

The case for contract extensions under Regulation 72 PCR 2015

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Contract extensions

- A form of contract modification.
- Can be the most simple type of modification – eg continuation of same mutual obligations over an additional period (eg services, supplies).
- Can involve extending contract delivery term (in cases of delay).

(The term ‘extension’ does not appear in reg 72.)

A policy tension at the heart of regulation 72?

Anti-modification

Competition: equality of opportunity, level playing field

Pro-modification

Efficiency, v.f.m., flexibility, protection of a discretionary space

Context: the award and post-award stages

- Directive 2004/18's focus: the award stage.
- But in Case C-454/06 *Pressetext* [2008] ECR I-4401 CJEU linked the two stages by drawing on the objectives of the procurement Directives (ie the promotion of equal treatment and transparency of procedures) to prohibit 'materially different' modifications during the post-award stage.
- Article 72 Directive 2014/24/ reg 72 PCR 2015 expressly addresses post-award modifications.

C-454/06 *Pressetext*: to what extent do the same principles apply pre and post-award?

- paragraph 34:

“In order to ensure the transparency of procedures and equal treatment of tenderers, amendments to the provisions of a public contract during the currency of the contract constitutes a new award of contract ... when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract.”

- lenient application of this approach in *Pressetext*.

Pressetext examples:

- which would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted [35]. (See *Gottlieb* [2015] EWHC (Admin), para 137; *Edenred* [2015] EWHC 90 (QB) paras 119-123, 132.)
- when it amends the scope of the contract considerably [*to encompass services not initially covered*] [36]. [*wording in square brackets not retained in Article 72/reg 72.*]
- when it changes the economic balance of the contract in favour of the contractor in a manner not provided for in the terms of the initial contract [37].

(See now reg 72(8) PCR 2015; Article 72(4) Directive 2014/24.)

Reg 72: a provision of 2 halves



permitted
modifications/ 'safe
harbours':
reg 72(1)(a)-(d), (5):

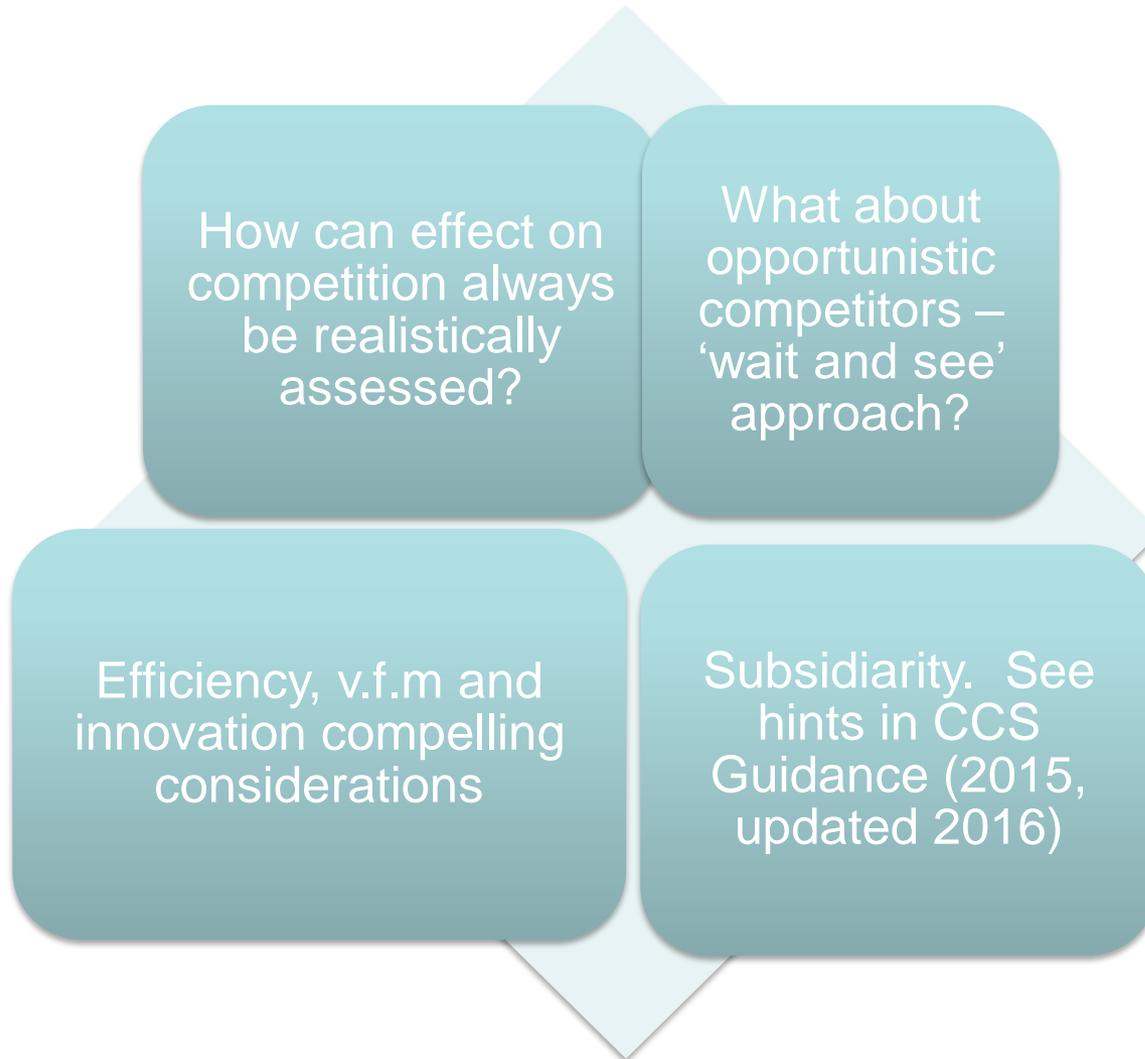


Prohibited
modifications – (ie
Presstetext):
reg 72(1)(e), (8)

+ve: the 'safe harbours'

- Cover (a) major changes in accordance with contractual/procurement documentation (b) additional requirements (c) unforeseen cases (c) minor changes (d) succession of contractor (Article 72(1)(a)-(d), (2)).
- More than an articulation of the *Presstext* examples. (Article 72(4)(a)-(d) apply 'without prejudice to' Article 72(1) and (2).)
- Reflect attenuated relevance of competition approach and a recognition of need and/or limited effect.

Post-award situation



So .. for major modifications: reg 72(1)(a)

- major modifications (‘irrespective of value’) may be made where provided for in contractual and procurement documentation in clear, precise and unequivocal review clauses – provided no change to overall nature of the contract.
- could potentially cover contract extensions? At what point would a contract extension change the overall nature of the contract? (Arguably well over 50%+).

.. additional requirements: reg 72(1)(b)

- recognises ‘significant inconvenience’ as a factor.
- NB the cumulative requirements that a change of contractor (i) is precluded for technical/economic reasons and (ii) would cause ‘significant inconvenience’/ ‘substantial duplication’ implies that technical/economic bar stops short of impossibility.
- as long as not aimed at circumventing the Directive and 50% limit (per modification); no prohibition on change to overall nature of the contract nor a requirement of foreseeability.
- application likely to be regulated by proportionality principle.

.. unforeseen cases: reg 72(1)(c)

- lenient approach to foreseeability (recital (109) - taking into account the authority's available means, the nature and characteristics of the specific project, good practice in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value).
- provided no change to overall nature of the contract and 50% limit (per modification): **reg 72(1)(c)**.
- application likely to be regulated by proportionality principle.
- need for OJEU notice.

.. *minor changes: reg 72(5)*

- applies (expressly) without the need to verify the *Pressetext* conditions, where value of modification is (a) below threshold and (b) <10% (services, supplies) <15% (works).
- subject to 50% limit (here, cumulative). (NB CCS Guide treats the 50% as applying only to (b).)
- even if above limit – may not be ‘material’ (reg 72(1)(e)).

Conclusion

- Article 72/ reg 72 has potentially expanded the possibility of contract extensions without re-tendering.
- NB proportionality and the need to evidence circumstances.
- Policy concern: tactical bidding.
- Increased prospect of upfront challenges?

Thank you for listening.

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