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**THE PUBLIC CONTRACTS REGULATIONS 2015 &
THE UTILITIES CONTRACTS REGULATIONS 2016
GUIDANCE ON AMENDMENTS TO CONTRACTS DURING THEIR TERM**

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OVERVIEW

What contract amendments are allowed?

1. The Public Contracts Regulations (PCR) 2015 provide clarity about the extent to which a contract can be amended after award without the need to re-advertise in OJEU. Permissible grounds for amendment include the existence of suitable “clear, precise and unequivocal” review clauses in the contract; a need for additional supplies or services where a change of supplier is impossible and would cause significant inconvenience, or a need for additional deliveries due to unforeseen circumstances (both subject to 50% maximum increase in initial contract value); where a new supplier replaces the existing supplier because of insolvency or genuine restructuring; and where the amendment, irrespective of its value, is not substantial..

Why is this helpful/necessary?

2. The changes here aim to reduce uncertainty arising from European Court cases (in particular, *Presstext, C-454/06*), which found that changes in a contract post award could in certain cases lead to a legal requirement for re-advertisement in OJEU. Their purpose is to provide a “safe harbour” for certain types of amendments. The provisions should be helpful to contracting authorities to ensure that changes to contracts once awarded are controlled properly.

What has changed?

3. The previous rules (The PCR 2006) contained only limited provisions on the extent to which additional or repeat requirements could be procured from the original contractor after contract award. Those limited provisions were contained in the rules on the negotiated procedure without prior publication of a contract notice (regulation 14) and have been maintained in the corresponding provisions of the new rules (regulation 32 of The PCR 2015).

4. The area of substantial change is that following the *Presstext* case, The PCR 2015 now provide more certainty on the type of amendments that can be made without the need to re-advertise, providing a modern and flexible set of express rules for contract amendments. For example, there is no financial limit on an amendment provided for in an option clause in the original contract, provided certain other conditions are met as explained in this guidance. The changes do not provide unlimited discretion, and contracting authorities must have the right to terminate a contract where the limits are breached. But the changes do recognise the realities of public procurement and that it should be possible, for example, to adapt the contract because of technological changes, or technical difficulties that have appeared during operation or maintenance, or to react to unforeseen circumstances. These new flexibilities are an important change that all procurement staff, suppliers and many other stakeholders will need to understand.

Which rules do I need to refer to?

5. The rules on modification of contracts during their term, see regulation 72 (attached at Annex A). Similar changes have been made in regulation 88 of the Utilities Contracts Regulations 2016.

KEY POINTS

Any Change

6. **A contract/framework may change without re-advertisement in OJEU where:**

- The change, irrespective of the monetary value, is provided for in the initial procurement documents in a clear, precise and unequivocal review or option clause, which specifies the conditions of use and the scope and nature of the change; and the overall nature of the contract/framework is not altered; or
- The change, irrespective of its value, is not “substantial” as defined in regulation 72(8).

Major Change¹

7. **A contract/framework may change without re-advertisement in OJEU where:**

- Additional works, services or supplies “have become necessary” and a change of supplier would not be practicable (for economic, technical or interoperability reasons) and would involve substantial inconvenience/duplication of costs (limited to 50% of original contract price); or
- The need for the change could not have been foreseen by a “diligent” contracting authority, provided these changes do not affect the nature of the contract/framework or exceed 50% of the price of the original contract.

8. In these cases, the contracting authority must publish in OJEU a “Notice of modification of a contract during its term”.

Minor Change²

9. **A contract/framework may change without re-advertisement in OJEU where:**

- It is a minor change that does not affect the nature of the contract/framework; and
- Does not exceed the relevant threshold; and
- Does not exceed 10% (services or supplies) or 15% (works) of the initial value.

¹ For brevity, this guidance uses “major change” to describe the changes allowed by regulations 72(1)(b), 72(1)(c) and 72(3). Major change is not a defined term.

² For brevity, this guidance uses “minor change” to describe the changes allowed by regulations 72(5) and 72(6). Minor change is not a defined term.

Corporate Changes³

10. **A contract/framework *may* change without re-advertisement in OJEU where certain corporate changes have occurred in the supplier such as merger, takeover or insolvency, provided:**

- The new supplier meets the original qualitative selection criteria; and
- Other substantial modifications are not made to the contract/framework.

³ Regulation 72(1)(d).

FAQs

When do these rules come into force?

Amendments made to contracts on or after 26 February 2015 need to comply with regulation 72 of the 2015 Regulations, which itself codifies case law including that established in *Presstext*.

The Utilities Contracts Regulations 2016 came into force on 18 April 2016 and amendments to contracts made after that date need to comply with its regulation 88.

Do these rules apply to contracts awarded before the 2015 Regulations?

Yes. Regulation 118(5) of the 2015 Regulations, as amended by The Public Procurement (Amendments, Repeals and Revocations) Regulations 2016, now states expressly that the provisions on contract amendments (regulation 72) apply to contracts which commenced before that date. Our interpretation is that this has been the case since the 2015 Regulations first came into force, as it is the date on which the amendment is made that matters, not the date when the contract was first awarded. The Supreme Court took the same view in its judgment in *Edenred* in July 2015.

Does this mean all current contracts need to be amended to include a termination clause, to comply with regulation 73?

No. Regulation 73(1) does not require contracts awarded before 26 February 2015 to be changed. But regulation 73(3) will apply and a termination clause will be implied.

Do these rules apply to call-off contracts awarded under framework agreements?

Regulation 33(6) states that call-off contracts may not depart from the terms of the framework agreement in any substantial respect. This is because amendments to call-off contracts are subject to the terms of the framework agreement used to award them. Where an amendment to a call-off contract is proposed, the terms of the framework agreement should first be considered in the light of regulation 33. If however the framework agreement is silent, and regulation 33 does not prevent the amendment, the rules in regulation 72 should be considered.

What does regulation 33(6) mean by “substantial”?

There is no definition for the purpose of regulation 33(6). However, it may be possible to use the meaning of “substantial” in regulation 72 to help understand the same term in regulation 33(6).

What about contract extensions?

These rules apply to contract extensions. A contract extension is an amendment to contract within the scope of regulation 72.

Do these rules only codify *Presstext*?

No, there are some differences. *Presstext* established that for an amendment to be legal it must not be a material amendment to the contract. An amendment is material if it:

- Introduces conditions which would have allowed for the admission or acceptance of a different tender; or
- Extends the scope of the contract considerably; or
- Changes the economic balance of the contract in favour of the contractor.

These are now included in the definition of a substantial change. Regulation 72 goes further in setting out comprehensively all the circumstances in which a contract may be amended.

What is a “substantial” change?

A substantial change is defined in regulation 72(8). It is any change, irrespective of value, which meets one or more of these conditions:

- Materially alters the character of the original contract/framework;
- Would have allowed other potential suppliers to participate or be selected, or another tender to be accepted;
- Changes the economic balance in favour of the contractor;
- Extends the scope of the contract/framework “considerably”;
- A new contractor replaces the original contractor, other than where the change arises from a review or option clause in the original contract or from corporate changes such as merger, takeover or insolvency.

Are “materially alter” and “considerably” defined?

It is not possible to define these terms in a way that will apply in all cases. A material alteration or considerable extension in one case will not necessarily apply in other cases. Contracting authorities will need to use their judgment on a case by case basis, taking legal advice as necessary.

Where more than one major change is made, does the 50% limit apply to each amendment or in aggregate?

Where more than one major change is made, the 50% limit applies each time provided the change is not aimed at avoiding the procurement rules. Note that it remains at 50% of the value of the original contract, not 50% of any increased price resulting from an earlier variation.

What about the limits to minor changes?

The 10% (services or supplies) and 15% (works) limits apply in aggregate, not each time. The value of each change must also be less than the relevant threshold. If a change exceeds these limits, it becomes an illegal change unless it falls within one of the other categories of permitted change.

How do the limits to major or minor changes work when the contract includes an indexation clause?

Where the contract price is subject to an indexation clause (such as a variation of price formula) the updated price as varied by the clause is the reference point for calculating the percentage change in value. So, in a services contract with an updated price of £10M the aggregate value of minor changes cannot exceed £1M, but each change must also have a value less than the relevant threshold.

Do bank step-in rights in a PPP/PFI contract meet the review clause condition?

Yes, provided the step-in rights are clear, precise and unequivocal, state the conditions under which they may be used, and do not alter the overall nature of the contract.

What happens if the change fails these tests?

A new procurement procedure, conducted in accordance with the procurement rules, is required.

What happens if a change is made that is contrary to the Regulations?

For contracts placed on or after 26 February 2015, the contracting authority may exercise its right to terminate the contract – see regulation 73(1)(a) (also attached at Annex A). For all contracts, the contracting authority also has the option of not agreeing to the change.

If a change is found by a court to be contrary to the Regulations, then the court can declare the contract ineffective (and the parties can agree beforehand what should happen in those circumstances) or make other orders.

Annex A – Regulations 72 and 73

Modification of contracts during their term

72.—(1) Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Part in any of the following cases:—

- (a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses or options, provided that such clauses—
 - (i) state the scope and nature of possible modifications or options as well as the conditions under which they may be used, and
 - (ii) do not provide for modifications or options that would alter the overall nature of the contract or the framework agreement;
- (b) for additional works, services or supplies by the original contractor that have become necessary and were not included in the initial procurement, where a change of contractor—
 - (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement, and⁴
 - (ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority, provided that any increase in price does not exceed 50% of the value of the original contract;
- (c) where all of the following conditions are fulfilled:—
 - (i) the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen;
 - (ii) the modification does not alter the overall nature of the contract;
 - (iii) any increase in price does not exceed 50% of the value of the original contract or framework agreement.
- (d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of—
 - (i) an unequivocal review clause or option in conformity with sub-paragraph (a), or
 - (ii) universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Part;
- (e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph (8); or
- (f) where paragraph (5) applies.

(2) Where several successive modifications are made:—

- (a) the limitations imposed by the proviso at the end of paragraph (1)(b) and by paragraph (c)(iii) shall apply to the value of each modification; and
- (b) such successive modifications shall not be aimed at circumventing this Part.

(3) Contracting authorities which have modified a contract in either of the cases described in paragraph (1)(b) and (c) shall send a notice to that effect, in accordance with regulation 51, for publication.

(4) Such a notice shall contain the information set out in part G of Annex 5 to the Public Contracts Directive.

(5) This paragraph applies where the value of the modification is below both of the following values:—

- (a) the relevant threshold mentioned in regulation 5, and
- (b) 10% of the initial contract value for service and supply contracts and 15% of the initial contract value for works contracts,

provided that the modification does not alter the overall nature of the contract or framework agreement.

⁴ Amended from “or” to “and” by The Public Procurement (Amendments, Repeals and Revocations) Regulations 2016.

(6) For the purposes of paragraph (5), where several successive modifications are made, the value shall be the net cumulative value of the successive modifications.

(7) For the purpose of the calculation of—

- (a) the price mentioned in paragraph (1)(b) and (c), and
- (b) the values mentioned in paragraph (5)(b),

the updated figure shall be the reference figure when the contract includes an indexation clause.

(8) A modification of a contract or a framework agreement during its term shall be considered substantial for the purposes of paragraph (1)(e) where one or more of the following conditions is met:—

- (a) the modification renders the contract or the framework agreement materially different in character from the one initially concluded;
- (b) the modification introduces conditions which, had they been part of the initial procurement procedure, would have—
 - (i) allowed for the admission of other candidates than those initially selected,
 - (ii) allowed for the acceptance of a tender other than that originally accepted, or
 - (iii) attracted additional participants in the procurement procedure;
- (c) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;
- (d) the modification extends the scope of the contract or framework agreement considerably;
- (e) a new contractor replaces the one to which the contracting authority had initially awarded the contract in cases other than those provided for in paragraph (1)(d).

(9) A new procurement procedure in accordance with this Part shall be required for modifications of the provisions of a public contract or a framework agreement during its term other than those provided for in this regulation.

Termination of contracts

73.—(1) Contracting authorities shall ensure that every public contract which they award contains provisions enabling the contracting authority to terminate the contract where—

- (a) the contract has been subject to a substantial modification which would have required a new procurement procedure in accordance with regulation 72(9);
- (b) the contractor has, at the time of contract award, been in one of the situations referred to in regulation 57(1), including as a result of the application of regulation 57(2), and should therefore have been excluded from the procurement procedure; or
- (c) the contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and the Public Contracts Directive that has been declared by the Court of Justice of the European Union in a procedure under Article 258 of TFEU.

(2) Those provisions may address the basis on which the power is to be exercisable in those circumstances, for example by providing for notice of termination to be given and by addressing consequential matters that will or might arise from the termination.

(3) To the extent that a public contract does not contain provisions enabling the contracting authority to terminate the contract on any of the grounds mentioned in paragraph (1), a power for the contracting authority to do so on giving reasonable notice to the contractor shall be an implied term of that contract.