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Exceeding advertised contract value

Kate Rees

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The Question

“How do you rescue the situation if the value of the contract reaches and exceeds the thresholds and you need to vary? Do you run a new procurement?”

The Problem

- Procurement law permits minor changes to the contract as it was advertised and awarded while staying under the protective cloak of the original competition.
- But material/substantial changes amount to a new contract.
- Failing to advertise/run a competition for an above-threshold contract is in principle a serious breach.

The importance of value

- Financial thresholds govern application of PCRs etc; value must be stated in adverts; value often impacts applicability of “safe harbours” (see later).
- Importance of value confirmed in two recent CJEU cases on framework agreements:
 - Autorità Garante (2018)
 - Simonsen & Weel A/S (2021)

The importance of value

- Cases decided that estimated and maximum value of framework must be established at outset of competition and once maximum is reached, framework no longer has any effect.
- But: “*modifications to a framework that are not substantial are allowed*” (Simonsen & Weel).
- Requirement to state maximum value is probably framework-specific, but general point that exceeding original contract value should ring “material change” alarms is unsurprising.

Regulation 72 PCR's

- Law on material change is in Regulation 72 PCR's 2015. It serves two purposes:-
 - Regulation 72(8) lists circumstances in which a change will be material/substantial;
 - Regulations 72(1) & (5) list safe harbours: circumstances in which a change is lawful without needing to consider whether it is/isn't substantial.

Regulation 72(8): “Substantial change”

- Three situations relevant to value changes:-
 - Modification extends scope of contract considerably.
 - Modification changes economic balance of contract in favour of contractor.
 - Modification introduces conditions which might have led to different competition.

Regulation 72(8): Extends scope considerably

- Scope extension may be temporal (e.g. same type of products but for longer) or physical (e.g. different products/services).
- Commission v Germany (2010) incorporating new region into existing contract for ambulance services, adding 25% by area and 15% by value, was a “considerable” extension. (NB: value of new services exceeded financial threshold on freestanding basis).
- But Italian Motorways (2018) (State Aid case): adding four years to 41 year motorway concession not “considerable”.

Regulation 72(8): Changes economic balance

- Even very modest improvement to price or risk position for contractor likely to infringe this. See Pressetext (2008).
- CJEU & English courts have been uninterested in reasons for the change. See e.g. Commission v Italy (Livorno-Civitavecchia motorway) (2019).

Regulation 72(8): Competition may have been different

- Would the original competition have unfolded the same way had the change been evident at the outset (same candidates, tenderers, winner)?
- If value increase driven by purchasing more of the same, more likely to be ok under this than addition of new products/services.

Safe Harbour: Regulation 72(1)(a): Review clauses

- Covers changes that have been provided for in clear, precise and unequivocal review clauses or options, regardless of value.
- Useful for “known unknowns”. See Edenred (2015).
- But most value changes arise from unexpected circumstances and this safe harbour unlikely to apply (though Bechtel (2021) may herald a more liberal interpretation by UK judges post Brexit)?

Safe Harbour: Regulation 72(1)(b): Additional works, supplies or services

- Additional works, supplies or services have become necessary and a change of contractor:
 - Cannot be made for economic or technical reasons; and
 - Would cause substantial inconvenience or duplication of costs for the authority.

Safe Harbour: Regulation 72(1)(b): Additional works, supplies or services

- Remarks of Advocate General in Livorno motorway case suggest additional means “different”, not more of the same. Court didn’t comment.
- Recital 108 of 2014 Directive may suggest both are covered: “...*authorities may be faced with situations where additional works, supplies or services become necessary; in such cases a modification of the initial contract without a new procurement procedure may be justified, in particular where the additional deliveries are intended either as a partial replacement or as the extension of existing services, supplies or installations...*”
- Very unclear!

Safe Harbour: Regulation 72(1)(c): Unforeseen circumstances

- Where the need for the change is brought about by circumstances that a diligent authority could not have foreseen, provided no change to nature of contract and any price increase does not exceed 50% of value of original contract.
- Heavily (and correctly), used during Covid-19, but establishing objective unforeseeability usually difficult.

Safe Harbour: Regulations 72(1)(b) and (c)

- Reg 72(3): Authorities using these provisions should send post-change modification notice for publication.
- Publication will usually be in Find a Tender but if original contract preceded Brexit and a contract award notice was never published, notice must be published on OJEU? See Public Procurement (Amendment etc) (EUExit) Regulations 2020.
- Is non-publication “merely” a breach of Reg 72(3) or does it invalidate the safe harbour?

Safe Harbour: Regulation 72(5): de minimis

- For changes valued (i) below the applicable financial threshold; and (ii) below 10% of original/indexed contract value (supplies/services) or 15% (works).
- This safe harbour may be used for any number of changes, but only up to the de minimis ceiling ie one allowance per contract, not per change.
- So always consider whether changes were made previously. Changes for which another safe harbour was available probably still count towards de minimis limit, but not clear?

Regulation 32 PCRs: Negotiated procedure without prior publication

- If value increase appears material/substantial and no safe harbour available, is the “new contract” one that can be awarded with no prior competition?
- Regulation 32 covers similar ground as safe harbours but with sometimes fewer conditions etc. Always worth checking!

Remedies

- Direct awards raise spectre of (ground one) ineffectiveness as well as damages.
- But if contract as amended bears reasonable relationship to contract originally advertised, UK courts (see Alstom (2011) and AEW (2019)) and now CJEU (see Simonsen and Weel (2021)) seem to exclude ground one ineffectiveness.
- Damages claim requires challenger to (i) know of the breach; (ii) feel aggrieved; (iii) demonstrate realistic prospect of having won competition that never happened. Claims are relatively rare.

Procurement Bill

- Basic structure of Reg 72 remains: change lawful if (i) it's not substantial (s69(1)(b)) or (ii) it falls within safe harbour (s69(1)(a)) or (iii) it is de minimis (s69(1)(c)).
- But obligation to publish notice (“contract change notice”) now applies pre-amendment and to nearly all changes (whether lawful or not) (s70(1)).

Procurement Bill

- Per s69(3) a “substantial modification” is one that:-
 - increases/decreases term by more than 10% of maximum term provided for at award OR
 - changes the overall nature of the contract or materially changes its scope (stricter than Reg 72?) OR
 - materially changes economic balance of the contract in favour of supplier
- Problem: courts will now have to define what is “material”

Procurement Bill

- Existing safe harbours broadly remain (see Schedule 8).
- New safe harbours include one for “known risks”: useful in principle for contracts (IT, infrastructure?) where problems are expected but not foreseen in detail? Lots of conditions apply!

Procurement Bill

- Per s69(4), “below threshold modifications” (ie de minimis changes) are subject to broadly same conditions as at present, plus new requirement that modification should not change scope of contract. What is “scope” for these purposes?
- Aggregate value of de minimis changes must not exceed applicable financial threshold, but made clear that only previous de minimis changes count towards this limit (e.g prior changes falling within another safe harbour are irrelevant).

Procurement Bill

- Authority must publish contract change notice before making any amendment except for listed small scale changes (s70(1)).
- May provide for standstill period (8 working days?) (s71).
- Ineffectiveness available for unlawful changes where claimant denied proper opportunity to seek pre-contractual remedy and change only apparent on publication of contract change notice or after change entered into (s93 and 94).
- So publication of adequate notice, followed by standstill, removes ineffectiveness risk. Authorities may in practice choose 30 day standstill to close off damages risk too?

Procurement Bill

- Will the proposed changes make it easier to accommodate value changes in future?
- Difficult to say, but on balance probably yes since judges will interpret “materially” to catch fewer changes as “substantial” in the first place. But much uncertainty in the meantime.
- New universal transparency obligation will not be popular!

Case References

- Autorità Garante della Concorrenza e del Mercato and Coopservice (2018) C-216/17.
- Simonsen & Weel A/S v Region Nordjylland og Region Syddanmark (2021) C-23/20.
- Commission v Germany (2010) C-160/08.
- Italian Motorways Investment Plan (Commission State Aid decisions) SA.49335 & SA.49336. (2018)
- Pressetext Nachrichtenagentur v Austria (2018) C-454/06.
- Commission v Italy (Livorno-Civitavecchia motorway concession) (2019) C-526/17.

Case References

- Edenred (UK Group) Ltd & Another v HM Treasury (2015) UKSC45.
- Bechtel Ltd v HS2 Ltd (2021) EWHC458.
- Alstom Transport v Eurostar International Ltd (2011) EWHC 1828.
- AEW Europe LLP v Basingstoke & Deane Borough Council & New River Leisure Ltd (2019) EWHC 2050.

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