



## PUBLIC CONTRACTS - POWERS OF AMENDMENT THAT ARE TOO WIDE

A recent dispute between the Law Society and the Legal Services Commission ("LSC") concerning the new legal services contract has given rise to some interesting points on the extent to which public contracts awarded in accordance with the EC public procurement rules can be subject to amendment. The contract in question was made between solicitors and the LSC to set out the terms on which solicitors would engage in publicly funded work. The contract included very wide powers of variation intended to give the LSC the ability to vary the contract unilaterally, including the technical specification, to take account of planned reforms to the legal aid system.

The main issue in the case concerned the question of whether the amendment provisions satisfied the obligation of transparency which is implied by the general European law principles of equal treatment and non-discrimination as set out in the EC Treaty and the EC procurement rules as implemented in Member States. It is these principles that underpin, inter alia, the requirements to advertise contracts, tender contracts in a fair manner and award public contracts impartially.

The court of first instance considered that the fact that the possibility of amendment was made clear in the contract and also by the fact that the parameters for reform of the legal aid system had been set out in publicly available documents meant that the obligation of transparency had been met. However, the Court of Appeal disagreed and found that these actions were not sufficient to justify a power of amendment as wide as the one in question and consequently concluded that the obligation of transparency had not been met.

The Court of Appeal found that the contract could not satisfy the principle of transparency simply on the basis that a power of amendment was included in the contract. The fact that the parameters of the possible reforms to the Legal Aid system were set out in publicly available documentation did not alter the Court's view. The Court noted that transparency would be achieved only where there was sufficient certainty in the definition of the subject matter and terms of the contract. In this case the Court determined that the power of amendment was too wide for the contract to be sufficiently certain.





The Court noted in conclusion on this point that the "power of amendment is so wide in this case that it amounts to a power to rewrite the Contract."

The Court of Appeal accepted that some changes may be necessary during the life of the contract and that the contracting authority might need to reserve the power to amend the terms. Not all changes will give rise to a problem and it will be a question of fact in each case. Although this case will be of general application it is worth noting that legal services are "Part B" services under the Public Contracts Regulations 2006 and therefore subject only to a light touch regulation. It seems likely therefore that provisions permitting amendment of a contract fully subject to the 2006 Regulations might run into other problems.



**This Bulletin contains summaries of complicated issues and should not be relied upon in relation to specific matters. You are advised to take legal advice on particular problems and we will be happy to assist.**

If you have any questions about information in this Bulletin, please contact James Dilley - [james.dilley@martineau-uk.com](mailto:james.dilley@martineau-uk.com)