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# White Paper Procurement Conference 2023

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## Variations

Is there a creative way of rescuing the situation if the contract value reaches and exceeds the threshold award notice, and you need to vary?

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# Content and Issues

## Possible scenarios

- During the procurement, the advertised figure turns out to be too low
- As above, but the increase moves it from below threshold to above threshold
- During the procurement, despite the estimate appearing to be correct, all bids received materially exceed the advertised value
- During the contract, the authority ends up spending more than the award value
- During the contract, the additional value moves the contract value from below threshold to above threshold
- Procurement Bill

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# Value increase during the procurement

- How might this happen?
  - Error
  - Failure to aggregate (for regular/recurring requirements)
  - Failure to include VAT
- Why might this be important?
  - “Breach” of procurement rules
  - Fails to connect to the market sector
- How do we fix it?
  - Is it material?
  - Issue a correction notice
  - Start again
- Commence a procedure if the increase moves it above threshold

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# Contract Variations

## Key Issues

- What is the risk?
- Regulation 72 - safe harbours
- Regulation 72 – substantial modification
- Case law
- Can it be justified (re-structured) as a *new contract* (instead of a variation) for which a direct award is possible?
- Mitigation measures

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## What is the risk?

- “A new procurement procedure in accordance with this Part shall be required for modifications of the provision of a public contract during its term other than those provided for in the regulation (Reg 72(9))
- In effect any variation not otherwise permitted amounts to a illegal direct award
- Remedy of ineffectiveness to apply to any contract varied

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# Regulation 72

## Safe harbours (1)

- Financial de minimis (Reg 72(5))
  - 10% supplies and services, 15% works; and
  - Value of increase is below the relevant threshold; and
  - Modification doesn't alter the overall nature of the contract
  - Above values are the net cumulative values of successive modifications
- Additional works, services or supplies that have become necessary (Reg 72(1)(b))
  - Change of contractor cannot be made for economic or technical reasons
  - Would cause significant inconvenience or duplication of costs
  - Any price increase does not exceed 50% of original contract value

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# Regulation 72

## Safe harbours (2)

- Unforeseen circumstances (Reg 72(1)(c))
  - Obligation of diligence on the authority
  - Does not alter the overall nature of the contract
  - Any price increase does not exceed 50% of original contract value
- Anticipated in the original procurement (Reg 72(1)(a))
  - Provided for in “clear, precise and unequivocal” review clauses
  - May include price revision clauses or options
  - Monetary value irrelevant
  - Review clause must state (1) the scope and nature of possible modifications or options and (2) the conditions under which they may be used
  - Must not alter the overall nature of the contract
- Contract modification notice to be published for Reg 72(1)(b) and (c) modifications

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## Regulation 72

### Substantial modifications

- Where the modifications, *irrespective of their value*, are not substantial (reg 72(1)(e))
- A modification *is* substantial where any of the following apply (Reg 72(8):
  - Renders the contract materially different
  - Would have potentially brought about a different procurement outcome if originally included
  - Changes economic balance in favour of the contractor
  - Extends the scope of the contract considerably
  - [New contractor replaces old contractor]

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## Relevant Case Law

- James Waste Management LLP v Essex County Council [2023] EWHC 1157
- Gottlieb v Winchester City Council [2015] EWHC 231
- Edenred v HM Treasury [2015] PTSR 1088

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# James Waste Management LLP v Essex County Council

## Key Points

- General observations on the safe harbours:
  - Require a narrow interpretation but not so narrow as to make them meaningless
  - Evidential burden remains on claimant not the authority
  - Council unable to make the justification under 72(1)(a) but not substantial anyway
- Substantial Modification - interpretation of 72(8):
  - “materially different” is an issue of fact but goes to the character and nature of the contract
  - “extends the scope considerably” – value of modification above threshold does not necessarily make it considerable
  - different procurement outcome
    - had to be a real prospect of another tenderer having won
    - To be assessed at the time of the award not the case (applying *Edenred* and *Gottlieb*)
  - “economic balance” – reasonable compensation for the modification does not change the economic balance

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# Gottlieb and Edenred cases

## Key issues

- Gottlieb
  - Different Procurement Outcome – not necessary to identify actual potential bidders
  - “materially different” – on the facts the component elements of the development scheme were quite different
  - Note the original procurement was not carried out in accordance with the relevant procurement rules
- Edenred
  - If scope is sufficiently broad In the first place there is no change
  - Whilst not very clear in this judgment, it must still be best to rely upon a clear precise and unequivocal review clause – 72(8) factors are not relevant if the review clause satisfies 72(1)(a)

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## Regulation 32

### Negotiated procedure without prior publication

- Additional deliveries (supplies only)
  - partial replacement or extension of existing supplies or installations
  - change of supplier would mean different characteristics causing incompatibility or disproportionate technical difficulties
- Repetition of similar works or services (not supplies)
  - Conformity to basic project originally procured
  - Original project must have flagged possible additional works and services and conditions under which they will be awarded
  - Option expires after 3 years from end of original project

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# Mitigation

- VEAT notice
  - Contains justification for award of contract
  - Expiry of 10 day period before contract entered
  - Protection from ineffectiveness claim
  - How do we reconcile a modification of contract (i.e. not a new contract) with a notice justifying the award of a contract?
- Contract award notice – reduces time limit to 30 days (from 6 months)
- Notification with reasons to economic operator (i.e. would be challenger) – reduces time limit to 30 days

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# Procurement Bill

- Simplification of what is “substantial”:
  - incorporates a 10% term increase or decrease
  - Retains economic balance provision
  - Changes overall nature of the contract or materially changes scope
- De minimis retained
- Introduces concept of a “convertible contract” – this clarifies that something which moves into scope of procurement by virtue of the change must be procured (unless permitted by the other permissions)
- Urgency and protection of life
- Unforeseeable circumstances
- Materialisation of a known risk

# Thank you

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