Changes to existing contracts under the public procurement rules

The information you need to know

Introduction
The purpose of this article is to examine the law governing circumstances in which a public authority can make changes lawfully to an existing public sector contract. The first step is to look at the EU public procurement directives and implementing regulations which establish the legal framework governing the award of public contracts falling within the scope of the public procurement rules. Directive 2004/18/EC (the ‘Public Sector Directive’) deals with the procurement procedures for the award of public works contracts, public supply contracts and public service contracts.

Changes to existing contracts
The particular issue we are looking at for contracting authorities is whether changes to a public sector contract constitute a “new contract”, which would require a new tender process to be undertaken. The decision of the European Court of Justice (‘ECJ’) in the seminal Pressetexte case (Case C-454/06) established that any changes which make a “material difference in character” to an existing procured contract should be subject to a new procurement process.

Materially different changes were held by the ECJ to be those that:
• introduce conditions which, had they been part of the initial award procedure, 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
• extend the scope of the contract considerably to encompass services not initially covered
• change the economic balance in favour of the contractor in a manner not provided for in the contract.

In determining whether a change is material, therefore, it is relevant to consider the monetary value of the proposed change and the scope of the changes compared to those originally tendered. If the possibility of changes to a contract are highlighted before tenders are received, then they may be permitted provided those changes do not materially affect the scope of the tender and they are applied in an objective way. Clear and unambiguous change provisions are key in this regard.

The ECJ also stated in this case that price is an important condition of a public contract and changes to it may constitute a breach of the EU public procurement rules. Such changes “mid-contract” should therefore be carefully considered. Minor price adjustments to accommodate changed external factors such as exchange rates or the Consumer Price Index are probably not material changes and are generally permitted.

Though a change to an existing contract may be caught within the scope of the Pressetexte criteria for material difference, it may nonetheless be permissible to proceed without having to re-tender the contract if one of the exemptions under the directives applies. The Public Sector Directive permits the award of a contract for additional supplies and services by negotiation without prior advertisement in certain limited circumstances, but as this is a derogation from general principles of Community law, it is strictly interpreted.
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This approach was confirmed in the recent case of Commission v Greece (Case C-601/10). The relevant exemption under scrutiny in this case was the “additional services” exemption, under article 31(4)(a) of the Public Works Directive. This article allows for the use of the negotiated procedure without the prior publication of a contract notice for additional services not included in the original arrangements but which have, through unforeseen circumstances, become necessary for the performance of the original services, on condition that the award is made to the economic operator performing such services:

- when such additional services cannot be technically or economically separated from the original contract without major inconvenience to the contracting authorities; or
- when such services, although separable from the performance of the original contract, are strictly necessary for its completion; and
- in either case, on condition that the aggregate value of contracts awarded for additional services does not exceed 50% of the amount of the original contract.

The Court ruled that derogations from the rules governing public service contracts had to be interpreted strictly, and the burden of proving the existence of exceptional circumstances justifying a derogation lies with the person seeking to rely on those circumstances.

Future developments

In December 2011, the European Commission adopted its proposals on public procurement. These proposals are part of an overall programme aimed at an in-depth modernisation of public procurement in the European Union.

The proposed new Public Sector Directive provides that a substantial modification of the provisions of a public contract during its term shall be considered as a new award for the purposes of the Directive and shall require a new procurement procedure. A modification shall be considered substantial where it renders the contract substantially different from the one initially concluded.

Contract modifications are not considered substantial where they have been provided for in the procurement documents in clear, precise and unequivocal review clauses or options. It is envisaged that the new regime will be implemented by mid 2014.

Conclusion

In light of the strict approach taken by the ECJ to derogations from the general principles of public procurement as set out in the directives and the case law, the prudent course for public authorities to take is to clearly set out change provisions in public contracts and to signal expected or possible changes in the tender documents is such possibilities are known at the time of the tender process. While changes to contracts awarded may often be necessary due to the economic climate and other considerations, such changes should be closely scrutinised to determine whether a fresh tender process needs to be undertaken. Of course, the text of the awarded contract must also allow for changes or variations and a method of calculation the time, scope and monetary changes in a clear and transparent manner.

Key contact

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