



EMEA Conferences

NEW EU DIRECTIVES CONCERNING PUBLIC PROCUREMENT TRANPOSED INTO ROMANIAN LAW STARTING MAY 2016

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Law . Tax

Modifications without new procurement procedures



Overview



- I. Introduction
- II. Presetext case and other case law
- III. Article 72 Directive 2014/24 - Modifications without new procurement procedures



Introduction

Introduction

- Public procurement legislation originally focused on the award phase
 - BUT: performance of the contract can render the procurement phase meaningless; For example:
 - the term of delivery is an award criterion;
 - There are two tenderers (A and B);
 - the contract is finally awarded to A, because of A's short delivery term;
 - B's delivery term was longer;
 - If, during the performance of the contract, A cannot meet its delivery term, B's bid was possibly better, and should have won.
- => The award phase and the contract performance are equally important

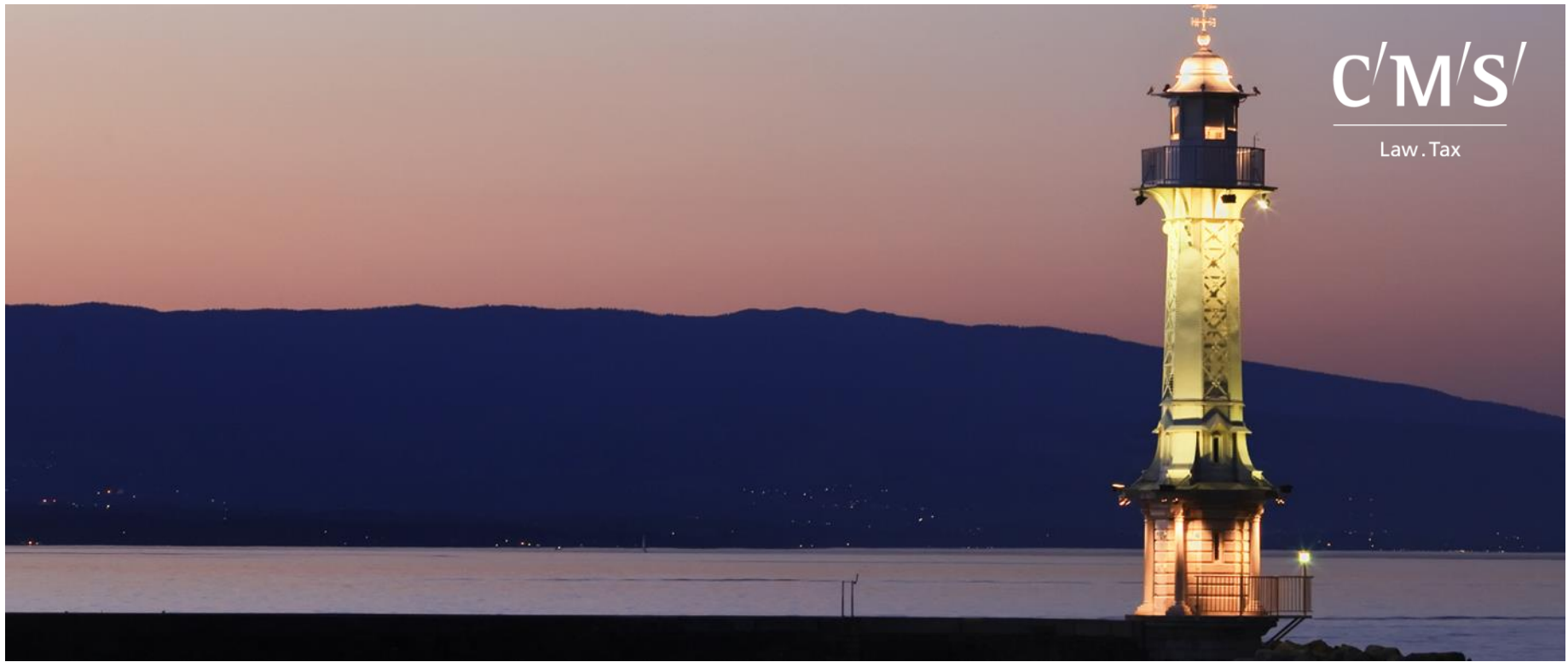
Introduction



Distorting competition via
the performance of the
contract

Legitimate requirements to
change the contract

- Public services &
- Public interest or
other



Pressetext case and other case law

Pressetext-case



Court of Justice

Pressetext

19.06.2008

Doc. C-454/06

An amendment to a public contract during its currency may be regarded as being material when

- *“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 would have allowed for the acceptance of a tender other than the one initially accepted.**”*
- *“it **extends the scope of the contract** considerably to encompass services not initially covered. (...)”*
- *“it **changes 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.”*

Admission of tenderers other than those initially admitted



Court of Justice

CAS Succhi di Frutta SpA
29.04.2004
Doc. C-496/99

“It follows clearly from the actual wording of that judgment that the contracting authority may not, at any stage of the procedure, amend the conditions of the invitation to tender, unless the notice of invitation to tender contains an express provision to that effect, as it would otherwise infringe the principles of equal treatment as between tenderers and transparency.”



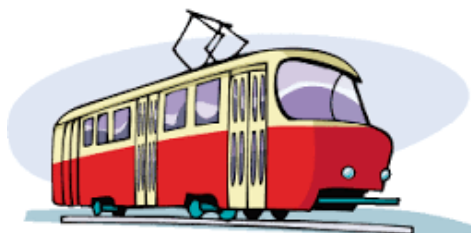
Admission of tenderers other than those initially admitted



Court of Justice

European Commission/France
05.10.2000
Doc. C-337/98

*“Firstly, as the French Government has pointed out, that alteration in the terms of the contract is attributable to the development of equipment between 1993 and 1996 and concerns its dimensions, and then only marginally (2 cm in width). Secondly, it cannot be ruled out that, in a **negotiated procedure which, by its nature, may extend over a long period of time, the parties might take account of technological developments** which take place while the negotiations are under way, without that being regarded each time as a renegotiation of the essential terms of the contract justifying the application of new rules of law.”*



Admission of tenderers other than those initially admitted



Court of Justice

European Commission/Netherlands
11.07.2013
Doc. C-576/10

- Context: awarding of a concession for a large building project (Doornakkers centre project):
- An opinion stated that:
 - the sale contract should comply with *‘the framework conditions and guidelines set by the municipality – namely, the specifications’*, and
 - that it should *‘meet the ... wishes of the purchasers/ end users’*.
- The Commission decided to bring an action as it considered these clauses unlawful.
- The Commission argued that the municipality did not establish in a binding form at the beginning of the ‘procedure’ the conditions and essential characteristics of the concession, but made the content of the contract and its essential conditions dependent on the progress of the negotiations.

Admission of tenderers other than those initially admitted



Court of Justice

European Commission/Netherlands
11.07.2013
Doc. C-576/10

*“(...) it was apparent from an information document sent in June 2002 to the candidate promoters by the municipality that the latter **‘already had a relatively clear idea of the expected result’**. According to the Commission, that document contained ‘details concerning the number of plots, the maximum height of the construction, the general direction the commercial development was to take, the location of the entrances to the health centre and the reintroduction of certain functions in the district park’.*

*Secondly, (...) **‘for the most part, the assignment of the buildings to be constructed had been defined by the municipality as early as 2002’**.*

*Thirdly, (...), the fact that the allocation of the financial risks for certain parts of the SPILcentrum project and responsibility for the development of public spaces could have been finally decided after the opinion of 23 April 2002 is not crucial. In the light of the Court’s case-law, **neither of those two specific features of the Doornakkers centre project can be regarded as substantially different in character from those initially envisaged.**”*

Admission of tenderers other than those initially admitted



Court of Justice

European Commission/Netherlands
11.07.2013
Doc. C-576/10

“Therefore, the premises on which the Court’s case-law relied on by the Commission in paragraph 46 above are based, namely the amendment of one of the essential terms of the contract and, consequently, the requirement that a new contract be concluded, are not established in the present case.”

Extending the scope of the contract



Court of Justice

European Commission/Kingdom of Spain
22.04.2010
Doc. C-423/07

“Accordingly, the conclusion must be that the additional works were awarded to Iberpistas despite the fact that they were not included in the subject of the concession at issue, as described in the second notice and the second tender specifications, which constitutes a breach of Articles 3(1) and 11(3) and (6) of Directive 93/37, read in conjunction with Annex V thereto.”

It concerned the **construction of different third lanes, a new tunnel, and a fourth lane of certain parts of a motorway**, and this for an amount of 151 million euro (original contract 132.02 million euro)

Extending the scope of the contract

- But reasonable approach for complex contract + revision clause
- European Commission London Underground decision (N 264/2002):

*“The Commission notes that the **principle of changes being made was known to all tenderers in advance** and considers that changes were introduced objectively. Thus, such modifications cannot be considered automatically to constitute a form of discrimination even where they are introduced after the designation of preferred bidders. This is all the more important in connection with **particularly complex tenders** which are negotiated over a long period of time (3 years in the case of PPP)”*

The economic balance of the contract

- The economic balance of the contract changes in favour of the contractor in a manner which was not provided for in the terms of the initial contract
 - For example: a price increase without the performance of any other works, supplies and services
 - Modification of the contractor's obligations, without any changes in price
 -



Article 72 of Directive 2014/24 - Modifications without new procurement procedures

Key changes: Codification of case law



- **Codification of contracts during their term**
 - Art 72 of the new “classic” Directive 2014/24/EU
 - Art 89 of the new utilities Directive 2014/25/EU
 - Art 43 of the new concessions Directive 2014/23/EU



- **Clarification of the rules** regarding the modification of existing contracts (based on the ECJ’s cases “*Presstext*” and “*Wall AG*”) without a new procurement procedure

Article 72 Directive 2014/24 - Modifications without new procurement procedures I

- **Codification of the Presetext doctrine?**
 - Draft version of Article 72:
 - commenced by emphasising the Presetext ruling as a general rule
 - Thereafter, it listed the exceptions to the Presetext ruling
 - Structure has changed:
 - Article 72 starts with the exceptions in which a contract change is admissible
 - Presetext ruling is relocated to article 72 (4).
- Conditions under which a modification is admissible are clearly determined, and the Presetext ruling is an ultimum remedium

Article 72 Directive 2014/24 - Modifications without new procurement procedures I

1. If the **modifications** have been **provided for in the initial procurement documents** (e.g. options)
 - regardless of the financial value of the modification
 - clear, precise and unequivocal
 - not altering the overall nature of the contract or the framework agreement



Article 72 Directive 2014/24 - Modifications without new procurement procedures I

Recital 111 of the Directive 2014/24:

“(…) It should consequently be clarified that sufficiently clearly drafted review or option clauses may for instance provide for **price indexations or ensure that, for example, communications equipment to be delivered over a given period continues to be suitable**, also in the case of **changing communications protocols or other technological changes**. It should also be possible under sufficiently clear clauses to provide for adaptations of the contract which are rendered necessary by **technical difficulties which have appeared during operation or maintenance**. It should also be recalled that contracts could, for instance, include both ordinary maintenance as well as provide for extraordinary maintenance interventions that might become necessary in order to ensure continuation of a public service.”

Article 72 Directive 2014/24 - Modifications without new procurement procedures I

2. For **additional works, services or supplies** by the original contractor that have become necessary and that were not included in the initial procurement where a change of contractor:

- cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement;
and
- would cause significant inconvenience or substantial duplication of costs for the contracting authority.
- If the increase in price is not higher than 50 % of the value of the original contract

Several successive modifications => limitation applies to the value of each modification (Shall not be aimed at circumventing this Directive);

Article 72 Directive 2014/24 - Modifications without new procurement procedures I

3. **Modification** if the following conditions are met:

- the need for modification has been brought about by circumstances which “a diligent contracting authority” could not foresee;
- modification does not alter the overall nature of the contract;
- any increase in price is not higher than 50 % of the value of the original contract or framework agreement.

Several successive modifications => limitation applies to the value of each modification (Shall not be aimed at circumventing this Directive);

“a diligent contracting entity” under the utilities directive 2014/25

The third condition does not exist under the utilities directive 2014/25

Article 72 Directive 2014/24 - Modifications without new procurement procedures I

- (109) Contracting authorities can be faced with external circumstances that they could not foresee when they awarded the contract, in particular when the performance of the contract covers a long period. In this case, a certain degree of flexibility is needed to adapt the contract to those circumstances without a new procurement procedure. The notion of unforeseeable circumstances refers to circumstances that could not have been predicted despite reasonably diligent preparation of the initial award by the contracting authority, taking into account its available means, the nature and characteristics of the specific project, good practice in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value. However, this cannot apply in cases where a modification results in an alteration of the nature of the overall procurement, for instance by replacing the works, supplies or services to be procured by something different or by fundamentally changing the type of procurement since, in such a situation, a hypothetical influence on the outcome may be assumed.

Article 72 Directive 2014/24 - Modifications without new procurement procedures I

4. if a **new contractor** replaces the one to which the contracting authority had initially awarded the contract as a consequence of:
- an unequivocal review clause or option;
 - universal or partial succession into the position of the initial contractor;
 - the contracting authority itself assuming the main contractor's obligations towards its subcontractors where this possibility is provided for under national law



Article 72 Directive 2014/24 - Modifications without new procurement procedures I

5. Where the modifications, irrespective of their value, are **not substantial**
- **Presumption**: it renders the contract or the framework agreement materially different in character from the one initially concluded
 - **In any event**, substantial if the modification:
 - introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates
 - changes the economic balance of the contract in favour of the contractor
 - extends the scope of contract/framework agreement considerably
 - replaces the original contractor (See exception after the next sheet)

Article 72 Directive 2014/24 - Modifications without new procurement procedures I

6. **value of the modification** is below both of the following values:
- the thresholds set out for the applicability of the Directives;
- and
- 10% of the initial contract value for service and supply contracts and below 15% of the initial contract value for works contracts


Recital 107 directive 2014/24:

Modifications to the contract resulting in a minor change of the contract value up to a certain value should always be possible without the need to carry out a new procurement procedure. To this effect and in order to ensure legal certainty, this Directive should provide for *de minimis* thresholds, below which a new procurement procedure is not necessary. Modifications to the contract above those thresholds should be possible without the need to carry out a new procurement procedure to the extent they comply with the relevant conditions laid down in this Directive.

Article 72 Directive 2014/24 - Modifications without new procurement procedures I

“without any need to verify whether the conditions set out under points (a) to (d) of paragraph 4 are met”

=> **Modification “6” is always not substantial!!!**



Does this clause imply that the Contracting Authority is obliged to examine whether the modifications as provided in 1 to 5 are substantial, or is this only the case for modification 5???



Article 72 Directive 2014/24 - Modifications without new procurement procedures I

Possible consequence of the modifications:

*“Member States shall ensure that **contracting authorities have the possibility**, at least under the following circumstances and under the conditions determined by the applicable national law, **to terminate a public contract during its term**, where:*

*(a) the contract has been subject to a **substantial modification**, which would have required a new procurement procedure pursuant to Article 72;”*

Conclusion

Modifications only admissible within relatively narrow limits



**For any modifications not mentioned under the new articles
a new procurement procedure is necessary**



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