performance (*conditio iuris*) limiting the necessary modifications of the obligation, is insufficient. This is because after a certain period of instability, the concept that, if the emergence (stoppage) of a specific legal effect depends on the will of a party, such a reservation cannot be regarded as a condition in the meaning of Art. 89 of the CC, has become strengthened (cf. judgments of the SC of 29 May 2000, III CKN 246/00, 5 June 2002, II CKN 701/00, 10 June 2005, CK 712/04, and 13 January 2011, III CSK 116/10, as well as Radwański, 2004, p. 276, Pazdan, 2020, p. 427–428 and Rott-Pietrzyk, 2009, p. 136). However, the reservations pass when the effect of the condition is combined with the will of the party (both parties) in such a way that it will only be an additional element, ultimately prejudging the existence of the consequences that are dependent on an uncertain future event. This mixed mechanism, with priority for the condition as an uncertain event, prevents arbitrariness, which is possible in the case of a completely discretionary decision of the authorized party. In practice, indexation clauses have been encountered for a long time enabling the contractor to demand an increase in the due fee in specified circumstances (according to a predetermined index), as have provisions authorizing the buyer of the goods to make substitute warranty repairs to goods at the guarantor's expense in the event of a lack of response to the authorized party's request. Therefore, there is no obstacle for the duly conditioned authorization of the contracting authority/creditor entrusting a third party with the performance or completion of the contract at the contractor's expense (especially in the event of a delay, defective performance of the obligation or the inability to perform) to arise directly from the public contract. What matters, however, is only the stipulation referring to the condition precedent, which makes the contracting authority's right arise, contingent not so much on the substitute performance of the contracted service itself, as its activation by way of an additional declaration provided to the contractor. Therefore, this applies to a condition that depends only partially on the will of the entitled party, based on the German model, as for example in the case of a trial sale in the meaning of § 495 BGB (cf. Radwański, 2004, p. 275, referring to the work of German studies). The method in which substitute performance is conducted by way of entrusting a third party with specific obligations at the debtor's expense, as well as its settlement in money, according to an agreed price list or another basis for setting the fee, may be determined by the requirements for performance stipulated in advance in the contract, which are essentially conditions of a *conditio iuris* nature. Concerns that the 'conditional' situation partly depends on the will of one of the parties recede into the background, as it does not involve discretion, or circumstances encompassed by the liability of any of the contractors (cf. Warciński, 2010, p. 109; Sobolewski, 2017, p. 692 and the decision of the SC of 22 March 2013, III CZP 85/12).

Other issues must be taken into account in public procurement, primarily whether the reservation of substitute performance of the ordered service and its

conditions are consistent with the PPL, since all conditions and premises that are in conflict with the Act or principles of social coexistence are ruled out a limine. Any contraindications dictated by principles of social coexistence, especially with respect to the positive values of substitute performance of the obligation, are immediately dropped, as long as no harmful clauses are imposed on the contractor in breach of the generally accepted principles of contracting. Therefore, the only question to be ascertained is whether the introduction of the authorization to unilaterally adjust the terms of performance of the contractor's specified obligations to the changing circumstances into the public contract is consistent with the statutory regulation of amendments to public contracts (Art. 454–455 of the PPL). Meanwhile, the legislator itself has expressly allowed for the renegotiation of the contract based on review clauses of an adaptive nature, if they sufficiently indicate in advance the type and extent of the modifications, and the procedure for including them in the contract (Art. 455, para. 1, item 1 of the PPL). The provision of Art. 441 of the PPL allowing the right of option to be reserved in the contract for the contracting authority in advance (an option for the contractor has not been allowed), if the type of option and the circumstances authorizing the contracting authority to exercise the option are sufficiently specified, provided that the reservation does not lead to a breach of the general nature of the contract. The right of option arising from the European directives (cf. especially Art. 72(1a) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC), is connected with the unilateral right to choose, primarily a larger quantity of the ordered service (the so-called quantitative option), specified properties of the service (the so-called qualitative option), one of several places of fulfilment of the performance or an alternative way of fulfilling it (the so--called performance option), etc. The group of potential options has not been specified in the Act. What matters is that the 'type of option', to which the contracting authority is exclusively entitled and which cannot undermine the general nature of the contract, is determined each time. The right arising from the option is of a unilateral nature. A correctly reserved option may be exercised by submitting an appropriate declaration of intent to the other party, without the need to wait for any acceptance. It cannot therefore be the same as the (bilateral) amendment of the contract, because it leads to a unilateral modification not so much of the contract itself, but of the obligation arising from it, directly on the basis of the original will of the parties expressed in the form of a correctly conditioned contractual reservation.

The question therefore arises as to which of the above structures is more reasonable when reserving a permissible modification of an obligation arising from a public contract involving the admittance of a third party to fulfil a substitute performance of a service which is charged to the contractor. Although the contracting authority's right to require the contractor to agree to the entrustment of the substitute performance of the service in the procedure of an amendment to the contract, in particular under Art. 455, para. 1, item 1 of the PPL, can be stipulated in the contract, such a solution will not be effective, because, each time, it requires the approval of the contractor, who, after all, is not always interested in allowing a substitute to perform the service for a fee. On the other hand, since the legislator followed the provisions of the European directives and decided to regulate the permissible modifications of the contract and the obligation arising from this (including the option), essentially limiting the contractual freedom of the parties, the design of some separate (simplified) basis for substitute performance generally making reference to Art. 353^1 of the CC would be erroneous. Reserving the contracting authority's right to apply substitute performance of obligations that are charged to the contractor should therefore be primarily related to the right of option under Art. 441 of the PPL. An interpretation to the contrary, particularly one intended to rule out the possibility of reserving the right to apply substitute performance in the contract, is inadmissible for functional reasons. First, a contracting authority faced with a serious delay by the contractor or defective performance of the contract would be left with either rescission of the contract or onerous legal action. Article 636 § 1 of the CC, which authorizes the contracting authority to entrust the correction or completion of a contract to a third party, only applies to specific task contracts and construction works. Secondly, substitute performance is desirable not only to ensure the actual performance of the contract, but all the more so at a later time, namely in the event of the contractor's liability under warranty for defects in the subject matter of the contract, in which case substitute performance may be a perfect panacea for the contractor's delay in fixing the defects. This is because, unlike under Art. 366(2) of the Swiss Code of Obligations, Polish case law does not allow for extrajudicial substitute performance of an obligation to fix defects in a work that has been delivered to the contracting authority, including construction work, based on the same application of Art. 636 § 1 of the CC (cf. the above resolution of the SC of 15 February 2002), which was, after all, modelled on the Swiss solution (on the interpretation of Art. 366.2 OR, cf. Gauch, 2019, chapter IV). Furthermore, in order to effectively perform a specific work contract or a construction contract, the provision of § 634 BGB of the recently amended German Code is applicable; this explicitly provides *ex lege* for a special warranty right for the contracting authority to correct the work itself at the contractor's expense, after the unsuccessful passage of the deadline set for the contractor to fix the defects or produce a new work. Consequently, the *de lege lata* basis for making the reservation in the contract that the contracting authority is entitled to make the substitute performance of the contractor's neglected obligations should be sought in Art. 441 of the PPL until this problem is possibly regulated by a separate provision.

The contractual authorization to entrust a third party with the substitute performance of the contracted service

at the contractor's expense may be based on: a) the right of option in the form of an adaptation clause that automatically adjusts the content of the obligation to the changing circumstances that were provided for in advance in the contract, or b) a renegotiation clause that entitles the contracting authority to demand the amendment of the contract to entrust the performance of the contract to a third party, with a releasing effect with respect to the contractor. The two possibilities from the European directives, which are reflected in Art. 441 and 455, para. 1, item 1 of the PPL, are related to a broader formula for the performance of the contract to be taken over by a third party (including in the procedure of renegotiating the contract) than the one traditionally understood under Polish law, undoubtedly justified by the needs of those jurisdictions where it is impossible to translatively take over a debt. The provisions of the new PPL also allow for at least two possibilities of modifying obligations in other situations. In particular, changes in the contractor's fee can arise from an automatic adjustment clause, or a renegotiation clause (cf. e.g. Art. 439 of the PPL), but the application of the right of option to the favour of the contractor has been omitted. However, the Act says nothing about the legal structure of the unilateral application of substitute performance of the contracted service, even for the contractor falling into arrears. It does, however, fit into the broad formula of Art. 441 of the PPL. An alternative authorisation to conduct the substitute performance may be structured on the basis of the renegotiation clause under Art. 455, para. 1, item 1 in conjunction with item 2a of the PPL, but the need to cooperate with the other party to the contract encourages looking for the application of this structure outside the sphere of the liability of the contractor, who does not need to be in conflict with the contracting authority, especially if there is a need the for concerted admittance of a specific third party to perform the contract, at the contractor's expense and risk (e.g. a subsidiary of the contractor), obviously after checking its reliability (cf. the circumstances of the case settled by the judgment of the SC of 13 January 2002, V CK 97/03, with a critical commentary by R. Szostak (2005, p. 22).

Substitute performance of an obligation in enforcement proceedings

If the contracting authority has a judgment ordering the contractor to fulfil debt obligations in kind in the form of the supply of specific goods identified by type or the performance of specific services or construction works, which can be performed by another person — enforcement can be applied in the procedure of substitute performance of these obligations, as provided for in Art. 1049 of the CPC. This method cannot be applied in the case of the enforcement of a court-ordered handover of an item specified by its identity to the contracting authority, enforced in the procedure of its confiscation (Art. 1041 of the CPC), as well as in the case of services or works (activities) which cannot be performed by another person, enforced by applying a fine imposed by the court in order to compel their performance (Art. 1051 of the CPC).

The contracting authority interested in starting enforcement by applying substitute performance of the contractor's obligations under Art. 1049 of the CPC files a motion for the initiation of enforcement with the district court with jurisdiction over the place of performance of the contract requesting that the debtor is obliged to fulfil the obligations being enforced under the sanction of awarding the contracting authority authorization to conduct their substitute performance at the debtor's expense. The demand is served on the basis of a contestable order after the justification of the motion is examined. The deadline set for the performance should be appropriate to the circumstances of the performance. Next, after the deadline passes unsuccessfully, upon a repeat request from the contracting authority, the court will authorize it to conduct substitute performance at the debtor's expense and, taking into account the additional demand, it may also award it an appropriate amount of money for that purpose (Flaga-Gieruszyńska, 2022, p. 2001; Łochowski, 2019, p. 1319). In the authorization, the court specifies the exact content of the debt obligations encompassed by the substitute performance. The burden of proof as to the amount needed to cover the costs rests with the applicant.

The order granting the contracting authority an appropriate amount may also be issued later. Nor is there any obstacle to the court later increasing the amount awarded if it proves to be insufficient. Any possible surplus is refundable at the request of the debtor on the basis of the provisions on groundless enrichment, although the enforcement court does not check or settle the costs of substitute performance (see Łochowski, 2019, p. 1319).

The choice of the third party for substitute performance, as well as the final shape of the contract for performance, are made in a tender procedure or through another procedure prescribed by the PPL.

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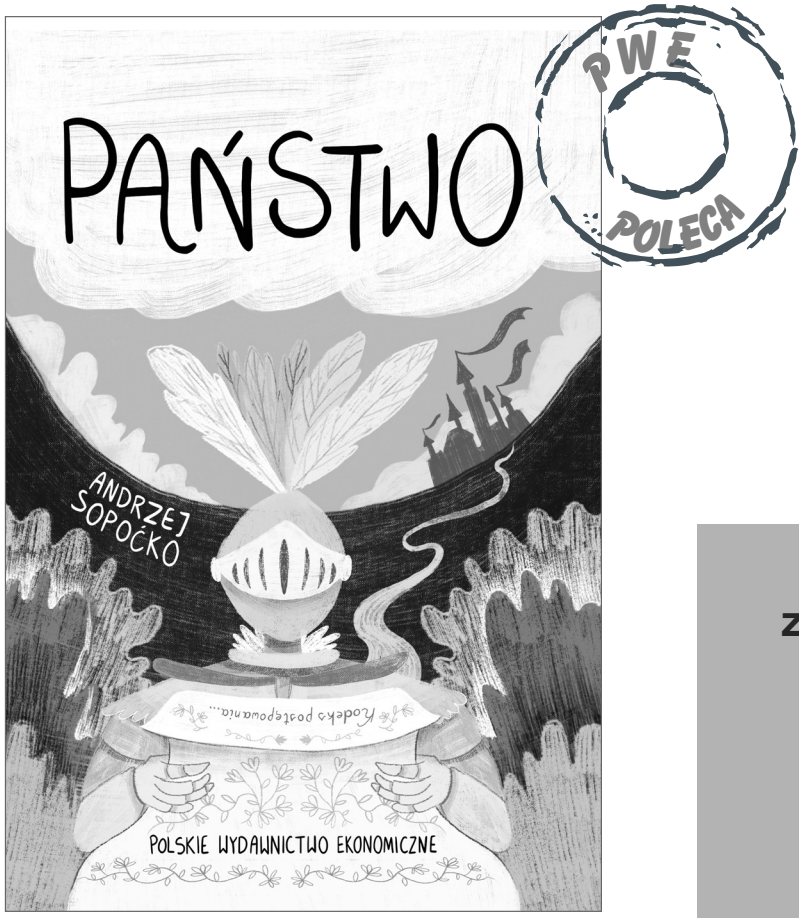
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Dr hab. Ryszard Szostak, prof. UEK

Professor and head of the Department of Administration and Public Procurements Law at the Institute of Law of Cracow University of Economics. He specializes in public procurement law.

Dr hab. Ryszard Szostak, prof. UEK

Profesor i kierownik Katedry Prawa Administracyjnego i Zamówień Publicznych w Instytucie Prawa Uniwersytetu Ekonomicznego w Krakowie. Specjalizuje się w prawie zamówień publicznych.



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