

What constitutes a “clear, precise and unequivocal review clause” for the purposes of modifying a contract?

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Context – Regulation 72, PCR

- Contract modifications may be made if provided for in “clear, precise and unequivocal” (CPU) review clauses: Reg. 72 (1) (a)

- Changes pursuant to, rather than of, the contract

- One of 6 “safe harbour” provisions

- If CPU clause fails test, consider other “fall-back” positions:
 - non-substantial change
 - additional works, services or supplies
 - unforeseen circumstances
 - de minimis changes
 - succession of contractor

Review clauses – the basic rules (Reg.72(1)(a))

- Clear, precise and unequivocal (*Succhi di Frutta*)
- No monetary value limits
- Must be “*provided for in initial procurement documents*”
- May include price revision clauses or options
- Must set out scope and nature of possible modifications/options
- Also, conditions under which they may be used
- Changes cannot alter overall nature of the contract
- Recital 111, Directive 2014/24; such clauses must not give “unlimited discretion” to the contracting authority – some examples, e.g. “*changing communications protocols or other technological changes*” and “*extraordinary maintenance interventions*” to ensure continuity of public services

Case Law

See in particular:

- *C-454/06 Pressetext*
- *C-496/99 Succhi di Frutta*
- *(Law Society) v. Legal Services Commission*
- *Edenred v HMT*
- *Gottlieb v. Winchester City Council*
- *C-549/14 Finn Frogne*:

- Contract changes may be accommodated “through the possibility of making express provision in [the contract] documents, for the option for the contracting authority to adjust certain conditions, even material ones, of the contract after it has been awarded... By expressly providing for that option and setting the rules for the application thereof in [those] documents...”

Principles

Transparency – all bidders are aware of the possibility of change

Non-discrimination – all bids are evaluated on the same basis

Predictability – the outcome of any review can be predicted

“Future proofing” the contract

Some scenarios:

- Price indexation
- Competitive bench-marking
- Technological changes
- The contracting authority’s changing requirements
- Project delays
- Technical problems/failures
- Geographical coverage – new sites/locations
- Third party step-in rights
- Option to renew/extend
- Change in contractor/sub-contractor (other than succession, e.g. M&A, insolvency)
- Change of law or regulation (Brexit?)

Case Study

Associated British Ports v Tata Steel [2017] EWHC 694

“in the event of any **major physical or financial change in circumstances** affecting the operation of [Tata’s] Works... either party may serve notice on the other, **requiring the terms of this Licence to be re-negotiated...** The parties shall immediately **seek to agree amended** terms reflecting such change in circumstances and if agreement is not reached within a period of 6 months... the matter shall be **referred to an Arbitrator...**”

- ❖ What “change in circumstances”?
- ❖ Procedure for re-negotiation?
- ❖ Basis on which parties will seek to agree terms?
- ❖ Factors to be taken into account by arbitrator?

Drafting considerations

Ensuring that changes are within a “reasonable compass” (*Edenred*) of the original contract:

- Highlighting potential for changes in the original bidding process (OJEU Notice, ITT, evaluation, etc.):
 - Scope
 - Value

- Clearly defined trigger events e.g.:
 - New technology or standards
 - Change in location
 - Increased demand
 - New sites becoming available for development
 - Failure to meet KPIs

...(cont)

- Minimise scope for negotiation over prices and terms

- Set out pre-agreed pricing mechanisms:
 - Indexation
 - Open book accounting
 - Bench-marking
 - “Most favoured customer” clauses
 - Expert determination
 - Dispute resolution/arbitration

- Provisions maintaining “economic balance”:
 - Profit margins
 - Allocation of risk
 - Prescribing limits of any changes

- Expressly excluding changes which alter “overall nature of the contract” as initially advertised

...(cont)

- Maintain broad description of purpose of contract in the tender documents:

“The Court must look to the OJEU Notice and the other procurement documents, including the contract contained in the ITT, to ascertain the nature, scale and scope of the operational services that the Atos contract was set up to provide” (*Edenred*).

General issues

- Need to strike balance between:
 - a “general” clause which risks failing the CPU test;
 - a “narrow” clause which risks failing to cover unanticipated changes in circumstances.

- Furthermore, it becomes more difficult to evaluate bids were numerous alternative options are proposed in the procurement.

- Use of frameworks v. review clauses.

- Is referring the matter to expert determination “clear, precise and unequivocal”?

- Setting up an argument under Regulation 72(1)(c) – lack of foreseeability – for non-anticipated changes falling outside CPU review clauses.

- Can you combine a “general” clause together with “specific” clauses?

- Successive modifications under a review clause – anti-circumvention.



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