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# Contract variations and the use of review clauses

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The logo for kbw, featuring the letters 'k', 'b', and 'w' in a blue serif font, with a large '1' positioned above the 'k'.

# Modification – the legislation

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- Public Contracts Regulations 2015 r.72
- Utilities Contracts Regulations 2016 r.88
- Concession Contracts Regulations 2016 r.43
- Limited differences -
  - No 50% value cap in utilities' inconvenience and unforeseeability cases
  - Automatic indexation in concession cases
  - Transitional provision in concession cases

# Modification: the basics

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- Basic test: new procurement required if but only if modification is substantial
- 5 cases where modification is substantial; 1 where in effect deemed insubstantial
- 4 gateways where modifications permitted without fresh procurement (even if substantial)

# Where change is substantial

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- Renders contract materially different in character
- Conditions which “would have allowed for” admission of other candidates/acceptance of another offer or “would have attracted” additional participants
- Economic balance changed in favour of contractor (in manner not provided for)
- Considerably extended scope
- New contractor (except as permitted)

# Change insubstantial or within gateway

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- Value of modification below both threshold and 10% of initial contract value (15% for works), and does not alter overall nature of contract
- Clear, precise and unequivocal review clauses
- Additional services where change of contractor problematical (price increase up to 50% of original value)
- Unforeseeable circumstances, overall nature not altered (price increase up to 50% of original value)
- Contractor succession following restructuring

# Two important recent cases

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- *Edenred (UK Group) Ltd v HM Treasury* [2016] 1 All ER 763 -
  - Added £132m of new services (of same nature)
  - Supreme Court applies r.72, holds not a substantial modification
  - Leaves open whether otherwise permitted by review clauses
- *R (Gottlieb) v Winchester CC* [2015] EWHC 231 (Admin) – applies previous *Pressetext* test – variations to development agreement unlawful – appeal not proceeding

# Review clause requirements

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- Must be in initial procurement documents (*Edenred*: means part of original procurement)
- Clear, precise and unequivocal
- May include price revision clauses or options
- Must state scope and nature of possible modifications/options
- Must state conditions under which may be used
- May not provide for changes that would alter overall nature of contract

# Review clauses: do they still matter?

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- Yes! – especially in long-term/complex contracts
- Some other new gateways are much broader than old *Pressetext* approach – but:
  - Not all changes are for additional supplies
  - Unforeseeable circumstances likely to be narrowly applied
  - New contractor gateway has various hurdles
- *Edenred* is not a cure-all decision – does not mean that anything goes if OJEU notice wide enough – will not help if economic balance has shifted (see *Gottlieb*)
- Bidders should take an interest too – especially if dialogue/negotiation offers chance to influence drafting

# Drafting review clauses (1)

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- Introduction at preferred bidder stage (or during lifetime of contract) too late
- Entirely general change provisions will not do – see *Gottlieb*
- Worth the effort in relation to major contracts – boilerplate approach may not be good enough
- Unlikely to achieve perfection, but sensible clauses may well give sufficient comfort for future change and make challenge unlikely
- Making intentions clear may sometimes mean change is not substantial anyway (see *Edenred*)

# Drafting review clauses (2)

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- What is sufficient precision?
  - Can see as facet of transparency/equality (cf. *R (Law Society) v LSC* [2008] QB 737)
  - Most importantly, avoid open-ended clauses
  - Possible trade off – the more specific the change, the less need to limit the circumstances in which it can be made (and vice versa)
  - Balance need for precision against over-complex drafting that may fail to catch needed changes – objective should be that bidders can see the nature of what may happen

# Drafting review clauses (3)

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- Vital to consider what issues likely to arise in course of contract
- Think especially about situations that will fall outside additional requirements gateway
- Identify trigger events where possible; consider whether possible to limit usage
- Use mixture of specific and relatively general clauses?

# Drafting review clauses (4)

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- Spell out consequences of change, especially for price – try not to leave to negotiation – might state principle that contractor to be no better and no worse off
- Expressly rule out changes altering overall nature of contract? – this is likely to be a problem only with very radical change (see *Edenred* para 41) – description in OJEU notice may matter – can increase in value alter nature?
- Expert determination mechanisms may reconcile flexibility with contractual certainty
- Whether changes require consent of both parties commercially important – but probably does not much matter for procurement law if sufficiently precise

# Review clauses – potential situations

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- Change of parties etc - assignment/novation; addition of new service recipients; step-in
- Changes in technology/methodology
- Changes to KPIs, benchmarking etc
- Addition/subtraction of services
- Extension – as well as specific periods, provide for failed/challenged procurement – provide for any necessary changes to price or other terms
- Response to likely external events e.g. planning failure

# Is there a limit to the permissible nature of a review clause?

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- Contract in *Edenred* laid down change procedures, specifically contemplated new B2B work opportunities, laid down principles for incorporation of new B2B service (including on charging/profit), limited contract value to that in OJEU notice
- Court of Appeal held this satisfied review clause gateway - Supreme Court discussed though did not need to decide (having held change not substantial)
- Lord Hodge in Supreme Court para 43: inclined to view that restrictions in contractual context sufficiently defined to meet r.72(1)(a)
- But still thought not “acte clair” in relation to *nature* of review clause – apparently contemplated that might need to be of same general nature as examples in Recital 111 to Directive (price indexation; adjustments for technological change)
- Nothing in wording of article 72 suggests such a limitation – hard to know how to define/where to draw line – likely to cause debate in future, but authorities should not worry too much meanwhile

# Some other practical points to help with use of r.72

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- Original value of contract – think about what goes into contract award notice – take generous view to help with 50% and 10%/15% rules?
- Keep records of subsequent modifications and value
- Keep records of original procurement for whole duration of contract – will help to know whether change is substantial, whether new contractor would have satisfied original selection criteria

# Risk mitigation on contract variation

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- Consider publishing VEAT notice – needs to comply with C-19/13 *Fastweb*
- Collateral contract may make provision for consequences if variation challenged – should unamended contract revive?
- Consider what provisions to include pursuant to r.73 (termination right where contract improperly modified) – see next slide

# Drafting of Reg 73 termination clauses

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- Introduction of such provisions during lifetime of contract (or at time of variation) might itself be substantial change?
- Will bidders have any influence? Might want to see:
  - Time limits for exercise
  - Notice requirements
  - Compensation provisions
- Other possibilities: treatment of assets; reinstatement of unvaried contract; general provision for arbitration on consequences

# Transitional provisions

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- What if contract is awarded under old (pre-2015/2016) regime, but modified under new regime?
- *Edenred* assumed that r.72 applied
- Public Contracts Regs r.118(5B) now confirms that (at least for post-2006 contracts) – same for Utilities r.122(8) – but Concessions apparently deliberately treated differently
- Appears that r.72 applies to “light touch” contracts – but not directly applicable to below threshold contracts of cross-border interest
- If *Presstext* still applies, similar but more room for overall assessment rather than structured rules, and not all r.72(1) gateways available