

WELCOME TO CLARITY

Contract Modifications Review Clauses

May 2018

BUSINESS

COMMERCIAL REAL ESTATE

INDIVIDUALS AND FAMILIES

PUBLIC SECTOR



The Question

Using real-life examples, when do review clauses crack the problem of varying a contract as business needs change? How flexible can they be; how do you get the best out of them; what will be approved by the courts?

Remedies

- Damages
- Ineffectiveness
- Contract Termination

Regulation 72(1)(a) & (d)

- Cannot Change the Overall Nature of the Contract
- Set out Scope, Nature and Circumstances
- Must be Clear, Precise and Unequivocal
- Irrespective of Value
- Examples:- Price Revisions, Options and Changes to the Contractor
- Recital 111

Overall Nature of the Contract

- Define it
 - Within a “clear and reasonable compass”
 - “This contract is for the Supply and Delivery of Fresh Fruit and Vegetables to Dumfries and Galloway Council. Deliveries to be made to establishments across the Council within agreed delivery schedules”
 - “A hypothetical influence on the outcome may be assumed” – Recital 109
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Circumstances - Unknown Unknowns

- What are the trigger events for the Review?
- Cannot be drafted too broadly
- Finn Frogne – variation arising from contractual dispute
- Regulation 72(1)(c) – Unforeseeable Events
 - Reasonably diligent preparation of initial award
 - Taking account of available means, project specifics, good practice and proportionality of cost vs value.

Circumstances - Known Unknowns

- Modifications pursuant to (not of) the contract
- Lessons Learnt from Previous Contracts
- What Might Change
 - Legislation/ Regulation
 - Price Revision
 - Extension of Contract Period
 - Technological Advances
 - Change in Contractor/ Sub-Contractor/Consortium
 - Change in Scope of Requirements

Scope & Nature of Modification

- Nature - what does it relate to?:
 - Volume
 - Logistics
 - Contract Period
 - Price
- Scope – what are the parameters of the changes

Clear, Precise & Unequivocal

- Avoid Agreements to Agree
- Limit Discretion & Negotiation
- *R(Law Society) v Legal Services Commission*
 - “We have the right to amend the Contract Documents from time to time if (i) we consider it necessary or desirable to do so in order to facilitate a reform to the Legal Aid System”
- Mechanistic
- Who, What, Why, When, How and Where.
- Third Party Determination – must also be clear, precise and unequivocal

Examples

- Options
- Price – index linked, open book basis, market testing vs. hardship clause or renegotiation
- Scope – Edenred
- Period
- Terms and Conditions
- Contractor/Sub-Contractor – identity of assignee vs. general covenant tests

Issues with Review Clauses

- Strike a Balance
- Takes your eye of the ball in relation to the principal supplies/services
- Issues in evaluation

What if it fails the test?

- Fall-back position of other safe harbours
 - *De minimis* – 10/15% (cumulative) limit
 - Unforeseen Circumstances – 50%
 - Non-Substantial Changes (irrespective of value)
 - Economic/technical/duplication of cost reasons for using incumbent- 50%
 - Permitted Succession of Contractor

Mitigation of Risk

- Pre-Procurement
 - Pre-market testing
 - Consider correctness of procedure
 - Collateral Contract to deal with Consequences of Ineffectiveness.
 - Drafting for consequences of Termination under Regulation 73
- Post-Procurement
 - Publication of a VEAT Notice in relation to the modification
 - Record Keeping – Regulation 83

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