

# EU PROCUREMENT DIRECTIVE: SIZE MATTERS

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**A new EU procurement directive will soon demand new contracts for sizeable variations to public projects, but tread carefully: substantial is a subjective word**

Since the early nineties any substantial construction contract that has been let by a government body or utility company has had to be tendered in accordance with certain statutory procedures. The construction industry is reasonably familiar with these rules and the risks and opportunities they entail.

These procedures seek to ensure that all contractors have advance notice of projects they may want to bid for, and stipulate that the tender process is open, transparent and conducted with reference to a clear set of criteria. Equally, they allow a contractor to challenge the award of a contract if the public body does not follow the rules.

These rules are shortly to be extended in a way that could have significant implications for the operation of construction contracts.

Procurement legislation of this type is generated by the EU, which has been concerned lately with a possible loophole because of the way variations to construction contracts can be instructed. Suppose a government contract is let for the construction of a 100km stretch of road. It will have to be carefully tendered in accordance with the usual procurement rules. However, suppose that part way through the project the roads authority decides it wants to extend the road by a further 50km. If the project was let as a new contract it would need to be tendered in accordance with the public procurement procedures. But could it not just be instructed as a variation to the original contract? The government body may choose this option to avoid the hassle and delay of having to run a new tender process. But other contractors in the market may object – they may have wanted to pitch for the work which has instead been given to the incumbent contractor at an inflated price.



Concerns about this loophole initially arose in 2008, with a legal challenge to an agreed variation of a contract by an Austrian company in the European courts. This led in turn to the EU passing a new directive which came into force on 17 April 2014. The directive does not automatically change UK law but the government is now required to introduce legislation to implement the new EU rules within the next two years.

The new rules are, perhaps inevitably, complex. In short, they prevent public bodies and utilities from instructing major variations to ongoing contracts. Instead they must run a new tender process to ensure that all interested contractors can compete.

Small variations to a project are exempted, so an employer may instruct variations with a cumulative value of up to 15% of the contract value without being caught by the rules. The directive separately provides that variations which are not “substantial” will be allowed. A variation can be challenged only if it is substantial and the 15% ceiling has been reached.

However, further exceptions will allow an employer to instruct a major change even if these two rules have been infringed – for example, where the additional works are necessary but a change of contractor is not possible for economic or technical reasons. This

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could apply where the work involves a technically complex facility and the integration of varied equipment into the structure means that bringing a new contractor in is not feasible.

A further exception arises where the modification could not be foreseen, does not alter the nature of the contract and amounts to less than 50% of the contract value.

There are therefore provisions which are designed to ensure that employers do not become unreasonably boxed in by these new regulations.

However, as with any failure to follow public procurement rules, the ramifications can be severe. Disgruntled contractors, who have lost out on the opportunity to bid for the work, have the right to challenge the award through the courts. They may be able to force the employer to follow an open tender process or demand compensation.

Many exemptions that allow employers to instruct the work as variations are based on rules which will be subjective in their application. For example, what is a “substantial” variation? An employer’s decision to instruct a variation or a contractor’s legal challenge of that decision may turn on what this entails.

While the legislation is designed to close a loophole in the public procurement rules, and therefore is necessary, it clearly also opens up further uncertainty in what is already a potential minefield.

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