Renegotiation of public (procurement) contracts: An EU law perspective

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Conflicts/dilemma/problem

- Objectives of procurement law:
  - Value *for* money (national)
  - *through* competition (vehicle)
  - and *through* transparency (vehicle),
  - *ensuring* non-discrimination (EU),
  - *ensuring* market-access (EU)...

- Real life:
  - *Long* contract management phase,
  - during which many things can *change*
  - that can not always be *foreseen* before award/conclusion.

- **Solution**: *re*-negotiate or *re*-tender?
Modifications: *Pressetext ECJ*

- Amendments to a public contract *only* constitute a *new award* when they are *materially different* from the original contract and demonstrate the *intention* of the parties to *renegotiate* the essential terms of that contract.

- Renegotiation *v. modification*. 

An amendment may be regarded as material when:

- (a) it introduces 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 for the acceptance of a tender other than the one initially accepted;
- (b) it extends the contract's scope to encompass services not initially covered. Or
- (c) it changes the economic balance in favour of the contractor in a manner not provided for in the initial contract.
Contracting authorities should, in the individual contracts themselves, have the possibility to provide for modifications to a contract by way of review clauses, but such clauses should not give them unlimited discretion. This directive should therefore set out to what extent modifications may be provided for in the initial contract.
“Modification of contracts during their term

1. A **substantial** modification of the provisions of a public contract during its term shall be considered as a **new award** for the purposes of this Directive and shall **require a new procurement procedure** in accordance with this Directive.”
Art. 71(1) 2014/24: „substantial“

“A modification of a contract during its term shall be considered substantial [...], where it renders the contract substantially different from the one initially concluded. In any case, [...], a modification shall be considered substantial where one of the following conditions is met: [...]

“(a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the selection of other candidates than those initially selected or would have allowed for awarding the contract to another tenderer;

(b) the modification changes the economic balance of the contract in favour of the contractor;

(c) the modification extends the scope of the contract considerably to encompass supplies, services or works not initially covered.”
Thank you!

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