



DWF Law LLP

White Paper 2020: Substantial Contract Modifications

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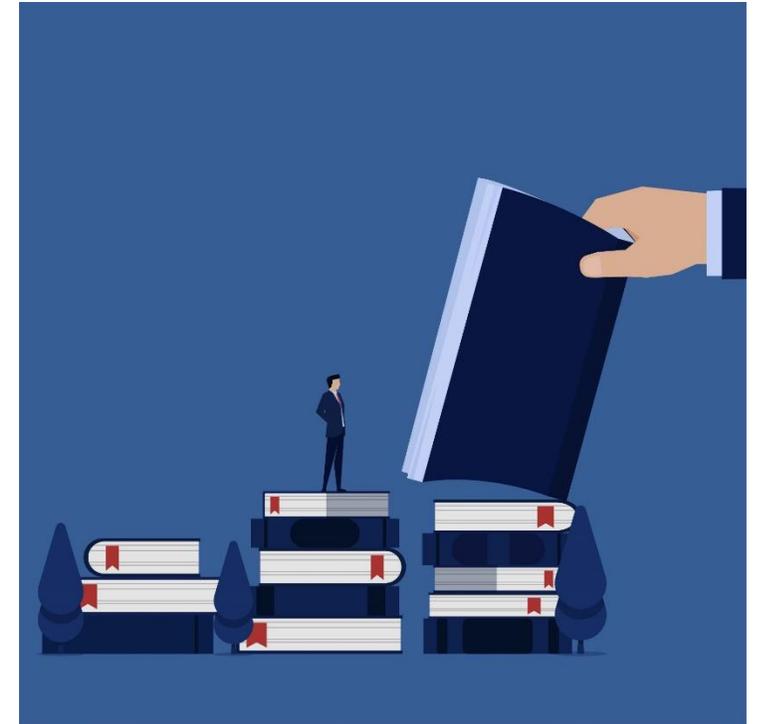
Question

“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?”



Starting point

- Regulation 72 Public Contracts Regulations 2015
- Six “safe harbours” of permitted modifications:
 1. Clear, precise and unequivocal review clauses – 72(1)(a)
 2. Additional necessary services, technical reasons, significant inconvenience and not over 50% of original contract value – 72(1)(b)
 3. Unforeseeable and not over 50% of original contract value – 72(1)(c)
 4. New contractor – contract or restructuring – 72(1)(d)
 5. Not substantial – 72(1)(e) and 72(8)
 6. Modification is below threshold and 10/15% of initial contract value – 72(1)(f)



Substantial modification

- Substantial modifications: one or more of the conditions in 72(8) is met:
 1. The modification renders the contract materially different in character
 2. 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; or
 - attracted additional participants
 3. 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
 4. The modification extends the scope of the contract considerably
 5. A new contractor replaces the original in cases other than provided for in the contract

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

Issue: whether a contract modification extended the scope of contract considerably

Facts

- OJEU notice – range between £1.25bn and £2bn
- Addition of £132.8m variation for B2B services
- Contract award notice stated NS&I intended to expand B2B service during lifetime of contract

- Edenred argued that the modification extended the scope considerably, changed the economic balance and would have allowed for admission of other candidates



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

Held

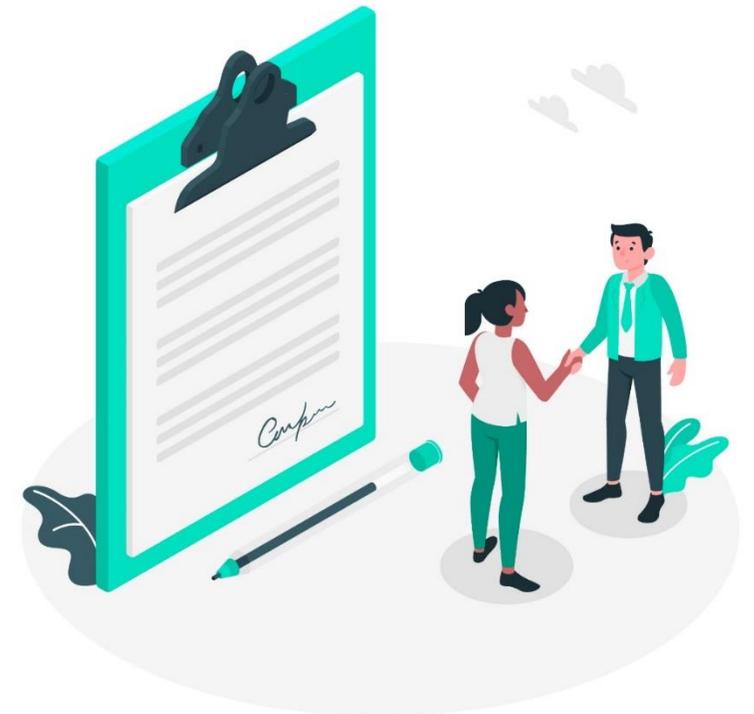
- Modification permitted
- Advertised procurement and related procurement documents envisaged the expansion of services, committed tenderer to undertake them and required it to have resources to do so
- Court must look at OJEU notice and other procurement documents including contract and ITT to ascertain nature, scale and scope of contract
- An extension of services does not extend the scope of the contract considerably if the OJEU notice provides for the expansion → “reasonable compass”



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

Facts

- Development Agreement
- 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



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

Held

- Changes 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
- Contract made more profitable for the developer → changed the economic balance
- Taken as a whole, contract would have been materially different in character



Finn Frogne [2016] EUECJ C-549/14

Facts

- Contract for supply and maintenance of a global communications system
- 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



Finn Frogne [2016] EUECJ C-549/14

Held

- Despite reduction in scope, the modifications were substantial
- CAs must take care when defining the subject matter of the contract and to include an amendment clause (i.e. clear, precise and unequivocal)
- 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



AEW Europe LLP v Basingstoke and Deane BC [2019] EWHC 2050 (TCC)



Facts

- OJEU notice advertised the Council's intention to procure a developer to regenerate Basingstoke Leisure Park located outside Basingstoke town centre
- Resultant development agreement covered a wider scheme with a greater scale of retail development
- Claimants did not participate in the procurement process but owned a separate retail facility in the centre of Basingstoke
- Claimants argued that the OJEU notice concerned development of a leisure facility and any retail development must be minor



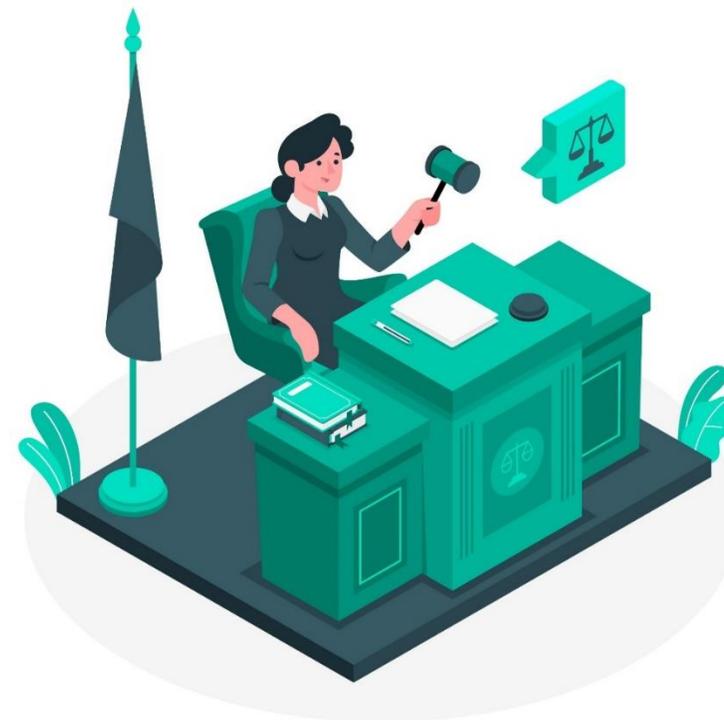
AEW Europe LLP v Basingstoke and Deane BC [2019] EWHC 2050 (TCC)

Held

- Regardless of the ultimate contract being broader in scope than that set out in the contract notice, a declaration of ineffectiveness was not available to the challenger because the notice was close enough to the contract awarded
- A lot of weight was put on the fact that a notice had been published and competition initiated as a result

Takeaway

- Whilst public bodies should always explore potential variations/additions to a project to "future-proof" a contract before initiating a procurement process, the Courts may take a pragmatic approach where increases in scope mirror the project set out in the contract notice.



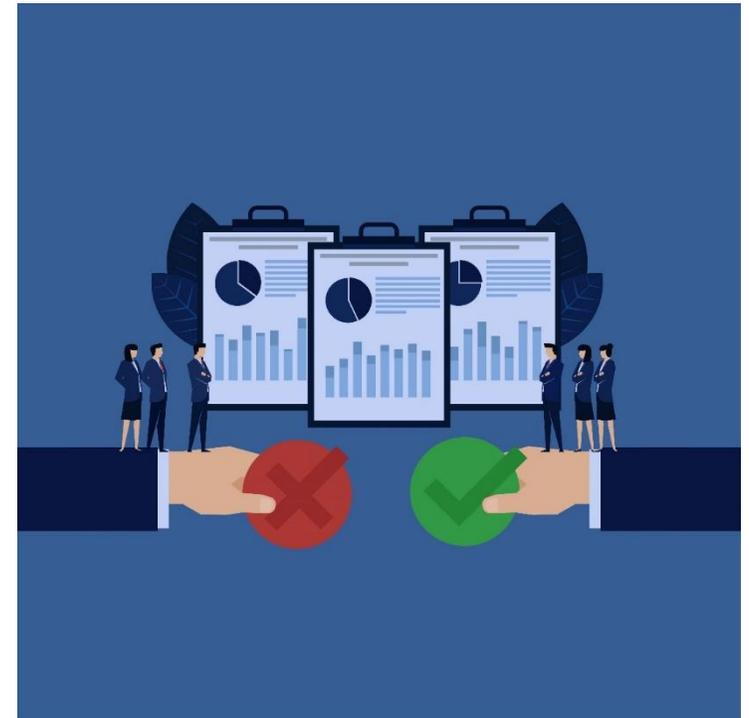
Mitigation measures at the outset – OJEU notice

OJEU Notice

Hooks to justify extension of similar services → include potential modifications in the notice in the Additional Information and Description of Procurement boxes

Estimated contract value in the OJEU notice → ensure this has sufficient range

Broadly drafted OJEU can assist



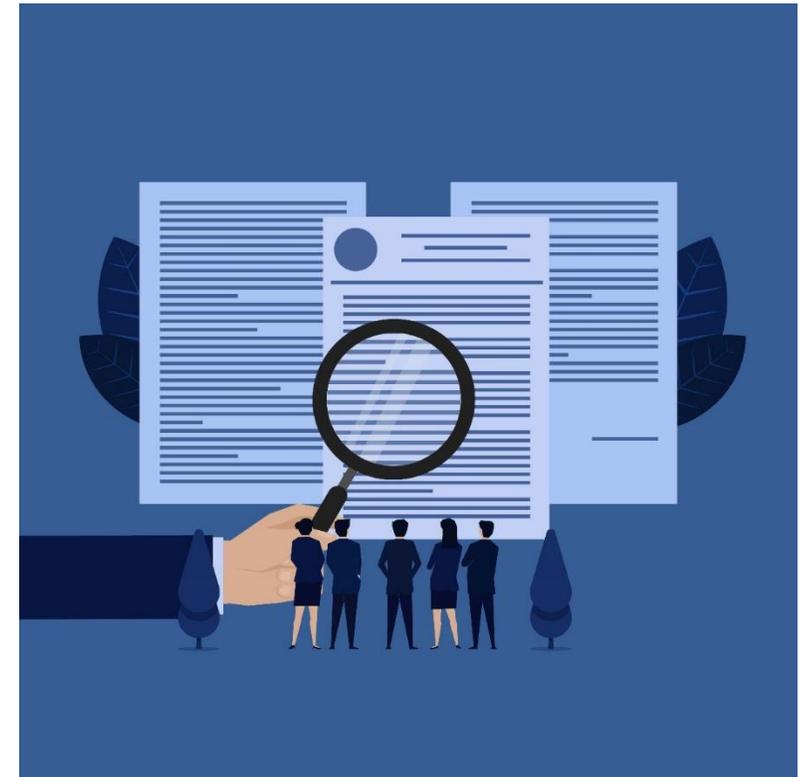
Mitigation measures at the outset - Contract

Contract

Variation provisions in the agreement → “clear, precise and unequivocal”; not general and unlimited powers of amendment (*R (Law Society) v Legal Services Commission* [2007])

Simple variation clause will not work: *R (Gottlieb) v Winchester City Council* (Council had absolute discretion to vary)

Pre-agreed pricing mechanism and describe types of additional services in the contract



Mitigation measures post-contract commencement – VEAT Notices

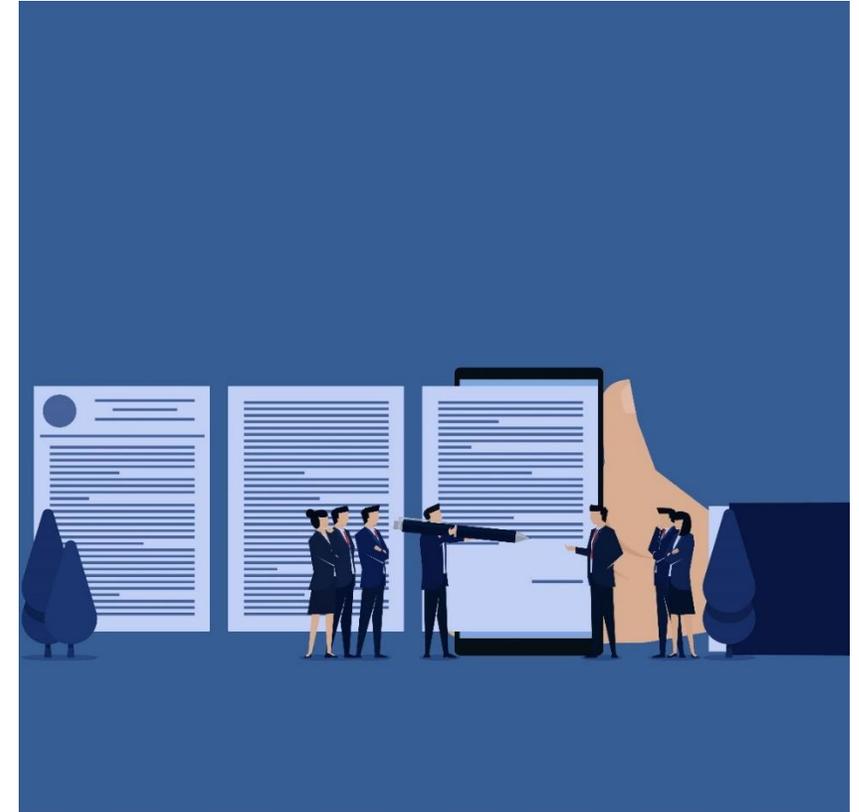
VEAT Notice

Contract award notice

Benefit = reduce limitation periods

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



Mitigation measures - Notices

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 CA acted diligently and whether it could legitimately hold the view that it could award without prior publication

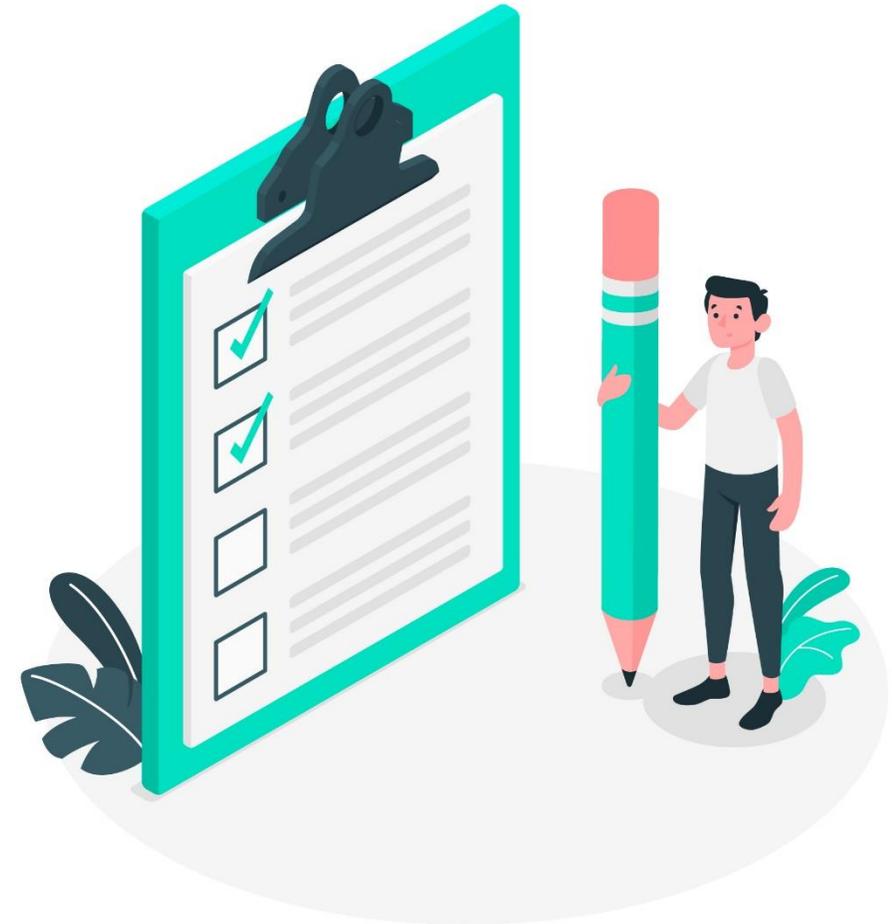
Faraday Development Ltd V West Berkshire Council [2018] EWCA Civ 2532

- Justification must be complete
- Need not be elaborated at great length → word limits in VEAT
- Clear and unequivocal explanation of CA's reasons required
- Enough relevant objective detail about the contract to enable a third party to make a properly informed decision whether to start proceedings in short period allowed

Mitigation measures – Internal audit note

- Issue in *Faraday* was that the notice did not alert the third party to the real nature of the transaction as it said nothing about the contingent obligations or the Council’s role on the Steering Group to approve works
- VEAT only valid if the justification details the “real nature of the transaction”

Internal audit notes documenting why action was taken may be useful in the event of any future challenge



Regulation 32 PCR 2015

Negotiated procedure without prior publication may be used in specific situations such as:

(b) works, supplies or services can be supplied **only** by a particular economic operator where:

- competition is absent for technical reasons; or
- protection of exclusive rights (e.g. IP rights)

and:

- there is no reasonable alternative or substitute; **and**
- the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement

(c) for reasons of **extreme urgency** brought about by unforeseeable events, the time limits for the open, restricted or competitive procedure with negotiation cannot be complied with

Other considerations and concluding advice

- Incorporate provisions in the OJEU notice → even if they do not make the contract they may assist in future
- Couple OJEU notice with clear, precise and unequivocal variation clauses → these can be at your discretion and do not need to be exercisable
- Consider whether the modification is actually substantial → get officers involved in justifying why it does not fall within 72(8).
- Context is important – at what point in the contract term? What market is it? → Risk of likelihood of challenge versus risk of successful challenge
- Limitation periods
- Exercise caution with use of VEATs and contract award notices
- Consider whether Regulation 32 applies
- COVID context may assist but note this is likely to change as time passes



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