

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?

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Contract Modification

What constitutes a substantial modification?

“Substantial Modification”

- Substantial Modification – Regulation 72(8)/88(7)
 - A modification is substantial where:
 1. It renders the contract materially different in character from the one initially concluded
 2. It would have allowed for the admission of other candidates, the acceptance of another tender or attracted additional participants to the tender process
 3. It changes the economic balance of the contract in favour of the contractor in a manner not originally provided for
 4. It extends the scope of the contract considerably
 5. A replacement contractor is appointed (except where otherwise permitted by the relevant Regulations)

Permissible Grounds



- Generally = substantial modification = new tender
UNLESS it falls into one of the permissible grounds:
 1. Change provided for in documents in “clear precise and unequivocal review” clause(s) (and the nature of the contract is not changed)
 2. Additional works where a change in contractor is not possible for economic/technical reasons(*)
 3. Need for change is due to unforeseen circumstances and the nature of the contract is not changed (*)
 4. Replacement of contractor (under a review clause or due to succession into the original contractor’s position)
 5. Not “substantial” change
 6. Safe harbour (value of the change is below threshold and 10% (services and supplies) and 15% (works) of contract value)

The Economic/Technical Ground

Regulation 72(1)(b)/ Regulation 88(1)(b)


“72/88 - (1)(b) Contracts and framework agreements may be modified without a new procurement procedure for additional works, services or supplies by the original contractor that have become necessary and were not included in the initial procurement, where a change of contractor—

- (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement, and (*)*

- (ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority/utility,*

provided that any increase in price does not exceed 50% of the value of the original contract ()”*

'Necessary'

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- *“Additional works, services or supplies by the original contractor that have become necessary”*
 - ‘Necessary’ is undefined
 - When completion of original contract would be unfeasible or materially burdensome for the contractor and/or the contracting authority/utility
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- Regulation 72(1)(b)(i)/Regulation 88(1)(b)(i)
 - *“requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement”*
- What constitutes an economic or technical reason will be examined on a case-by-case basis
 - Commission v Italy (C-385/02) [2004]

‘Economic or Technical Reasons’



- [Commission v Italy \(C-199/85\) \[1987\]](#)
 - It is insufficient to demonstrate that a particular provider can produce the most efficient performance, rather it is required to show that only that provider can produce what is required
- [Commission v Germany \(C-275/08\) \[2009\]](#)
 - A contracting authority (or utility) must research the market at an European level in a significant way to determine whether any other suitable provider exists
- [Commission v Greece \(C-394/02\) \[2005\]](#)
 - The mere fact of inviting other providers to negotiate or participate in a process will not be conclusive of whether other qualified providers exist

‘Significant Inconvenience’ and ‘Substantial Duplication of Costs’



- Pertains to the costs and technical difficulties related to the substitution of the present contractor
 - Does not relate to the necessity of conducting another award procedure
- Overlap between ‘substantial duplication of costs’ and ‘economic reasons’?
- Exceptions are generally strictly interpreted by the courts

The Economic/Technical Ground

The modification notice



- **Modification Notice – Regulation 72(3)/88(2)**
 - A modification notice **MUST** be published in OJEU when relying on this ground
- **The modification notice MUST, as a minimum, set out:**
 - a) the “nature and extend of the modifications being made”;
 - b) the reasons for the modification (including specifically a “description of the economic or technical reasons and the inconvenience or duplication of cost preventing a change of contractor”
 - c) details of any change in contract value.


The Risks of Getting it Wrong



- Risk of challenge
- Risk of declaration of ineffectiveness
- Other approaches?

The Economic/Technical Ground

Minimising the need for reliance on this ground



Minimising the Need for Contract Modification



- Reliance on this ground for modifying a contract should not be commonplace.
- Consider the use of other exemptions and pre-plan where possible...
- Need for increased use of review clauses



Thank You

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