

## Legal Updates & News

### Bulletins

---

## UK Public Procurement Law Digest: Varying Existing Contracts

January 2009

by [Alistair Maughan](#), [Masayuki Negishi](#)

#### Related Practices:

- [Government Contracts](#)
- [Sourcing](#)

### Sourcing Update, 8 January 2009

#### Contract Variations and Amendments: what scope is there to amend an existing contract before a new contract (and competition) becomes necessary?

Most contracting authorities are well aware that there is limited scope to amend a contract previously awarded under the EU public procurement regime. It is generally accepted that whatever scope does exist depends upon the degree of flexibility built into the original Official Journal (OJEU) notice and other initiating documents. By structuring their procurements carefully, many contracting authorities reserve rights to extend the duration of an awarded contract or extend its scope to cover other advertised services.

It is also well known that certain types of material change to the scope of an existing contract, such as the addition of new services or extensions to the awarded term, which were not previously described in the procurement scope, will normally have to be put to a new competitive tendering procedure.

However, it is not clear how other less immediately obvious changes (such as changes to the pricing or contract terms and conditions) to an existing contract should be treated. In a recent landmark case, the European Court of Justice for the first time has provided guidance on this key issue. Contracting authorities and suppliers alike ought to consider this as a welcome clarification. But the possible downside of the decision is that it limits authorities' flexibility and makes contract re-negotiation more problematic, because some contract changes previously felt to be permissible may now be ruled off-limits.

#### What is the case?

The case of *presstext Nachrichtenagentur GmbH v Republik Österreich (Bund) and others (Case C-454/06)*, a decision of the European Court of Justice ("ECJ"), arose from a claim brought by presstext Nachrichtenagentur ("PN"), a news agency that unsuccessfully sought to offer its services to the Austrian government. PN alleged that the various amendments made to the contract between the Austrian government and its incumbent provider of news agency service provider, the Austria Presse Agentur ("APA"), constituted an unlawful award of contract contrary to the EU procurement rules.

#### Why is this case/development important?

The decision of the ECJ in this case provides helpful clarification of the extent to which changes can be made to an existing public sector contract without initiating a new competitive tendering process.

Neither the EU public procurement regulations nor the UK implementing regulations set out express rules on when a proposed amendment to an existing public contract, in fact, constitutes an award of a new contract to which the open advertising and tender rules ought to apply. But, as a matter of general principle, the ECJ has now stated clearly that where changes are proposed to an existing contract, and those proposed changes result in a contract that is materially different in character from the original contract such as to demonstrate the intention of the parties to re-negotiate the essential terms of that contract, the contracting authority should initiate a new tender process in compliance with the EU procurement rules.

The ECJ has also provided guidance on what constitutes a material amendment and when a proposed contract “variation” ought, in fact, to be dealt with by way of a new contract procurement exercise. The key part of the ECJ ruling is that a change to an existing contract would constitute a “material difference” where:

- the change to be introduced into the contract conditions, had it been part of the initial tender, “*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*”; or
- the change would result in the scope of the original contract being extended “*considerably to encompass services not initially covered*”; or
- the change would result in a shift in “*the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract*”.

To some extent, one might say that these three grounds are sensible, and accord with principles of fairness and transparency. After all, if a change is sufficiently minor that it would not have made a difference to the original award decision, or would not give significant advantage to the incumbent supplier, it would be disproportionate to treat that change as giving rise to a requirement to initiate a new competitive tendering process.

The first two elements of this test are largely unremarkable because most sensible contracting authorities have used these sorts of tests for many years to determine the legitimate scope for extension of existing contracts.

But the third test – relating to the shift in economic balance – potentially covers new ground and raises the possibility that contract changes previously regarded as being entirely within the ordinary course of dealings in the contract management phase might now be prohibited. Authorities must now be on their guard to ensure that significant contract changes are not made to existing contracts without first checking whether the proposed change is so material that it is impermissible, and in fact would require a new procurement process.

### What happened in this case?

In 1994, prior to the accession of Austria to the EU, the Austrian government entered into an agreement with APA, a cooperative that historically provided various news agency services to the Austrian government and to which almost all of Austria’s media outlets belonged.

The agreement allowed the federal authorities of Austria to issue press releases via APA, access and use current information provided by APA, and access APA’s database of historical information and past press releases. Among other things, the agreement had the following features:

- the agreement was concluded for an indefinite period, with a waiver by both parties of their right to terminate the agreement until 31 December 1999;
  - the services charges under the agreement included:
    - an annual charge, which related to the use of editorial articles and media archives; and
- a usage charge based on per-minute unit price, which related to the use of online inquiries and which was described as “*a price corresponding to the lowest graduated consumer price of the official tariff... less 15%*”;
- the charges were subject to indexation based on the consumer price index (“CPI”) for 1986, or the relevant replacement index.

In 2000, APA established a wholly-owned subsidiary, APA-OTS (which took the form of a limited liability company), and entered into a contract with APA-OTS, whereby APA-OTS was bound to pass its annual profits back to APA and to follow the instructions given by APA in managing its business, whilst APA was contractually bound to make good any annual losses incurred by APA-OTS.

APA subsequently transferred to APA-OTS the operation of some of the services previously provided directly by APA under the 1994 agreement. The Austrian government was duly notified, and assurances were given that there would be no change in the overall service performed, and that APA was jointly and severally liable with APA-OTS. The Austrian government agreed to the transfer, and thereafter directed its payments to APA-OTS.

Following the introduction of APA-OTS, APA and the Austrian government entered into a supplemental agreement in 2001, amending the original agreement as follows:

- the annual charge was adjusted to reflect the conversion of Austrian Schilling into Euro, and the converted figure was rounded up to give a discount of 0.3%;

- the per-minute unit price used in calculating the usage charge was adjusted to reflect the conversion of Austrian Schilling into Euro;
- the basis of indexation was changed from the CPI for 1986 to the CPI for 1996; and
- the indexation mechanism was to be disregarded for 2002 - 2004, resulting in an effective price discount for that service equal to 2.94% for 2002 and 1.47% for 2003.

Subsequently, an additional supplemental agreement was signed in 2005, which further amended the original agreement as follows:

- the waiver of the right to terminate the agreement was renewed until December 2008; and
- the 15% rebate originally given in respect of the usage charge based on per-minute unit price for online inquiries was increased to 25%.

In 2004, PN, a relatively new entrant to the Austrian news agency market, unsuccessfully sought to offer its own news agency services to the Austrian government. Having failed to secure a contract with the Austrian government, PN subsequently brought legal proceedings against the Austrian government, APA, and APA-OTS, contending, among other things, that the changes made to the original agreement, including the introduction of APA-OTS as well as the two supplemental agreements signed in 2001 and 2005, constituted unlawful de facto award of contracts.

Directive 92/50/EEC on Public Services Contracts (now replaced by Directive 2004/18/EC – the prevailing EU procurement directive upon which the UK Public Sector Contracts Regulations 2006 is based) provided, among other things, that “*In awarding public service contracts or in organizing design contests, contracting authorities shall apply procedures adapted to the provisions of this Directive*” (Article 3(1)). The Austrian Court asked the ECJ for a ruling on whether or not the changes made to the original agreement amounted to a new “award” of contract for the purposes of Directive 92/50/EEC.

Having reviewed its previous judgments, the ECJ noted that as a general principle, amendments to an existing contract constitute an award of new public contract for the purposes of Directive 92/50/EEC when the amended contract is “*materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to re-negotiate the essential terms of that contract*”.

As noted above, the ECJ proceeded to set out three tests for when a change to an existing contract might constitute a “material difference”, *i.e.*, where the change:

- if included from the start would have allowed other bidders to bid, or might have changed the eventual award decision; or
- would result in the scope of the original contract being extended considerably to encompass services not initially covered; or
- would result in a shift in the economic balance of the contract in favour of the contractor.

The ECJ then considered the facts of the case, and concluded as follows:

**A)** The introduction of APA-OTS into the arrangement between the Austrian government and APA was essentially the result of an internal reorganisation of APA that did not modify the original agreement in any fundamental way, particularly in light of the fact that APA retained significant control over APA-OTS, as well as the fact that APA was jointly and severally liable with APA-OTS, so long as the control of APA-OTS remained with the APA.

Here, it should be noted that the ECJ specifically held that the fact that there was no guarantee that APA’s control over APA-OTS would not in the future be transferred to a third party, was irrelevant to the question of whether or not there was a new award of contract, although the ECJ did point out that different considerations may apply at the point in time when the transfer of control to a third party did occur in this type of situation. This raises the spectre that, in future, a “change in control” of a supplier under an awarded public contract might constitute an event that triggers a re-procurement.

**B)** Those changes to contract price that were made purely as a result of the conversion of the stipulated currency into Euros did not materially change the original agreement, because that change was only an adjustment resulting from an external change in circumstances.

**C)** While other changes to prices (such as changes resulting from rounding-off of the converted prices or the disapplication of indexation mechanism) could give rise to a new award of contract, this was not the case here, as the changes to the CPI were in keeping with the stipulation in the original contract to keep

the indexation provision up-to-date, while the effect of rounding-off or price-fixing in this particular case was minimal. In any event, the changes were all to the detriment of the supplier, APA, which effectively consented to a reduction in prices.

**D)** While an indefinite contract term could potentially be incompatible with the principles of EU law by impeding competition and hindering the application of the public procurement rules, there was nothing in EU law that specifically prohibited the conclusion of public service contracts for an indefinite period. Likewise, there was nothing that automatically outlawed an undertaking not to terminate for a given period where the contract was concluded for an indefinite period.

Even if the Austrian government had intended to terminate the agreement and put it out for a tender, the period of waiver (three years) envisaged in the second supplemental agreement had not been excessively long so as to prevent the Austrian government from making the necessary arrangements to terminate the contract and go to the market. Therefore, the second waiver that applied from 2005 to 2008 could not have been construed as a material change to the original agreement.

## Conclusion

This case offers helpful guidance on what variations may – or may not – be permissible to existing contracts. Authorities will have to pay closer attention to changes made as part of contract management.

Obviously, much depends upon the circumstances of each case but, based upon the facts of this case, it is also possible to identify various types of changes that are less likely to constitute a material change and thus necessitate a new tender process:

- transfer of a contract from the incumbent supplier to a new supplier due to a corporate re-structuring or reorganisation of the incumbent supplier;
- changes to the financial terms of an existing contract that result from stipulations in the original agreement, such as the updating of consumer prices index to be used in the indexation of service charges;
- changes to the financial terms of an existing contract that are necessary as a result of external circumstances, such as the need to change the stipulated currencies into Euros;
- changes to the financial terms of an existing contract that are to the detriment of the incumbent supplier, such as changes that result in the contracting authority receiving a discount; or
- waiver of the right to terminate an existing contract, where the existing contract was initially entered into for an indefinite period.

*For a copy of Morrison & Foerster's consolidated digest of recent cases and decisions affecting UK public procurement law, please click [here](#).*