



# Contract Changes

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## **The challenge**

- Contract changes
- What are the "magic words" and review mechanisms when it comes to making changes mid-contract?
- How do you achieve your aims without falling foul of the rules?

## **The evolution of the principles**

- An off-market contract amendment is treated like a direct award
- Before 2014, the directives (and so the regulations) were silent on the topic
- Case law filled the gap – with a restrictive view on what was permitted
- “Presettext” and others Codified in the 2014 directive and the 2015/16 regulations

## **Safe harbours**

- Contract review clause
- Additional requirements
- Unforeseen circumstances
- Contractor identity change
- Non-substantial changes

## **Safe harbour 1: Contract review clause**

- The magic words go in the ITT and the contract, and should be mirrored in the change documentation
- The requirements: clear, precise and unequivocal
- The content:
  - Scope and nature of possible modifications or options
  - Conditions as to when the review may be used
- The limit: define the overall nature of the contract
- No limit as to value – but make that clear and unequivocal too. The “Edenred” example: “within a clear and reasonable compass”.

## **Do standard form contract review clauses comply?**

2.1 The Purchaser may order any variation to any part of the Services that for any other reason shall in the Purchaser's opinion be desirable.

2.2 Any such variation may include (but shall not be restricted to) additions, omissions, alterations, substitutions to the Services and changes in quality, form, character, kind, timing, method or sequence of the Services.

2.3 Where any such variation.... has affected or may affect the costs incurred by the Supplier ..... the Supplier will notify the Purchaser..... [which] shall be considered by the Purchaser..... and [the Purchaser] may authorise such alteration to the sums to be paid..... as are, in the Purchaser's opinion, appropriate and reasonable in the circumstances.

## What could a contract review clause say?

- “Edenred”: contracts need to be able to “accommodate the occurrence of events and the changes of policy that are part of public life”.
- The overall nature of this contract is the transport of secondary school pupils to and from school
- The scope and nature of possible modifications are changes to routes and the timing of routes, including the addition of new routes and the cancellation of routes.
- The conditions as to when the review may be used include/are (1) changes to school hours or term dates, (2) special events requiring changes to pupil transport requirements, (3) school closures / openings and (4) population changes requiring route adjustment.
- If there is a view the price will change using the mechanism..... [e.g. matrix of vehicle type and a price per mile].

## Test against recital 111

- Review or option clauses should not give unlimited discretion
- Sufficiently clearly drafted review or option clauses:
  - may provide for price indexations
  - may allow that communications equipment to be delivered over a given period continues to be suitable (changing communications protocols / other technological changes)
  - could provide for adaptations of the contract which are rendered necessary by technical difficulties which have appeared during operation or maintenance
  - could include both ordinary maintenance as well as provide for extraordinary maintenance interventions that might become necessary in order to ensure continuation of a public service

## Test against case law

- Winchester City Council – the terms of the variation clause allowed absolute discretion “without any indication of what changes might be accepted or on what basis”. It was “so broad and unspecific that it did not meet the requirement of transparency” because it did not provide the information which a tenderer would need in order to assess scope.
- Law Society - a wide, unspecific amendment clause broke the transparency rule, and was found to be essentially a power to re-write the contract

## **Safe harbour 2: Additional requirements**

- Economic or technical justification for use of same contractor – including interchangeability and interoperability
- Significant inconvenience or substantial duplication of costs
- 50% value limit
- Magic words go in the change documentation, including the new OJEU notice for the purpose
- The magic words for the ITT and contract should focus on the first safe harbour based on the thought process around additional requirements – not laying the ground for this one

## **Safe harbour 3: Unforeseen circumstances**

- Circumstances which a diligent authority could not have foreseen
- 50% value limit
- Magic words go in the change documentation, including the new OJEU notice for the purpose
- But also define the overall nature of the contract - which is the limit for this safe harbour - in the contract.
- Drafting in the contract to link the conditions in the review clause (i.e. what was foreseen) to the concept of what was not?
- Not that helpful because the test is an objective one.

## **Safe harbour 4: Contractor change**

- Permitted if done:
  - pursuant to a review clause; or
  - on a “restructuring”
- The magic words go in the review clause, given the uncertainty about the restructuring condition, particularly around business acquisition
- Sub-contractor change?

## Safe harbour 5: Non-substantial changes

- Less than OJEU threshold and 10% of value (15% for works). No magic words required.
- Other examples of where a change will be substantial
  - Materially different in character
  - Change to tender outcome (or hypothetical tender outcome)
  - Economic balance
  - Material extension to scope
- Devote the energy on magic word drafting to safe harbour 1, but if describing “nature” of contract for that purpose, add in “character” and “scope”.

## Final magic words

- Contracting authority must include specific termination right
- Contracting authority may include specific consequences of termination clause
- If it does not, implied termination clause but no implied consequences



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