Wezenlijke wijziging in het aanbestedingsrecht

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Summary - Material amendments to public contracts in public procurement law

This PhD thesis researches the doctrine of material amendments to public contracts. This doctrine regulates the extent to which modifications are allowed, during both the procurement as well as the execution stages of a public contract. While having firm roots in public procurement, it also interacts, in Dutch practice, with the law of obligations. Therefore, the main question is to what extent this doctrine limits the freedom to modify a contract that is awarded according to a EU public procurement procedure. This thesis answers this question primarily from a public procurement law perspective, whilst recognizing the importance of the interaction with the Dutch law of obligations.

Chapter 1 introduces the subject matter and explains the importance of this research. Each year, public authorities in The Netherlands spend tens of billions of euros on public contracts. Too much reticence to modify contracts can limit optimal realisation of a contract's possibilities, because optimizations are often discouraged to prevent the accusation of unlawful conduct. On the other hand, too many amendments may prove detrimental to the position of third parties. This problem therefore requires a clear and univocal legal framework. However, the doctrine of material amendments is notoriously complex. It is also controversial, because its application can severely and negatively affect the possibilities of contracting parties to modify their contract. This means that there is a practical and theoretical need for this thesis. To answer the main question, eight sub-questions are formulated and answered in separate chapters. As part of the answer, a comparison is drawn with the French experience.

Chapter 2 analyses the justification of the prohibition to materially amend a public contract. It demonstrates how this prohibition has a firm basis in EU public procurement law, but that it has also developed independently on a national level. In addition, it is argued that the outcome in *Pressetext* is not an example of judicial activism, but a logical and inevitable ruling by the CJEU. Finally, the prohibition to amend a contract to the detriment of a third party is viewed from the perspective of Dutch tort law ("onrechtmatige daad").

Chapter 3 assesses the possibilities for flexibility. Three key issues are discussed: the scope of Article 72(1)(a) Directive 2014/24/EU, the follow-up contract for similar works or services, and the change of contractor or subcontractor. Firstly, the wording of Article 72(1)(a) Directive 2014/24/EU is criticized: Some language versions of this provision contain an Oxford-comma, while others do not. As

a consequence, options could either be viewed as an example of a review clause or as a separate category. Given that review clauses are usually introduced to provide a framework for uncertainties, the absence of an Oxford-comma could imply a restricted view on the type of options allowed. However, it is submitted that this provision should be read as laying down separate categories, thus allowing for a broader scope of application. The discussion then turns to the interaction of Article 72(1)(a) with the Dutch law on obligations, especially in terms of their qualification and in relation to the determinability of obligations. After this, the second issue is reviewed, namely the possibility to apply the negotiated procedure without prior publication for the award of new works or services consisting in the repetition of similar works or services to the incumbent contractor. After an analysis of the relevant criteria, this chapter offers a comparison between said procedure and the use of options. This also allows for reflections on the interaction with the Dutch law of obligations, especially with regard to the qualification of this possibility and the follow-up contract. Thirdly, regarding the change of contractor, particular attention is given to the desirability of so-called waiting-room clauses, which allows the replacement of a contractor by (usually) the tenderer that submitted the second-best bid. Finally, it is submitted that Articles 63 and 71 of the Directive allow for more possibilities to change a subcontractor, but also that caution is necessary because of the inherent risk of discussion and discrepancies in the contractual chain.

Chapter 4 discusses the issue of proposing amendments during the procurement stage of the public contract. Both the nature and the moment of the amendment are aspects to consider. Because the existence of a material amendment can be difficult to ascertain, I propose that the contracting authority should have the possibility to issue a notice in which it motivates the desired course of action, especially in the context of the question whether an amendment is either material or significant in the sense of Article 47(3)(b) Directive 2014/24/EU. The issue of material amendments is also important in the context of a failed procedure. Often, the contracting authority resorts to the use of a procedure without prior notice. I argue that the current motivation obligations fall short to provide effective legal protection. Finally, a reflection is offered on the Dutch case law. According to this case law, an obligation to materially amend the contract is required in case of a retender. I conclude that the doctrine of material amendments fulfils diverse functions during the procurement stage.

Chapter 5 examines how the prohibition to materially amend a public contract relates to the question of how provisions of that contract should be interpreted. After all, it is through interpretation that an amendment can be ascertained. The existence of an amendment can depend on the question of how the contract should be interpreted. Under Dutch law, the so-called ‘haviltexmaatstaf’ is, in principle, the relevant norm. As such, the contract must be interpreted while considering the reasonable expectations from the contracting parties and not the wording of the contract on its own. To the extent however that a contract is destined to affect a third party, an interpretation according to objective criteria is warranted. While

the Directives do not provide for an interpretative norm, the case law of the CJEU does contain the obligation to interpret the procurement documents according to the standard of the reasonably well-informed and normally diligent tenderer. When comparing that standard with national interpretation norms, the use of the so-called 'geobjectiveerde haviltexmaatstaf' seems appropriate. This entails that the public contract is interpreted according to objective criteria, while subjective elements can be considered to a certain degree. Following these findings, it is argued that the risk for unclarities should, in principle, fall to the contracting authority. Therefore, it seems contrary to the obligations under EU law to offload that risk on to tenderers and/or the contractor.

Chapter 6 is dedicated to the application of Article 72 Directive 2014/24/EU. First, it is argued that this provision lays down an exhaustive list of possibilities to amend a public contract. Second, it is asserted that this list offers more possibilities when compared to the previous EU public procurement law framework, but also that several unclarities need clearing up. The discussion then turns to a comparison with the Dutch law of obligations. The relevance of the doctrine of material amendments is discussed in relation to the need to comply with the terms of the contract as well as the opportunity to conclude a settlement agreement and the possibility to bring forward a claim to amend the contract due to unforeseen circumstances. On that basis, it is suggested that the possibilities for amendments should be made applicable to public contracts that fall outside the scope of the Directives, or that a similar system should be developed, given the improved legal certainty and the increased room for flexibility provided for by such rules.

Chapter 7 deals with the sub-question to what extent a third party can effectively exercise its rights with regard to amendments during the execution stage since many amendments are hidden from view. Assuming that transparency is in order, the next question is how and when this should take place. Transparency is here understood as the obligation to inform third parties about an amendment and to motivate its legality. Because these issues have not yet gained wide attention in The Netherlands, this chapter starts with an overview of the main arguments in favour of, or against a high level of transparency. On the one hand, effective legal protection, value for public money, the principle of good governance, as well as the fight against corruption, can be used as arguments. On the other hand, however, transparency could also hinder the level playing field and damage the party whose business' secrets or confidential information have been published. It might also increase administrative burdens. With these arguments in mind, the current legal framework is discussed. Current obligations contain omissions regarding the time limit to publish a notice as well as the consequences of a faulty or absent notice. In addition, the case law is unclear when it comes to the application of the voluntary ex ante transparency notice. Possible future developments regarding transparency obligations are discussed separately. It is expected that additional obligations will be proposed by the EU legislature.

Chapter 8 analyses the consequences of a material amendment during the execution stage of a public contract. First, the obligation to organise a new procurement procedure is theoretically logical and, in certain circumstances, practically feasible. However, this obligation can lead to difficulties for the possibility to successfully put an amendment, or an amended contract, out to tender. It is proposed that this obligation must be nuanced. In addition, it seems that a contracting authority is not always obliged to organise a procedure according to the EU public procurement directives, especially when the contract in question falls outside the scope of their application. It is also proposed that a contracting authority should be able to resort to the use of the negotiated procedure without publication if the relevant criteria are met. Secondly, the obligation from Article 73 Directive 2014/24/EU and the remedy of ineffectiveness are considered. Particular attention is given to the choice of the Dutch legislature not to implement Article 73, which is based on the assumption that Dutch law already provides for sufficient possibilities to terminate a contract during its term. This assumption does not seem to be accurate, even though such a possibility exists for the majority of cases. Nevertheless, this choice can bring about complex legal discussions, which could have been easily avoided if the legislature had introduced a separate provision. The remedy of ineffectiveness is discussed on the basis of four issues: who can invoke this remedy; within which time limit; which part of the contract should be declared ineffective; and under which circumstances can this sanction be put aside. Finally, the possibilities to issue a fine and to claim for damages are discussed. In sum, it is concluded that there is no clear-cut system of consequences, which also allows for a tailormade approach.

Chapter 9 offers concluding remarks, firstly that, while the doctrine of material amendments limits the freedom of the contracting authority to modify a public contract, it also justifies this limitation. It can also be said that the current Directives extend that freedom in comparison with the previous EU public procurement rules, particularly when they have been diligently prepared in the procurement procedure. Furthermore, several suggestions are put forward to improve the current legal framework both at EU and national levels. Finally, it is expected that the issue of transparency in amending public contracts during the execution phase will become an important matter of debate.