

# Changes

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# The question



- Drawing on recent and live cases, at what point does a minor contractual change become substantial?

Six categories of permitted modifications:

- Clear, precise and unequivocal review clauses (72(1)(a))
- Additional works – economic and technical reasons (72(1)(b))
- Unforeseeable modifications (72(1)(c))

- New contractor (72(1)(d))
- Modifications which are not substantial (72(1)(e) and (8))
- Minor modifications (72(1)(f) and (5))

## Relevance of value:

- Categories (a) and (e) are “irrespective of their monetary value”
- Categories (b) and (c) have a 50% test
- Minor modifications (category (f)) are defined by their value

# Substantial modifications



- The modification renders the contract materially different in character
- The modification introduces conditions which, if part of the initial procurement, would have:
  - Allowed for the admission of other candidates
  - Allowed for the acceptance of another tender
  - Attracted additional participants

- The modification changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the initial contract
- The modification extends the scope of the contract considerably
- A new contractor replaces the original in cases other than permitted in category (d)

# *Edenred (UK Group) Ltd v HM Treasury* [2015] UKSC 45



- Issue : whether modification extended scope of contract considerably
  
- Facts:
  - OJEU notice – range between 1.25bn and £2bn
  - Addition of £132.8m variation for B2B services.
  - Value in contract award notice - £660,000
  - Contract award notice stated NS&I intended to expand B2B service during lifetime of contract

- Held:
  - Modification not prohibited
  - Advertised procurement and related procurement documents envisaged the expansion of services, committed tenderer to undertake them and required it to have resources to do so
  - Court must look at OJEU notice and other procurement documents including contract in ITT to ascertain nature, scale and scope of contract

- Facts:
  - Contract for supply of global communications system and maintenance
  - Settlement due to performance difficulties (so no deliberate intent to renegotiate contract)
  - Contract size reduced from 527m DKK to 35m DKK plus lease to CA (worth 50m DKK)
  - Waiver of all rights by both parties

- Issues:
  - Was deliberate intention to renegotiate contract necessary?
  - Was the objectively unpredictable nature of performance of aspects of contract justification for amendment?
  - Was there a material variation?

- Held on deliberate intention:
  - Not a decisive factor
  - Whether material amendment must be analysed from an objective point of view

- Held on objective unpredictability:
  - Not unforeseeable
  - Therefore, for CA to take care when defining the subject matter of the contract and to include an amendment clause (i.e. clear, precise and unequivocal)

- Held on material variation:
  - Smaller contract may be of interest to smaller tenderers
  - Smaller contract may permit reduction in level of abilities required and, therefore, permit further tenderers to apply

# *R (Gottlieb) v Winchester City Council* [2015] EWHC 231



- The variations:
  - Change from bus station to stops/bays and retail space
  - Affordable housing – 35% (c.£6.5m contribution) to £1m plus a further possible clawback of £1m
  - Reduction in provision for civic uses
  - Addition of a site
  - More flexible terms for procuring construction of retail elements
  - Extension to long-stop date

- First 5 were material – individually and cumulatively
- The position was to be considered at the date of the original contract
- It was probable that other companies with the capacity, funding and expertise would have bid

- Each variation, if in place then, would have meant contract would have been of significantly greater commercial value to bidders
- Taken as a whole, contract would have been materially different in character

# Minor modifications



- Category (f):
  - The value of the modification is below the threshold AND
  - The value of the modification is below 10% of the initial contract value (service and supply contracts) and 15% (works contracts)
  - Provided that the modification does not alter the overall nature of the contract
- Where successive modifications are made, the value is the cumulative value of the successive modifications

# Clear, precise and unequivocal variation clauses



- Modifications provided for in clear, precise and unequivocal review clauses or options provided that:
- Clause states the scope and nature of possible modifications or options as well as conditions under which they may be used
- Clause does not provide for modifications or options that would alter the overall nature of the contract

Not clear, precise and unequivocal:

- *R (Law Society) v Legal Services Commission* [2007]
  - Power to amend from time to time if LSC considered it necessary to facilitate a reform of the legal aid scheme
  - General and unlimited powers of amendment, subject to some procedural conditions, do not satisfy the requirement of transparency
  - Power to re-write the contract

Not clear, precise and unequivocal:

- *R (Gottlieb) v Winchester City Council* [2015]
  - Council had absolute discretion to approve Required Elements and other listed types of amendment
  - Approval not to be unreasonably withheld
  - Contractor had to provide statement of the effect of the variation on projected rental income

### Held:

- No indication of what changes might or might not be accepted or on what basis
- Variation clause was so broad and unspecific that it did not meet the requirement of transparency
- Did not provide information tenderer would need to assess potential scope for variations
- At best, bidder would know that applications could be made to Council for variations and that effect of any variation on rental income would be a relevant factor

Was clear precise and unequivocal (obiter) – *Edenred*:

- SC “inclined to the view” that clause was clear, precise and unequivocal :
  - B2B opportunities confined to those within scope of OJEU notice
  - Profit margin restricted
  - Alteration of allocation of risk prohibited

- VEAT notice (ineffectiveness)
- Contract award notice
- Expiry of limitation period

- Reg. 99(3) and (4)
- Five requirements:
  - Name and contract details of CA
  - Description of object of contract
  - Justification of decision to award without OJEU notice
  - Name and contact details of winner
  - Where appropriate, any other information which CA considers it useful to include

*Fastweb* [2014] EUECJ C-19/13

- Justification must disclose clearly and unequivocally the CA's reasons for considering it legitimate to award the contract without prior publication of a contract notice, so that interested persons are able to decide with full knowledge of the relevant facts whether they consider it appropriate to bring an action
- Court must decide whether it acted diligently and whether it could legitimately hold the view that it could award without prior publication

- And finally some guidance – *Faraday Development Ltd v West Berkshire Council* [2018] EWCA Civ 2532
  
- Justification
  - Must be complete
  - Need not be elaborated at great length
  - Clear and unequivocal explanation of CA's reasons required
  - Enough relevant objective detail about the contract to enable a 3P to make a properly informed decision whether to start proceedings in short period allowed

- Object of the contract
  - “exempt land transaction” over-simplification, incorrect or at best misleading
  
- Justification
  - Undermined by mistaken understanding of object of contract
  - Unclear
  - Did not alert 3P to real nature of transaction
  - Nothing said about contingent obligations
  - In negative terms
  - No picture of contract as it truly is

# When does a variation become substantial?



- It's not a question of value but.....
- Beware of making too many changes
- Consider what was important in the procurement
- Consider what contract you started with, what contract you have ended up with
- Consider the impact on the market

# Final thoughts



- Take care with VEAT notice
- Think about limitation
- Think about an exit strategy
- Draft a clear, precise and unequivocal variation clause!