

Variations

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David Hansom, Partner, Clyde & Co LLP

The question

Cutting through all the opinions, how many times can you vary a contract?

What requires a new process?

Where are the red lines?

Coverage

- What do the PCR(Scotland) say?
- What does the case law say?
- Ideas to future proof procurements
- The answer

What do the PCR say?

- No unfettered right to amend a contract however we wish
- Applies during procurement procedure **and** after award
- Regulation 72 PCR(S) codifies the decision in *Pressetext*
- 6 “safe harbours”

What are the safe harbours?

- **6 to choose from**
- Provided for in contract (“clear, precise and unequivocal”)
- Additional works, services or supplies
- Unforeseen circumstances
- Low value changes
- Replacement of contractor
- Changes not substantial for reg 72(8)

- Changes outside of these safe harbours = risk of illegal direct award

- Risk assessment needed

Clear precise and unequivocal (reg 72(1)(a))

- Legal test derives from EU case C-496/99 *Succhi di Frutta*
- Scope of changes must be “set out in the procurement documents”
- No financial value limits (up or down)
- Can include options and/or price revision clauses
- Must set out the scope and nature of change
- Cannot alter nature of contract
- No unlimited discretion

- Too broad, and clause will not be sufficiently clear etc
- Too narrow, and may not meet actual needs when you get there

Additional works or unforeseen (reg 72(b) and (c))

- Both requested a lot in practice
 - **Additional**
 - not envisaged when procurement run/contract awarded
 - must be “economic or technical reasons” why someone else can’t
- and**
- “Significant inconvenience or substantial duplication of costs”
-
- **Unforeseen**
 - circumstances which a diligent contracting authority could not have foreseen
 - modification does not alter the overall nature of the contract
-
- In either case, max 50% value more than advert and notice required

Change of contractor or low value (reg 72(d) and (f))

- **Change of contractor**

Either

- Envisaged in contract when let or
- “following corporate restructuring, including takeover, merger, acquisition or insolvency” of original

Note

- New provider must meet SQ requirements
- No other substantial modifications
- General anti avoidance provision
- See *Lightways (Contractors) Limited v Inverclyde Council (2015)*

Change of contractor or low value (reg 72(d) and (f))

- **Low value**
- Change itself is below the threshold **and** less than
 - 10 % of the initial contract value for service and supply
 - 15% of the initial contract value for works
- Changes cannot alter the overall nature of the contract

Red lines - Non material (reg 72(8))

- A change will be “substantial” if one or more of:
- Changes make contract “materially different in character”
- Introduces conditions which would have (a) allowed others to bid (b) allowed for another winner or (c) attracted other bidders
- Changes economic balance in favour of contractor and not envisaged
- Extends the scope considerably
- New contractor other than under reg 72 (d)

- All hard to prove in practice especially years later?
- Risk assessment needed in each case

What do the cases say?

- Court will look back to OJEU/tender notice
- Changes within “reasonable compass” of original (*Edenred v HMT*).
- Changes can go too far either individually or aggregated
- A general variation clause will not work
- Paying contractor more to do same is high risk (*R (Gottlieb) v Winchester City Council*)
- Reductions in scope also caught (*C549/14 Finn Frogne*)
- Transparency in initial process (*AEW Europe LLP v Basingstoke*)
- Significant extension to length of concession likely to be material (*C526/17 Commission v Italy*)

Red lines/ what needs a new process?

- Anything that
- You can't get into a safe harbour
- Which changes the fundamental nature of the contract
- Gives unfettered discretion to the CA
- (see recent case law on neutral vendors – *East of England Broadband Project (2022)*)

- Riskier if no governance/audit trail

Practical points to consider

- Future proof the procurement e.g
- Highlight possible changes in advert and docs
- Define trigger events e.g new technology, price benchmarking, adding in additional specific needs
- Exclude any changes that could change basis of contract

- Carry all points over into contract
- Keep records (reg 84 and others) as first line defence
- Indemnities from contractor for breach/ ineffectiveness?
- Involve lawyers in design and structure

Practical points to consider

- Beware of multiple “small changes”
- Operational contract management/ record keeping
- VEAT notice as last resort/if justified and ineffectiveness a concern

- Instead of a new competitive tender consider:
- Piggy backing on another’s contract (subject to reg 72)
- New procurement under regulation 32 PCR (negotiated without prior publication)

The answer

- More flexibility than rules are given credit
- Not an unfettered right
- No cap on number of changes but court will aggregate
- VEAT notice not a magic bullet
- Governance and audit trail key
- Likely increase in case law if recession etc and changes become essential

Q&A

440

Partners

1,800

Lawyers

4,000

Total staff

2,500

Legal professionals

50+

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David Hansom

Partner

david.hansom@clydeco.com

0044 0207 876 4127

