public matters newsletter

Christmas edition – December 2013

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law, less ordinary

public matters newsletter - December 2013

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talk to us...

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Material changes to contracts

As you will (hopefully) recall we are doing a series of articles on the new draft public sector directive. We had hoped that the draft would be in final form and would have been agreed by now but some final 'tweaks' are being made to the text with the intention of final legislative agreement in late January or early February. On the assumption that these changes will only be tweaks I am going to plough on and look at the draft (classic) directive's approach to material amendments.

Over the past few years the concept of material change has developed in case law based on principles of equal treatment and transparency. Contracting authorities are now well aware that potentially, a change to an existing contract could mean that a new procurement exercise is required as a result of the changed nature of the contracting relationship. A change could involve:

- a change in the contracting counter party as a result of the contractor selling or restructuring its business or their insolvency
- the exercise by a third party of step in rights they have
- a change of subcontractor
- the extension of contract beyond that which was originally envisaged when awarded
- redesign or other change in nature of the delivery of services or works and changing needs of a long contract.

Over the last few years the courts have come up with a number of different tests to decide whether there was a new procurement exercise needed, these have included, for example:

- a detailed rules test (Succhi di Frutta) where the ECJ held that if the contracting authority wished to be able to amend some terms of the invitation to tender after the successful tender had been selected, it should have provided for that possibility, and the rules for doing so, specifically in the tender documents

- a functional link test (Commission v France). In that the case, the ECJ decided that it was not clear that there was a sufficient functional link between the first and second phases of the project such that the second phase services required a further competition.

However, without going into all of the cases it is the Pressetext case which is most commonly cited when considering what *"material change"* is. In this case the ECJ held that amendments constitute a new award where they demonstrate the intention of the parties to renegotiate essential terms. The ECJ set out various circumstances when a change will be material including where it (the change):

- introduces conditions that, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or the acceptance of a tender other than the one initially accepted
- extends the scope of the contract considerably to encompass services not initially covered; or
- changes the economic balance in favour of the contractor in a manner that was not provided for in the terms of the initial contract.

In Pressetext the court also applied the concept of material change to other circumstances that were put before the court (for example internal company reorganisations and price changes).

As Sam McGinty explores in more detail, elsewhere in this month's Public Matters, the key questions to ask in practice are:

- how substantial are the changes in the context of the length/complexity of the contract?
- are they within the scope of a contract change mechanism? How closely is it defined?
- are they a necessary response to external events or a distortion of competition by giving the contractor benefits for which it did not compete?
- how likely is it that the outcome of the original procurement might have been affected?

The new directive provides that a new procurement is required only if a contract modification is substantial (Art 72)and it goes on to detail four cases in which a modification is going to be deemed substantial:

- the change introduces conditions which would have allowed for the admission of other candidates/acceptance of another offer or would have attracted additional participants in the original competition
- it shifts the economic balance in favour of the contractor
- it considerably extends the scope of the contract
- it results in a new contractor (except as permitted under the directive).

The directive then sets out four cases in which modifications will be permissible:

- where modifications, irrespective of their monetary value, have been provided for in the initial tender documents in clear, precise and unequivocal review clause/option– the contracting authority must state the scope, nature and conditions under which the clause/option may be used and cannot alter the overall nature of the contract/framework agreement. Recital 48 of the Directive gives some background explanation to this

- where the additional works, services or supplies by the original contractor have become necessary and a change in contractor cannot be made for economic or technical reasons, would cause significant inconvenience or substantial duplication of costs for the contracting authority and any increase in price must be limited to 50% of original contract value (this applies to each successive modification) – see Recital 45a of the directive

- where the modification is required due to unforeseen circumstances, the modification does not alter the overall nature of the contract and any increase in price limited to 50% of original contract value (this applies to each successive modification) – See Recital 46 of the directive

- there is a replacement of a contractor due to exercise or review clause/option, universal or partial succession following corporate restructuring providing original PQQ criteria still fulfilled and no other substantial modifications – See Recital 47 of the Directive

The directive also helpfully confirms where a change is, in any event, going to be deemed insubstantial and therefore can be carried out without fear of challenge. This is where the value of the modification is:

- (a) below the EU financial thresholds; and
- (b) below 10% of the original contract value for service and supply contracts and below 15% of the original contract value for works contracts.

It must be noted that the modification may not alter the overall nature of the contract (for successive modifications, the value is to be assessed on the basis of net cumulative value). Under article 73 – contracting authorities are to be allowed the possibility to terminate a contract that has been materially varied (See Recital 48aa of the directive). It is unclear in the drafting whether the contracting authority will have to terminate, and how in any event this could or will be enforced.

As with the attempted codification of the Teckal line of case law, this part of the directive can only ever capture a part of the extensive line of case law in the area. However, I really think that this article is going to be extremely useful for public bodies moving forward. It gives a clear framework of tests which can be understood and relatively clearly tested.

talk to us...

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Using the Functions and Responsibilities Regulations to challenge full council decision making

Introduction

Local government practitioners are used to judicial review challenges of council budget making decisions. This has seen case law develop e.g. on how to comply with the statutory equality duty. In turn, this has resulted in greater involvement of lawyers in the budget preparation and setting exercise that until comparatively recently was seen as the exclusive preserve of finance officers. It also means that more care is now needed when it comes to providing any legal sign off for budget reports before they are submitted via the cabinet/executive to full council. The days of assuming that the report is exclusively concerned with financial matters with no legal issues arising are long gone.

Buck v Doncaster M.B.C

In the context of advising on legal issues arising from budget preparation and decision making this recent Court of Appeal decision confirming amongst other things that full council cannot 'micro manage' a council's budget is helpful.

The decision is noteworthy for its concise summary of the legal framework surrounding executive governance under the Local Government Act 2000 (the Act), the split of functions between executive and full council particularly in the sphere of budget setting and approval under the Functions and Responsibilities Regulations (the Regulations) and setting of the level of council tax under the Local Government Finance Act (the Finance Act).

Ms Buck was concerned about cuts to Doncaster Council's library service and the Mayors decision not to implement the full council decision providing a contingency budget that amongst other things would have enabled previously closed libraries to re-open. Ms Buck contended that the Mayor's decision was unlawful and instituted a judicial review claim.

The case raised important issues as to the division of powers between the council's executive (an elected Mayor) and the full council (also elected)).

The decisions

At first instance the judge dismissed the claim following analysis of the Act, the Regulations and also the budget making provisions relating to the setting of council tax contained in the Finance Act. Ms Buck appealed. The Court of Appeal dismissed the appeal.

The court summarised the legal position as follows:

- full council may allocate more or less funds than are requested by the executive in any proposed budget. It is the final arbiter of what goes into the budget

- the budget processes are geared to avoid any budget deficiency by insuring that the revenue expenditure of the council cannot be exceeded but this does not allow full council to micro manage the authority's functions and interfere with the executive functions of the executive

- under the Functions and Responsibilities Regulations, full council cannot require the executive to spend money in a particular way, or, to spend money on a particular function – unless it proposes to act in a way contrary to the plans and strategies reserved to full council.

For the claim to succeed under the 'contrary to plan or strategy' exception Ms Buck had to show:

1. The existence of a plan or strategy.
2. That the plan or strategy had been adopted or approved by full council.
3. The Mayor's decision to proceed with the library proposals before the full council decision was contrary to that plan or strategy.

The court decided on the facts that there was no plan or strategy; rather the Mayor's budget proposals in relation to the library service were an expression of a small aspect of the policy which formed the basis of the budget. Further, there was no adoption or approval by the full council of any plan or strategy arising from the wording of the amendment. As 1 and 2 above were not met, the court did not consider 3.

Will there be another Functions and Responsibilities challenge?

The answer, given the ingenuity of those advising on such challenges, is probably 'yes' as the 'contrary to plan or strategy exception' was not considered in Buck. Time may yet tell on which democratically elected body has the last word on council budgets.

The need to be alert and attentive to budget proposals as they develop in the days leading up to full council approval remains along also with the care required when advising on the wording of any amendments at the full council meeting.

For now, practitioners will need to take even greater care when advising about potential budget cuts where they could be contrary to existing council plans and strategies that require full council approval.

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What to do?

The question of when it is acceptable, or maybe necessary, in a public procurement process to request further information from bidders is not answered by legislation and so it is necessary to look at the case law. In the last two months, two further cases, one English and one Danish, have been added to the list and are helpful in giving summaries of the law so far and the general principles that surround this difficult issue.

As a contracting authority, you wish to award contracts to those organisations or individuals who are most able to provide the works, goods or services in an economically advantageous fashion. You don't want to be unhelpful during a procurement process, particularly where there appears to be a genuine mistake on the part of a bidder.

However, allowing a bidder to correct an error in their tender documents, including providing a response where an unfinished tender has been submitted can lead to a claim of unequal treatment. On the other hand, refusal by a contracting authority to allow clarification of information can lead to a claim that it has acted disproportionately by not taking the overall effect on the procurement exercise into account.

By way of reminder, Regulation 4(3) of the Public Contracts Regulations 2006 (as amended) (the 'Regulations') require a contracting authority to:

> "(a) treat economic operators equally and in a non-discriminatory way; and
> (b) act in a transparent way."

The important previous cases are:

- Tideland Signal[1] where the ECJ stated that it was *"clearly disproportionate and thus initiated by a manifest error of assessment"* that the European Commission had rejected a tender without seeking clarification

- Firebuy[2] where the High Court set out several principles taken from a number of other cases: a contracting authority only has a *"margin of appreciation"* when it has first complied with its obligations of equality, transparency and objectivity; a contracting authority has a margin of appreciation in relation to matters of judgement or assessment and the court should only interfere if

[1] Tideland Signal Limited v European Commission [2002] 3 CMLR 33
[2] Lion Apparel Systems Ltd v Firebuy Ltd [2007] EWHC 2179 (Ch)

there has been a manifest error; *"manifest error"* should be used without any exaggerated description of obviousness but simply where an error has clearly been made that is of importance

- Harrow Solicitors[3] where the court said: all bidders must be treated equally; the principles of equal treatment and good administration would be violated if a bidder could amend its tender after the submission date had closed; if a contracting authority had the discretion to seek clarification about a tender (and this would be set out in the tender documents) the court will only interfere if (i) it was exercised unequally or unfairly or (ii) it was not exercised but could be used simply to correct an obvious error or ambiguity so that a consideration of an advantageous bid was not excluded; any such clarification must be just that, and not amount to a change in the tender

- SAG[4] in which the ECJ said that the principles of equal treatment and transparency don't preclude *"the correction or amplification of details of a tender where appropriate, on an exception basis, particularly when it is clear that they require mere clarification or to correct obvious material errors, provided that such amendment does not in reality lead to the submission of a new tender…"*. It also held that requests for clarification must be sent to all bidders in the same situation, only after all tenders have been looked at

- Hossacks[5] where the court held that there must be a comparable position with another tender where the contracting authority acted differently for a claim to have a likelihood of success.

The first case, Ministeriet Forskning, Innovation og Videregaende v Manova A/S[6] focused specifically on the equal treatment of bidders. This was for a Part B contract (occupational guidance and advice centres) so the general principles set out in the TFEU have particular relevance. As part of the procurement exercise, bidders were requested to submit a copy of their most recent balance sheet. Two bidders did not submit these, one of them referred the contracting authority to its website where they published such information. Both bidders were asked to, and did, submit balance sheets after the submission date had passed.

Both of these bidders were successful with their tenders and were awarded contracts for the guidance centres. Another bidder was unsuccessful and brought a claim for a breach of the principle of equal treatment. This was upheld by the first court and the contracts were annulled. When the decision was appealed, the appellant court referred the question to the ECJ, whether asking a bidder for a copy of its balance sheet after the submission date had passed was a breach of equal treatment of bidders.

[3] R (on the application of Harrow Solicitors and Advocates) v LSC [2011] EWHC 1087 (Admin)
[4] SAG ELV Slovenska AS and others v Urad re verejne obstaravanie (Case C-599-10)
[5] The Queen on the application of Hossacks (a firm of solicitors) v the Legal Services Commission [2012] EWCA Civ 1203
[6] Case C-336/12 (decided 10 October 2013)

The ECJ relied heavily on the SAG judgement in coming to the decision that, in this case, it was not a breach of the principle of equal treatment to ask for the balance sheets from both the bidders that had not submitted one. This was on the basis that the balance sheets were published documents which could be proved to pre-date the final submission date for tenders. The lack of a balance sheet didn't mean that the tenders were imprecise or failed to meet the technical requirements set out in the tender documents: clarification on issues such as those would not be permitted.

The court also stated that, if tender documents set the provision of certain information as an absolute requirement and non-submission would mean that a tender was excluded, then a contracting authority is required to work within the parameters it has set and could not ask for further information. Any request that is made must not unduly favour or disadvantage the bidder(s) to which it is addressed.

The second case is The Queen (on the application of All About Rights Law Practice) v the Lord Chancellor (as successor to the Legal Services Commission) [2013] EWHC 3461 (Admin). This case referenced the Manova case. Here, the claimant had, in error, submitted a blank tender information form ("TIF") which was mandatory as part of the ITT stage. This was submitted at the same time as the PQQ. The tender documents were clear that the TIF had to be completed and returned before the submission date, that a bidder could not amend information in its tender after the submission date and that the LSC was under no obligation to contact a bidder to clarify information provided. The tender was for a contract for legal aid work under the mental health section of the Legal Services Commission's ('LSC') tender exercise for all areas of legal aid work. The claimants tender was rejected because of the blank TIF and, in the original case brought in 2010, a claim for unequal treatment and disproportionate and/or irrational actions of the part of the LSC was dismissed because two other bidders who submitted blank TIFs were also rejected.

However, it then came to light, after an FOI request by another law firm, that under the same tender exercise, the LSC had in actual fact, asked for clarification from other bidders on no less than 54 occasions. The LSC agreed that there had been inaccurate information at the time of the first case and that it should be resubmitted to the court. The general principle adopted by the LSC appears to have been that where whole documents or answers were blank at the ITT stage then no clarifications were requested. Where bidders either asked, or were asked, to amend information that had already submitted they were allowed to do so where it would not have changed the outcome of the exercise. At PQQ stage the approach was more relaxed. Several bidders had submitted TIFs but failed to submit PQQs. They were allowed to submit PQQs retrospectively.

The High Court held that the LSC had not acted disproportionately when rejecting the claimant's tender on the basis of a blank TIF. The tender documents were very clear that the TIF was the only mandatory form to be supplied as part of a tender. Therefore, there was a distinct difference between the acceptance of a tender which did not have a PQQ attached and one which didn't have a TIF attached. To have allowed the

TIF to be submitted after the submission date would have been to allow a new bid which was not allowed under the terms of the procurement exercise. It was not clear that there would be a 'quick and easy' remedy to the problem: not all information could be found in other documents that had been submitted; the LSC didn't know whether the TIF had, in fact, been completed and not returned or simply hadn't been completed at all (obviously the latter would mean that it would not be a quick remedy); and to allow further information would have jeopardised the implementation of the tender.

With regard to the claim of unequal treatment, the court held that, for the purposes of deciding who was a comparator, it was not any bidder for any of the LSC contracts that were being tendered for. It was only those in the mental health competition that were relevant. In fact, within the mental health competition, the only true comparators were those who had also had their tenders rejected due to a blank TIF being submitted. The court held that those who had submitted a blank PQQ (and been allowed to resubmit) were not comparators, since the submission of a PQQ was not mandatory in the way that the TIF was. Even if the pool of comparators was broader, that didn't help the claimant in this case, given the level of details that the LSC had asked other bidders to clarify.

These cases are helpful as setting out summaries of the case law so far and how to apply it. There is a general consensus of both English and European courts that contracting authorities have a certain level of discretion when deciding to request further information. That discretion has to take into account the impact of a further request on the outcome of the procurement exercise.

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A Christmas stuffing of Spanish clubs by the Commission?

Readers may recall my article earlier this year outlining a number of preliminary investigations, rumours, complaints and rumblings concerning state aid and a host of football and other sporting clubs around Europe. Well, it's all kicking off now.

Monday (16 December) saw the European Ombudsman, Emily O'Reilly, telling the European Commission to get on with making a decision on whether to open infringement proceedings against Spain in relation to alleged unfair tax advantages for a number of top Spanish football clubs. This followed a complaint from investors in other European football clubs alleging that the Commission's inaction might be linked to the fact that the Competition Commissioner (Joaquin Almunia) supports one of the football teams in question (Athletic Bilbao, if you're interested) and was a minister in the Spanish government that decided on the tax advantages at the time[1].

Emily O'Reilly stated:

> *"The Commission has failed to act on this complaint for more than four years. Not only is this bad administration, but to the European public it can look like a conflict of interest given the Commissioner's strong links to one of the football clubs in question. In my inquiry, I have not looked into the merits of the allegations concerning the breach of State Aid rules. I trust, however, that the Commission will decide to open an investigation tomorrow in order to investigate the facts and dispel any suspicions."*

Readers will recall that the complaint (made in 2009) was that Spain had infringed state aid rules by granting unfair tax advantages to four Spanish football clubs to the value of several billion Euro.

The Commission's administrative deadline to decide on the opening of infringement proceedings is 12 months. As the Ombudsman noted, in this case, more than four years had elapsed without a decision. The Commission had accepted the Ombudsman's proposal for a 'friendly solution' in September, but didn't act or give convincing reasons as to why no decision has been taken. Hence the formal decision.

[1] http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/52874/html.bookmark

It clearly worked. Two days later, the Commission decided to open an investigation into the aid given to Real Madrid, Barcelona, Athletic Bilbao and Atlético Osasuna[2]. The Ombudsman was happy:

"I am glad that the Commission has finally acted in this case after a delay of more than four years. It is important for the European public to see that the Commission deals rapidly with concerns about the breach of state aid rules. My role is not to look into the merits of the allegations, but I am satisfied that the Commission is now investigating the facts, thereby dispelling any suspicions of a conflict of interests."

The Commission also decided to progress its other state aid investigations into Spanish clubs:

- the land transfers between the city of Madrid and Real Madrid; and
- guarantees given by the state-owned Valencia Institute of Finance for loans to Valencia, Hercules and Elche, while they were in financial difficulties.

And finally, in a busy week for the Commission and football, it has approved aid to be given by France for the construction and renovation of stadiums in preparation for the European Championships in 2016. Let's hope the designs are as attractive as some of those built in Germany for the 2006 World Cup.

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[2] http://europa.eu/rapid/press-release_IP-13-1287_en.htm

Key decision on SME participation in public procurement

In last month's issue, I mentioned that the Cabinet Office was leading a drive to encourage SME participation in public procurement and was considering responses to its consultation 'Making public procurement more accessible to SMEs'. This consultation came about at the recommendation of Lord Young of Graffham, the Prime Minister's advisor on enterprise and small business. He advocated a set of 'single market' principles to be applied by all public bodies in their procurement to address SME concerns about the complexity, cost and inconsistency of public procurement. The UK Government views SMEs as a crucial engine for growth and a source of creativity and innovation. It has already taken various measures to open up public sector procurement to SMEs including, for example, launching the 'contracts finder' and 'mystery shopper' facilities and abolishing pre-qualification questionnaires (PQQs) for most central government contracts below £100,000.

On 7 December the Cabinet Office announced the decisions it has taken following its consultation. These include introducing legislation in 2014 to:

- abolish PQQs for low value contracts. The government is proposing to eliminate these for almost all goods, services and works procurements under £173,934 (the current EU threshold for goods and services procurements). 43% of respondents to the consultation supported this proposal. However, 31% of respondents opposed this proposal on the basis that it would result in a significantly higher number of tenders to evaluate. It remains controversial therefore

- mandate the use of a standard core PQQ for high-value contracts and ensure small business needs are taken into account in the design of procurement processes. The use of a mandatory core PQQ across the whole public sector was supported by 64% of respondents

- make contract opportunities easier to find by making them all accessible on a single online portal. 65% of respondents were in favour of publishing opportunities over £10,000 on contracts finder

- make sure small firms are treated fairly by mandating prompt payment terms all the way down a public procurement supply chain. 84% of respondents were in favour of ensuring that standard payment terms are passed down through the supply chain for all public contracts

To back up these reforms the Government also intends to:

- introduce reporting requirements for all public bodies
- prototype a new rating service for small firms to judge public bodies on their procurement credentials and for public bodies to rate their suppliers with a view to a wider roll out of this initiative in 2014
- launch a 'solutions exchange' service to help public bodies engage with the market prior to commencing a formal procurement. The service will also provide an opportunity for SMEs to pitch innovative proposals to government
- extend the reach of the mystery shopper scheme, so that it not only investigates reports of unfair treatment, but also spot-checks public bodies to make sure that their procurement is small business friendly. The results of mystery shopper investigations will be made more visible so that poor practice by public bodies and their contractors can be challenged.

It remains to be seen whether these new initiatives will help the Government to achieve the commitment it has set in its 'Small Business: GREAT Ambition' publication of ensuring that 25% of central government expenditure goes to SMEs by 2015. Increasing SME access to public procurement is also one of the main objectives of the new public procurement reforms currently making their way through the EU legislative machine. The Cabinet Office noted in its consultation that some of the concerns raised by respondents will be allayed by some of the measures in the draft public sector directive (e.g. use of e-invoicing). Other measures that are aimed at benefitting SMEs in the new directive include, for example, an obligation on contracting authorities to consider breaking a contract into lots, SMEs being able to self-certify that they meet certain selection criteria and the encouragement of wider pre-procurement market engagement.

It is striking to note that 99.9% of the UK's 4.8 million businesses are SMEs and that SMEs create around £34 of gross value added to the UK economy for every £100 of turnover, whilst large companies create around £27. The proposed measures announced by the Cabinet Office are to be welcomed, therefore, in that they are aimed at generating more public sector business for SMEs. Some of these measures are likely to be more successful than others however and there is some unrest amongst the public sector that the measures may actually place an even heavier administrative and unmanageable burden on public bodies.

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Case law update

Persons who are illegally in this country are generally prohibited from receiving any state support, save where necessary to prevent a breach of convention rights. Overstayers with children will often seek to use this proviso, coupled with Article 8 of the convention and a local authority's powers under S17 of the Children Act 1989, to secure accommodation and support for the family. Disputes around the validity of claims for support and the nature of local authorities' obligations towards those otherwise barred from state support have resulted in a number of significant judgments over recent years, and to some extent the debate continues. This article summarises recent cases and considers how the law may develop in the near future.

Recent cases have considered the position of those who would be destitute without local authority support and would have to return to their country of origin. The courts have determined that if such persons have a prospective application for leave to remain based on convention grounds they are entitled to support on the basis that the removal of support would mean that they would be deprived of the opportunity of pursuing their application. This is a surprising position, not least given the resource implications, that was reached in a decision of the High Court (KA v Essex County Council). An appeal against that decision was however dismissed because on the facts of that case the matter had become academic. The decision has however been the subject of judicial disapproval in the case of MN & KN (referred to further below), on grounds that it extends the procedural protections conferred by Article 8 too far.

No obligation will arise under S17 unless the claimants are destitute or at risk of destitution. Often the individuals seeking support have lived in a hidden community throughout their time in the country, securing accommodation, employment and support from other illegal overstayers and leaving no official trace. The challenge for local authorities arises when a parent who has apparently supported themselves for many years presents with their children as destitute and without any support. Such persons are often unable or unwilling to provide information to enable the authority to investigate the support that has been and may continue to be available to the family. This leaves the authority in a difficult position, especially in circumstances where the children are apparently well looked after and not in need when assessed against standard criteria, and where the only need is for accommodation.

The courts have recently provided some assistance for social workers faced with such cases. In MN & KN v Hackney LBC, we acted for Hackney in successfully resisting a judicial review claim brought by parents seeking accommodation who were apparently able to support themselves and their children but refused to provide information as to their whereabouts for a period of over 10 years. The court held that in those

circumstances Hackney were entitled to draw adverse inferences from a refusal to provide information – if an individual refused to provide information to verify that former sources of support were no longer available it could be inferred that such support remained available. That approach has subsequently been applied in a similar case where the court refused to grant permission to bring a judicial review claim to an overstaying mother who was seeking support and accommodation but had been consistently dishonest with the authority. The court again held that it was entirely open to the authority to draw inferences and refuse to accept assertions of destitution in circumstances where a claimant had been dishonest and had undisclosed resources.

Other recent cases have seen the courts emphasise the duty on those seeking state support in circumstances where such support was ordinarily prohibited to provide their open and honest co-operation with the assessment process, and reinforce the ability of social workers to draw inferences from refusals to co-operate, or to co-operate honestly (N v Enfield LBC). The courts have recently confirmed that local authorities are under no duty to use their general power of competence under the Localism Act 2011 to provide support to claimants that is not otherwise available to those claimants in order to avoid a breach of convention rights (MK v Barking & Dagenham). The power of competence cannot be used to circumvent the statutory prohibition on the provision of state support to illegal overstayers. In MK, the claimant was the adult niece of an overstayer who had been accepted for S17 support with her children. The claimant's argument that her and/or the children's Article 8 rights required her to be accommodated with the children were not accepted and her argument that the council should use its localism act powers to provide such accommodation was also rejected.

There is undoubtedly comfort to be drawn by social workers from recent case law, in terms of their ability to deal robustly with cases of illegal overstayers who are prima facie ineligible for any support and who have supported themselves apparently successfully for many years. The decision in MN is however due to be considered by the Court of Appeal, partly on grounds that the judge's obiter criticism of KA was flawed. This will give the Court of Appeal another opportunity to reconsider that decision. The decision in MN is also criticised on grounds that it in effect places a burden of proof on claimants and that the making of inferences as to the availability of alternative support means that the authority does not have to identify such support and satisfy itself that such support is in fact available and is suitable for the children who have been identified to be in need of it. Hackney are robustly resisting the appeal and defending the High Court judgment.

Cases of illegal overstayers with children present social workers with a number of challenges. Some authorities are adopting a multi-disciplinary approach that brings together officers from UKBA and anti-fraud teams to share information to identify any discrepancies and to investigate undisclosed resources and networks. This approach is proving effective in eliminating fraudulent claims and, in so doing, ensuring that finite resources are protected for those who are genuinely in need.

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new public procurement thresholds

The European Commission has published the new public procurement thresholds to apply from 1 Jan 2014. The new thresholds are set out below with the previous figures in brackets.

Central government supply and service contracts/design contests: EUR 134,000 (130,000) / £111,676 (113,057).

Other contracting authority supply and service contracts/design contests: EUR 207,000 (200,000) / £172,514 (173,934).

Works contracts, subsidised works contracts and works concession contracts: EUR 5,186,000 (5,000,000) / £4,322,012 (4,348,350).

Utilities, Defence and Security supply and service contracts/design contests: EUR 414,000 (400,000) / £345,028 (347,868).

Utilities, Defence and Security works contracts: EUR 5,186,000 (5,000,000) / £4,322,012 (4,348,350)
Contracting authorities in UK will no doubt be disappointed that despite the increase in the Euro figures, the new UK public procurement thresholds have actually decreased due to the vagaries of exchange rates. Although the new procurement directive is due to be adopted in the UK in 2014 it is likely that these thresholds will still be used under the new regime.

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Q & A: variation of contracts

This month, Samuel McGinty, in house lawyer at North West Leicestershire District Council, addresses some topical issues when managing contractual variations.

There are many good reasons why parties to a contract may wish to revisit its terms. Local authorities are faced with making huge savings over the coming years. Some of these will be found by procuring goods, works or services in new ways and some of these can be achieved by reviewing existing contracts and driving efficiencies out of those relationships.

However, renegotiation needs to be carefully considered as it is not always without risks.

Why would we want to vary one of our contracts?

Contract management is an often neglected part of the commissioning cycle. When the contract is signed it is put in the back of a drawer, never to be seen again, but a well drafted contract will include mechanisms for contract management and maybe even changes during the term. Proper contract management can help drive savings out of your relationship and secure a higher quality of service – some of this may be achieved through tweaking contracts.

The law is a fluid thing and sometimes changes may need to be made to reflect the shifting legal landscape in the area of delivery. Similarly, a practical change in circumstances could mean the rights and obligations of the parties need to be revised.

Mid-term changes may be legislated for in the contract, such as periodic increases in pricing in line with the retail price Index or as a result of regular contractor meetings. For example, when reviewing innovative services, both parties are learning as they go along and requirements will evolve.

Our contractor wants to vary our agreement, should we agree?

As a general principle of contract law, no one party may make a change to the terms of a contract without the consent of the other party.

When asked by the other party, you will need consider the situation carefully:

- **how have you procured the contract?**
  In most cases, this will be determined by value. If its value exceeds the thresholds set out in and has been procured in accordance with the Public Contracts Regulations 2006 (the 'Regulations'), there are risks where it represents a material change to the existing arrangement (see below). However, in all circumstances, you should remember your duty to achieve value for money – if the change represents a significant change to the goods, works or services, how can you be sure you are getting the best price and quality? You may need to go back to market to establish whether you could be getting a better deal

- **what exactly are you changing?**
  It is important to refine exactly what outcome is sought, then identify which parts of the contract you need to amend to get you there. Consider carefully as to whether the proposed changes have a knock on effect on other parts of your relationship

- **do you need to seek approval?**
  You will need to consult your standing orders to establish whether a variation of the kind proposed requires any approval. As a starting point, return to where the decision to enter into the contract was made, such as cabinet or a committee, depending on your arrangements

- **does the business case stack up?**
  You may be required, depending on your approval route, to set out the business case for making the change – this is a commercial, rather than legal issue, but will certainly be informed by the legal implications

- **do you have a duty to consult with anyone?**
  Depending on the nature of the change, the nature of the services and the process you went through in letting the contract, you may have an express or implied duty to consult. Consultees may include service users, trade unions or staff. If you are in a more complex contracting arrangement (such as a PFI), you may need the approval of another party to the contract.

What happens where there is a material change?

Where a contract has been procured in accordance with the regulations, a material change to the contract is considered unlawful. In 2006 in Pressetext (Case C-454/06) the European Court of Justice held that a change to a contract could be considered an unlawful award of a new contract where the rights and obligations of the parties are materially different in character from the original contract. This has been considered and confirmed in various subsequent cases.

We're happy it's lawful for us to vary the contract, how do we do it?

Start with your contract and establish whether it sets out how to vary. Some contracts set out the variation procedure in some detail. Where it is a variation by operation of the contract, such as an increase to the rates set out, it may not be necessary to put anything in writing, but in most cases a formal variation document will need to be entered into.

Depending on the nature of a change, a deed of variation may be necessary or the contract may account for a different procedure. This will need to be assessed in all the circumstances of the proposed change.
Is this going to change under the new directive?

In short, no. The principles set out in the Pressetext case along with other principles arising out of the case law on material change have been codified in the new draft procurement directive and are expected to stay for the final text (please see Peter Ware's article elsewhere in this issue). Article 72 of the current draft is entirely concerned with modification of contracts during their term. Whereas other European legislation is tweaked and 'gold plated' by Whitehall, it is not currently proposed to do anything but implement the final text as drawn into domestic legislation. The concept of material change is here to stay.

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