



Procuring when implementing EU funded projects

contract modification, related issues and cases

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Contract modification

- Possible scenarios
- Extension of the modification principles
- Rules applicable to pre-accession instruments
- The reform of the directives



Possible scenarios for modification – 1.

A) Amendment clauses in original contract

- Clear and precise with well defined scope (indexation, options, etc)
- Are other types of clauses abusable?

Review clauses cannot be used to circumvent the application of the Directives! /Case: change of participant in an IPPP/



Possible scenarios for modification – 2.

B) Modifications not governed in the original contract

- minor ones
- modifications amounting to a new award



Modifications amounting to a new contract

rule of thumb: material amendments to public contracts entail a new award procedure

/cases: Succhi di Frutta, Presstext, Commission v France, la Chauvinière)

Material amendment:

- a) New terms and conditions would have allowed other participants
- b) Significant extension of scope
- c) Change in economic balance of contract to the detriment of the contracting authority

/case: correction of post-accession inflation/



Types of modifications

Can concern:

- the nature of the contract
- the price
- duration
- volume of work
- other contractual conditions



Relevance of the grounds for negotiated procedure w/o prior publication of the notice

- Additional works/services
Public Sector Directive Art 31(4)(a)
- Additional deliveries
Art 31 (2)(b)
- The relevance of *c. rebus sic stantibus* and *force majeure*



Extension of the modification principles

- **to concessions**

/cases: Wall AG and case of amendment of service concession concluded pre-accession/

- **to events taking place before the modification**

/case: contract awarded to an affiliated undertaking in light of the Mödling judgement/



Rules applicable before/after accession – 1.

Legal bases

- Article 33(2) of the Act of Accession
- Article 16a(2) of Regulation 1164/94
- PraG rules
- CJEU case-law



Rules applicable before/after accession – 2.

- Original (pre-accession) tendering rules govern amendments concluded post accession
- BUT, if amendment amount to a new contract, this has to be assessed in light of EU law (other than PraG rules)

/case: correction of post-accession inflation/

Relevance?



The new directives on modification

Codification of existing case-law with new elements

- Definition of cases when new award is needed
- Definition of substantial modification (value threshold?)
- *C. Rebus sic stantibus?*
- Review clauses?



Thank you for your attention!