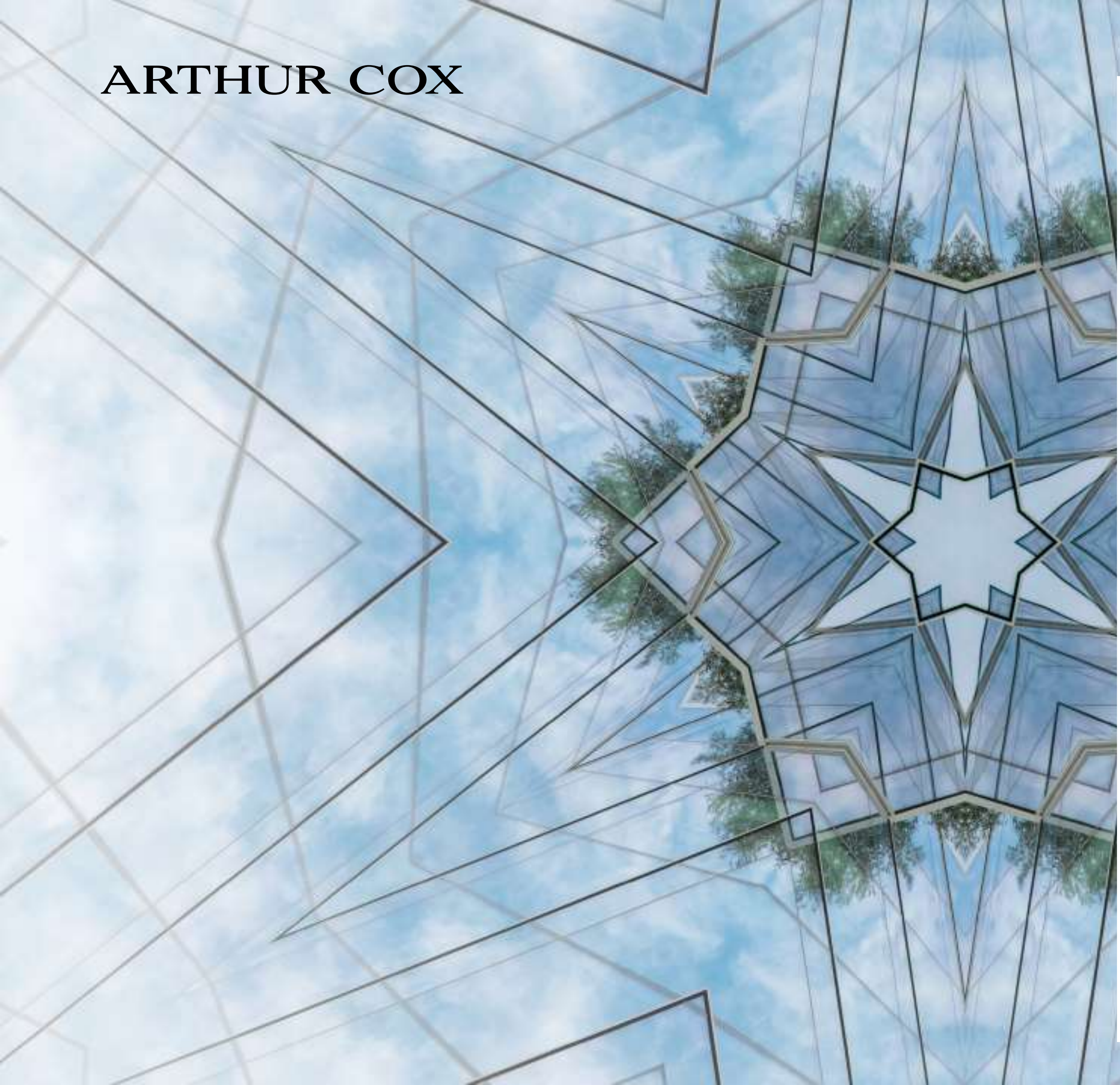
ARTHUR COX



What mechanisms can mitigate the risk of rising costs and fluctuating prices, including energy and stakeholder concerns about going to market?

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Partner

INTRODUCTION

Recent Major Developments:

- Brexit
- Covid – 19
- Ukraine war

Supply chain issues

Increased costs for delivery

Focus on what can be done from a procurement perspective?

STRUCTURE OF PROCUREMENT

Procurement Route:

- Open (or Restricted)

  v

- Negotiated

Length of Contract, shorter = easier to price?

Nature of Contract, single contract for everything or framework or DPS?

PRICE ADJUSTMENT MECHANISMS

Indexation

Annual CPI adjustment

Of some comfort, but challenges:

- alignment with changes in tenderers’ prices / costs?

- ability to respond quickly to changes in prices (usually applied annually)

More focused Price Adjustment?

FOCUSED PRICE ADJUSTMENT

More complicated, but potentially can offer more benefit to both Contracting Authority and contractor

Identification of what changes in price, causes concern and hence mechanism is to cover

Then identification of relevant index that tracks these

Base price then set that tenderers told to assume for bidding purposes

FOCUSED PRICE ADJUSTMENT

Base price same for all tenderers but may not reflect actual costs

Changes from this price (up or down) can then be reviewed during the term

Changes from the base level correspond to alteration in prices

Appropriate interval to be set (may not be annual, e.g. quarterly?)

Objective is to have a clearly transparent process, amounting to approximation of costs and changes in prices

FOCUSED PRICE ADJUSTMENT – EXAMPLE MECHANISM

Base Price of £1.85 per litre for Diesel, identified from published index

Ability for either party to request a review if there is > [5%] change from Base Price

A change to the Base Price then translates to a change in (an element of) the Contractor's price

Following a change:

- the Base Price is reset to the price set as part of the last review
- ability for a further change to be requested after a further 3 month time period

Changes may be up or down.

FOCUSED PRICE ADJUSTMENT – WORKED EXAMPLE

If Base Price of £1.85 per litre for Diesel, tenderers submit their tenders on basis that value as measured by the index may increase or reduce from this over time

Assumes that 25% of Contract Price relates to diesel costs and this element is adjusted

After 4 months index price increases to £2.15 per litre

So element of Contract Price relating to diesel <u>increases</u> by 16.2% $(\frac{2.15 - 1.85}{1.85}\ x\ 100)$

After further 3 months price decreases to £1.50 per litre

So element of Contract Price relating to diesel <u>decreases</u> by 30.2% $(\frac{1.50 - 2.15}{2.15}\ x\ 100)$

FOCUSED PRICE ADJUSTMENT

Advantages

– Clearly identifies the risk that parties are concerned about

– To a certain extent shares risk, although really passes to Authority

– Transparent, all tenderers in same position

Challenges

– Identifying appropriate indexes that will match or approximate changes in costs

– Splitting the Contract Price in an appropriate segment for the indexes to apply to

SUPPLIER TERMINATION ON NOTICE

Option to let Contractor terminate on notice

Need to be careful with this commercially

Theory is to afford Contractor protection that they can get out of the contract if prices move against them

As Contracting Authority will need to conduct new procurement length of notice needs to facilitate this (may be significant)

New procurement may lead to increased prices

OPTIONS ONCE TENDERS RECEIVED

- Second Round of Tendering

- Collapse the Competition

SECOND ROUND OF TENDERING

In context of Open or Restricted Procedure

Ability of Contracting Authority to call for second round of tendering once bids received and evaluated

Nothing express in Regulations of Directive in relation to this

Limited UK case law

Danninger v Bus Atha cliath [2007] IEHC 29

DANNINGER V DUBLIN BUS (1)

Project for construction of new bus station

Rules of competition contained clear statement:

"*The Board reserves the right to request a best and final offer from one or more Tenderers.*"

Initial bids were received, then Dublin Bus invited "*best and final bid for the project*"

Danninger resubmitted their bid but didn't change price. Second placed tenderer in first competition increased bid and won

DANNINGER V DUBLIN BUS (2)

Paragraphs 44 & 45 judge recapped some of relevant case law at the time:

Resource Management Services v Westminister City Council *[1999] 2 C.M.L.R. 849*

- procedure of having a second round not condemned
- If second round procedure, equal treatment must clearly be applied

Advanced Totes Limited v. Bord na gCon and Autotote Worldwide Services Limited *[2004] IEHC 495*

- *"in relation to retendering on price, I have no doubt that parties who did tender could not have been prejudiced nor adversely affected"*

DANNINGER V DUBLIN BUS (3)

Paragraphs 46 to 48 judge refers to observations of Professor Sue Arrowsmith in her book The Law of Public Utilities Procurement

- The better view is that a second round of tendering is permitted

Court concluded:

Second tendering round was **not unlawful**, but emphasised safeguards:

- Need to flag possibility in initial tender document

- All Tenderers afforded equal opportunity

COLLAPSE PROCUREMENT

Generally courts recognise board discretion to abandon

Paragraph 12 of ***Amey Highways Ltd v West Sussex Council*** *[2019] EWHC 1291 (TCC).)* – summarises position

Can Contracting Authority collapse for Value for Money grounds?

Montpellier Estates Ltd v Leeds City Council *[2013] EWHC 166 (QB)*

MONTPELLIER ESTATES LTD V LEEDS CITY COUNCIL

Competitive Dialogue carried out in 2007 & 2008

Council developed a Plan B, as a Public Sector Comparator

Tenderers notified of this and told that:

- Would be assessed against the PSC;
- Council would then consider:
  - Continuation to full tender; or
  - Closing down the competition

MONTPELLIER ESTATES LTD V LEEDS CITY COUNCIL (2)

Judge's view was competition was fair and transparent

Paragraph 445, "…*LCC acted lawfully in deciding to abandon the tender exercise, having discovered that to award the contract on the basis of the advertised award criteria would not achieve value for money due to the level of public sector funding which it would need to make the project viable."*

Information provided sufficient, but at paragraph 442:

"*if the contracting authority delays informing the other party to the negotiations of its decision to abandon the procurement and has thus continued the pre-contract negotiations which it knew were bound to fail, that conduct could breach the principle of good faith and amount to the abuse of its right not to contract"*

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