

# PRESSETEXT CASE STUDY

PRESSETEXT  
NACHRICHTENAGENTUR GMBH  
V  
AUSTRIA AND OTHERS



*This case study will be considered  
within the following PASS Training Courses*

**Implementing the new Selection Process**

**Contract Management**



Visit

[www.passprocurement.co.uk](http://www.passprocurement.co.uk)

# Presstext Nachrichtenagentur GmbH v Austria and others

## What changes are necessary in a contract for it to be considered a new agreement?

**In 1994 the Austrian Republic entered a contract for an indefinite period with APA, a news service provider, waiving its right to terminate until 31 December 1999. The contract allowed the authorities to access information and press releases and use the original text service (OTS). In September 2000, APA established a wholly-owned subsidiary, APA-OTS, and transferred its OTS service to it.**

The parties entered a supplemental agreement to the contract in 2001 when Austria joined the euro, rounding off some prices, substituting the price index, entering a second supplemental agreement in 2005 waiving termination rights until December 2008, and reducing the price of online enquiries.

Rival agency Presstext challenged on the basis that the original agreement was severed following APA's restructuring in 2000, and the supplemental agreements were unlawful. The European Court of Justice (ECJ) stated amendments to a public contract only constitute a new award when they are materially different from the original contract and demonstrate the intention of the parties to renegotiate the essential terms of that contract.

### **None of the changes were materially different.**

APA-OTS had separate legal personality to APA but it was a wholly-owned subsidiary and APA continued to assume responsibility under the contract, meaning it was

an internal reorganisation. The adjustment to the euro prices was minimal and objectively justified. The contract provided for updating the price index. It was for an indefinite period and there was no suggestion the authority would have terminated it, so the increased waiver period did not distort competition. The price reduction could be considered to come under the terms of the contract and was to the detriment of APA, so did not shift the economic balance in its favour.

An amendment may be regarded as material when (a) it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted, or for the acceptance of a tender other than the one initially accepted; (b) it extends the contract's scope to encompass services not initially covered; or (c) it changes the economic balance in favour of the contractor in a manner not provided for in the initial contract.

### **What this means**

This case sets out useful guidance on what constitutes a material change.

Small price amendments, especially those which work against the contractor's interests, will not constitute such a change. Where the change falls within one of the three situations set out by the ECJ, consideration must be given to whether it demonstrates an intention to renegotiate the essential terms of the contract. If so, a new award must be made.

It would be wise to include provisions for foreseeable change in contracts, because where the contract allows for a particular change the issue will not arise.

The ECJ noted that substitution of a contractual partner would amount to a material change unless it was provided for in the contract, such as through provision for sub-contracting.

[www.passprocurement.co.uk](http://www.passprocurement.co.uk)

**PASS Procurement**

Medius, 60 Pacific Quay,  
Glasgow G51 1DZ

e: [pass@passprocurement.co.uk](mailto:pass@passprocurement.co.uk)  
e: [consultancy@passprocurement.co.uk](mailto:consultancy@passprocurement.co.uk)  
t: 08445 2770 70555

Delivered by

