CAN YOU AMEND A CONTRACT AFTER SELECTION OF THE FINAL BIDDER?

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Michael O’Connor and Nicola Dunleavy of Matheson Ormsby Prentice look at the impact of the turbulent credit markets on the delivery of Public Private Partnership (PPP) projects and explain that in the negotiated and competitive dialogue procedures, amendments to the contracts with the final bidders are allowed, provided certain criteria are met and provided that the competition is set up correctly.

The current turbulence in the credit markets has raised many questions about the future of public private partnerships as an instrument for delivering public infrastructure. In the short to medium term it is hoped that public authorities will start to incorporate a degree of flexibility into procurements to enable projects to react to the ongoing market disruption during the procurement phases without the need to restart the procurement process. This approach will not however address the challenges faced by projects currently in procurement and which are struggling to reach financial close. The answer for these projects lies in the decided case law.

THE TRADITIONAL APPROACH

Public authorities believe that they have narrow rights to change the contract after bids are in, even in the negotiated procedure but particularly under competitive dialogue. On its face, this belief is in line with the European Commission's views in its Explanatory Note’ (which is not legally binding) that once the preferred bidder has been identified, the “room for manoeuvre… is fairly limited” and the clarification process with the preferred bidder “does not entail any negotiations solely with this economic operator – amendments aimed at authorising such negotiations were proposed and rejected by the Community legislative process. It relates to something much more limited, specifically ‘clarification’ or ‘confirmation’ of undertakings already appearing in the final tender itself”.

THE REALITY OF CHANGE

The reality is that the procurement of a complex project can take many months if not years. Many things change during that time. The current credit crisis is a prime example.

In the recent past there was the impact of 9/11 on the insurance markets. Changes can flow from planning permissions granted after a final bidder is selected or from financial due diligence. The cost and time involved in the financial due diligence means that lenders do not usually engage until a final bidder is selected. Amendments to the contract become essential to respond to altered conditions. The question is can these changes be made?

The case law of the European and Irish courts and decisions of the European Commission provides the answer “yes, if …”. If the competition is set up correctly, certain amendments of the contract after selection of the preferred bidder will not offend the procurement rules.

WHAT THE LAW SAYS...

In essence, the law says that if the possibility for change is highlighted in advance, and provided that the change does not materially alter the scope of the tender, the change should be allowed.

1. Explanatory Note – Competitive Dialogue – Classic Directive
Two core principles must be observed in changing a contract after bids are received: the principles of transparency and equal treatment. These principles prevent favouritism and promote a level playing field. Transparency means that the conditions of the award procedure must be clear and that compliance with the conditions must be verifiable. Equal treatment aims at avoiding discrimination.

In *Commission v CAS Succhi di Frutta SpA*\(^2\) the Commission invited tenders for the supply of fruit juice as aid to the Caucus. The tender documents provided that the supplier would be paid in apples or oranges from EU intervention stocks. The successful bidder proposed to also accept peaches. The European Court of Justice (“ECJ”) found that the tender documents contained prescriptive requirements about the kinds of fruit used for payment. The principle of transparency would be breached if the Commission amended this for the successful bidder only. The ECJ gave some helpful guidance that changes to requirements would be allowed when the possibility for change is set out before bids are received:

“Should the contracting authority wish, for specific reasons, to be able to amend some conditions of the invitation to tender, after the successful tenderer has been selected, it is required expressly to provide for that possibility, as well as for the relevant detailed rules, in the notice of invitation to tender…so that all undertakings interested in taking part in the procurement procedure are aware of that possibility from the outset and are therefore on an equal footing when formulating their respective tenders.”

In *Danninger v Bus Átha Cliath*\(^3\), the Irish High Court considered an objection to the use of a ‘Best and Final Offer’ stage in a competition for the award of a public works concession contract. The Court stressed the importance of expressly stating in tender documents what steps may be taken:

“If a re-tender is sought it should be flagged in the tender document circulated to the qualifying parties. Equality of opportunity, once a reasonably competitive price is offered, requires that those tenderers who are asked to resubmit should have an equal opportunity in terms of putting forward their best and final offer in the second round.”\(^4\)

In *London Underground PPP*\(^5\), the terms of a PPP contract were amended after the preferred bidder had been chosen in a negotiated procedure. The changes included amendments to the funding provisions, the timing and scope of work and risk allocation. The European Commission carried out a detailed analysis of the amendments to the PPP contract and examined the procurement procedure. The Commission noted that "negotiation with single preferred bidders was an unavoidable part of the process of finalising a market price"\(^6\) for this complex project. It found that the public authority had complied with the procurement rules because:

(a) the possibility of changes being made was flagged to all bidders from the start and the introduction of changes was operated in an objective way

(b) the amendments to the contract did not change the scope of the PPP

(c) many of the changes came from external factors not brought about by the contracting party, including the events of 9/11, which impacted equally on all bidders

(d) the modifications were not so substantial as to have attracted market players who did not consider tendering originally

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2. Case C-496/99 [2004] ECR 1-3801
3. [2007] IEHC
4. Paragraph 52
5. State aid No. 264/2002
6. Paragraph 89
7. Paragraphs 86, 87, 88, 89 and 91.
(e) the contracting authority could show that the outcome of the competition would not have changed, even when the offers of other bidders were adjusted to take the post-tender amendments into account

Amendments to contracts at preferred bidder stage are allowed under the negotiated and competitive dialogue procedures. This is true in particular where the possibility of changes is known from the start and the changes are brought about by “factors which would have had an impact not only of the bids of the preferred bidders, but also on the bids of the non-preferred bidders if those bids had remained in the competition”.

Although it is yet to be tested by the Irish or European courts, changes must be allowed where external factors which apply equally to all bidders bring about changes at the preferred bidder stage of the procurement process. For example, the tightening credit markets impacts all bidders equally. Lenders will require changes to the standardised ‘Project Agreements’ imposed on the market during different economic times. Where the possibility of changes occurring has been flagged to all tenderers in advance; where the changes do not fundamentally change the contract or the award decision; and where the change do not involve discrimination, they will not offend the procurement rules.

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