# Practical procurement tips in light of the changing landscape brought about by COVID-19

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# Modifications to existing contracts

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# Why?

- In light of Covid-19:
  - Uncertainty as to financial position
  - Uncertainty as to legislative position, **Brexit!**
  - Market depressed, best value likely to be achieved?
  - **Conclusion:** want to avoid a procurement exercise

# Regulation 72

- Six permitted categories/safe harbours
  - Category 1: amendment clauses
  - Category 2: economic and technical reasons
  - Category 3: unforeseen changes
  - Category 4: new contractor
  - Category 5: “insubstantial” modifications
  - Category 6: minor modifications

# "Major" changes

- Two scenarios:
  - Additional works, services or supplies *"have become necessary"* and a change of supplier would not be practicable (for economic, technical or inoperability reasons) and would *involve substantial inconvenience/duplication of costs* (**reg 72(1)(b)**)
  - Need for change could not have been foreseen by a "diligent" contracting authority (**reg 72(1)(c)**)
  - Both limited to up to 50% of price of original contract
  - Latter, changes should not alter nature of contract
  - Require a publication notice (**reg 72(3), (4)**)

# “Minor” changes

- **Reg 72(1)(f), (5)**
- Not affect the nature of the contract
- Does not exceed relevant threshold
- Does not exceed 10% (services/supplies)
- Does not exceed 15% (works) of initial value of contract

# “Insubstantial” variations

- Reg 72(1)(e):
  - Modifications, irrespective of their value, are not substantial within the meaning of sub-paragraph 8

- Reg 72(8): one of the following:
  - Renders the contract materially different in character from the one initially concluded
  - Introduces conditions which, had they been part of the initial procurement procedure, would have (i) allowed for the admission of other candidates than those initially selected (ii) allowed for the acceptance of a tender other than that originally accepted or (iii) attracted additional participants in the procurement procedure

# “Insubstantial” variations (2)

- Reg 72(8): one of the following (continued):
  - Changes the economic balance of the contract in a manner which was not provided for in the initial contract
  - Extends the scope of the contract considerably
  - New contractor replaces the original in cases other than permitted in category 4

# Amendment clauses

Reg 72(1)(a):

- Modifications, irrespective of their monetary value, which are provided for in clear, precise and unequivocal review clauses or options provided:

  - Clause states the scope and nature of possible modifications or options as well as conditions under which they may be used
  - Clause does not provide for modifications or options that would alter the overall nature of the contract

# Edenred (UK Group) Limited v. HM Treasury

[2015] EWHC 90, Andrews J
[2015] EWCA Civ. 326, CA
[2015] PTSR 1088, SC

- Facts
- Variation proposed: term of 5 years, value of £132.8m

- Edenred's arguments

  - Allowing admission of other candidates
  - Changed the economic balance of the contract
  - Extending the scope of the contract considerably

# Edenred (2)

- **Courts' conclusions:**
  - The proposed variation would not have widened the range of potential bidders beyond those who expressed an interest in the first place. Edenred would not have bid by itself as it had insufficient resources **(Andrews J at [119-123, 132], CA at [87-89])**
  - Did not alter the economic balance of the contract **(Andrews J at [133-139])**
  - Did not extend the scope "considerably" as within the scope of the services that were advertised for tender and awarded in the original contract **(Andrews J at [104]-[118], CA at [76]-[77], SC at [35-38])**

# Edenred: Supreme Court

Lord Hodge JSC:

- Extension of services does not extend scope of the contract considerably if the advertised initial contract and related procurement documents envisaged such expansion, committed the economic operator to undertake it and required it to have the resources to do so
- “Were it otherwise, it is difficult to see how a Government department or other public body could outsource services that were essential to support its own operations and accommodate the occurrence of events and the changes of policy that are part of public life”
- There could be cases where the authority has designed a contract as a means to avoid its obligations under EU law
- But here -the scale and nature of NS&I’s aspirations “appear to be within a reasonable compass”

# Gottlieb v. Winchester City Council

- [2015] EWHC 231 (Admin)
- Development agreement
- Contrast with Edenred

- Variations were “substantial”, because proposed changes:
  - provided significantly greater commercial value to potential bidders
  - made the contract more profitable for the developer

# Finn Frogne

- **Facts**
  - Contract entered into for the supply and maintenance of a communications system , c€70m
  - Agreed settlement reducing scope of contract, now c€12m, waived all other rights
  - Danish court ruled unsurprisingly that that change was a substantial modification

# Finn Frogne (2)

- **Conclusion:**
- Unless the terms of the settlement, agreed between a CA and supplier who are embroiled in a commercial dispute over a public contract, fall within reg 72 or reg 32 PCR 2015, then possible that the terms of the settlement constitute an unlawful modification of the original contract

# Finn Frogne (3)

- Implications:
  - "substantial" modification may be one where the amendment reduces the scope of the contract
  - Intention of the parties to the contract irrelevant
  - But may be saved by the possibility of making such amendments in the original contract, but must clauses be clear, precise and unequivocal

# Amendment clauses

- Gottlieb:

- Terms of the clause: absolute discretion *"without any indication of what changes might be accepted or on what basis"*

- Variation clause was: *"so broad and unspecific that it did not meet the requirement of transparency.... It did not provide the information which an economic operator would need in order to assess the potential scope of variations when tendering..... At best, a potential bidder would only know that applications could be made to the Council for variations and that the effect or any variation on rental income would be a relevant factor"*

# Amendment clauses (2)

- Edenred

- Four key issues in Regulation 72(1)(a):

  – Value irrelevant
  – Modifications must be in initial procurement documents
  – Degree of specificity of clause
  – Cannot alter overall nature of contract

# Amendment clauses (3)

- Degree of specificity is the most significant restriction
- Here: restrictions which (a) confined opportunities to scope of OJEU notice and (b) set out principles, including restricting increase in profit margin and prohibiting alteration of allocation of risk
- Inclined to view that *"these restrictions, in their contractual context were sufficiently defined"* to meet Reg 72(1)(a)
- Examples in Recital 111 not exclusive but may indicate the general nature of modifications envisaged
- Nature of clause not "acte clair" –but not necessary to decide

# Clear, precise, unequivocal clauses

- DO:

- Tie into scope in OJEU notice
- Have pre-agreed pricing mechanism
- State that risk/profit balance won't change
- Make sure within a "reasonable compass"
- Ensure that the maximum estimated value of the contract is sufficient to accommodate additional services
- Describe the additional services/length of agreement and that review clause will only be effective to incorporate the services/extension
- Select bidders on basis of standards for performing a contract of the value/scope including the additional services

# Clear, precise, unequivocal clauses (2)

- DO NOT:

- Rely on absolute discretion
- Or broad and unspecific clauses which do not provide the information which an economic operator would need in order to assess the potential scope for variations when tendering
- Use the words “material” or “substantial” in the clause
- Have unnecessary mandatory or essential requirements

# Abandoning existing procurements without contract award

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# Roadmap

1. Circumstances in which abandonment may be of interest to contracting authorities
2. Alternatives to abandonment
3. Amey Highways Limited v West Sussex County Council [2019] EWHC 1291 (TCC)
4. Ryhurst Ltd v Whittington Health NHS Trust [2020] EWHC 448 (TCC)

# Abandonment: where relevant?

- Extant procurement exercises for purchases or services that have seen a sudden drop in demand which is unlikely to recover soon
- Re-allocation of tight budgets to emergency spending on other areas in light of Covid-19
- Pause on procurement where it is expedient to start afresh in a few months or more (e.g. anticipating shifts in pricing

# Alternatives to abandonment

- Variation - **addressed by Parishil**
- Call-offs from framework agreements or dynamic purchasing systems (DPS).
- Key prerequisites for call-offs:
  - (1) Prior identification as a permitted customer;
  - (2) Compliance with the original scope of the contract, framework agreement or DPS;
  - (3) Procurement was PCR 2015 compliant originally;
  - (4) Adequacy of existing terms.

# *Amey Highways Limited v West Sussex County Council* [2019] EWHC 1291 (TCC)

Stuart-Smith J

# *Amey* – Facts (1)

- Amey brought a claim for damages against the local authority
- Alleged breaches of the authority's duties under the PCR in respect of a procurement exercise for award of 10-year highways service contract awarded to Ringway
- Amey had scored only fractionally lower than Ringway – it argued that, but for errors in scoring, it would have won

# *Amey* – Facts (2)

- In light of claim no.1, the local authority did not award the contract but instead decided to abandon the procurement process and start again
- Amey brought a second claim challenging the lawfulness of the decision to abandon the first procurement exercise
- Claim no.2 tried at same time as preliminary issues in damages claim concerning effect of abandonment decision (claim no.1)

# *Amey* – Summary of principles on lawful abandonment

- A contracting authority has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and thus in any decision to abandon a procurement: [12](a)
- The exercise of that discretion is not limited to exceptional cases or has necessarily to be based on serious grounds: [12](b)

# *Amey* – Summary of principles on lawful abandonment

- The decision to abandon is subject to fundamental rules of EU law, i.e. rationality, equal treatment (including reason-giving) and transparency: [12](d)-(e),(g)
- It is not enough to merely examine whether the decision to abandon was ‘arbitrary’: [12](f)
- Potential triggers: (1) changes in the economic context or factual circumstances or (2) the needs of the contracting authority: [12](h)

# *Amey* – Factual analysis (1)

- On the facts, Stuart-Smith J concluded:
  - After taking into planned savings and benefits of the proposed Ringway contract, the Council decided that "contracting with Ringway and pursuing the Amey litigation to a conclusion was **an unpalatable risk**": [41](ii)
  - The key Council officials "hoped and intended" that abandoning the procurement would have the effect of terminating claim no.1, **but did not believe that abandonment "was bound to have that effect":** [41](iii)

# *Amey* – Factual analysis (2)

- There was "**no other rationale that was driving the decision to abandon the Procurement**": [41](v)
- The chosen route, i.e. not contracting with its preferred tenderer and not achieving the anticipated savings, was a "**means to an end rather than the end itself**": [42]

# Conclusions in *Amey*

- It is **wrong that a procurement can only engage public law principles and remedies**; nothing in the PCR has that effect: [57]-[58]
- Irrespective of a concurrent public law claim, a damages claim for breach of the PCR is essentially a private law claim upon completion of cause of action, subject only to *Francovich* conditions: [11]
- A lawful abandonment may prevent private law claims from coming into existence thereafter; it **does not extinguish an accrued cause of action on the part of an economic operator:** [60]-[62]

# Conclusions in *Amey*

- Abandonment decision had **no effect on claim no.1**, if Amey establishes that damages claim: [79]
- Brief application of principles at [12] in deciding on question of *lawful* abandonment at [80]-[89]:
  - Abandonment decision **not** irrational; it was 'a rational attempt to preserve public funds': [83]
  - All bidders were equally placed without any binding commitments, so no breach of equal treatment: [85]
  - No lack of transparency: [86]
- Amey **permitted to proceed** with claim no.1: [89]

# Points to take away – (1)

- Do not look at abandonment in a vacuum – contracting authorities should **consider carefully any accrued rights**, which will survive that step; i.e. timing is crucial (irrespective of Covid-19)
- The level of scrutiny as to whether a decision to abandon was ***lawful*** is modest, though **not limited to arbitrariness** (arguably harder to attack in many emergency situations arising from Covid-19)
- See the helpful summary in *Amey* at [12]

# Points to take away – (2)

- Best practice to document the reasons for abandoning a procurement clearly and contemporaneously to avoid fact-sensitive disputes like in *Amey*
  - more challenging given time and resource pressures resulting from Covid-19;
  - but a vital step to curb costs and litigation risk

# Ryhurst Ltd v Whittington Health NHS Trust [2020] EWHC 448 (TCC)

## HHJ Stephen Davies

# *Ryhurst* – Facts (1)

- Ryhurst was a specialist provider of health estate management services
- Part of a group which included a company responsible for supply and installation of cladding at the Grenfell Tower
- June 2016 – the Trust had begun a procurement exercise for a 10-year strategic estates partnership (SEP) contract

# *Ryhurst* – Facts (2)

- October 2017 – the Trust decided to award the contract to Ryhurst
- June 2018 – decision to abandon the procurement; reasons:
  - improved financial position;
  - strengthened relations with other partner organisations;
  - risk of insufficient stakeholder engagement; and
  - need for approval from the Trust's regulator

# *Ryhurst* – Facts (3)

- Ryhurst claimed the real reason for the decision to abandon the procurement was pressure from local campaign groups, MPs and others due to the Grenfell connection
- Claim for breach of duties owed under the PCR 2015, seeking damages for losses

# *Ryhurst* – Guidance on principles

- Summary of principles on abandonment in *Amey* at [12] cited with approval: [20]
- **Key issue in *Ryhurst* – identity of bidder:**
  - Held that "a public authority may decide to abandon a procurement by reference to reasons connected with the individual circumstances of the tenderer concerned", **but** subject to "fundamental principles of EU procurement law": [25]

# *Ryhurst* – Transparency

- On transparency obligation (see [32]):
  - Ryhurst would have to establish that, had the Trust not breached the transparency obligation, it would either on the BOP have entered into the SEP or, alternatively, not have wasted further time and expenditure while the Trust was in breach of its transparency obligation

# *Ryhurst* – Equal treatment

- Submission that it was sufficient for *Ryhurst* to show that it had a characteristic that no other bidder had, i.e. Grenfell connection rejected by HHJ Davies at [38]-[45]
- No need to always apply a two-stage analysis without room for consideration of objective justification at stage (1), i.e. comparable situations must not be treated differently: [41]

# *Ryhurst* – Equal treatment

- To challenge abandonment, Ryhurst must go further and show it was "**manifestly erroneous or irrational or disproportionate or not objectively justified**": [44]
- Non-discrimination principle does not add anything to equal treatment principle: [45]

# *Ryhurst* - Proportionality

- HHJ Davies rejected submission that proportionality principle did not apply because Ryhurst had no legal right to be awarded a contract by the Trust
  - "the decision to abandon must be proportionate to the reasons given by the Trust for its decision to abandon, albeit allowing the Trust a proper margin of appreciation in making that decision": [51]

# *Ryhurst* – Manifest error and relevant considerations?

- Two key points on manifest error ([54]):
  - Contracting authorities have a margin of appreciation as regards manifest error
  - Broad equivalence between manifest error and *Wednesbury* unreasonableness in UK law.
- Relevant considerations principles from public law **do not usually apply to damages claims in procurement context** ([55]-[65])

# Conclusions in *Ryhurst* – (1)

- The Trust had established a significant change in its financial position in June 2018 compared with June 2016; that was ‘a genuine and a principal reason’ for abandonment: [219]
- Strengthening relations with other partner organisations would not have been a sufficient reason in itself, but the Trust was reasonably entitled to and did consider it “as supporting the decision to abandon”: [231]

# Conclusions in *Ryhurst* – (2)

- The Trust was **not** obliged to put out of its mind the fact that there was a lack of stakeholder support **simply because one of the reasons, or even the principal reason, for that was the Grenfell connection**: [247]
- Accordingly, no breach of equal treatment, non-discrimination, proportionality or avoiding manifest error obligations on the Trust: [247]

# Points to take away

- General guidance in *Amey* at [12] remains a helpful starting point; *Ryhurst* provides more detail on EU procurement law principles in abandonment context
- Politically sensitive issues (i.e. Grenfell) are not necessarily impermissible; best to see how and why they are relevant to the success of the subject-matter of the procurement
- No special Covid-19 principles as yet

# Strike outs and other pre trial issues: post MSI Defence Systems

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# What we will cover

1. The case: *MSI Defence Systems v Secretary of State for Defence* [2020] EWHC 164 (TCC)
2. Strike out applications: tactical considerations.
3. Themes from *MSI*

# *MSI Defence Systems v Secretary of State for Defence* [2020] EWHC 164 (TCC)

- Provision of repair and support services for 30mm naval gun systems for 5 years with option to extend for another 5 years
- Not a PCR claim
- Under the Defence and Security Public Contracts Regulations 2011
- Rewound process mid way through
- Multiple amendments to the claim
- Still negotiating confidentiality ring after 10 months

# Strike out

1. The summary judgment variant: [5]-[6]
   - CPR 24.2(a) and CPR 3.4(a)
   - unless plain and obvious on the face of the POC and bound to fail, strike out should be used "sparingly" (*Liconic AG v UK Biocentre Limited* [2014] 8 WLUK 116 at [4].

2. The abuse of process variant [7]
   - CPR 3.4(b)
   - Relied on proportionality

# The procurement dilemma

[8] It is one of the recurring difficulties in procurement cases that claimants **often have partial and inadequate information**, a difficulty that is heightened **by short and relatively inflexible periods within which to bring a claim in time**. While recognising that difficulty, it does not relieve the pleader of the obligation to comply with normal principles of pleading: if anything it emphasises the need for skill and judgment to be exercised so as to achieve compliance.

# The key paragraph of the pleading

On the basis of the limited information available so far to the Claimant, it is averred that the Defendant has acted in breach of its duties to the Claimant under the Regulations and general EU Treaty principles, including the principles of equal treatment, transparency, non-discrimination, proportionality and/or good administration, made manifest errors, and/or acted irrationally and/or otherwise in breach of its public law duties as follows.“

# Judgment of Stuart Smith J

- Key paragraph was "*inelegant*" but not inappropriate [55];
- "inappropriate" to have pleaded evidence as to why C's solution was allegedly better. Not concise and evidence rather than pleading
- However,
  - Not fanciful
  - Not an abuse
- [88] "the way forwards"

# Strike out in procurement cases: tactical considerations

1. The temptation of a quick disposal
2. The chicken and egg nature of disclosure / amended pleadings
3. Preparing for a full hearing is expensive
4. Nervousness around confidentiality
5. What if it is not successful?

   - see *Liconic*?

   - What happened in this case

# Themes from *MSI* (1)

**1. TCC (very) active case management**

– Early CMH

- TCC Guide App H [21] says “may”
- read as “is extremely likely to”

– List of issues to be agreed and filed early

- May even be ordered before disclosure

– Judge’s focus on getting to trial

- even though common to settle

# Themes from *MSI* (2)

**2. Early confidentiality ring and early disclosure**

- TCC Guide Appendix H [7] and [24]-[26]
- *Roche Diagnostics Limited v the Mid Yorkshire Hospitals NHS Trust* [2013] EWHC 933

3. **Sympathy to amendment applications**

- Can pose difficulties / expense with disclosure

# Themes from MSI (3)

## 4. Front loading of prep

## 5. What about JR permission?

– Automatic transfer to TCC (Guide at [12]-[20])

– Similar approach to CPR 3.4 (a). Different to typical CPR Part 54 approach in Admin Court.

# 2. Will this lead to more, not less, inter partes correspondence?

# Q&A session

# THE END

**Thank you for your attention.**

If you have any questions

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