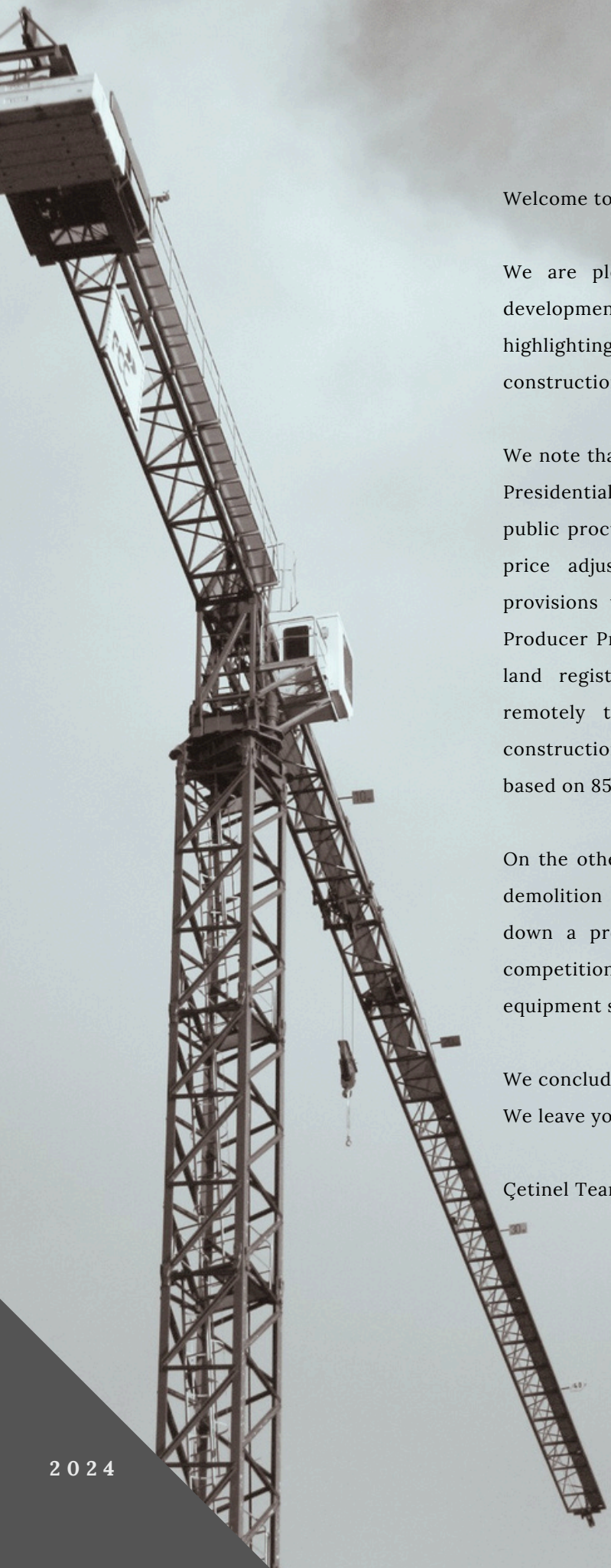
VOLUME 4

ÇETİNEL

2024 CONSTRUCTION LAW WRAP UP

TURKISH CASE-LAW

2025



Welcome to Our 4th Construction Law Wrap-Up!

We are pleased to continue our tradition to track construction law developments in Türkiye and we accordingly present 2024's wrap-up, highlighting the most noteworthy case law and legal updates in Türkiye's construction law landscape.

We note that as continuation of post-Covid waves, at the beginning of 2024, Presidential Decree No. 8089 set out principles for price adjustments in public procurement contracts in accordance with which the coefficient for price adjustment clauses will increase, and contracts without such provisions will be subject to a price difference based on the Domestic Producer Price Index. Significant amendments were introduced for remote land registry transactions, allowing parties to complete the process remotely through TAKBİS. Changes to work experience criteria for construction projects were made, determining the work experience amount based on 85% of the calculated value.

On the other hand, the Constitutional Court ruled to annul the immediate demolition rule, protecting property rights. The Council of State struck down a problematic formula in construction tenders, safeguarding fair competition. The Public Procurement Authority banned unrelated equipment supply in tenders, ensuring transparency and fairness.

We conclude that we witnessed another rather active year here in Türkiye. We leave you to it then.

Çetinel Team

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LEGISLATION NEWS

Price Adjustment Principles

At the beginning of 2024, Presidential Decree No. 8089, issued on January 15, 2024, was published in the Official Gazette No. 32431 on January 16, 2024, setting out the Principles on the Implementation of Provisional Article 7 of Law No. 4735 on Public Procurement Contracts. Under these Principles, construction contracts awarded in Turkish lira pursuant to Law No. 4734 on Public Procurement prior to March 1, 2023, and still in force as of December 28, 2023, will benefit from an enhanced price adjustment mechanism for works performed between January 1, 2024, and December 31, 2024.

For contracts that include price adjustment clauses, the coefficient will increase from B=0.90 to B=1.00. In certain housing projects under the Housing Development Administration (TOKİ), this coefficient will rise further to B=1.15. Contracts lacking price adjustment provisions will be subject to a price difference of 15% of the change in the Domestic Producer Price Index (D-PPI) published by TURKSTAT. Contractors do not need to submit a written request to apply the increased price adjustment.

Furthermore, contractors may apply for an extension of up to six months for ongoing contracts meeting the specified conditions, provided that a written request is submitted to the contracting authority by February 15, 2024. The Public Procurement Authority is responsible for resolving uncertainties in implementing these principles. Administrative bodies must submit inquiries through their relevant ministries, while contractors must first direct their questions to the contracting authority.

LEGISLATION NEWS

Remote Land Registry Transactions

The regulation published in the Official Gazette on December 3, 2024, introduces significant amendments concerning land registry transactions for immovable properties located outside the jurisdiction and contracts for the transfer of ownership when parties are present at different land registry offices. The new provisions allow transactions through TAKBİS, enabling parties to complete the process remotely, without being in the same land registry office. Declarations of intent will be received separately at different offices, and official deeds will be prepared accordingly. Additionally, title deed fees and revolving fund charges must be paid before the registration or cancellation procedures are finalized. The regulation also clarifies the responsibilities of the relevant authorities to ensure proper coordination between different land registry offices. These amendments aim to remove geographical barriers in land registry transactions, streamlining procedures and enhancing efficiency.

LEGISLATION NEWS

Work Experience Criteria Changes

With the Regulation published in the Official Gazette on December 10, 2024, amendments were made to the Regulation on the Implementation of Construction Works Tenders. The work experience amount for land and/or flat exchange construction projects will now be determined based on 85% of the calculated value, derived from the building permit area and the unit construction cost set by the Ministry for the contract year. Additionally, work experience certificates issued under the previous rule may be reissued upon request within thirty days, reflecting the updated criteria while maintaining a reference to the original document. The Regulation entered into force on its publication date.

Case Law Updates

This section highlights significant decisions issued by Turkish courts and authorities concerning various practical aspects of construction law.

HIGH COURT DECISIONS

BURDEN OF PROOF MISJUDGED:

COURT OVERTURNS RULING IN CONSTRUCTION DISPUTE

In this case[1], the claimant company asserted that it had performed construction work pursuant to an oral contract with the defendant but had not received the progress payment. Accordingly, it initiated enforcement proceedings for a receivable of TRY 660,761.20. Upon the defendant's objection, the claimant filed an action for annulment of the objection. The defendant argued that there was no written contract between the parties, that he had completed the construction himself, and that he had no outstanding debt. He also asserted that the alleged fiduciary agreement must be proven with written evidence.

The Court of First Instance dismissed the case on the grounds that the claimant failed to prove the contract with written evidence, witness statements were insufficient, and the defendant denied the debt under oath. At the appellate stage, the Regional Court of Appeal upheld the decision, rejecting the appeal on the merits by confirming that the contract was not proven with written evidence.

Upon review, the Court of Cassation noted that the lower court dismissed the case on the grounds that there was no written contract between the parties and that the claimant failed to prove the works performed. However, the defendant's own statements acknowledged the existence of an oral agreement between the parties. The dispute revolved around who had completed the construction. In a work contract, the contractor is presumed to have completed the work, and it is the landowner's responsibility to prove otherwise. The lower court misinterpreted the burden of proof and rendered a decision based on the claimant's evidence, leading to the dismissal of the case. Consequently, the Court of Cassation annulled the decision of the Regional Court of Appeal, which had rejected the appeal, and overturned the judgment of the Court of First Instance.

[1] 6th Civil Chamber Case No. E. 2022/3076, K. 2024/175 Dated 16 January 2024

HIGH COURT DECISIONS

UNAUTHORIZED USE OF ARCHITECTURAL PROJECTS:

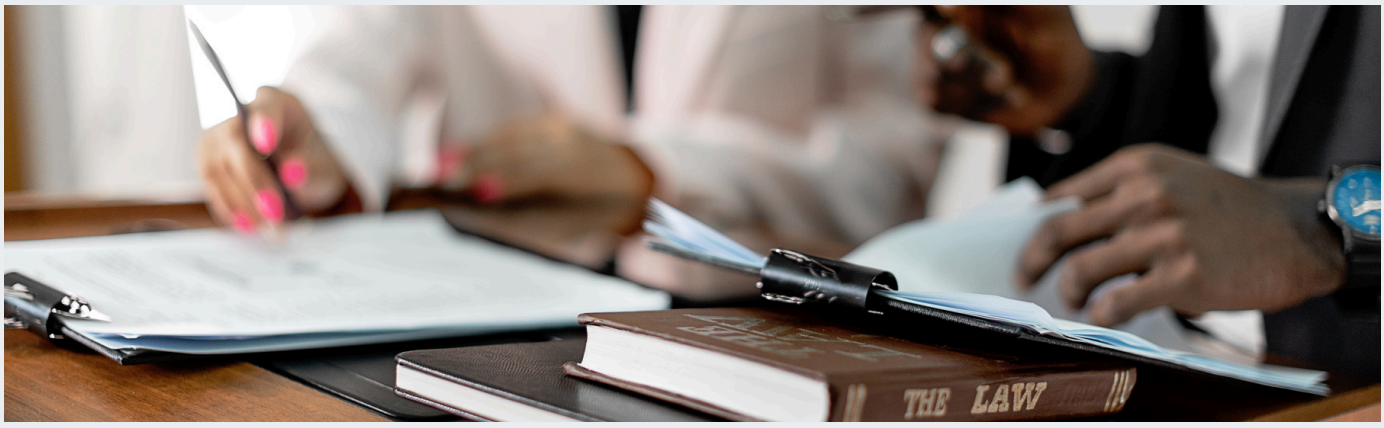
COURT OF CASSATION REINFORCES CREATOR'S ECONOMIC RIGHTS

The case[2] concerns a claim for compensation arising from the infringement of authorship rights under the Law No. 5846 on Intellectual and Artistic Works. The claimant alleged that it had undertaken the project service procurement tendered by the Kahramanmaraş DSİ 20th Regional Directorate, and that the architectural projects it prepared were used without permission in another tender, causing material and moral damages. The claimant sought compensation in the amount of TRY 227,247.00.

The DSİ 20th Regional Directorate argued that, pursuant to the service contract, the intellectual property rights of the projects belonged to the administration, and therefore, the claimant could not claim copyright. The other defendant, the contractor company, contended that the projects were provided by the DSİ, and thus, the action was misdirected, and they bore no liability.

The first instance court determined that the claimant's projects had been used in another construction project with minor modifications, constituting an unauthorized use that infringed the claimant's authorship rights. The court awarded TRY 214,500.00 in compensation, holding the defendants jointly and severally liable. The decision was upheld by the appellate court, which dismissed the appeal on the merits.

Finally, the Court of Cassation affirmed the appellate court's decision, ruling that the projects prepared under the service contract could not be used in other projects without the author's consent and emphasizing the protection of the author's economic rights. The defendants were condemned to pay TRY 214,500.00 in compensation along with commercial interest.



[2] 11th Civil Chamber Case No. E. 2022/4712, K. 2024/1136 Dated 15 February 2024.

HIGH COURT DECISIONS

TITLE DEED REGISTRATION IN EXCHANGE FOR LAND SHARE: COMPLIANCE WITH ZONING LAWS AS A PREREQUISITE

The Court of Cassation has reviewed a case[3] concerning a request for registration by way of assignment under a construction contract in exchange for land share.

In the present case, the buyer-claimant, who purchased an independent unit from the contractor, requested the registration of the title deed in their name based on a preliminary real estate sales agreement concluded with the contractor. However, the landowner opposed the claim, asserting that the property was covered by a title allocation document, that the title deed was registered in the name of the Treasury, and that, pursuant to the construction contract in exchange for land share between the landowner and the contractor, the costs of obtaining the title deed were to be borne by the unit owners.

The first-instance court determined that the subject property had been constructed under the Squatter Housing Law and that construction records had been issued in relation thereto. Based on a letter from the municipality indicating that the property lacked an approved project and occupancy permit, the court ruled that title registration was not legally feasible and accordingly dismissed the case.

The Court of Cassation emphasized that, in registration by way of assignment cases, it must be determined whether the contractor has fully performed its obligations. Given that the contract included a turnkey delivery clause, the court underlined the necessity of assessing whether the construction complied with zoning regulations and the relevant construction permits. The case file indicated that the building lacked an occupancy permit and was in violation of the construction permit and its annexed projects according to municipal records.

Consequently, the lower court must examine whether the construction can be brought into compliance with zoning and occupancy requirements, determine the costs necessary to remedy the deficiencies, and establish which party is responsible for covering these costs under the contract. If the structure can be legalized, the title deed registration may be granted upon the deposit of the required amount; otherwise, the claim must be dismissed.

[3] 6th Civil Chamber Case No. E. 2022/3441, K. 2024/84 Dated 10 November 2024.

CONSTITUTIONAL COURT DECISION

CONSTITUTIONAL COURT STRIKES DOWN IMMEDIATE DEMOLITION RULE: PROTECTING PROPERTY RIGHTS

TIn this decision[4], the Constitutional Court examined the unconstitutionality of the provision in the first paragraph of Article 18 of the Squatter Housing Law No. 775, which stipulates that "...without the need for any decision, it shall be immediately demolished by the municipality or state police," upon the claimant's initiation of an annulment action following notification by the municipality that the demolition would be executed. The review was conducted in light of Articles 36, 40, and 125 of the Constitution.

In the objection, it was argued that the contested provision authorizes the immediate demolition of all unauthorized structures constructed on lands or plots belonging to municipalities, the Treasury, special provincial administrations, budgetary departments, or under the rule and disposition of the state, without any decision or written administrative act, and without providing any legal remedy. This eliminates the right to seek judicial review, violating the freedom to seek legal remedies, the right of access to a court, and the right to an effective remedy. Moreover, since the commencement of the time limit for filing an action against administrative acts is based on written notification, administrative acts must be communicated to the concerned parties in a clear and understandable manner.

The Constitutional Court ruled that unlicensed structures, if used for years without state intervention, have economic value and are protected under property rights. Furthermore, structures that fall outside the scope of Article 18 of Law No. 775 but are subject to demolition orders (such as those benefiting from zoning amnesties or leased by paying occupation fees) should also be considered property. Consequently, the right to property over such structures is protected under Article 35 of the Constitution.

Regarding the evaluation under Article 40 of the Constitution, the Constitutional Court stated that the state is obligated to take legal and administrative measures to ensure the protection of the right to property. Unauthorized structures may be deemed lawful under certain circumstances, and the lack of the right to challenge a demolition order in court is unconstitutional. Additionally, since a demolition order constitutes an administrative act, it must be subject to judicial review. Such orders may be subject to annulment actions to assess their legality. However, the provision under review allows the immediate demolition of structures without any prior demolition order, thereby preventing the concerned parties from seeking judicial review in advance and consequently violating the right to an effective remedy.

As a result, the Constitutional Court ruled to annul the contested provision on the grounds of its inconsistency with Articles 35 and 40 of the Constitution, while finding no violation of Articles 36 and 125.

[4] Constitutional Court Case No. E. 2023/191, K. 2024/58 Dated 22 February 2024.

COUNCIL OF STATE DECISIONS

COUNCIL OF STATE STRIKES DOWN PROBLEMATIC FORMULA: SAFEGUARDING FAIR COMPETITION IN CONSTRUCTION TENDERS

In this case[5], the Council of State reviewed the request for annulment of paragraph 6 of Article 46 of the Regulation on Implementation of Construction Works Tenders and the request for annulment of the work experience certificate issued in the claimants' names by the Housing Development Administration (TOKİ).
The claimants acted as contractors in a tender conducted by TOKİ, fulfilled their contractual obligations, and completed the project. However, although the realized contract amount was 779 million TRY, the work experience certificate indicated the amount as 73 million TRY. The claimants claimed that the reduced certificate amount caused them significant harm and that the contested regulation (Article 46/6 of the Regulation on Implementation of Construction Works Tenders) should be annulled. They argued that the amendment made to the regulation in 2014 caused unfair competition between public and private sector work experience certificates.

The defendants (Public Procurement Authority and TOKİ) argued that the regulatory amendment was based on Council of State case law and statistical data, and that the 60% ratio was adopted to create an equitable criterion in land share-based construction contracts, where the contract value cannot be directly determined.

The contested provision states: "In determining the work experience amount for land share-based construction works, the area of the construction specified in the building permit is multiplied by the unit construction cost determined by the Ministry of Environment and Urbanization according to the class and group of the construction in the Communiqué on Approximate Unit Construction Costs to be Used in Calculating Architectural and Engineering Service Fees for the year in which the contract is signed, and 60% of the resulting amount shall be taken as the basis."

The Council of State found that the work experience calculation lacked clear, measurable, and verifiable criteria. It concluded that the method could allow contractors to show their work experience amounts as either artificially high or low, potentially leading to unfair competition in tender processes.

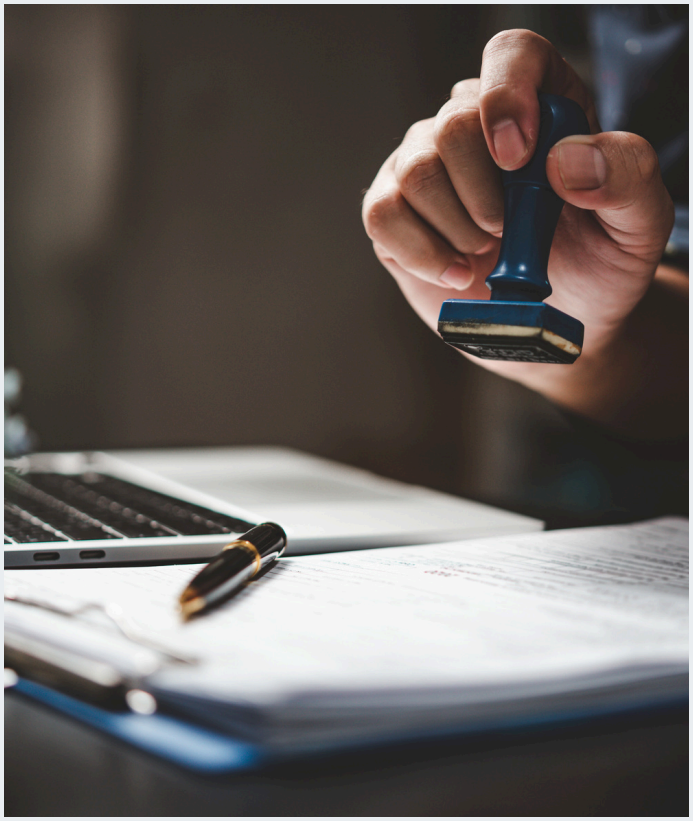
Accordingly, the Council of State found paragraph 6 of Article 46 of the Regulation unlawful and annulled the provision.

[5] 13th Civil Chamber Case No. E. 2018/2912, K. 2024/1007 Dated 28 February 2024.

STATE COUNCIL DECISIONS

PUBLIC PROCUREMENT AUTHORITY DECISIONS
PUBLIC PROCUREMENT AUTHORITY BANS UNRELATED EQUIPMENT SUPPLY IN TENDERS:

ENSURING TRANSPARENCY AND FAIR COMPETITION



Within the scope of Presidential Circular No. 2024/7, a significant regulation regarding public procurements has been introduced. Based on evaluations conducted under the Public Procurement Law No. 4734, it has been decided[6] that provisions requiring the contractor to supply vehicles, machinery, and equipment unrelated to the subject of procurement or construction (such as supervision vehicles, service vehicles, computers, phones, tablets, etc.) cannot be included in procurement processes of public administrations.

For new tenders, procurement documents—such as administrative specifications, contract drafts, and technical requirements—must not include provisions requiring contractors to supply unrelated vehicles, machinery, or equipment for administrative use.. For ongoing tenders, if possible, amendments will be made to remove such provisions from the tender documents. If amendment is not possible, tenders that have not yet been contracted and are in violation of the Circular will be cancelled.

[6] Public Procurement Authority Decision No. 2024/DK.D-91 Dated 27 May 2024.

STATE COUNCIL DECISIONS

UPHOLDING FAIRNESS:

PUBLIC PROCUREMENT AUTHORITY'S STAND IN CONTROVERSIAL TENDER PROCESS

TThe Public Procurement Authority examined[7] the exclusion of the applicant's bid by the tender commission in its decision. The applicant alleged that their offer was rejected without requesting additional documents regarding an invoice amount. Additionally, they claimed that the winning bidder had failed to submit qualification documents such as the share ledger, board of directors' resolution book, and trade registry gazette. The applicant further argued that the bid letter was signed by unauthorized persons, the power of attorney was not in accordance with the procedure, and the balance sheets, business volume documents, and price offers contained significant errors.

The PPA ruled that the rejection of the applicant's bid without examining their business volume documents was procedurally defective. It determined that the contracting authority had acted unlawfully by not requesting supporting documents before excluding the bid. However, the PPA rejected the applicant's claims regarding the winning bidder's qualification documents and signature authority. The applicant's allegations regarding balance sheets and price offers were partially upheld. As a result, the PPA decided to annul the tender proceedings and instructed a re-evaluation of the bids.

[7] Public Procurement Authority Decision No. 2024/UY.I-792 Dated 12 June 2024.