



Can the company perform extra-contract work?

The works carried out arbitrarily by the contractor cannot be charged to the customer.

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The Court of Naples, with sentence no. **273 of 11 January 2023**, dealt with the problem of **extra-contract work carried out by the contractor company** in favor of the client condominium. The pronouncement is particularly interesting as it establishes the obligation of the company to pay compensation for damages and to return what has been received for non-agreed works. Let's take a closer look at the pronouncement in the commentary.

Contract and works in condominium: the case

The story starts from the **opposition to the injunction** promoted by the condominium, which complained of the sums requested by the contractor, illegitimate and unfounded.

To be precise, the condominium not only believed that it owed nothing to the company but, in a counterclaim, requested the **termination for non-fulfillment** of the contract enforced in the monitoring phase or, alternatively, the return of the sums paid in excess for the **works unauthorized** and, in any case, **compensation** for all damages suffered as a result of the breach of contract.

The illegitimacy of non-contractual work

serious breach committed by the contractor in the execution of the contract is evident.

In fact, it carried out less than half of the agreed interventions, however charging the customer an expense equal to almost the entire amount agreed as a maximum expense limit.

These higher costs, although corresponding to works actually carried out and not contested, cannot be charged to the customer because they concern **non-contracted works carried out arbitrarily by the contractor**, in the absence of the counterparty's consent.

The circumstance that some of these non-contracted works may be considered necessary does not appear decisive in the opinion of the expert witness, above all in the light of the contractual provisions.

Indeed, the contract stipulated an **obligation of prior approval** for any additional work not contemplated in the bill of quantities.

To be precise, in the contract it was written that *«the **cost variations up to a maximum of 5% of the entire contracted amount** and the activities not quantified and/or accounted for in the bill of quantities must be examined by the Works Management and that any further cost variations and/or further works not contemplated in the metric calculation, beyond the percentage of 5%, must be approved in advance by the Client in a condominium assembly»*

From this provision emerges, therefore, the intention of the parties to derogate from the by now consolidated rule in jurisprudence according to which *«In terms of the contract, the variations not foreseen in the project, where strictly necessary for the realization of the work, can be carried out by the contractor without the prior authorization of the client but, in this case, where there is no agreement between the parties, it is up to the judge to ascertain the need for it and determine the consideration for the related works, setting it to the unit prices envisaged in the estimate or to*



current market prices" (Cass., sentence n. **10891/2017**).

The CTU has ascertained that the extra-contract work carried out by the company far exceeds the 5% limit established in the contract; approval by the condominium was therefore required for their execution.

It therefore appears evident, in the opinion of the Neapolitan judge, that the opposite injunction has as its object a **claim for payment of non-contracted works** that have neither been commissioned nor approved in advance by the customer.

It follows that the execution of the same by the opposing contractor integrates a **breach of contract** which certainly cannot constitute a source of income for the defaulting party.

Termination of the contract due to default by the contractor

The condominium's counterclaim must also be accepted. The CTU made it possible to detect the **non-execution** of some contractual works, as well as the bad execution of others: for example, the inspection carried out by the Consultant revealed the presence of some **chromatic defects** on the condominium facade, as well as the non-compliant execution of the the art of covering the irons of the electro-welded mesh and laying the iron cover of the metal reinforcements.

Furthermore, as already highlighted above, the breach by the contractor must be considered established, also with reference to the contractual obligation to request the client's consent before being able to proceed with carrying out non-contractual work.

It follows that, although partly necessary, the aforementioned variations had to be **authorized in advance by the counterparty** , as established by the contract.

Given the huge value of the unauthorized variations, and of the work not performed together with the defects of some works, the Court of Naples considers a **serious breach** by the contractor to be integrated, which justifies the **termination of the contract pursuant to art. 1453 civil code**

Indeed, as the Supreme Court teaches, *«the principle enshrined in art. 1455 code civ. , according to which the contract cannot be terminated if the breach is of little importance in relation to the interest of the other party, must also be adapted to a criterion of proportion based on contractual good faith.*

Therefore, the seriousness of the breach by one of the contracting parties should not be commensurate with the extent of the damage, which could also be absent, but with the significance of the breach of contract with reference to the will expressed by the contracting parties, the nature and purpose of the relationship, as well as to the concrete interest of the other party in the exact and timely performance" (Cass., sentence n. 14034/2005).

In the present case, the express provision of the need for **prior approval** by the customer of any variation of more than 5% with respect to what was agreed in the bill of quantities is justified by the need for the Condominium to meet the costs of the contract with the sums received by way of compensation from the Municipality and, in any case, not to incur **large additional costs** without having previously examined the essential nature of the same for the purpose of correct execution of the work and consequently obtained the consent of the condominiums.

Therefore, **the breach by the contractor company is to be considered serious** , as it disappointed the customer's expectation of achieving, against the agreed maximum expense, a complete result that would allow the building to be made safe.

The refund of the amount paid for the non-contracted works

The acceptance of the request for termination results in the condemnation of the opposing party to the **return of what was unduly received for the unauthorized non-contractual works** .

Indeed, *«on the subject of the contract, the recovery effects of the termination in relation to the services already performed operate retroactively, on the basis of the general rule established by art. 1458 of the Civil Code, with a total "restitutio in integrum" for each of the contracting parties and regardless of the imputability of the default.*

It follows that, in the event of termination of the contract due to the fault of the contractor, the latter has the right, in deduction from the reasons for damage due to the client, to the recognition of compensation for the works carried out and of which, in any case, the client himself be beneficial" (Cass., order n. 27640/2018).

In the present case, the condominium benefited from the works carried out in execution of the contract, which certainly should not be **demolished** , also given the public interest underlying these interventions for the safety of the building.

amount corresponding to the agreed works due to the contractor must therefore be deducted from the sum paid by the client.

It follows that, in the face of the termination of the contract due to the fault of the opposing party, the latter will have to return to the client the difference between what the latter paid and the compensation to which it was actually entitled.

Compensation for damages for non-contractual work

The opposite company is *voti tort*.

The opposing company has committed a double breach: the execution of unauthorized non-contractual works and the incorrect execution of some works.

In relation to the first infringement, the opposing party has not adequately attached and proved what were the specific damages suffered as a result of the **unauthorized variations** . Therefore, the probative burden weighing on the same cannot be considered fulfilled pursuant to art. 2697 civil code

On the other hand, as regards the damages caused by the non-professional execution of some maintenance works, these must be considered proven in the light of the expert report.

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