

2020

Modifications: After contract placement, how do you rescue the situation if a modification is substantial but you can't change contractor for economic and technical reasons?

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Outline and context

- Direct negotiation as an alternative
 - Safe harbours for modification:
 - Non-substantial modification
 - Pre-agreed modification
 - Sub-threshold modification
 - Unforeseeable circumstances
 - Necessary additions
 - Housekeeping considerations

 - A word on context ...
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Is direct negotiation available as an alternative?

- Basic requirement for 'new procurement procedure' in case of any modification where the safe harbours under Regulation 72 are not applicable (Regulation 72(9))
 - However, note direct negotiation procedure envisaged by Regulation 32 (Regulation 33 in Scotland) in cases of:
 - Extreme urgency (Regulation 32/33(2)(c))
 - Additional supplies or installations (Regulation 32/33(5)(b))
 - Repetition of similar works or services (Regulation 32/33(9))
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Are the modifications actually substantial?

- Regulation 72(1)(e) and 72(8) – exhaustive list
 - Specified circumstances:
 - Materially different in character (paragraph (a))
 - Impact on original procurement procedure (paragraph (b))
 - Change to economic balance of contract (paragraph (c))
 - Extension of scope considerably (paragraph (d))
 - Change of contractor (paragraph (e))
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Does your contract provide for the modification?

- Regulation 72(1)(a)
 - Irrespective of monetary value
 - Requirements:
 - Provided in initial procurement documents
 - Clear, precise and unequivocal
 - Defined scope, nature and circumstances
 - Do not allow alteration to overall nature of contract
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Is the modification sufficiently low in value?

- Regulations 72(1)(f) and 72(5)
 - Valuation test:
 - \leq Regulation 5 threshold; and
 - \leq 10% initial contract value (supplies / services); OR
 - \leq 15% initial contract value (works)(NB applies to 'net cumulative value' of successive modifications)
 - Additional requirement as regards overall nature of contract
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Does the modification result from an unforeseeable event?

- Regulation 72(1)(c)
 - Cumulative test:
 - Circumstances a diligent contracting authority could not have foreseen
 - No alteration to overall nature of contract
 - Any price increase \leq 50% of value of original contract
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Does the modification involve necessary additions?

- Regulation 72(1)(b)
 - Additional works, services or supplies (not included in initial procurement) which have become necessary
 - Change of contractor:
 - cannot be made for economic / technical reasons; and
 - Would cause significant inconvenience / substantial cost duplication
 - Any price increase \leq 50% value of original contract
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What about housekeeping?

- Importance of good quality record-keeping for audit and legal purposes
 - Anti-avoidance rule in Regulation 72(2)(b) in relation to successive modifications
 - Notice requirements:
 - OJEU (or 'UK e-notification') notices in relation to 'unforeseeable circumstances' and 'necessary additions' safe harbours (Regulation 72(3))
 - Contract award notices required if Regulation 32/33 used as alternative
 - Consider use of VEAT notices as additional risk mitigation
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