Briefing

Procurement

BURGES SALMON

February 2015

Contract change under the Public Contracts Regulations 2015

As we announced on 6 February, the new Public Contracts Regulations 2015 are due to come into effect on 26 February and will introduce a number of changes and clarifications to existing procurement law.

This briefing looks at one important aspect of the new Regulations: the codification and evolution of law on material changes to public contracts.

Material Change: Back to Basics

It is an established principle of procurement law that it is not permissible to make a material change to a public contract without a new competition. If a material change is made without a new competition and a challenge is brought, the contracting authority may be ordered to pay damages or fines or the contract may be shortened or declared ineffective. However, in practical terms there is difficulty in identifying clear boundaries as to when a change is material and when it is not. The new Regulations attempt to address this.

Material Change: New Regulations

In the new Regulations there are five grounds that provide examples of when a change will not be material. In addition, even if none of the five grounds are satisfied, there is a safe harbour, which may still allow a change to be permitted without a new competition.

Material Change: New Regulations

Approach in New Directive:

Five grounds which are definitely not "material" + **One catch-all safe harbour**

So, in what circumstances will a change be permitted under the new Regulations?

Ground 1: Change is provided for in the initial procurement documents in clear, precise and unequivocal clauses (such as price revision clauses or options).

It should be noted that overarching contract change provisions will not satisfy this requirement, as such clauses are general in nature and not specific to a particular change in a particular circumstance. Authorities and contractors should consider during a procurement process whether it is appropriate to anticipate changes and draft review clauses accordingly to give them the flexibility they need during the term of a contract.

Ground 2: Additional work is necessary and changing the contractor would involve significant inconvenience or duplication of cost and would not be practicable for economic or technical reasons.

Here, the challenge will be in identifying what constitutes "significant inconvenience" and what the threshold will be in terms of practicability for economic or technical reasons. In any case, no change can be greater than 50% of the original value of the contract.

Ground 3: Contract change is needed for unforeseeable circumstances, provided the nature of the contract is unaltered and the price increase is less than 50% of the original contract value.

In assessing whether a change is foreseeable, one will need to assess whether the relevant circumstances were foreseeable, having regard to the knowledge of the relevant market, at the time that the contract was entered into.

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Ground 4: A new contractor may replace the existing contractor if, for example, an express clause allows for that or in the event of a takeover/restructuring.

It will be interesting to note how the interpretation of the 4th ground develops with case law. For example, we do not believe it would be permissable for contract novation clauses to provide an unfettered right for contactors to cherry-pick public contracts that they have not competed for as a means of avoiding the procurement rules.

Ground 5: Modifications are not substantial, based on changes to the scope of the contract and the changes in the economic balance of the contract. In other words, the existing test for material change established by the case of Pressetext.

Historically, the application of the Pressetext test proved difficult when trying to establish clear thresholds of what is material and what is not. The 5th ground, by its nature, retains the same uncertainty.

General "safe harbour"
If none of the five grounds above are satisfied, the safe harbour may apply. A change will not be material if:

The value of the change is within the relevant threshold value (i.e. for services and supplies, less than £172,514 for all contacting authorities other than central government, where the threshold is £111,676; and £4.32m for works contracts); **and**

The value of the change is not greater than 10% of contract value (15% for works contracts).

The very low values provided for by the safe harbour mean that use of the safe harbour is expected to be relatively infrequent.

Better on balance?

The Regulations go further than simply codifying the existing case law in relation to material change. Instead, we see an evolution of the rules, which are now based on structured rules rather than an overall assessment. Whilst welcome clarity is provided in certain areas, as can be seen above, uncertainties remain and clarification through case law will be welcomed.

Contacts

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