الدراسة الثامنة:

Limits of Financial Guarantees Established for the Ministry Towards Contractors in Public Works Contracts

Dr. Mahmoud Ali Melhem[1]

Introduction

The financial guarantees prescribed by the Ministry towards the contractor it had contracted with to implement a specific project are determined by the bank guarantee provided by the contractor as a guarantee for the implementation of this contract or any amounts due to it in return for the works that it had already performed and are eligible for payment or will become due to it in return for the works that it had already performed and are eligible for payment or will become due to it for this contract or any other contract with the Ministry or any other governmental body, meaning that these guarantees may take one of two forms:

The first form is the financial amounts owed to the contractor for the work that it had already performed and is eligible for payment or that will become due to it for this contract or any other contract with the Ministry or any other government agency.

[1] Professor of civil law. Secretary of the Private Department of Kuwait International Law School.

The second form is the bank guarantee "letter of guarantee" submitted by the contractor to the Ministry for a specific contract itself, with its conditions and duration, as a guarantee for the proper implementation of this contract.

The Court of Cassation defined the letter of guarantee as "a personal and final pledge that in itself creates in the bank an original, abstract and direct obligation to pay its value to the beneficiary whenever it requests it within the period stated therein and under the conditions stated therein."

If the Ministry's authority is absolute in direct implementation of the final guarantee for the contract that the contractor failed to implement, as well as the amounts due to him, whether within this contract or any other contract with the Ministry or any other governmental body, then the question has arisen about the extent of the Ministry's right to reserve and liquidate the guarantees. Bank deposits provided by the same contractor in other contracts that he executed correctly?

The Court of Cassation answered this question through the principles it sent, which are:

- It is necessary to adhere to the purpose for which the letter of guarantee was issued, and within the limits of the period specified in the letter originally and in extension.

In explaining this, the Court of Cassation ruled that "the relationship of the beneficiary (the Ministry) with the bank is governed by the letter of guarantee alone, as it determines the bank's obligations and the conditions under which it pays, so that it is only bound within the limits of its statement. If the letter of guarantee stipulates certain conditions for the possibility of the 'Ministry' demanding the bank, it must These conditions are respected, and the beneficiary "the Ministry" has no right

to demand the value of the letter of guarantee from the bank unless these conditions are met.

"The ruling of cassation in Appeal No. 33/81, Commercial, Session 6/10/1981, published in the legislative reference issued by the Ministry of Public Works by Counselor Ahmed Mansour – Part Two, p. 205 et seq.[1]

The value of the letter of guarantee is considered money owned by the bank, and therefore the contractor cannot claim it until now, as he has not pledged to pay it to him, but rather with a guarantee within its limits, and his creditors may not place a lien on it under the hands of the bank or with the ministry, and it does not fall under the responsibility of the ministry unless it requests it within the limits of the bank's commitment. And its conditions stated in the letter. "The Cassation Ruling in Appeal No. 211/94, Commercial Session 1/3/1955.

The administration's oppression in the use of its power change the administrative contract.

- **The first topic:** The Contract: For a contract to be valid several conditions must be satisfied: (Offer - Acceptance - Capacity - Consideration - Intention to create legal relations - Invitation to treat - Misrepresentation - Illegal contracts)
- **The second topic:** The Ministry's right to liquidate a letter of guarantee for a contract that has been executed
- **The third topic:** The letter of guarantee is intended for the contract for which it was created solely
- Conclusion
- Recommendations

[1] MR. Ahmad Mansour - Legislative Reference - Contract Implementation Stage - Part Two - pp. 205-206 Kuwait

الملخص

حدود الضمانات المالية المقررة للوزارة تجاه المقاولين في عقود الأشغال العامة

إذا كانت سلطة الوزارة مطلقة في التنفيذ المباشر على الكفالة النهائية الخاصة بالعقد الذي قصر المقاول في تنفيذه، وكذلك المبالغ المستحقة له سواء داخل هذا العقد او أي عقد آخر لدى الجهات الحكومية أو لدى أي وزارة، فقد أثير التساؤل عن مدى حق الوزارة في حجز أو تسييل الكفالات البنكية المقدمة من ذات المقاول في عقود أخرى قد نفذها بصورة صحيحة.

نخلص في هذا البحث على أن قيمة خطاب الضمان تعتبر أموالًا مملوكة للبنك، ومن ثم فإن المقاول لا يستطيع المطالبة بها، لأن البنك لم يتعهد بأدائها له وإنما بضمان في حدودها، لذا لا يجوز لدائنيه توقيع الحجز عليها تحت يد البنك أو لدى الوزارة، ولا تدخل ذمة الوزارة إلا إذا طلبتها في حدود التزام البنك وشروطه المبينة في الخطاب.

The first topic: The Contract: For a contract to be valid several conditions must be satisfied: (Offer - Acceptance - Capacity - Consideration - Intention to create legal relations - Invitation to treat - Misrepresentation - Illegal contracts)

A contract is a legally binding agreement that defines and governs the rights and duties between or among its parties. A contract is legally enforceable when it meets the requirements of applicable law. A contract typically involves the exchange of goods, services, money, or a promise of any of those. In the event of a breach of contract, the injured party may seek judicial remedies such as damages or cancellation

The elements of a contract are: offer, acceptance, intention to create legal relations, consideration, and legality of both form and content. Not

all agreements are necessarily contractual, as the parties generally must be deemed to have an intention to be legally bound. A so-called gentlemen's agreement is one which is not intended to be legally enforceable, and "binding in honour only"

In order for a legally enforceable contract to be formed, the parties must reach mutual assent (also called a meeting of the minds), and more contemporarily known as 'agreement'. This is typically reached through offer and an acceptance which does not vary the offer's terms, which is known as the "mirror image rule". An offer is a definite statement of the offeror's willingness to be bound should certain conditions be met. If a purported acceptance does vary the terms of an offer, it is not an acceptance but a counteroffer and, therefore, simultaneously a rejection of the original offer. As a court cannot read minds, the intent of the parties is interpreted objectively from the perspective of a reasonable person, as determined in the early English case of Smith v Hughes [1871]. It is important to note that where an offer specifies a particular mode of acceptance, only an acceptance communicated via that method will be valid.

Contracts may be bilateral or unilateral. A bilateral contract is an agreement in which each of the parties to the contract makes a promise or set of promises to each other. For example, in a contract for the sale of a home, the buyer promises to pay the seller $200,000 in exchange for the seller's promise to deliver title to the property. These common contracts take place in the daily flow of commerce transactions, and in cases with sophisticated or expensive precedent requirements, which are requirements that must be met for the contract to be fulfilled.

Less common are unilateral contracts in which one party makes a promise, but the other side does not promise anything. In these cases,

those accepting the offer are not required to communicate their acceptance to the offeror. In a reward contract, for example, a person who has lost a dog could promise a reward if the dog is found, through publication or orally. The payment could be additionally conditioned on the dog being returned alive. Those who learn of the reward are not required to search for the dog, but if someone finds the dog and delivers it, the promisor is required to pay. In the similar case of advertisements of deals or bargains, a general rule is that these are not contractual offers but merely an "invitation to treat" (or bargain), but the applicability of this rule is disputed and contains various exceptions. The High Court of Australia stated that the term unilateral contract is "unscientific and misleading".

In certain circumstances, an implied contract may be created. A contract is implied in fact if the circumstances imply that parties have reached an agreement even though they have not done so expressly. For example, John Smith, a former lawyer may implicitly enter a contract by visiting a doctor and being examined; if the patient refuses to pay after being examined, the patient has breached a contract implied in fact. A contract which is implied in law is also called a quasi-contract, because it is not in fact a contract; rather, it is a means for the courts to remedy situations in which one party would be unjustly enriched were he or she not required to compensate the other. Quantum meruit claims are an example.

Where something is advertised in a newspaper or on a poster, the advertisement will not normally constitute an offer but will instead be an invitation to treat, an indication that one or both parties are prepared to negotiate a deal.

An exception arises if the advertisement makes a unilateral promise, such as the offer of a reward, as in the famous case of Carlill v Carbolic Smoke Ball Co, decided in nineteenth-century England. The company, a pharmaceutical manufacturer, advertised a smoke ball that would, if sniffed "three times daily for two weeks", prevent users from catching the 'flu. If the smoke ball failed to prevent 'flu, the company promised that they would pay the user £100, adding that they had "deposited £1,000 in the Alliance Bank to show our sincerity in the matter". When Mrs Carlill sued for the money, the company argued the advert should not be taken as a serious, legally binding offer; instead it was a "mere puff"; but the Court of Appeal held that it would appear to a reasonable man that Carbolic had made a serious offer, and determined that the reward was a contractual promise.

Although an invitation to treat cannot be accepted, it should not be ignored, for it may nevertheless affect the offer. For instance, where an offer is made in response to an invitation to treat, the offer may incorporate the terms of the invitation to treat (unless the offer expressly incorporates different terms). If, as in the Boots case, the offer is made by an action without any negotiations (such as presenting goods to a cashier), the offer will be presumed to be on the terms of the invitation to treat.

Auctions are governed by the Sale of Goods Act 1979 (as amended), where section 57(2) provides: “A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until the announcement is made any bidder may retract his bid."

In commercial agreements it is presumed that parties intend to be legally bound unless the parties expressly state the opposite as in a

heads of agreement document. For example, in Rose & Frank Co v JR Crompton & Bros Ltd, an agreement between two business parties was not enforced because an "honour clause" in the document stated "this is not a commercial or legal agreement, but is only a statement of the intention of the parties".

In contrast, domestic and social agreements such as those between children and parents are typically unenforceable on the basis of public policy. For example, in the English case Balfour v. Balfour a husband agreed to give his wife £30 a month while he was away from home, but the court refused to enforce the agreement when the husband stopped paying. In contrast, in Merritt v Merritt the court enforced an agreement between an estranged couple because the circumstances suggested their agreement was intended to have legal consequences.

A concept of English common law, consideration is required for simple contracts but not for special contracts (contracts by deed). The court in Currie v Misa declared consideration to be a “Right, Interest, Profit, Benefit, or Forbearance, Detriment, Loss, Responsibility”. Thus, consideration is a promise of something of value given by a promissor in exchange for something of value given by a promisee; and typically the thing of value is goods, money, or an act. Forbearance to act, such as an adult promising to refrain from smoking, is enforceable only if one is thereby surrendering a legal right.

In Dunlop v. Selfridge Lord Dunedin adopted Pollack's metaphor of purchase and sale to explain consideration. He called consideration 'the price for which the promise of the other is bought'.

In colonial times, the concept of consideration was exported to many common law countries, but it is unknown in Scotland and in civil law jurisdictions. Roman law-based systems neither require nor recognise

consideration, and some commentators have suggested that consideration be abandoned, and estoppel be used to replace it as a basis for contracts. However, legislation, rather than judicial development, has been touted as the only way to remove this entrenched common law doctrine. Lord Justice Denning famously stated that "The doctrine of consideration is too firmly fixed to be overthrown by a side-wind." In the United States, the emphasis has shifted to the process of bargaining as exemplified by Hamer v. Sidway (1891).

Courts will typically not weigh the "adequacy" of consideration provided the consideration is determined to be "sufficient", with sufficiency defined as meeting the test of law, whereas "adequacy" is the subjective fairness or equivalence. For instance, agreeing to sell a car for a penny may constitute a binding contract (although if the transaction is an attempt to avoid tax, it will be treated by the tax authority as though a market price had been paid). Parties may do this for tax purposes, attempting to disguise gift transactions as contracts. This is known as the peppercorn rule, but in some jurisdictions, the penny may constitute legally insufficient nominal consideration. An exception to the rule of adequacy is money, whereby a debt must always be paid in full for "accord and satisfaction".

However, consideration must be given as part of entering the contract, not prior as in past consideration. For example, in the early English case of Eastwood v. Kenyon [1840], the guardian of a young girl took out a loan to educate her. After she was married, her husband promised to pay the debt but the loan was determined to be past consideration. The insufficiency of past consideration is related to the pre-existing duty rule. In the early English case of Stilk v. Myrick [1809], a captain promised to divide the wages of two deserters among

the remaining crew if they agreed to sail home short-handed; however, this promise was found unenforceable as the crew were already contracted to sail the ship. The pre-existing duty rule also extends to general legal duties; for example, a promise to refrain from committing a tort or crime is not sufficient.

Sometimes the capacity of either natural or artificial persons to either enforce contracts, or have contracts enforced against them is restricted. For instance, very small children may not be held to bargains they have made, on the assumption that they lack the maturity to understand what they are doing; errant employees or directors may be prevented from contracting for their company, because they have acted ultra vires (beyond their power). Another example might be people who are mentally incapacitated, either by disability or drunkenness.

Each contractual party must be a "competent person" having legal capacity. The parties may be natural persons ("individuals") or juristic persons ("corporations"). An agreement is formed when an "offer" is accepted. The parties must have an intention to be legally bound; and to be valid, the agreement must have both proper "form" and a lawful object. In England (and in jurisdictions using English contract principles), the parties must also exchange "consideration" to create a "mutuality of obligation," as in Simpkins v Pays.

In the United States, persons under 18 are typically minor and their contracts are considered voidable; however, if the minor voids the contract, benefits received by the minor must be returned. The minor can enforce breaches of contract by an adult while the adult's enforcement may be more limited under the bargain principle. Promissory estoppel or unjust enrichment may be available, but generally are not.

A contract is often evidenced in writing or by deed. The general rule is that a person who signs a contractual document will be bound by the terms in that document. This rule is referred to as the rule in L'Estrange v Graucob. This rule is approved by the High Court of Australia in Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd. But a valid contract may (with some exceptions) be made orally or even by conduct. Remedies for breach of contract include damages (monetary compensation for loss) and, for serious breaches only, repudiation (i.e. cancellation). The equitable remedy of specific performance, enforceable through an injunction, may be available if damages are insufficient.

Typically, contracts are oral or written, but written contracts have typically been preferred in common law legal systems; in 1677 England passed the Statute of Frauds which influenced similar statute of frauds laws in the United States and other countries such as Australia. In general, the Uniform Commercial Code as adopted in the United States requires a written contract for tangible product sales in excess of $500, and real estate contracts are required to be written. If the contract is not required by law to be written, an oral contract is valid and therefore legally binding. The United Kingdom has since replaced the original Statute of Frauds, but written contracts are still required for various circumstances such as land (through the Law of Property Act 1925).

An oral contract may also be called a parol contract or a verbal contract, with "verbal" meaning "spoken" rather than "in words", an established usage in British English with regards to contracts and agreements, and common although somewhat deprecated as "loose" in American English.

If a contract is in a written form, and somebody signs it, then the signer is typically bound by its terms regardless of whether they have

actually read it provided the document is contractual in nature. However, affirmative defenses such as duress or unconscionability may enable the signer to avoid the obligation. Further, reasonable notice of a contract's terms must be given to the other party prior to their entry into the contract.

An unwritten, unspoken contract, also known as "a contract implied by the acts of the parties", which can be either an implied-in-fact contract or implied-in-law contract, may also be legally binding. Implied-in-fact contracts are real contracts under which the parties receive the "benefit of the bargain". However, contracts implied in law are also known as quasi-contracts, and the remedy is quantum meruit, the fair market value of goods or services rendered.

Misrepresentation means a false statement of fact made by one party to another party and has the effect of inducing that party into the contract. For example, under certain circumstances, false statements or promises made by a seller of goods regarding the quality or nature of the product that the seller has may constitute misrepresentation. A finding of misrepresentation allows for a remedy of rescission and sometimes damages depending on the type of misrepresentation.

In a court of law, to prove misrepresentation and/or fraud, there must be evidence that shows a claim was made, said claim was false, the party making the claim knew the claim was false, and that party's intention was for a transaction to occur based upon the false claim.

There are two types of misrepresentation: fraud in the factum and fraud in inducement. Fraud in the factum focuses on whether the party alleging misrepresentation knew they were creating a contract. If the party did not know that they were entering into a contract, there is no meeting of the minds, and the contract is void. Fraud in inducement

focuses on misrepresentation attempting to get the party to enter into the contract. Misrepresentation of a material fact (if the party knew the truth, that party would not have entered into the contract) makes a contract voidable.

Assume two people, Party A and Party B, enter into a contract. Then, it is later determined that Party A did not fully understand the facts and information described within the contract. If Party B used this lack of understanding against Party A to enter into the contract, Party A has the right to void the contract.

The foundational principle of "caveat emptor," which means "let the buyer beware," applies to all American transactions. In Laidlaw v. Organ, the Supreme Court decided that the buyer did not have to inform the seller of information the buyer knew could affect the price of the product.

According to Gordon v Selico [1986] it is possible to misrepresent either by words or conduct. Generally, statements of opinion or intention are not statements of fact in the context of misrepresentation. If one party claims specialist knowledge on the topic discussed, then it is more likely for the courts to hold a statement of opinion by that party as a statement of fact.

It is a fallacy that an opinion cannot be a statement of fact. If a statement is the honest expression of an opinion honestly entertained, it cannot be said that it involves any fraudulent misrepresentations of fact.

For an innocent misrepresentation, the judge takes into account the likelihood a party would rely on the false claim and how significant the false claim was.

Remedies for misrepresentation. Rescission is the principal remedy and damages are also available if a tort is established. In order to obtain

relief, there must be a positive misrepresentation of law and also, the person to whom the representation was made must have been misled by and relied on this misrepresentation: Public Trustee v Taylor.

Contract law does not delineate any clear boundary as to what is considered an acceptable false claim or what is unacceptable. Therefore, the question is what types of false claims (or deceptions) will be significant enough to void a contract based on said deception. Advertisements utilizing "puffing," or the practice of exaggerating certain things, fall under this question of possible false claims.

If based on an illegal purpose or contrary to public policy, a contract is void. In the 1996 Canadian case of Royal Bank of Canada v. Newell a woman forged her husband's signature, and her husband agreed to assume "all liability and responsibility" for the forged checks. However, the agreement was unenforceable as it was intended to "stifle a criminal prosecution", and the bank was forced to return the payments made by the husband.

In the U.S., one unusual type of unenforceable contract is a personal employment contract to work as a spy or secret agent. This is because the very secrecy of the contract is a condition of the contract (in order to maintain plausible deniability). If the spy subsequently sues the government on the contract over issues like salary or benefits, then the spy has breached the contract by revealing its existence. It is thus unenforceable on that ground, as well as the public policy of maintaining national security (since a disgruntled agent might try to reveal all the government's secrets during his/her lawsuit). Other types of unenforceable employment contracts include contracts agreeing to work for less than minimum wage and forfeiting the right to workman's compensation in cases where workman's compensation is due.

The second topic: The Ministry's right to liquidate a letter of guarantee for a contract that has been executed[1]

Undoubtedly, when the Ministry requests the liquidation of a letter of guarantee for another contract that has been executed and ended correctly, it does not request that in its capacity as one of the parties to the letter of guarantee, the "beneficiary" whose purpose has ended with the correct implementation of the contract, because this status has disappeared immediately after the completion of the work of this contract and its correct implementation. Rather, it is requesting this in its capacity as one of the contractor's creditors, which is in violation of the law, as the contractor's creditors are not permitted to impose a lien on the letter of guarantee under the hands of the bank in accordance with what was established by the previously mentioned cassation ruling.

In application of this also, the Court of Cassation ruled that the Ministry is not entitled to renew the letter of guarantee after the end of the contract work and the completion of the warranty and maintenance period for its work, considering that the purpose for which the letter of guarantee was issued has ended. In this ruling, the court did not accept the Ministry's defense that the reason for not The release of the guarantee is when the Ministry of Finance imposes a precautionary seizure on the contractor's dues in satisfaction of income tax, and was listed in the rationale for its ruling "The amounts represented by the letter of guarantee are considered funds owned by the bank until they are disbursed to the Ministry. Therefore, the contractor's creditors may not place a lien under the bank's hand or under the Ministry's hand on

[1] Ruling of the Court of Cassation in Appeal No. 211/94 Commercial Session 3/1/ Dr. Ahmed Mansour - Legislative Reference - Contract Implementation Phase - Part Two 1995

the value of the letter of guarantee. Accordingly, the precautionary lien signed by the Ministry of Finance is under the Ministry's control on the contractor's receivables." The letter of guarantee is not included." The court added that "there is also no argument for the instructions issued by the Ministry of Finance in Circular No. 16/1979 to refrain from delivering the final payment due for the work carried out by foreign companies for the benefit of government departments until the contractor submits a clearance certificate from the tax administration, because The scope of its application is determined by the amounts owed to those foreign companies and bodies for the work they carry out to the parties addressed in this circular. This distances the disputed letter of guarantee from the scope of application of these instructions, and the court concluded that there was no legal basis for renewing the disputed letter of guarantee." The ruling of cassation in Appeal No. 310/88, commercial, session 4/24/1989 - previous reference(1).

It also ruled that "since this was the case, the contested ruling was the one who deducted the value of the bank guarantees provided by the company under appeal as a guarantee for the implementation of the disputed contract, amounting to KD 74,748,821, based on a letter from the Director of the Financial Accounting Department dated 12/8/1998 and addressed to the Director of the Financial Accounting Department." The legal department of the Ministry, and it was clear from the last letter that the amounts that were deducted from the dues of the company being appealed against were 12.21914 KD, the total due to the latter in exchange for its implementation of contract No. M/S/29/95-96, and an amount of 4280 KD, the amounts of the guarantees that were

(1) Ruling of the Court of Cassation in Appeal No. 310/88 Commercial Session 4/24/1989 Dr. Ahmed Mansour - The stage of concluding the contract - The stage of implementing the contract Legislative Reference - pp. 207-208-209

confiscated on behalf of the Ministry, and it was clear from this letter that the guarantees that were confiscated were about a contract other than the claim bond contract - which bears the number Makh/A/33/87, and therefore the ruling's conclusion that the value of these guarantees is the responsibility of the appellant ministry is a corrupt conclusion." The cassation ruling in appeal No. 1455/2005, administrative session 3/27/ 2007[1]

The text of Article 60/4 of the legal conditions came to preserve the privacy of the letter of guarantee and that it is a bank business governed by the rules of the commercial law, and therefore it is not permissible to apply the provisions of the Civil Code or any other provisions that are not consistent with the legal nature of the letter of guarantee. "The Cassation Ruling in Appeal No. 33/81, Commercial Session 6/10/1981 - previous reference.[2]"

On this basis, the text of the aforementioned article is as follows: "All amounts due from the contractor to the Ministry in application of the provisions of the contract, whether in the form of fines, compensation, expenses, or otherwise, the Ministry has the right to deduct them from the final guarantee or from any amounts that are due to the contractor or will become due to the contractor." With the Ministry based on this contract or any other contract with the Ministry or any other governmental body, and all of this without the contractor having the right to object and without the need for a warning or taking any judicial procedures."

[1] Ruling of the Kuwait Court of Cassation - Appeal No. 1455/2005, Administrative Session 3/27/2007.
[2] Ruling of the Court of Cassation in Appeal No. 33/81, Commercial Session, June 10, 1981.

The third topic: The letter of guarantee is intended for the contract for which it was created solely

The Ministry has the right to pay off its debts owed by the contractor in application of the provisions of the contract, where the Ministry has the right to deduct it from the final guarantee, and the phrase "final guarantee" came to be defined by the definite article "the" and it is known that the significance of the definite noun goes to a specific denominator defined among its peers, unlike the indefinite noun which is given by a common, general, unspecified name. Therefore, what is meant by the final guarantee mentioned in the previous article is the final guarantee provided by the contractor as a guarantee for the implementation of the work of this contract, and does not extend to the guarantees provided for other contracts. As for the word "amounts," it was different in its wording - and the difference in wording necessitates a difference in ruling, as the fundamentalists said- It came in the negative to indicate a common and non-specific term, that is, it means any amounts that are due to the contractor or will become due to the contractor to the Ministry based on this contract or any other contract with the Ministry or any other governmental entity, and the phrase "or any other contract with the Ministry or any other government agency" has come in conjunction with what came before it, which is the word "amounts and not on the final guarantee," considering that the word "amounts" is the closest conjunction to this phrase.

The research concludes and does not agree with the ruling of the Court of Cassation mentioned above, and with the rulings of the Supreme Administrative Court, which concluded that "it is decided that the bank guarantee is considered a personal guarantee from the bank to the original debtor, who is the contractor, and for the benefit of the

creditor, who is the contracting administrative body. In this way, the bank, in its commitment to the letter of guarantee, is committed in its capacity as a principal before the administrative body, not as a representative of its client, the "contractor," and that the letter of guarantee, even if it takes the place of cash insurance, except that it is not a payment instrument like a check or the rest of commercial papers, but rather it is a guarantee instrument only, and therefore this guarantee is limited only to the contract issued in its regard only and does not exceed it for any other contract, and the administration may not take measures to liquidate this guarantee to collect its dues before The contractor for another contractual process.

Conclusion

We agree with what the General Assembly of the Fatwa and Legislation Departments in Kuwait concluded when it issued a fatwa that the requirement of a bank guaranteeing a contractor with the Ministry of Health and limiting the guarantee to a specific contract in itself makes it limited to its limits, so it is not permissible for the Ministry to deduct its dues from another contract before this contractor from a letter The guarantee issued in relation to the contract that was validly executed, and this consideration does not change what is stated in Clause Fifty-Seven of the General Conditions of the Contracts concluded with this contractor regarding the deduction of what the Authority is entitled to from the contractor as a penalty for his breach of his obligations from the insurance deposited by it or from any other amount that is due. has before the (contracting) interest or any other interest, this is because this discount only applies to amounts due to the contractor. As for the letter of guarantee, it does not represent a right for the contractor, as according to the proper legal definition, it is a personal

guarantee from the bank to secure the implementation of the contract it concluded with the Ministry, and therefore there are no amounts due to this contractor until it is permissible. The deduction is in fulfillment of amounts owed to the government for other contracts. "Fatwa No. 138 of 2/11/1961, session of 12/21/1960, published in the group of the technical office of the State Council on administrative contracts in forty years, clause 199, p. 375[1].

Recommendations

Limiting the guarantee to a specific contract in itself makes it limited in scope. However, the Ministry may deduct its dues arising from a contract towards the contractor from the letter of guarantee issued to guarantee another contract that has been implemented correctly. On this basis, the limits of the financial guarantees set for the Ministry towards the contractor contracted with it to implement a specific project are determined by the guarantee. The bank account provided by the contractor as a guarantee for the implementation of this contract, or the financial sums due to it in return for the work it has already performed and which are valid for disbursement, or any other sums due to it or that will become due in another contract with the Ministry or any other governmental entity.

In the study, I concluded that the management is bound to compensate the damage resulting from its despotism in using its powers in modifying the contract so that it will not be incurred by the contractor. It shall also rebalance the administrative contract financial issue in order to avoid the contractor's inability to continue the contract

[1] Fatwa No. 138 of 2/11/1961, session of 12/21/1960, published in the group of the Technical Office of the State Council on administrative contracts in forty years
Clause 199, p. 375.

performance and fulfillment, leading eventually to the disinterestedness of many contractors in contracting with the management that becomes disable to facilitate the matter in regular way and the consequences of meeting the public facility of the audiences requirements dealt with it.

Bibliography

References:

- André De Laubadère, Traité élémentaire de droit administratif, Tome № 02, 5ème édition, Librairie générale de droit et de jurisprudence, Paris (France), 1970. Bennadji Chérif, Les marchés publics et la corruption en Algérie, Revue d'étude et de critique social, N0 25, Alger, 2008.
- Charles Debbasch, Frédéric Colin, Droit administratif, 12ème édition, Economica, Paris (France), 2018.
- Jean Rivero, Jean Waline, Droit administratif, 19ème Edition, Dalloz, Paris (France), 2002.
- SaroitBadaoui, Le fait du prince dans les contrats administratifs, L.G.D.J, Paris (France), 1954

Websites:

- http://jafbase.fr/docAsie/Irak/code%20civil%20irakien%201951.pdf
- http://www.mtpt.gov.dz/?p=2520
- https://cours-de-droit.net/arret-effimieff-1955
- https://support.google.com/google-ads/answer/85961?hl=ar
- https://www.a7wallaw.com/9966
- https://www.caci.dz/ar/Archives-Evenement/Pages/Avis-d%27appeld%27offres-national-restreint-.aspx
- https://www.cairn.info/revue-legicom-2004-2-page-117.htm#pa1
- https://www.wipo.int/edocs/lexdocs/laws/ar/eg/eg026ar.pdf

المراجع باللغة العربية:

- أشرف أنس جعفر، العقود الإدارية: دراسة مقارنة لنظم المناقصات والمزايدات وتطبيق القانون رقم 182 لسنة 2018 الخاص بالتعاقدات العامة في مصر ولائحته التنفيذية مع دراسة لعقودBOT وعقود الشراكة مع القطاع الخاص، دار النهضة العربية للنشر والتوزيع، القاهرة، مصر، 2021.