

## Varying the terms of public contracts--what are the rules?

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**Public Law analysis: What impact will the ruling by the Supreme Court on *Edenred v HM Treasury* have on public outsourcing contracts? Philip Moser QC, a barrister at Monckton Chambers, advises this will now be the leading judgment on material variation in public procurement and will no doubt inform challenges on contract review clauses.**

### Original news

*Edenred (UK Group) Ltd and another v Her Majesty's Treasury and others* [2015] UKSC 45, [2015] All ER (D) 07 (Jul)

*The appellants had brought proceedings challenging the decision to use National Savings and Investments (NS&I) to deliver the government policy of tax-free childcare (TFC). In order for NS&I to administer TFC, it was necessary to amend an outsourcing contract between NS&I and Atos IT Services Ltd. The claim was dismissed and the Court of Appeal, Civil Division, dismissed the appellants' appeal, holding, among other things, that the amendment of the contract would not be unlawful. The Supreme Court, in dismissing the appellants' appeal, held, among other things, that the proposed amendment to the contract would not considerably extend the scope of the contract in terms of the Public Contracts Regulations 2015, SI 2015/102, reg 72(8) (PCR 2015) and, therefore, it did not involve substantial modifications under PCR 2015, reg 72(1)(e).*

### What is the background to this case?

NS&I, a government agency, offers banking services and support functions to other government departments, which it calls 'B2B services'. NS&I has outsourced its own operational services, including support for its B2B Services, to Atos, under a public contract procured pursuant to the Public Contracts Regulations 2006, SI 2006/5 (PCR 2006). It was envisaged in the tender and the contract itself that it could be extended to support new B2B services. Now that the government is introducing its TFC scheme, NS&I is to provide and administer the necessary childcare accounts and support to HMRC as a B2B service. NS&I will modify its contract with Atos to include services related to TFC. The claimant, a childcare voucher supplier, complained there would be no new public procurement process in relation to this further work. The High Court (Andrews J) and the Court of Appeal each held that the proposed TFC arrangements were lawful under the PCR 2006 and applicable EU law.

### What issues did the Supreme Court have to consider?

There were two issues before the Supreme Court:

- o Whether the government utilising NS&I to provide the services necessary to deliver TFC and the consequent modification of the NS&I/Atos contract is unlawful because it amounts to a material variation contrary to EU procurement law?
- o If so, whether the claimant is entitled to relief, and if so whether pursuant to its Pt 7 action or via a judicial review brought by the claimant's trade association?

### What did the Supreme Court decide, and why?

The Supreme Court held unanimously the modifications required to the NS&I outsourcing contract with Atos to provide the services necessary to deliver TFC will not amount to a material variation of that public contract. The court decided on the basis of PCR 2015 which had come into force by the time of the appeal, reflecting current EU and UK law, including the *Presstetext* case law (*Presstetext Nachrichtenagentur GmbH v Austria*: C-454/06) on material variation. Their Lordships held that the proposed modifications to the contract, regardless of value, will not 'considerably extend' the scope of that contract (PCR 2015, reg 72(8)) so that they do not involve 'substantial' modifications (PCR 2015, reg 72(1)(e)).

In its reasoning, the court explained the prohibition against modifying a contract to encompass services not initially covered does not prevent an expansion envisaged in the original Official of Journal of European Union (OJEU) advertisement and related procurement documents where these committed the economic operator to undertake them and required it to have the resources to do so. The court also inclined to the view that the amendments were further justified as being made pursuant to 'clear, precise and unequivocal' review clauses in the contract itself, within the meaning of the PCR 2015, reg 72(1)(a) (this being the argument that had found favour in the Court of Appeal), but that the point was not acte clair. However, in view of the finding on the PCR 2015, regs 72(1)(e) and (8) in favour of the respondents, it was not necessary to decide the point and no reference to the Court of Justice of the European Union (CJEU) was required.

### **To what extent does the judgment clarify EU law on tendering and public service contracts?**

The judgment has clarified considerably the circumstances in which a public contract may be modified after it has been entered into. On one, extreme, view, this was not possible at all save for de minimis matters. The PCR 2015, reg 72 had already indicated that that could not be right, and the Supreme Court in *Edenred* has confirmed that emphatically. Each case will still turn on its facts, though, as to whether--and if so to what extent--modifications are permissible. The judgment has brought less clarity on the question of when a public contract may be amended purely pursuant to its own terms, and whether this mechanism is limited to changes for matters such as price indexation, adjustments for technological change, and maintenance. The judgment suggests that such amendment is not so limited, but leaves the question open.

### **Is the decision likely to affect the way in which the government allocates or tenders public service contracts?**

No. The judgment confirmed the way the government has conducted and managed the outsourcing contract. If the judgment had gone against the government, that would have necessitated change, but we won and so the status quo is preserved.

### **Does the judgment have any wider implications?**

This will now be the leading judgment on material variation in public procurement and will no doubt inform challenges on contract review clauses. It will be looked to especially when contracting authorities are considering outsourcing services.

### **What should practitioners take away from the Supreme Court judgment--especially in terms of advising clients?**

Authorities that wish to procure for services that may need expanding must consider carefully the terms of the advertisement, contract and related procurement documents. Economic operators will do likewise if they wish to challenge (if necessary at the OJEU notice stage) the nature, scale and scope of the proposed services and potential expansion. On the other hand, authorities must also be careful not to be held to have designed a contract as a means of avoiding its obligations under EU law and challengers will be astute to test that. If contracts are to contain review clauses, they must achieve a high level of clarity and precision as to what may be amended and how, with binding contractual obligations to that effect.

### **Any further points of interest?**

If PCR 2015 had been in force at the relevant time and the possibility for modification by other means had not been available, one may query whether PCR 2015, reg 72(1)(b) (necessary additional works where a change of contractor is uneconomic or inconvenient) would not have been another possible avenue of change.

*Philip Moser QC has a wide ranging EU law, commercial and procurement law practice. He obtained the first PCR 2006, reg 47G order to lift a suspension on contract-making and was leading counsel in the first Supreme Court case on variation of public contracts and the first case decided under PCR 2015. As well as appearing in many other high-profile and reported procurement cases, he has appeared frequently before the CJEU and national courts in cases including EU sanctions, Francovich damages and VAT fraud. In *Edenred v HM Treasury* he was leading counsel for the government.*

*Interviewed by Kate Beaumont.*

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