



White Paper Procurement Conference 2021

Michael Mousdale

Future Proofing

“What is a tangible methodology for future proofing a new procurement - leveraging the available flexibilities and introducing compliant measures which give you an advantage?”

Coverage

Working with others

What is the appropriate form of procurement?

Providing for change

Substantial modifications

Consequences of unauthorised change

Green paper position

Practical steps

What are you trying to Future Proof?

Availability of the procurement to other authorities

Volume/scope of supplies or services

New works

Change to terms (including price)

Known Knowns, Known Unknowns, Unknown Unknowns

Working with others

Availability to other contracting authorities

Contract or Framework?

Eligibility to join a framework

Advising of value/volume in a framework (see [Autorità Garante della Concorrenza e del Mercato - Antitrust, Coopservice Soc. coop. arl](#) (Case C-216/17))

Piggy-backing a procurement

Occasional Joint Procurement

Central Purchasing Bodies

- Acquisition of supplies or services *from* a CPB
- Acquisition of works, supplies or services from frameworks, DPS or contracts awarded/operated by the CPB

Why you should future proof your contracts

Regulation 72(9)

“A new procurement procedure...shall be required for modifications of the provisions of a public contract or a framework agreement during its term other than those provided for in this regulation”.

In other words, unless the modification is not substantial (as defined) or is covered by a specific permission to change in Regulation 72, it will be necessary to re-procure.

Clear, precise and unequivocal review clauses

Regulation 72(1)(a)

Applies to both contracts and frameworks

Have been provided for in the *initial procurement documents*

Review clauses may include price revision clauses or options

Necessary to state *both* the scope and nature of possible modifications or options *as well as* the conditions under which they may be used

- It is not enough to merely anticipate what modifications might be required - but must set out the conditions or circumstances in which they might be used

Opportunity to deal with both *known knowns* and *known unknowns*

Additional works, services and supplies

Regulation 72(1)(b)

Have become *necessary* and were not included in the original procurement

Change of contractor:

- cannot be made for economic or technical reasons*; and
- would cause significant inconvenience or substantial duplication of costs

Any increase in price does not exceed 50%

See also Regulation 32(5) - **supplies** only - no requirement for necessity but technical incompatibility etc is a requirement

See also Regulation 32(9) - repetition of similar **services** or **works** - flagged in the original procurement and called upon within 3 years of conclusion of original

NB - Regulation 32 involves a new contract, not a modification

Requirement to notify

* e.g. interchangeability or interoperability with existing equipment, services or installations originally procured

Unforeseen Circumstances

Regulation 72(1)(c)

Unknown Unknowns

Brought about by circumstances which a *diligent* contracting authority could not have foreseen

Modification does not alter the overall nature of the contract

Any increase in price shall not exceed 50% of the value of the original contract

Requirement to notify

Other Permitted Changes

Regulation 72(1)(d) and Regulation 72(5)

Change of contractor following restructuring, insolvency etc

De minimis

- 10% of value of services and supplies; or
- 15% of value of works; and
- Value of increase does not exceed relevant threshold
- Value applies cumulatively to successive modifications

Substantial modifications (not otherwise protected)

Regulation 72(8)

*presstext** tests

Renders the contract materially different in character from the one initially concluded

Would have affected the original procurement if had been included

Changes the economic balance in favour of the contractor (not otherwise provided for)

Extends the scope of the contract considerably

Change contractor in a way not covered by 72(1)(d)

*Case C-454/06 *presstext Nachrichtenagentur GmbH v. Republik Österreich & ors.* [2008]

Consequences of Unauthorised Change

Regulation 72(9)

Illegal Direct Award

Remedy of Ineffectiveness

- cancellation of contract (or just the change?)
- damages (to challenger and contractor)
- civil financial penalty

Protection measures

- Contract award notice
- VEAT notice?

VEAT Notices

Why have they got such a bad press?

What is it?

- Notice in UK e-notification service of intention to enter into contract
- Contract not entered into for at least 10 days
- Notice contains justification for direct award

But also, the contracting authority must consider the award to be permitted without prior publication

Not a get out of jail card

[Case C-19/13, Italian Interior Ministry v Fastweb SpA](#)

Faraday v West Berkshire Council

Is the justification robust? Have you exercised diligence?

Is it relevant to Regulation 72?

Green Paper

New provision to permit amendments to contracts to be made in cases of crisis or extreme urgency

Re-wording of Regulation 72 so that it is clearer and easier to understand

72(8) (substantial modifications) to be turned on its head to instead define what is not a substantial modification

Tangible methodology

Develop collaborative strategies to share your procurement arrangements

Make sure you have flagged intention to repeat services in the original procurement (32(9))?

Have you dealt with change in the original procurement in a clear, precise and unequivocal way? (72(1)(a))?

- Have you stated the scope and nature *and* conditions in which they may be used; what are the trigger points?

The future proofing should not just be *your* information in the procurement documents. Require bidders to address (and commit as far as possible) in their bid:

- For your known knowns, bidders should bid and price in the same way as for any other element of the contract
- For your known unknowns, bidders should provide ideally a skeleton methodology and pricing structure and process for finalising the terms
- For your unknown unknowns - look to use the flexibility the green paper will give you

Contact us

Birmingham office

Victoria House
Victoria Square
Birmingham
B2 4BU
+44 (0)121 237 3900
+44 (0)121 236 1291

Exeter office

1st Floor
The Mount
72 Paris Street
Exeter
EX1 1JY
+44 (0)1392 458800
+44 (0)1392 458801

London office

15th Floor
6 Bevis Marks
London
EC3A 7BA
+44 (0)20 7337 1000
+44 (0)20 7929 1724

Manchester office

14th Floor
No.1 Spinningfields
1 Hardman Square
Spinningfields
Manchester
M3 3EB
+44 (0)370 270 6000
+44 (0)161 375 0068

Nottingham office

Mowbray House
Castle Meadow Road
Nottingham
NG2 1BJ
+44 (0)115 976 6000
+44 (0)115 947 5246

