

Variations

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- What practical steps can you take to de-risk contracts or framework agreements that reach or exceed their thresholds and you are faced with an unwanted variation?

Changes – Public Contracts Regulations 2015



Safe harbours – Reg 72:

(a) clear, precise and unequivocal variation clauses

(b) economic or technical reasons

(c) unforeseeable circumstances

(d) new contractor due to (a) or insolvency

(e) changes not substantial

(f) minor changes

Section 74:

- Modifications permitted if
 - Not substantial modifications
 - Permitted modifications (Schedule 8)
 - Below threshold modifications

- Substantial modifications:
 - Increase/decrease term by more than 10%
 - Materially change scope
 - Materially change economic balance in favour of supplier

➤ Schedule 8

- Provided for in contract
- Urgency and protection of life
- Unforeseeable circumstances
- Materialisation of known risk
- Technical difficulties and substantial duplication of costs
- Transfer on corporate restructuring
- Defence authority contracts

- Below threshold modifications
 - Would not increase or decrease term by more than 10% (goods, services), 15% (works)
 - Aggregated value less than threshold
 - Modification would not materially change scope

James Waste Management Ltd v Essex County Council [2023] EWHC 1157

- Safe harbours should be interpreted narrowly
- But burden of proof on challenger

- Two safe harbours relied on – substantial amendment and amendment clause
- Modification was not substantial
- Reliance on the amendment clause did not arise but would not have been successful

Modification was not substantial:

- Whether materially different in character – different location not prevented by contract, short-term, low value proportionately
- Whether extended contract considerably – narrow construction can't deprive words of meaning; should be interpreted in common sense way

- Whether could have allowed different tenderer to win:
 - Notional different procurement at time of original contract
 - Need real prospect of different outcome because contract now contains modification
 - Close scores not enough – impossible to predict different result as a realistic possibility

- Change in economic balance
 - Yardstick is whether compensation is reasonable
 - Evidence that rate was reasonable
 - Impact of modification small

Could not rely on amendment clause safe harbour:

- Complicated variation clause (Schedule 21)
- Clause was not followed – couldn't rely on it if not followed
- In any event, variation clause was not sufficient – too wide, permitted changes not demarcated
- *“making use of Schedule 21 involves a strong element of overt transparency which...is the price for being able to invoke it, quite apart from the substantive constraints set out in Reg 72(1)(a)”*

- Distinction between:
 - Framework agreements
 - Other contracts

- For other contracts, question is whether variation falls within a safe harbour

- For call off contracts under framework agreements, additional question of whether the framework value has been exceeded

Regulation 6 – methods for calculating value of procurement

- Estimated value of procurement shall be based on total amount payable
- Choice of method to calculate estimated value must not be made with intention of excluding it from Regulations
- For FWs and DPSs, value shall be the maximum estimated value of all the contracts envisaged for the total term

Framework rules – Regulation 33:

- FW is agreement to establish terms – in particular re price and, where appropriate, quantity envisaged
- Call off contracts may under no circumstances entail substantial modifications to terms laid down in FW
- Call off contracts (single contractor) shall be awarded within the limits laid down in the FW

Difficulty can arise if value or quantity exceeded:

- *Autorita Garante* (2018) C-216/17
- *Simonsen & Weel* (2021) C-23/20
- *EPIC v Austria* (2022) C/274/21 and C-275/21
- *Consultant Connect v NHS Bath* (2022)

Autorita Garante

- Call off contract awarded to a second CA – no quantities had been estimated for other CAs
- The phrase “where appropriate” does not mean that an indication of the quantity of services which the framework agreement covers is merely optional

Reasons:

- Although only required to use best endeavours re value and frequency of contracts, imperative that the original CA states the total quantity which subsequent contracts may comprise

- Where there is a single contractor, contracts must be awarded within the limits of the terms laid down in the agreement - so once the limit is reached, the agreement will no longer have any effect
- Not stating total quantity would be breach of principles of transparency and equal treatment
- Requirement to indicate the quantity and amount of the services that the agreement will cover is a manifestation of the prohibition on using framework agreements improperly or so as to prevent, restrict or distort competition

- *Simonson & Weel:*
 - Contract notice for FW did not give information about estimated or maximum value of contract
 - Relying on *Autorita Garante*, the original CA must state estimated and maximum value
 - The original CA can make commitments on its own behalf or on behalf of the other potential CAs”*only up to a maximum quantity and/or a maximum value and once that limit has been reached the agreement will no longer have any effect*”
 - However, modifications to FW agreement that are not substantial are allowed

EPIC (2022):

- In reliance on *Simonsen & Weel*, a contract can no longer be lawfully awarded on the basis of a FW agreement whose limit has been exceeded and which, therefore, is rendered ineffective
- Unless the award of the contract doesn't entail a substantial modification of the FW agreement

Consultant Connect (2022):

- FW was advertised with a value of £3m
- Contract placed for £2.7m when £734k of contracts had already been called off
- Court found that RWIND tenderer was entitled to rely on the £3m and that it was a gross undervalue
- But
 - *Simonsen & Weel* was distinguishable – no estimated maximum value stated
 - Ground of complaint arose at time of publication of contract notice and no challenge brought

Procurement Bill

- Estimated value is value for the time being estimated by a CA (section 4)

- Estimates must be in accordance with Schedule 3
 - A CA must estimate the value of a FW as “the sum of the estimated values” of all the contracts that have or may be awarded
 - Anti-avoidance – where a CA estimates the value of 2+ contracts and they could be provided under a single contract, must include all contracts in estimate unless has good reasons not to do so
 - If CA is unable to estimate (eg because duration if unknown), it is to be treated as having estimated value as an amount of more than the threshold

- FW must include the estimated value of the FW (section 45)



Contract notice

- Take care in deciding on scope
- Take care in deciding on estimate
- Don't underestimate

Management of FW

- Keep records of call off contract values
- Check before you call off

Tender documents

- Think through possible amendments when drafting amendment clause

Planning

- Be prepared for the need to re-tender
- Be realistic about time needed to re-tender
- Don't make big changes unless you need to!

Deciding on safe harbours

- Consider what amendments are really needed
- Comply with amendment clause if you're planning to rely on it
- Get technical opinion on technical reasons
- Keep records of reasons