

Changes to long-term public contracts: *the good, the bad and the ugly.*

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Law on public contract modifications

- ▶ CJEU case-law
 - ▶ C-496/99 P *CAS Succhi di Frutta*;
 - ▶ C-337/98 *Commission v France*;
 - ▶ C-454/06 *pressetext*;
 - ▶ C-91/08 *Wall AG*;
 - ▶ C-549/14 *Finn Frogne*
- ▶ Directives
 - ▶ 2014/23/EU Art 43 , 2014/24/EU Art 72, 2014/25/EU Art 89
 - ▶ **NB!** Legal certainty vs case-by-case justice
- ▶ National law
 - ▶ public procurement law, contract law, administrative law etc.

Looks at

1. “THE GOOD”

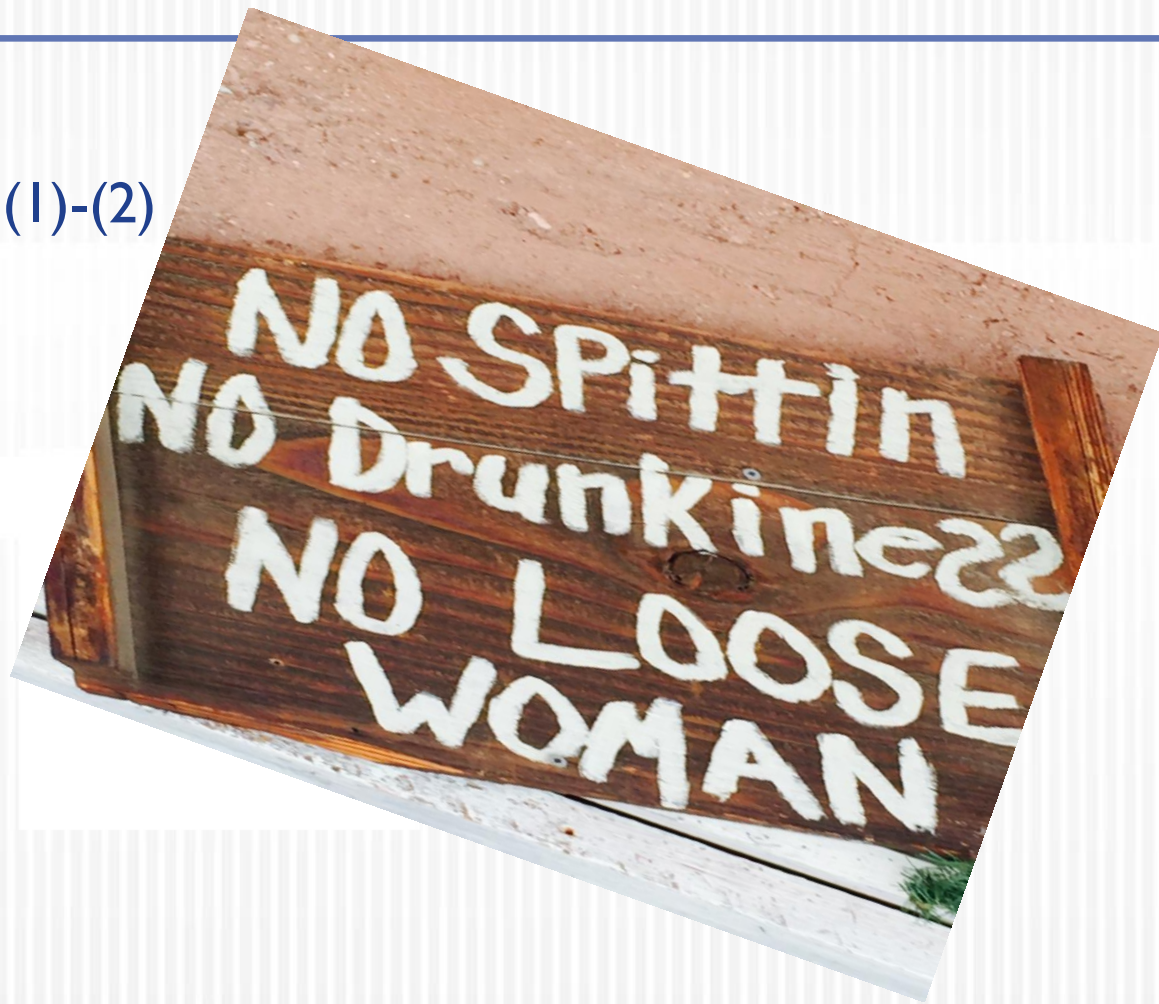
Directive 2014/24 Art 72 (1)-(2)

2. “THE BAD”

Art 72 (4)

3. “THE UGLY”

Art 72 (1) (e) vs (4)



1. “THE GOOD”

Directive 2014/24/EU Art.72 (1) – (2), *Pressetext C-454/06*:

- ▶ Change with **low value** (10%, 15% and threshold)
- ▶ Clear, precise and unequivocal **review clauses**
- ▶ **Additional works** (services, supplies) up to 50% of contract value subject to additional restrictions
- ▶ Change under **circumstances unforeseeable** for a *diligent* contracting authority up to 50% of price
- ▶ **Replacing the contractor** with a qualified person due to restructuring, if no other changes occur.

Art 72 (2) - *de minimis* clause

- ▶ the value of the modification (cumulatively for successive modifications) is below both:
 - ▶ the relevant procurement threshold and ‘
 - ▶ 10 % of the initial contract value for service and supply contracts or 15 % for works contracts
- ▶ the change does not alter the overall nature of the contract.

See also: *pressetext* para 61-63

What about bad faith changes of low value?

Example: Riigikohus 3-3-1-31-11

- ▶ Võru Municipality conducted a competition for awarding an exclusive right for waste removal services. Even **before the start** of the exclusivity period, the Municipality introduced new local prices, increasing the contract price by **5,7%**.
- ▶ Raise of national pollution fees and increase of fuel prices were cited as reasons for the change. However, the first was known prior to submission of bids while the second is a commercial risk of the bidder. Also, the terms of the competition entitled to change the contract price only when the underlying costs would raise by 10 % or more.
- ▶ Municipality was tied to its own terms, increase of the contract price therefore **unlawful**.

What about changes of no clear value?

- ▶ **Relaxed** actual performance requirements, exercise of discretion for the benefit of the contractor:
 - ▶ Consent to substandard performance, failure to claim damages, penalties, securities etc.
- ▶ **Relaxing terms** of contract in favour of contractor:
 - ▶ E.g. Change of a qualified performer (subcontractor)

Wall AG (39): A change of subcontractor, even if the possibility of a change is provided for in the contract, may in exceptional cases constitute [a substantial] amendment ... where the use of one subcontractor rather than another was, ... a decisive factor in concluding the contract ...
 - ▶ E.g. Change of risk, liability, legal essence - compare to US!

What about changes of negative value?

- ▶ *Finn Frogne (29): an amendment ... consisting in **a reduction in the scope** of [a] contract's subject matter may result in it being brought within reach of a greater number of economic operators. ... any reduction in the scope of that contract may result in that contract being of interest also to smaller economic operators. Moreover, since the minimum levels of ability required for a specific contract must ... be related and proportionate to the subject matter of the contract, a reduction in that contract's scope is capable of resulting in a proportional reduction of the level of the abilities required of the ... tenderers.*
- ▶ **NB!** See also: recital 2 of Directive 2014/24: facilitation of more SME participation in public procurement!

Art 72 (1) (a) - review clauses

Clear, precise and unequivocal review clauses:

- ▶ provided in initial contract documents
- ▶ may include price revision clauses, or options.
- ▶ must state the **scope and nature** of possible changes
- ▶ must state the **conditions** when may be used
- ▶ shall **not** provide for changes that would **alter the overall nature** of the contract
- ▶ **irrespective of monetary value.**

Review clauses recommended!

- ▶ *Finn Frogne (36): Furthermore, the very fact that, because of their subject matter, certain public contracts may immediately be categorised as being **unpredictable in nature** means that there is a **foreseeable risk** that **difficulties** may occur at the implementation stage. Accordingly, in respect of such a contract, it is for the contracting authority ... to take care when defining the subject matter of that contract. ... the contracting authority may retain the possibility of making amendments, even material ones, to the contract, after it has been awarded, on condition that this is provided for in the documents which governed the award procedure.*

Examples of review clauses

Review based on **objective external criteria**:

- ▶ Indexing, periodic automatic change etc.
- ▶ Benchmarking clause: comparison with prices of similar products (services):
 - ▶ Needs a reasonably transparent market!
 - ▶ Needs agreement as to identifying prices, consequences of failure to negotiate etc.
- ▶ “Most favoured customer clause”
 - ▶ Agree as to applicable products, market etc.

NB! Renegotiation clauses do **not** necessarily create “safe havens”.

Art 72 (1) (b) - additional works

Additional works, if:

- ▶ cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations; and
- ▶ would cause significant inconvenience or substantial duplication (?) of costs for the authority
- ▶ any increase in price not over 50 % of the value of the original contract (for any of successive changes)
- ▶ consecutive modifications shall **not be aimed at circumventing** the Directive (!)

Art 72 (1) (c)

- unforeseeable circumstances

- ▶ Circumstances unforeseeable for a reasonably diligent authority in the preparation phase, looking at:
 - ▶ **external** circumstances
 - ▶ **NB!** Compare to *Finn Frogne!*
 - ▶ available means, **nature** of project, **good practice** in the field
 - ▶ balance b/w the resources for preparing the award and its foreseeable value.
- ▶ Overall nature of contract is not changed
- ▶ Any increase in price not over 50 % of the value of the original contract (for any of successive changes)
- ▶ Consecutive modifications shall **not be aimed at circumventing** the Directive (!)

2. “THE BAD”

2014/24/EU art 72 (4), *Presstext C-454/06*: any changes making the contract **materially different in character**, incl modifications:

- ▶ with hypothetical influence upon the circle of tenderers or tenders in the initial award procedure
- ▶ changing the economic balance of the contract in favour of the contractor unless provided so in the initial contract terms
 - ▶ **NB!** Compare with long term price change!
- ▶ extending the scope of the contract considerably
- ▶ replacing the contracting party unless pursuant to the exception under art 72 (1) (d).

Hypothetical influence

- ▶ **Relaxing** the initial standards, e.g.:
 - ▶ *Wall AG*: exclusion of qualifying performer
 - ▶ *Finn Frogne*: reduction of contract scope leading to possibly reduced selection criteria
 - ▶ relaxing high standards for products
 - ▶ compare with the US case law:
Webcraft Packaging (B-194087): initial very high standards for a specialty product (paper) were relaxed and could have opened the competition to paper mills previously unable to participate
- ▶ Ordering **new** products
 - ▶ *CAS Succhi di Frutta*: substitution of products
 - ▶ US example: *Onix Networking Corporation (B-411841)*: order of “cloud-based” e-mail as a service added to order of software and technical services by Peace Corps. Having restricted the original competition to Microsoft products and resellers, Google resellers possessed capacity to the changed orders as well.

Extension of scope

- ▶ Look at:
 - ▶ bidder expectations?
 - ▶ nature of contract?
 - ▶ E.g. Technological developments?
 - ▶ Broad terms of competition?
 - ✓ US examples: *Sallie Mae* (B-400486),
Overseas Lease Group (B-402111),
Emergent BioSolutions Inc., (B-402576) etc.

3. “THE UGLY”

- ▶ Art 72 (1) (e): any modification that is **not substantial** according to paragraph (4), irrespective of its value, can be made without a new award procedure.



What about time extensions?

- ▶ Change of time as basis of contract
 - ▶ E.g. change of service period, PPP period
 - ▶ However: compare to *pressetext!*
- ▶ Adjustment of schedule
 - ▶ E.g. accepting time overrun of works
 - ▶ However: compare to *Finn Frogne!*

CONSEQUENCES OF UNLAWFUL CHANGES

- ▶ Contract ineffectiveness
 - ▶ Issues: *locus standi* of third parties? Right to damages of ex-contractor?
- ▶ Right of contracting authority to terminate
 - ▶ Issues: legal certainty? Claims of third parties? Right to damages of ex-contractors? application of the principle of proportionality upon the discretion of authorities? Etc.
- ▶ Right to damages of third parties?

CONCLUSIONS

- Legal certainty *vs* case-by-case justice
- Competition *vs* contracting
 - Interests of new tenderers: *Finn Frogne*
 - Anticipation of changes by original bidders *vis a vis* contractual scope
- Consequences of unlawful changes
 - Principle of proportionality
 - Legal certainty

Thank you for your attention!

