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Contract modifications

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- A contract modification will be lawful if within one of the safe harbours in reg. 72(1) or if there are grounds for using the negotiated procedure without publication (reg. 32).
 - A modification will be substantial and probably impermissible where (eg):
 - It changes the contract in a way which calls into question the original tender procedure – because, had that been the contract at the time of the procurement, other tenderers might have been admitted to the procedure or another tender would have been accepted (*Finn Frogne*, §28).
 - It transfers significant commercial risk from the contractor to the authority (eg *Bechtel*).
 - It increases contract value by an amount which is higher/considerably higher than the threshold for application of the PCR (C-160/08 *Commission v Germany*).
 - It renders a contract of significantly greater value than it appeared to bidders at the time of the original procurement, or which bidders could have predicted, even if the authority's financial position is unchanged (*Gottlieb*).

Some key principles (2)

- A modification will not considerably extend the scope of a contract, and so will not be substantial, where the additional services etc. were envisaged in the OJEU Notice or ITT and made possible by amendment provisions (*Edenred*, §38).
- A contractual review clause will only justify a modification where it contains “*specification of the scope and nature of possible modifications and the conditions under which they may be used*” (*Edenred*, § 44).
- A modification only has to be published where made pursuant to reg. 72(1)(b) and (c): see reg. 72(3).
- An unlawful modification is equivalent to a direct award, and can give rise to a declaration of ineffectiveness, as well as a power (or duty?) to terminate the contract pursuant to reg. 73.
- Changes to contractual terms during a tender process are judged on principles analogous to reg. 72 (eg *Bechtel*).
- But a declaration of ineffectiveness will only be available in very limited cases of pre-contract change (*AEW v Basingstoke BC*).

- What is a modification's permitted scope, value and period, where an extension has already been made to the original contract terms?
- Where two or more modifications are made, the 50% limitation on value increase in reg. 72(1)(b) and (c) applies separately to each modification.
- But for the *de minimis* “safe harbour” in reg. 72(5), the value of each modification is the “*net cumulative value of the successive modifications*” (reg. 72(6)).
- Apart from *de minimis*, an earlier lawful modification is a complete reset in all (or almost all?) cases.
- But what about an earlier unlawful modification? We are where we are? Or should the earlier modification be treated as void?

- Currently, lack of publicity before modification and poor prospects of a damages claim all but eliminate challenges by other economic operators.
- Judicial review challenges by other interested parties faced difficulties on standing (see *Gottlieb and Wylde v Waverley DC*).
- But litigation by the Good Law Project has clarified rules on standing, and make judicial review challenges more likely to get permission.
- Following the *Contracts Publication* case ([2021] EWHC 346 (Admin)):
 - It is not a pre-condition of standing that a claimant has been or would be affected in some identifiable way by a contract modification.
 - The Court will consider (i) the gravity of the alleged breach, (ii) whether a public law remedy should be available in addition to the private law remedies in the PCR, and (iii) whether the claimant is seeking to use the public procurement regime for a purpose for which it was not created.

- In *Public First* ([2021] EWHC 1569 (TCC)), Good Law Project had standing to challenge a direct award because:
 - It had a sincere interest in promoting lawful conduct and no ulterior motive.
 - The claim was “*not one that an economic operator can realistically be relied on to bring*”.
 - The gravity of the issues raised justified the scrutiny of the Court.
- Applying that approach to contract modifications:
 - A local councillor like Mr Gottlieb or a local pressure group may also have a “sincere interest” in observance of the PCR and no ulterior motive.
 - An economic operator claim could face serious obstacles.
 - An unlawful modification is equivalent to a direct award, which is the most serious breach of procurement law.

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- It is proposed that the reg. 72 safe harbours will be extended by addition of an extreme urgency ground (presumably without this having to be unforeseeable, as in reg. 72(1)(c)).
 - The definition of “substantial” modification will be re-ordered and re-worded.
 - There will be a new requirement for publication of a “contract amendment notice” and a standstill period (save only where modification is *de minimis* or on extreme urgency grounds).
 - The contract amendment notice will effectively replace the VEAT notice for contract modification and will significantly change the current landscape for modification challenges

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