



## INTRODUCTION

In a world where change is the only constant, public sector contracts often find themselves in the whirlwind of modifications, and adaptations. From unforeseen circumstances like financial challenges and the recent pandemic to extensions in contract periods and evolving demands, contracts rarely escape unscathed. However, determining which changes can be made without triggering a fresh procurement exercise has been a subject of scrutiny and legal interpretation. Join us as we delve into the captivating realm of contract modifications and explore the recent legal landscape that has shed light on what truly belongs in the bin.

## BACKGROUND TO MATERIAL CHANGE

Centuries after the Greek philosopher Heraclitus proclaimed the inevitability of change, the landmark ECJ case C-454/06 Presstext Nachrichtenagentur GmbH v Republik Österreich (2008) thrust the issue of contract variations into the spotlight. As a reminder, the case emphasised the importance of transparency and equal treatment of suppliers, leading to the codification of its principles in the European Public Procurement Directive 2014/24 and subsequent implementation under Regulation 72, Public Contracts Regulations 2015 (PCR15). This provided helpful clarification for practitioners and helped contracting authorities to navigate the path in determining the lawfulness of contract modifications. The dreaded consequences being the exposure to the declaration of ineffectiveness, fines and termination, if successfully challenged in Court.

## NAVIGATING SAFE HARBOURS

Within the labyrinth of Regulation 72 PCR15 (popularly referenced as “safe harbours”) emerged as permissible circumstances for contract modifications:

- changes are expressly provided for in the original procurement documents with clear, precise, and unequivocal review clauses (Reg 72 (1)(a));
- changes are necessitated by economic or technical reasons and would cause significant inconvenience, provided the increase does not exceed 50% of the original contract value (Reg 72 (1)(b));



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- changes arising from unforeseen circumstances that a diligent contracting authority could not have foreseen, without altering the overall nature of the contract, and where the price increase remains below 50% of the original contract value (Reg 72 (1)(c));
- contractor replacement due to review clauses or as a consequence of corporate restructuring (Reg 72 (1)(d));
- where the changes, irrespective of their value, are not 'substantial' within the meaning of Reg 72(8), (Reg 72 (1) (e)); and
- "De minimis" exception where the value of the modification value falls below the relevant financial thresholds (Reg 72 (1)(f)).

## THE CASE OF JAMES WASTE MANAGEMENT LLP V ESSEX COUNTY COUNCIL

Despite contract variations being a regular occurrence for many public sector contracts, caselaw on the use and interpretation of Reg 72 PCR15 has been relatively rare since it came into effect over 8 years ago. This has all changed following the recent High Court decision in James Waste Management LLP (JW) v Essex County Council [2023] EWHC 1157 (TCC) which has ignited a spark of clarity. This case examined whether a modification to the Council's integrated waste handling contract constituted a substantial and unlawful change. Let's unravel the intricacies of this case and the key takeaways it offers.

The facts relating to JW's complaint are rather complex and not easy to digest from the lengthy 53 page judgment. In outline, the Council acting as a Waste Disposal Authority entered into an Integrated Waste Handling Contract (IWHC) with Veolia ES (UK) Ltd in 2013 following a competitive dialogue procedure.

This required Veolia to manage up to 21 recycling centres for household waste, the Council's 5 Waste Transfer Stations (WTS) and the haulage of waste to various treatment and disposal points, including landfill sites.

To allow time for Basildon, Castle Point and Rochford District Councils (BCPR), which were district Waste Collection Authorities to complete their own separate haulage and transport procurement, the Council issued an Authorised Change Request (ACR) in June 2021 to make an in term modification of the IWHC. This required Veolia, for a limited period of 5 months, to operate a new Waste Transfer Site (operated by a sub-contractor and not part of the original 5 WTS), process the waste and then transport processed waste to an alternative landfill site in Bellhouse, Essex. The ACR provided a gate fee per tonne for processing the waste and the payment of the agreed IWHC rate per mile, relating to haulage services for a minimum guaranteed coverage of 38 miles.

JW claimed that the contractual modification to the IWHC constituted a "substantial" modification under Reg 72(1) (e) PCR15, as it made the IWHC materially different in character, introduced conditions which would have allowed for the acceptance of different bidders or winner had it been the basis of the original tender, changed the economic balance of the contract and extended the scope. They further claimed that the modification was not permitted under Reg 72(1)(a) PCR15. On a different matter, the Council was also in breach of the procurement principles under Reg 18 PCR15, when it awarded a call off contract to Enovert that required processing of waste delivered to the landfill site at Bellhouse.

## COURT DECISION

The court examined the grounds under Regulation 72(8) of the Public Contracts Regulations 2015 (PCR15) to determine whether the modification was material. The court's decision provided valuable insights into the interpretation and application of these grounds. Here are the key points from the court's ruling:

- **Materially Different in Character**

The court concluded that the modification did not fundamentally alter the nature of the contract. The addition of the new WTS did not change the overall character of the contract, as it was a short term addition and did not introduce new services.

- **Acceptance of a tender other than that originally accepted**

The court considered whether a different contractor would have won the original tender if the modification had been applied from the outset. While the scores of the bidders in the original tender were close, the court did not find that another contractor winning the tender was a realistic prospect.

- **Change of Economic Balance**

The court determined that the modification did not tip the economic balance of the contract in favour of the contractor. The overall context of the contract and the specific commercial arrangements were taken into account, and the modification was considered reasonable compensation.

- **Extended Scope**

The court found that the extended coverage of the services was not considerable in the overall scheme of the contract. The increase in the contract's value and scope was relatively insignificant compared to the total contract value.

Additionally, the court examined whether the modification was within the provisions of Regulation 72(1)(a), which allows for modifications specified in the contract. The court ruled that the modification was not covered by the change mechanism provision in the contract, as the specific procedure for activation had not been followed.

## WAS THE CALL OFF MADE IN COMPLIANCE WITH PROCUREMENT PRINCIPLES (REG 18)?

JW argued that the call off had not been compliantly awarded, as it was reserved for waste from a specific Mechanical Biological Treatment facility when that facility was operating. However, as the facility was not in use (this was a failed PFI contract subject to a previous trial), the waste did not come from the facility, and this prevented the call off from being awarded under Lot 1. The judge rejected this argument and stated that as it was not operating, the scope of Lot 1 was wider than the receipt of waste from the facility. It should be noted here that JW were providing services to the Council under Lot 4 between June 2020 and 2021, which included the processing and onward disposal of the BCPR waste and this had been a lucrative deal for the claimant.

## KEY TAKEAWAYS

The key takeaways from the judgment in this case regarding the operation of Regulation 72 of the Public Contracts Regulations 2015 (PCR15) are as follows:

- The six gateways in Regulation 72, which were previously referred to as "safe harbours," should be interpreted narrowly because they represent exceptions to the general rule that material changes require a fresh procurement process under Regulation 72(9).
- Contracting authorities have the choice of which gateway to invoke, and the burden of proof lies with the potential claimant to establish, on the balance of probabilities, that the gateway relied upon does not apply.
- The financial thresholds mentioned in Regulation 72(1)(f) (10/15%) are specific to that particular gateway and do not affect the meaning of the term "considerable" in the context of the gateway under Regulation 72(1)(e). This means that certain "above threshold" changes may be permitted in specific cases where the change in price is minimal compared to the overall contract value.
- When determining whether the contract value has materially increased, the relevant date for making a comparative analysis is the date of the modification.

## CHANGES TO CONTRACTS – WHAT GOES IN THE BIN?

- Contracting authorities are advised to retain the original tender evaluation and moderation records (Regulation 84 report) and maintain an audit trail of the reasons and justifications for relying on a particular gateway. This documentation can be useful in the event of a future challenge.
- Careful attention should be given to drafting review clauses to ensure they remain available under Regulation 72(1)(a) when required. The judge emphasised that if parties want to rely on a change control clause, not only must the scope of the change be clearly defined, the procedural requirements must also be strictly followed. Failure to comply may render the clause ineffective.
- In some cases, a modification may involve minor alterations to the originally agreed pricing scheme in a contract. Parties should consider the overall impact and take into account any valid reasons when assessing whether the economic balance of the contract has changed.

While this decision is welcomed, it highlights the practical challenges of implementing contractual changes during the term of a contract. Seeking specific legal advice at the earliest opportunity can help ensure compliance with the narrow gateways and minimise the risk of challenges.

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