

Changes

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Presentation to White Paper conference Spring 2016

- What are the "magic words" and review mechanisms which generalise and extend your options when it comes to making changes mid-contract?
- How do you achieve your aims without falling foul of PCR 2015?

- *Commission v France* C-337/98 (2000)
- *Commission v CAS Succhi di Fruta SpA* C-496/99 P (2004)
- *R (Law Society) v Legal Services Commission* (2007)
- *Pressetext v Austria* C-454/06 (2008)
- *Wall AG v Frankfurt* C-91/08 (2010)
- *R (Gottlieb) v Winchester CC* (2015)
- *Edenred v HM Treasury* (2015)
- Directive 2014/24/EU recital 111

- Public Contracts Regulations 2015 r.72
- Utilities Contracts Regulations 2016 r.88
- Concession Contracts Regulations 2016 r.43
- Note:
 - PCR r73: termination – implied or terms?
 - Where modification unlawful, can parties fall back on original contract (e.g. where expressly provided?)
 - UCR: no 50% max for inconvenience /unforeseeability
 - Concessions: automatic indexation

- 72 (9) A new procurement procedure required unless permitted in reg. 72
- Substantial modifications prohibited:
 - Materially different contract
 - Would have allowed for admission of other candidates or acceptance of another tender
 - Economic balance changed pro-contractor in way not provided for initially
 - Extends scope considerably
 - Replacement contractor other than as permitted

➤ Permitted:

- Additional services $\pounds \leq 50\%$
- Unforeseeable circumstances $\pounds \leq 50\%$
- $< 10\%$ or 15% original value, $<$ threshold, does not alter overall nature
- Contractor succession on re-structuring
- **Clear precise and unequivocal review clauses**

Providing for change: reg. 72(1)(a)



Where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses or options, provided that such clauses—

(i) state the scope and nature of possible modifications or options as well as the conditions under which they may be used, and

(ii) do not provide for modifications or options that would alter the overall nature of the contract or the framework agreement;

Quiz 2!



- It is not the strongest of the species that survive, nor the most intelligent, but the one most responsive to change.
- Progress is impossible without change, and those who cannot change their minds cannot change anything.
- Only the wisest and the stupidest never change.

- **Fundamental principles of 72(1)(a):**
 - Parties should be confined to changes which potential and actual tenderers could have foreseen on the basis of the procurement documents and which do not amount to a wholly different contract from that which was advertised, competed, awarded and concluded; and by implication...
 - Possible to assess whether any modifications are within the limits established by the documents.

No magic, only hard work



- Look back: what changes have been desired or made in the past?
- Look ahead: what might trigger a change (“conditions under which they may be used”)? E.g.:
 - Law/regulation/policy
 - Resources
 - Demand
 - Input costs
 - Available technology
 - Structure

- What kinds of changes might be required (“scope and nature”)?
 - Charges (“no better no worse” provision?)
 - Specification (inputs/outputs: possible to identify likely areas of change?)
 - Metrics (e.g. KPIs, benchmarking)
 - Personnel (NB reg. 67(3)(b))
 - Subcontractors/supply chain (NB regs. 71, 84)
 - Increased/decreased scope of delivery
 - New customers (CAs/SUs) (possible to identify potential?)
 - CPs (e.g. planning risk, projected returns)

No magic, only hard work



- Set out potential changes as early and completely as possible (but be honest, don't hold out unrealistic prospect of expansion of scope to attract bids)
- Avoid open-ended/vague/general language:
 - *The authority intends that the agreement will be an incremental partnership and therefore it will not necessarily be limited in scope to the services provided by the departments above but may also include other transactional and specialist services...the contract may be extended to other public related organisations and associated partners ...The estimated value of the contract is on a range between £5m and £500m...term of agreements flowing from the partnership may extend beyond the 15-year term of the contract set out above.*

No magic, only hard work



- Specify consequences, especially for price/cost or risk
- Specify process and power of decision
- Unilateral or consensual unlikely to be decisive for procurement law

- Wider requirements: equal treatment, transparency, non-discrimination, proportionality; record-keeping;
- PCR 2015 reg. 99(4) VT notice (note *FastWeb C-19/13* (2014))
- Collateral contract (PCR 2015 reg. 101 (5) – (6))
- Termination

- Most contracts provide only for process, but some guidance/prompts as to “typology of changes”:
 - SOPC4/PF2
 - Change in law
 - Tax changes
 - VAT changes
- Standard form construction and ICT contracts
- Contract notice 2011/S 224 – 363697 (*Edenred*)

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