

White Paper Procurement Conference

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?

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MODIFICATION OF CONTRACTS AFTER SIGNATURE

Codification of *Presstext* but with detailed structured rules and exceptions

- Article 72 of Directive 2014/24 (Public Sector)
- Article 89 of Directive 2014/25 (Utilities)
- Article 43 of Directive 2014/23 (Concessions)

Codification of Case Law

- C-454/06 *Pressetext* [2008] ECR I-4401
- C-91/08 *Wall AG*
- C-496/99P *Succhi di Frutta* [2004] ECR I-3801
- C-160/08 *Commission v Germany*
- C-337/98 *Commission v France* [2000] ECR I-8377
- N264/2002 *London Underground*
- *Gottlieb R* [2015] EWHC 231
- *Edenred v HM Treasury* [2015] EWHC 90/OB

THE *PRESSETEXT* TEST

- Amendments constitute a new award of a contract where they are materially different in character from the original contract, and so demonstrate an intention to renegotiate the essential terms
- Amendments may be material if:
 - They would have allowed the admission of other bidders or the acceptance of another tender
 - they extend the scope of the contract considerably, to services not initially covered
 - They change the economic balance in favour of the contractor

KEY CONSIDERATIONS UNDER *PRESSETEXT*

- Calls for an overall judgment
- How substantial are the changes, in context of the length/complexity of the contract?
- Are they within the scope of a contract change mechanism? How closely is it defined?
- Are they a necessary response to external events, or a distortion of competition by giving the contractor benefits for which it did not compete?
- How likely is it that the outcome of the original procurement might have been affected?

BASIC RULE – ARTICLE 72(1)(e) AND ARTICLE 72(4)

Contract can be modified, regardless of value, without a new procurement where the modifications are not substantial i.e. render the contract materially different in character from the one initially included.

BASIC RULE – ARTICLE 72(1)(e) AND ARTICLE 72(4)

What is “Substantial”?

The following are regarded as substantial:

1. If the changes had been part of the initial procurement, different candidates may have applied/qualified and a different tender may have been selected
2. The changes alter the economic balance in favour of the Contractor
3. The changes extend the scope of the contract considerably
4. A change of Contractor, unless it falls within the New Contractor Exception

EXCEPTIONS TO BASIC RULE

1. “De minimis” Exception – Article 72(2)
2. “Review Clause” Exception – Article 72(1)(a)
3. “Interoperability” Exception – Article 72(1)(b)
4. “Unforeseen Circumstances” Exception – Article 72(1)(c)
5. “New Contractor” Exception – Article 72(1)(d)

“DE MINIMIS” EXCEPTION – ARTICLE 72(2)

- Value of modification is both:
 - below threshold; and
 - below 10% of initial contract value (15% for works) after any contract indexation
- Modification does not alter overall nature of contract
- Successive modifications will be valued on the basis of net cumulative value

“REVIEW CLAUSE” EXCEPTION – ARTICLE 72(1)(a)

- Must be in initial procurement documents
- Clear, precise and unequivocal
- May include price revision clauses or options – no financial limit
- Must state scope and nature of possible modifications/options
- Must state conditions under which may be used
- May not alter overall nature of contract

“INTEROPERABILITY” EXCEPTION – ARTICLE 72(1)(b)

- Change of contractor cannot be made for economic/technical reasons such as interoperability with existing equipment, services or installation procured under the initial procurement
- AND
- Change of contractor would cause authority
 - significant inconvenience, or
 - substantial duplication of costs
 - Any price increase not to exceed 50% of original value, contractually indexed (not to circumvent through consecutive modifications)
 - OJEU modification notice required

“UNFORESEEN CIRCUMSTANCES” EXCEPTION – ARTICLE 72(1)(c)

- Need for modification brought about by “circumstances which a diligent contracting authority could not have foreseen”
- Modification does not alter overall nature of contract
- Any price increase not to exceed 50% of original value, contractually indexed (not to circumvent through consecutive modifications)
- OJEU modification notice required

“NEW CONTRACTOR” EXCEPTION – ARTICLE 72(1)(d)

1. Change of Contractor satisfies “an unequivocal review clause or options”
2. Corporate Restructuring
 - includes takeover, merger, acquisition and insolvency
 - new operator must fulfil original selection criteria
 - must not entail other substantial modifications/be aimed at circumventing Directive
3. Public Authority assumes Main Contractor’s obligations to Sub-Contractors

TERMINATION OF PUBLIC CONTRACTS

- Directives
 - Article 73 of Directive 2014/24
 - Article 44 of Directive 2014/23
 - Article 90 of Directive 2014/25
- Public Authorities should have the right to terminate a public contract during its term AT LEAST where:
 1. It has been substantially modified and a new procurement is required;
 2. The Contractor should have been excluded under Article 57(1)
 3. The contract should not have been awarded as Member State is in breach of Treaty or Directives

EXAMPLE OF ‘FUTURE PROOFING’ CLAUSES – THE “REVIEW CLAUSE” EXCEPTION

1. General variation clauses not acceptable
2. Additional Scope; ask for day rates even if it is a fixed price lump sum contract
3. Additional parties; anticipate the potential to appoint additional consultants or sub-contractors during the programme
4. Extension of Term; provide for the potential extension even if there is no intention at the time of entering into it to do so.

EXAMPLE OF ‘FUTURE PROOFING’ CLAUSES – THE “REVIEW CLAUSE” EXCEPTION

5. Change of Control, Assignment, novation, sub-contracting;
 - assume that company will be bought by a third party/merge or become insolvent; or
 - assume funders will step-in on debt default and appoint a replacement contractor; or
 - that current finance will be re-financed;
6. Changes in technology

EXAMPLE OF 'FUTURE PROOFING' CLAUSES – THE “REVIEW CLAUSE” EXCEPTION

7. Benchmarking/market testing
 - for example catering, security, cleaning contracts
8. Change in law/tax/tariffs
 - change in general law requiring capital/opex expenditure
 - discriminatory change of law
 - application of tax/tariffs
9. Change in insurance

THANK YOU

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