

Guidance on contract changes: James Waste Management LLP v Essex County Council

29 June 2023

In *James West Management LLP v Essex County Council*, James Waste Management LLP alleged that the variation of the existing awarded contract was beyond the narrow boundaries permitted by the Public Contracts Regulations 2015 (PCR). The High Court found that the modification of the Integrated Waste Handling Contract (IWHC) with Veolia did not constitute a substantial modification and was therefore permitted.

Facts of the case

Essex County Council (the Council) has statutory responsibilities for disposing of waste in its area and had contracted Veolia via an IWHC for a duration of eight years and five months with an option to extend for a further seven years. Veolia's responsibilities included running the recycling centres for household waste, the waste transfer stations and the haulage of waste to treatment and disposal points such as landfill sites. The waste transfer stations were in five specific locations.

In June 2021, the Council signed a modified contract with Veolia whereby the latter would provide a processing service at a newly established waste transfer station outside of the Council-owned ones. Veolia would process the waste and transport it to the relevant landfill sites. This arrangement was set up for a 5 month period. The new waste transfer system in the modified contract would be implemented by a subcontractor to Veolia, who would charge a gate fee for processing the waste and mileage for its haulage service. James Waste Management LLP challenged this arrangement on the basis that such a change was not a permissible modification in accordance with Regulation 72 of the PCR.

Regulation 72 of the PCR (the Regulation) sets out permitted modifications to contracts in the form of "safe harbours" whereby if such a modification falls into one of them a new procurement procedure is not required. It also provides that variations that are not "substantial", regardless of their value, can be made without the need to follow a fresh procurement procedure (Regulation 72(1)(e)). The nature of what is substantial is set out in regulation 72 (8) as follows:

(8) A modification of a contract or a framework agreement during its term shall be considered substantial for the purposes of paragraph (1)(e) where one or more of the following conditions is met:—

(a) the modification renders the contract or the framework agreement materially different in character from the one initially concluded;

(b) the modification introduces conditions which, had they been part of the initial procurement procedure, would have—

(i) allowed for the admission of other candidates than those initially selected,

(ii) allowed for the acceptance of a tender other than that originally accepted, or

(iii) attracted additional participants in the procurement procedure;

(c) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;

(d) the modification extends the scope of the contract or framework agreement considerably;

(e) a new contractor replaces the one to which the contracting authority had initially awarded the contract in cases other than those provided for in paragraph (1)(d)

The decision

Justice Waksman reviewed the different elements that render a modification a substantial one and considered whether they were applicable to this case.

1. Material different in character

It was not accepted that the running of the new waste transfer station, its fee structure nor its geographical location, although different to the other previously established sites, indicated a material difference in character. Additionally, it was found that these modifications were only for a short time period of 5 months, and were relative to the duration of the IWHC as a whole. Justice Waksman also considered the estimate cost of the modification and found that an increase in price of 0.81% of the total cost was insufficient to render the contract materially different in character.

2. Extended the scope considerably

Justice Waksman disagreed with James Waste Management LLP's argument that any extension which has a value of more than or not much more than the operative threshold in the PCR is enough to qualify a modification as extending the scope. He also used a common-sense approach to the term 'considerably' to find that, as the modification did not materially impact the character of the agreement, there were insufficient grounds to find that the modification considerably extended the scope of the contract.

3. A different tender

James Waste Management LLP would have needed to demonstrate that had the modification introduced conditions which were part of the initial procurement procedure, this would have allowed for the acceptance of a tender other than originally accepted, or attracted additional participants in the procurement procedure. It was found that on the balance of probabilities that this would not have been the case, especially given that the modification was insignificant in comparison with the contract as a whole.

4. Change of economic balance

For this argument to succeed, the modification would have needed to change the economic balance of the contract in favour of the contractor in a manner not provided for in the initial contract. Justice Waksman adopted a two stage approach:

1. Was there a change to the economic balance of the contract in favour of the contractor?
2. If there was, was it such a change that was or was not provided for in the initial contract?

It was found that no positive evidence was presented of uncompetitive in Veolia's prices and it was not demonstrated that the economic balance of the IWHC had advanced towards Veolia.

Therefore, the modification did not amount to a substantial one and was not in breach of procurement law.

Why is this case important for contracting authorities?

This judgement gives contracting authorities further guidance on the application of Regulation 72 and when a modification to contracts is permissible without the need for a new procurement process. An emphasis was placed on the relatively minor scale of the modifications and contracting authorities should strive to keep changes to the minimum required and ensure they are reasonable and commercial.

Contact

Mark Hickson

Head of Business Development



onlineteaminbox@brownejacobson.com

+44 (0)370 270 6000

Related expertise

Contentious procurement

Local government procurement

Projects and contract procurement

Public contracts, projects and funding

Public procurement

Waste