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When do review clauses crack the problem of varying a contract when business needs change?

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Introduction

- Requires consideration of Regulation 72 PCRs 2015 and Regulation 88 UCRs 2016
- Premiss of these Regulations: a contract subject to the rules when procured remains subject to them throughout performance
- Contract may be subject to minor changes, but "substantial" changes give rise to a new contract which should be subject to fresh award process

Introduction

- List of changes considered substantial in Regulation 72(8) PCRs includes changes which:-
  - render contract materially different in character; or
  - had they been present initially would have attracted different field/winner
  - extend scope of contract considerably
  - alter economic balance of contract in favour of contractor
- Regulation 72(1)(a)-(f) lists circumstances where changes may be made without the need for a new procurement procedure (no need to consider whether change is substantial or not)

Review clause provision

- Regulation 72(1)(a): "The modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses … 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

Review clause provision

- Recital 111 of Directive 2014/24/EU amplifies that review clauses must not give Authority "unlimited discretion" and that review clauses must be drafted sufficiently clearly

- The extensive (pre 2015) case law is key to understanding Regulation 72(1)(a)

The requirement of specificity

- *Succhi di Frutta (2004)* is the seminal case
- European Commission sought to purchase fruit juice/jams; payment to be in apples or oranges
- Commission accepted bid offering to be paid in peaches; once contract underway, apricots were added too

The requirement of specificity

- ECJ held that equal treatment and transparency required *"all the conditions and detailed rules of the award procedure [to be] drawn up in a clear, precise and unequivocal manner in the notice or contract documents"* so that all bidders could understand their exact significance etc
- If Commission had required *"for specific reasons"* to consider bids offering other fruits, or change fruits once contract underway, it should have *"expressly"* provided for that possibility in the ITT *"as well as for the detailed rules"*
- This required *"laying down in particular the precise arrangements for any substitution of other fruit …"*

The initial competition

- So Authority must specify upfront what may change and how; not (only) the mechanism for effecting the change
- The possible change must also be incorporated into the competition, with proposals from bidders (if relevant) on this aspect, which are taken into account in evaluation
- See *Commission v France (Le Mans) (2004)*

The initial competition

- Objective: to avoid the need for substantive negotiations with winning contractor if the change is implemented; to ensure it could not have changed original outcome (because it was part of original competition)

- Amended contract terms need not be fully drafted from the outset. *Pressetext (2008)* and *Edenred (2015)* accept that "tinkering" is possible to implement the new arrangement at the time, provided all essential details were settled at the outset

"Unforeseeable" changes

- Will the courts relax the requirements for review clauses where the precise nature of necessary changes cannot be predicted?

- *Gottlieb v Winchester (2015)* suggests not!

  – Development Agreement concluded in 2004 but progress was slow (planning permission, CPO etc) and financial crash caused further difficulties

"Unforeseeable" changes

- Amendments were required to (i) reflect Authority's/customers' changed requirements; and (ii) make the scheme viable

- Review clause allowed developer to propose amendments; Council would accept or not in its discretion (not to be unreasonably withheld where change necessary for planning purposes)

- Challenged as substantial changes

"Unforeseeable" changes

- Defence argued changes were not "substantial" and/or came within review clause

- Held: changes were substantial and review clause failed the specificity test of Succhi di Frutta. Even changes required by third party (planning authority) would not be allowed

"Unforeseeable" changes

- Similar hard line from ECJ in *Finn Frogne (2016)*
- Contract concerned telecommunications system worth €70m for all Danish emergency services. Project suffered delays/disputes. Parties eventually reached settlement to avoid litigation. System now to be for Danish regional police only; value reduced to €4.69m
- Authority argued that performance difficulties were common with complex IT contracts and parties should be allowed "broad discretion" to find solution

"Unforeseeable" changes

- Court turned this back on the Authority; if the difficulties were predictable it should have made use of

  "the possibility of making express provision, in [the contract] documents, for the option … to adjust certain conditions, even material ones, of that contract after it has been concluded. By expressly providing for that option and setting the rules for the application thereof in those documents, the contracting authority ensures that all economic operators interested in participating in the procurement procedure are aware of that possibility from the outset and are therefore on an equal footing when formulating their respective tenders"

- Not realistic!

Regulation 72(1)(a) simply implements the case law

- Aside from throwaway comment by Supreme Court in *Edenred (2015),* no suggestion that legislators intended Regulation 72(1)(a) to be any more liberal than previous case law

- So, Regulation 72(1)(a) promises much but delivers little? Only really allows changes "pursuant to" not "of" the contract

- Thus Regulation 72(1)(a) changes often won't be "substantial" changes in any event; indeed, may not be changes at all!

Specific examples: price

- Price adjustments pursuant to an index are unproblematic. See *Pressetext (2008)*; *Commission v France (Rennes) (2000)*
- Benchmarking likewise, so long as mechanism for finding prevailing market price is specific
- MFN clauses?
- Open book?

Specific examples: scope/quantity/duration

- Extending duration and/or adding new quantities of same service and/or adding different services etc, should all be feasible

- *Edenred (2015)* shows possibilities

  – Contract to provide operational services for NS&I. Contract contained "headroom" to allow greater volume of services to be provided if NS&I won new B2B business

Specific examples: scope/quantity/duration

- OJEU Notice set out NS&I's intentions; advertised value included the headroom (£2 billion v current value of £660 million)
- New services extensively discussed with 3 bidders
- Tender documents showed mechanism whereby new prices would be calculated (if necessary) to keep profit margin for successful bidder the same

Specific examples: scope/quantity/duration

- Court of Appeal: parties had included effective review clause/scope for extension which met the clarity, precision, specificity tests

- Supreme Court (and High Court): because of the headroom there was no substantial change at all. In the alternative, there was a review mechanism that satisfied Regulation 72(1)(a)

Adapting for technological or legislative change

- Adapting for technological changes approved in *Commission v France (Rennes) (2000)* and in Recital 111 of Directive 2014/24/EU
- Requires careful thought upfront to identify trigger
- Pricing mechanism: open book?
- Legislative changes: theoretically possible, but in practice clauses usually very vague!

Adapting for problems during performance

- Cases suggest it is difficult to provide for these in advance with sufficient specificity

- Consider instead when the issues arise whether change is "substantial" in first place under Regulation 72(8) and/or whether a different safe harbour will assist?

Checklist for Regulation 72(1)(a)

- Provide as much detail as possible in procurement documents
- Include value of possible change within advertised contract value
- Insofar as implementing change will require input from successful bidder, (new price for extended term etc) get this as part of initial bid and evaluate
- Minimise the need for negotiation between the parties at the relevant time
- NB even with sufficient telegraphing, a change may be so radical it changes nature of contract and so falls outside Regulation 72(1)(a)

Case references

- European Commission v CAS Succhi di Frutta [2004] C-496/99
- European Commission v France (Le Mans) [2004] C – 340/02
- Pressetext Nachrichtenagentur GmbH v Republik Osterreich & Others [2008] C-454/06
- Edenred (UK Group) Ltd and Another v HM Treasury and Others [2015] UKSC 45
- R (on the application of Kim Gottlieb) v Winchester City Council [2015] EWHC 231
- Finn Frogne A/S v Rigspolitiet ved Center for Beredskabskommunikation [2016] C-549/14
- European Commission v France (Rennes) [2000] C-337/98

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