

# The contractor's dilemma

We can define the contractor's dilemma as lose your shirt or go au naturel? **Bruno Herbots** from Beauchamps Solicitors explains.

A variation clause entitles Employers to issue change notices to the Contractor for additional works at the price/rates set out in the contract. Luckily for Contractors, this is only the case when the variation falls 'inside' the contract. Contractors seek to class variations as falling 'outside' the contract so that they are entitled to a quantum meruit payment on the basis of a new implied contract.

For works to fall outside the contract, it must be "impossible to trace the original work contracted for", or the works must be "of a kind totally different from that originally contemplated"; or "so peculiar, so unexpected, and so different from what any person reckoned or calculated upon..." when the contract was entered into.

A good example of works falling outside the contract can be found in *Blue Circle Industries v Holland Dredging Co* (1987). That contract involved dredging works in a lough where the dredge material was to be deposited on the embankment of the lough. During the currency of the contract, the contractor was asked to build an artificial island using the dredge material. It is not surprising that the court held that this was wholly outside the contract.

Contractors must affirm, prior to carrying out such a variation, that same falls outside the contract (*Balfour Beatty v Kildson Goldmines Limited* [1989]), failing which it will remain inside the contract. Consequently, the Contractor must "shout so as to be out".

This approach might now have to be reconsidered in light of the recent landmark decision of the European Court of Justice ("ECJ") in the *Presstext* case (Case C-454/06). In this case, the ECJ held that: "(...) amendments to the provisions of a public contract

(...) constitute a new award of a contract (...) when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to re-negotiate the essential terms of that contract". If an amendment results in a new contract, the (public body)

Employer could be obliged to re-tender that new contract in accordance with EU public procurement rules.

The ECJ further advised that an amendment may be regarded as material when it:

- (a) amends an essential term of the existing contract;
- (b) extends the scope considerably; or
- (c) alters the economic balance in favour of the Contractor.

This materiality test corresponds with the concept of the *ménage à trois* of the three constituent elements of any building contract:

- (a) terms and conditions;
- (b) scope of works; and
- (c) schedule of price.

However, the ECJ further confirmed that a material change might not have to be re-tendered if that change was provided for in the terms of the initial contract. This is the dilemma.

By accepting unconditionally that the instructed variation is inside the contract, you will be bound by the contractual prices and risk 'losing your shirt'.

Alternatively, you could affirm that the said variations are material and fall outside the contract. Unfortunately, since *Presstext* you risk losing the additional works and/or contract altogether and be left au naturel. ■

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