



How do you rescue the situation if the value of the contract reaches and exceeds the thresholds and you need to vary?

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28 September 2022



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Agenda

1. Basic Rule
2. Substantial Modifications
3. Safe Harbours
4. Modification Notices
5. Key Takeaways
6. Risk Mitigation

Basic Rule

- **Contracts can be modified** where the modifications, irrespective of their value, **are not substantial** (Reg 72(1)(e))
- **New procurement process is required where modification of existing contract is substantial** – unless the modification falls within one of the safe harbours in Regulation 72



Regulation 72(7): Substantial Modifications



- Modification is substantial where it renders the contract or framework agreement **materially different** in character; **and**
 - it introduces conditions which would have allowed for admission of other candidates, acceptance of another tender or attracted additional participants; **or**
 - it changes the economic balance in favour of the contractor not provided for; **or**
 - it extends the scope of the contract considerably; **or**
 - change of contractor in a way not covered by Reg 72(1)(d)

Regulation 72(7): Substantial Modifications



- Recital 107: *“A new procurement procedure is required in case of material changes to the initial contract, in particular to the **scope and content of the mutual rights and obligations of the parties, including the distribution of intellectual property rights.** Such changes demonstrate the parties’ intention to renegotiate essential terms or conditions of that contract. This is the case in particular if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure.”*

Regulation 72(7): Substantial Modifications



- *Finn Frogne Case (Case C-549/14)*:
 - Reduction in scope can constitute substantial modification - smaller contract may be of interest to smaller tenderers
 - Irrelevant that material amendment results from settlement of commercial dispute rather than deliberate intention of CA
- *Commission v Italy (Case C-526/17)*
 - Motorway concession contract extended by more than 18 yrs – significant increase in remuneration through longer operation
 - Material change to conditions of existing concession

Five Safe Harbours – Permitted Modifications



- De Minimis (Reg 72(4))
- Clear, precise and unequivocal review clause (Reg 72 (1)(a))
- Additional works, services and supplies (Reg 72(1)(b))
- Unforeseeable circumstances (Reg 72(1)(c))
- New contractor as a result of unequivocal review clause or universal or partial succession (Reg 72(1)(d))

Regulation 72(4) and (5): De minimis changes



10% of initial contract value for services/ supplies contracts OR 15% of value for works contracts

Value of increase does not exceed relevant threshold

Value applies cumulatively to successive modifications

Does not alter overall nature of contract

Regulation 72(1)(a): Clear, precise and unequivocal review clauses



- Where the modifications, irrespective of their monetary value, have been provided for **in the initial procurement documents** in **clear, precise and unequivocal** terms where such clauses
 - state the **scope and nature** of possible modifications or options as well as the **conditions** under which they may be used, and
 - do not provide for modifications or options that would alter the **overall nature** of the contract or framework agreement

Regulation 72(1)(a): Clear, precise and unequivocal review clauses



- Reference to procurement documents is wider than just the contract
- Requires contracting authority to consider likely changes at the outset
- Recital 111: “...such clauses should not give [contracting authorities] unlimited discretion ... sufficiently clearly drafted review or option clauses may for instance provide for **price indexations...**”

Regulation 72(1)(a): Clear, precise and unequivocal review clauses



- Broad and unspecific variation clauses not sufficient
- Not enough to anticipate what modifications might be required – must set out **scope, nature and conditions or circumstances in which they might be used**
- Indexed price adjustments expressly permitted; other price revision clauses or options also potentially covered provided they are sufficiently precise
- No limit on value of modification

Regulation

72(1)(a): Clear, precise and unequivocal review clauses



- *Edenred (UK Group) Ltd v HM Treasury* [2015]
- Must look at contract notice and other procurement documents to ascertain nature, scale and scope of contract
- Scope of changes restricted to those envisaged in documents
- Documents set out principles of contract amendment – restricting increase in profit margin and prohibiting alteration in risk allocation

Regulation 72(1)(a): Clear, precise and unequivocal review clauses



- *Succhi di Frutta* (Case C-337/98)
- Principles of equal treatment and transparency require that “*all the conditions and detailed rules of the award procedure must drawn up in a clear, precise and unequivocal manner in the notice or contract documents*” so that all tenderers can understand their exact significance and interpret them in the same way
- Commission should have expressly provided for the possibility in the ITT by setting out “*the precise arrangements for any substitution of other fruit...*”

Regulation 72(1)(b): Additional works, services and supplies



- Additional requirements that have become **necessary** and were not included in the original procurement and change of contractor:
 - Cannot be made for **economic or technical reasons**, such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement; **and**
 - Would cause **significant inconvenience or substantial duplication of costs**

Regulation 72(1)(b): Additional works, services and supplies



- Does the modification involve necessary additions?
 - No definition of necessary
- Modification available when new contractor not feasible or materially burdensome
- BUT economic or technical reasons must be sufficiently significant that they would cause *“significant inconvenience or substantial duplication of costs”*

Regulation 72(1)(b): Additional works, services and supplies



- Increase in price must not exceed 50% of value of original contract
- Applies to value of each modification
- No requirement that modification should not alter overall nature of the contract but successive modifications **must not be aimed at circumventing the procurement rules** – clearly several modifications increase risk of circumvention
- Publication of modification notice required

Regulation 72(1)(c): Unforeseen circumstances



- Need to modify the contract brought about by circumstances which a **diligent contracting authority could not have foreseen**
- Could include increase (or decrease) in scope of contract, extension (or reduction) of contract term
- Does the need for the modification result from an unforeseeable event? – need to show causal link
- Modification must not go beyond what is necessary to adapt the contract to the unforeseen circumstances

Regulation 72(1)(c): Unforeseen circumstances



- Diligent may vary depending on, for example, the available means of each contracting authority
- Recital 109: The circumstances *“could not have been predicted despite reasonably diligent preparation of the initial award by the contracting authority, taking into account its available means, the nature and characteristics of the specific project, good practice in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value”*

Regulation 72(1)(c): Unforeseen circumstances



- Modification **must not alter the overall nature of the contract** – the more significant the change, in terms of scope, length and terms, the more difficult to justify
- Increase in price must not exceed 50% of the value of the original contract
- Applies to value of each modification but successive modifications **must not be aimed at circumventing the procurement rules**
- Publication of modification notice required
- Wider ground than Reg 72(1)(b) but only available in exceptional circumstances, not as result of bad planning

Regulation 72(1)(c): Unforeseen circumstances



- *Commission v Germany* (Case C-318/94)
 - Failure of regional authority to approve project was not unforeseeable
- *Commission v Spain* (Case C-24/91)
 - Growing number of students had existed for years, therefore not an unforeseen circumstance

Regulation 72(1)(c): Unforeseen circumstances



- *Commission v Italy* (AG) (Case C-525/03)
 - Regular seasonal occurrences (forest fires) cannot be considered unforeseeable events
 - *“such occurrences may in some years be of such exceptional intensity or extent as to be legitimately regarded as unforeseeable... Exceptional forest fires due to exceptional weather conditions are however by definition not foreseeable...”* - state of emergency declared in July 2002

Modification Notices

- Directive/Regulations do not expressly state time period within which publication required
- Often assumed as akin to award notice, ie 30 days
- Early publication starts limitation period
- Schedule 3, Part 2 sets out information to be included – as much as possible



Modification Notices

- Number of Modification Notices Published on OJEU

	Ireland (€5m)	Denmark (€5.8m)	Spain (€47m)	Germany (€83m)
2020	69	28	1,601	10,324
2021	75	106	2,805	12,537
2022	46	56	2,513	10,402



Regulation 72(1)(d): Replacement Contractor



- New contractor replaces original one as a result of:
 - Unequivocal review clause or option in conformity with Reg 72(1)(a)
 - Universal or partial succession following **corporate restructuring, including takeover, merger, acquisition or insolvency**
 - replacement contractor must fulfil **criteria for qualitative selection** initially established,
 - must not entail other substantial modifications to the contract
 - is not aimed at circumventing the application of the Regulations

Regulation 72(1)(d): Replacement Contractor



- *Advania Sverige v Dustin Sverige* (Case C-461/20)
 - One of the contractors was declared insolvent - new contractor took over initial contractor's rights and obligations under agreement
 - New contractor fulfilled qualitative criteria for selection
 - Article 72(1)(d)(ii) met even though virtually no business of original contractor had transferred

Key Takeaways

Is the modification substantial? If so, new tender is required unless it falls within one of the safe harbours in Reg 72

Does your contract provide for the modification in clear, precise and unequivocal terms?

Is the modification sufficiently low in value to benefit from the de minimis safe harbour?

Does the modification involve necessary additions?

Is the modification required as a result of an unforeseeable event?

Risk Mitigation

Include potential modifications in procurement documents – scope and time – and ensure estimated contract value has sufficient range

Prepare and keep record or reasons for each modification and why it was deemed justifiable for audit and legal purposes

Keep changes to minimum necessary and remember need to demonstrate causal link

Remember that overall nature of contract must not be altered for changes due to unforeseen circumstances and de minimis changes

Publish modification notice for unforeseen circumstances and necessary additions safe harbours

Get in Touch



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