

ECJ Rules on Contract Variations!

The European Court of Justice's (ECJ) recent Wall AG (C-91/08) judgment, clarifies the test to be applied when contracting authority seeks to vary an existing public contract, particularly where a sub-contractor is replaced prior to, or following, contract award.

The decision concerned a service concession contract between the City of Frankfurt (CoF) and FES, a limited liability company (51% shares held by CoF; 49% by a private undertaking) for operating, maintaining, servicing and cleaning 11 public toilets in the CoF, including two new-builds; Wall AG (Wall) being designated in the contract as FES's sub-contractor for advertising services and supplying cubicles (the Services).

Before any services were provided, FES competitively tendered to Services, awarding the sub-contract to another provider (DSM) – not Wall. Unsurprisingly, Wall asked the national court to prohibit FES entering into the sub-contract with DSM and/or the performance of any contract by a third party, alleging a sub-contractor change represented a substantial change to the original concession contract, not only in breach of the EU procurement rules but also the fundamental obligation of transparency. The national court referred the case to the ECJ, asking several questions including: *Does the duty of transparency require, in the case of an intended amendment to a service concession contract – including the substitution of a sub-contractor whose identity was emphasised in the tender – that the negotiations on this point are again opened up to competition with an appropriate degree of advertising, and what would be the criteria for requiring such an opening up?*

The ECJ said where contract amendments are materially different to the original contract awarded – demonstrating the parties' intention to renegotiate the contract's essential terms – a new award procedure may be required to ensure transparency and bidders' equal treatment. They also clarified a sub-contractor change may result in such a material amendment in the circumstances where the use of a particular sub-contractor was an influential factor in entering into a contract with a particular bidder; therefore potentially requiring a new award procedure.

Also considered by the ECJ was application of the procurement rules to private-public bodies, particularly whether mixed entities are treated as contracting authorities. Assessing the constitution of FES, the ECJ concluded it failed to satisfy two conditions required to be a contracting authority. FES wasn't effectively controlled by the CoF and also operated competitively in the wider market deriving significant income from other authorities and private undertakings. So, the ECJ found that the obligation of transparency won't generally apply to an undertaking if it: (a) is set up by a regional or local authorities but also operates competitively in the market; (b) belongs to a local authority with a majority shareholding but a $\frac{3}{4}$ majority vote at a general meeting is required for decisions to be taken; (c) has only a $\frac{1}{4}$ of its supervisory board appointed by the local authority; and (d) received more than $\frac{1}{2}$ of its turnover from bilateral contracts.

The requirement to carefully consider whether an amendment constitutes a new award isn't new. The ECJ previously put down a test (Presstext) which is to be applied when an authority wishes to vary an existing contract, stating an amendment might be material if it would have resulted in a different outcome if included originally, extends the scope of the contract, and/or changes the economic balance of the contract. Wall builds on this. Of course not all variations will be unjustifiable, but care should be taken when proposing changes to an existing contract – including in relation to a supply chain – especially where the identification of a specific sub-contractor was a material consideration in the authority determining that a participant had sufficient capacity for contract delivery.

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