

# Do erroneous tender documents entitle a lump-sum contractor to additional remuneration?

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## Introduction

Whether a contractor can claim for remuneration beyond an agreed lump sum or a contractual ceiling in the absence of a change order or variation is a recurrent issue. Under Swiss law, a lump-sum contractor may be entitled to additional remuneration if its work is rendered more difficult due to a fault of the employer.

But what happens if the contractor is aware of the employer's fault? In a 2015 judgment the Supreme Court analysed whether a contractor which has spotted or could have spotted errors by the employer that subsequently affect construction costs is nevertheless entitled to additional remuneration.

## Decision

An employer and a contractor had entered into a contract for works on a commercial building. The contract was governed by the SIA Norm 118 (a standard form used widely in Switzerland) and provided for lump-sum remuneration.

The contractor claimed additional payments for works which it considered to be outside contractual scope. However, the employer refused to pay anything beyond the lump sum. It argued that under the contract the works had not been priced, and only a formal modification of the contract could lead to an increase of the agreed lump sum. The contractor went to court. The first-instance court found that under the SIA Norm 118 a formal variation was not an absolute prerequisite for a contractor's right to additional remuneration. A fault of the employer would do. The court therefore ordered the employer to remunerate the contractor for certain additional costs that it had caused.

The employer subsequently appealed to the Supreme Court. In its judgment (4A\_213/2015, August 31 2015), the court confirmed that under Clause 58(2) of SIA Norm 118, the contractor can claim additional remuneration if the performance of the works is rendered more difficult due to the employer's fault. It then went on to examine whether this was the case for the individual work items for which the lower court had granted additional remuneration to the contractor.

Among these items was the building's steel structure, which turned out to be considerably more expensive than the estimate which the employer's engineer had provided to the contractor in the tender process. It was undisputed that the engineer had made a calculation error and had factored in insufficient steel quantities. The lower court found that the error in the tender documents had been recognisable for the experienced contractor. Given this concurrent fault, the lower court ordered the employer to pay only half of the additional costs to the contractor.

However, the employer argued that the contractor should have drawn its attention immediately to the error. Having failed to do so, it could not subsequently claim additional remuneration for works

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that were manifestly underpriced in the tender documentation.

The court considered that Article 58(2) applies only in special circumstances that appear "after the conclusion of the contract". Therefore, if the contractor knew of the calculation error in the tender documents, it could not seek additional remuneration under Article 58(2). While the lower court had found that the error was recognisable for the contractor, it did not say that the contractor had actually been aware of the error. Given that this finding was binding on the court, the court examined only whether the mere recognisability of the error could extinguish the contractor's right to remuneration under Article 58(2).

The employer argued that this was the case, relying on Article 25 of the SIA Norms, which obliges the contractor to notify the employer immediately of any circumstances that lead to delay or additional costs. Failing such notice, the contractor must itself bear the consequences of the delay or additional costs. The same holds true under Swiss statutory law (Article 365(3) of the Code of Obligations).

However, the court ruled that the contractor is entitled to rely on information received from the employer without further verification if the employer or its representative is experienced in the specific field that the error related to. In contrast, general construction experience on the employer's part will not be sufficient to relieve the contractor from the duty to verify. If the employer has the requisite specific experience, as was the case here, the contractor can be blamed only for failing to identify errors that are manifest. The court left open whether there is a duty on a diligent contractor to verify easily verifiable data even if the employer is experienced. The lower court had not found that the error was manifest or that it was easy to verify, and this finding of fact was binding on the court. The court therefore ruled that the employer owed full compensation to the contractor for the additional costs.

## Comment

A lump-sum contract will not protect an employer from having to pay additional remuneration to the contractor for costs that the latter has incurred due to a fault of the employer or its representatives. Mistakes in tender documentation may constitute a fault attributable to the employer which entitles the contractor to additional remuneration.

No clear guidance can be drawn from the court's judgment as to whether contractors must examine tender documents for accuracy. It is clear, however, that they cannot turn a blind eye to manifestly erroneous data.<sup>(1)</sup>

Some contracts will state that the contractor has verified information provided by the employer and accepts its accuracy. In such a case, the contractor is well advised to verify the information that it receives to the extent possible and to make reservations if its accuracy is uncertain or cannot be verified (eg, in respect of sub-soil conditions).

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## Endnotes

(1) Paragraph 4.4.2 (in English translation): "The rule of good faith draws a line to the right to rely on data received as being accurate where there is a manifest inaccuracy."

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