

# Guidance: Contract Modifications

August 2024

## **Guidance on Contract Modifications**

### **What are contract modifications?**

1. Following the award of a contract, changes (referred to as modifications in the Procurement Act 2023 (Act)) may need to be made to that contract to ensure it can be successfully fulfilled, as demands and circumstances change throughout its lifetime. The Act gives contracting authorities legal certainty when making modifications, setting out ten grounds in total on which public contracts or 'convertible contracts' (see paragraphs 37-39 below) may be modified during their term, provided the relevant requirements are met. If a modification cannot be justified on at least one of the grounds, the modification is not permitted and a new procurement must be carried out if the contracting authority wishes to implement the subject-matter of the modification.
2. Modifications to below-threshold contracts (unless they are convertible contracts) and light touch contracts do not need to be justified on one of the ten grounds; they may be freely modified under the Act. Except where expressly set out, this guidance applies to public contracts only and not below-threshold contracts.

### **What is the legal framework that governs contract modifications?**

3. Sections 74-77 and Schedule 8 of the Act and regulation 40 regulate contract modifications.
4. Section 74(1) sets out the circumstances under which public contracts or convertible contracts may be modified. Contracting authorities may modify a public contract or a convertible contract if the modification:
  - a. is a 'permitted modification' under one of the eight grounds set out in Schedule 8 (section 74(1)(a)); or
  - b. is not a 'substantial modification' as described in section 74(3) (section 74(1)(b)) (a modification on this ground is described in this guidance as 'non-substantial' modifications); or
  - c. is a 'below-threshold modification' as described in section 74(4) (section 74(1)(c)).
5. Section 74 also expressly permits contracting authorities to modify light touch contracts.
6. Section 75 provides that before modifying a contract, contracting authorities must publish a contract change notice, unless an exemption applies. The information that must be included in a contract change notice is set out in regulation 40.
7. Section 76 sets out the rules contracting authorities must follow if they choose to enter into a voluntary standstill period (see paragraphs 50-57 below) after publishing a contract change notice.

8. Section 77 sets out a second transparency requirement. If a modification is made that requires the publication of a contract change notice and the modification is to a contract with a value greater than £5 million (including the value of the modification itself), the contracting authority must publish a copy of the modification or a copy of the contract as modified. Some contracts are exempt from this requirement (either expressly or by operation of section 77), as set out in the table in paragraph 40 below.

## **What has changed?**

9. To give contracting authorities greater flexibility to deal with the challenges of managing a contract successfully, there are four new modification grounds in the Act. These are: urgency and the protection of life; materialisation of a known risk; and two new grounds specific to defence authority contracts. Four grounds that were available under the Public Contract Regulations 2015 (PCR), Utilities Contracts Regulations 2016 (UCR) and Concessions Contract Regulations 2016 (CCR)<sup>1</sup> have been retained but updated, to give contracting authorities greater certainty when using them.
10. The four grounds retained from the previous legislation are: where the modification is provided for in the contract, where the modification has arisen due to unforeseeable circumstances, where the modification is for additional goods, services or works provided for in the contract and where the modification is to enable the transfer of the contract on corporate restructuring.
11. Overall, greater flexibility to make contract modifications is balanced by far greater transparency under the Act. The requirements to publish contract change notices and modifications to contracts valued at over £5 million are significant changes from the previous legislation. They are changes that will give interested parties visibility over the modifications made (including the cost of those modifications) during the life of a contract.
12. Other changes include the introduction of a convertible contract and changes to the way the value of a contract is calculated when making modifications (as set out at paragraph 16).

## **Key points and policy intent**

### The modification grounds

13. Modifications to public and convertible contracts can only be made if at least one of the ten grounds set out in section 74 and Schedule 8 of the Act applies. Sections 74(1)(b) and 74(1)(c) may be considered to be more appropriate to more minor amendments, but the Act does not prohibit minor amendments being made under Schedule 8 and an amendment under section 74(1)(b) or 74(1)(c) may be significant; for example an amendment to a works contracts under section 74(1)(c) may amount to a fairly significant amendment, given the value of the works threshold. The modification grounds are summarised in the table below:

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<sup>1</sup> See regulation 72 of the PCR, regulation 88 of the UCR and regulation 43 of the CCR. The Defence and Security Public Contracts Regulations 2011 do not contain specific provisions on contract modification; in practice regulation 16 was used to modify contracts.

<b>Non-substantial and below-threshold modifications</b>		
<b>1</b>	<b>Non-substantial</b>  Section 74(1)(b)	Modification is permitted on this ground if it is not a 'substantial modification as defined in section 74(3), i.e. if it does not: <ul style="list-style-type: none"> <li>● increase or decrease the term of the contract by more than 10% of the maximum term provided for on award; or</li> <li>● materially change the scope of the contract; or</li> <li>● materially change the economic balance of the contract in favour of the supplier.</li> </ul>
<b>2</b>	<b>Below-threshold</b>  Section 74(1)(c) and section 74(4) (meaning of 'below-threshold modification')	Modification is permitted on this ground if it: <ul style="list-style-type: none"> <li>● does not increase or decrease the estimated value of a goods or services contract by more than 10%, or a works contract by more than 15%; and</li> <li>● does not materially change the scope of the contract.</li> <li>● cannot be made on the grounds at Schedule 8 or is not a substantial modification (as set out in section 74(3)).</li> </ul> <p>Section 74(1)(c) may be used multiple times, but the meaning of a below-threshold modification provides, at section 74(4)(b), that the aggregated value of the changes made on this ground must be less than the threshold applicable to that type of contract.</p>
<b>Permitted modifications under Schedule 8</b>		
<b>3</b>	<b>Provided for in the contract</b>  Schedule 8, paragraph 1	Modification is permitted on this ground if the possibility of the modification is unambiguously provided in: <ul style="list-style-type: none"> <li>● the contract as awarded; and</li> <li>● the tender or transparency notice for the award of that contract; and</li> <li>● the modification would not change the overall nature of the contract.</li> </ul>
<b>4</b>	<b>Urgency and the protection of life</b>  Schedule 8, paragraphs 2-3	Modification is permitted on this ground if its purpose: <ul style="list-style-type: none"> <li>● could, alternatively, be achieved by directly awarding a contract under section 41 (Direct award in special cases); and</li> <li>● such direct award could be made by reference to either extreme and unavoidable urgency (under Schedule 5, paragraph 13) or regulations made under section 42 (Direct award to protect life, etc).</li> </ul>
<b>5</b>	<b>Unforeseeable circumstances</b>  Schedule 8, paragraph 4	Modification is permitted on this ground if: <ul style="list-style-type: none"> <li>● the circumstances giving rise to the modification could not reasonably have been foreseen by the contracting authority before the award of the contract; and</li> <li>● it does not change the overall nature of the contract; and</li> <li>● it does not increase the estimated value of the contract by more than 50%. This 50% threshold does not apply if the</li> </ul>

		contract is a utilities contract.
<b>6</b>	<b>Materialisation of a known risk</b>  Schedule 8, paragraphs 5-7	<p>Modification is permitted on this ground if:</p> <ul style="list-style-type: none"> <li>• a 'known risk' (as defined in Schedule 8, paragraph 6) has materialised which was not caused by any act or omission of the contracting authority or supplier, and as a result the contract cannot be delivered to the contracting authority's satisfaction; and</li> <li>• it is in the public interest in the circumstances to amend the contract rather than award a new contract; and</li> <li>• it does not increase the estimated value of the contract by more than 50% (unless it is a utilities contract, in which case the 50% cap does not apply); and</li> <li>• it was set out in the tender notice or transparency notice for award of the contract that the contract may require amendment due to the identified risk; and</li> <li>• goes no further than necessary to address the known risk.</li> </ul> <p>When considering the public interest in relation to this type of modification, the contracting authority:</p> <ul style="list-style-type: none"> <li>• must consider whether a new contract (rather than a modification) could provide more value for money; and</li> <li>• may consider technical and operational matters.</li> </ul>
<b>7</b>	<b>Additional goods, services or works</b>  Schedule 8, paragraph 8	<p>Modification is permitted on this ground if:</p> <ul style="list-style-type: none"> <li>• it is for goods, service or works that are additional to (which would include a repetition of) goods, services or works already provided for in the contract; and</li> <li>• using a different supplier would result in the supply of goods, services or works that are different from, or incompatible with, those already provided for in the contract; and</li> <li>• the contracting authority considers that the difference or incompatibility would result in: <ul style="list-style-type: none"> <li>○ disproportionate technical differences in operation or maintenance or other significant inconvenience; and</li> <li>○ substantial duplication of costs for the authority; and</li> </ul> </li> <li>• the modification would not increase the estimated value of the contract by more than 50%. This limit of 50% does not apply if the contract being modified is a utilities contract.</li> </ul>
<b>8</b>	<b>Transfer on corporate restructuring</b>  Schedule 8, paragraph 9	<p>The novation or assignment of a public contract to another supplier (which would include another contracting authority) is a permitted modification if it is required following a corporate restructuring or similar circumstance.</p> <p>Section 74(9) prohibits a contracting authority from modifying a contract to change a supplier except where this ground applies. The</p>

		new supplier must not be an excluded supplier.
<b>Permitted modifications under Schedule 8 for defence authority contracts<sup>2</sup></b>		
<b>9</b>	<b>Defence authority contracts</b>  Schedule 8, paragraph 10	Modification to a defence authority contract is permitted to: <ul style="list-style-type: none"> <li>• ensure the contracting authority is able to keep up with developments in technology; or</li> <li>• prevent or mitigate any adverse effect of such developments.</li> </ul>
<b>10</b>	<b>Defence authority contracts</b>  Schedule 8, paragraph 11	Modification to a defence authority contract is permitted to ensure the continuous provision of goods, services or works where that is necessary to ensure the Armed Forces maintain their operational capabilities, effectiveness, readiness, safety, security or logistical capabilities.

14. More than one ground may apply to a particular modification. For example, a modification may be permissible under section 74(1)(a) on more than one of the grounds set out in Schedule 8 or may meet the criteria for a non-substantial modification under section 74(1)(b) and also be permissible under Schedule 8. For example, a modification that is of low value and involves minimal scope changes may be required to deal with unforeseeable circumstances and therefore meet the criteria for both a non-substantial modification (under section 74(1)(b)) and the 'unforeseeable circumstances' ground in Schedule 8, paragraph 4. Note, however, that this is not the case for below-threshold modifications. A modification cannot be classed as a below-threshold modification if it could be made under another ground i.e. if it meets the criteria for a non-substantial modification or if a ground in Schedule 8 applies (section 74(4)(d)).

15. The Act prohibits (at section 74(7)) contracting authorities from combining a modification that is not permitted by the Act with one that is permitted in order to make the non-permitted modification. For example, a contracting authority should not make repeated small below-threshold modifications to a contract in order to purchase additional goods, services or works when those modifications could reasonably have been made as a single (larger) modification but that single modification would have been over the threshold set out in section 74(4)(a).

16. Where a reference is made to the 'estimated value of the contract' in the contract modification grounds, this means the estimated value of the contract at the time it is valued - i.e. the estimated value immediately before the modification is made (see section 4).

#### Use of the grounds in sections 74(1)(b) and (1)(c)

<sup>2</sup> Section 7(4) defines a defence authority contract as a defence and security contract awarded by a defence authority. Section 7(5) and regulation 46 provide that a defence authority is the Secretary of State for Defence, AWE plc, the National Crime Agency and the Oil and Pipelines Agency.

17. When making changes to a contract, contracting authorities should select the ground that is most appropriate for the changes they wish to make, and, as set out at paragraph 14 above, in some (but not all) cases more than one ground may apply.
18. The non-substantial and below-threshold grounds in section 74(1)(b) and (c) have some common features in that both set limits on any increase or decrease in contract term or value (respectively) and on changes in scope. The term 'increase or decrease' in the meaning of non-substantial and below-threshold modifications refers to modifications that reduce the duration or value of a contract, as well as modifications that increase the duration or value. There are differences, however, in how changes to the value or contract term are calculated (see paragraphs 20 and 24 below).

#### The non-substantial ground

19. The effect of section 74(1)(b) means that contracting authorities may amend a contract in any way provided this does not amount to a substantial modification as described in section 74(3).
20. One of the restrictions in section 74(3) relates to the term of the contract. If using the non-substantial ground to increase or decrease the duration of a contract, the increase or reduction must amount to 10% or less of the maximum duration provided for when the contract was awarded. To note, the maximum duration provided for includes any extensions to the contract term provided for in the original contract.
21. The contracting authority may have flexibility to modify the duration of the contract above 10% using other grounds, rather than 74(3) in the Act. For example, if a contracting authority wishes to extend a 5 year contract by an additional year not provided for in the original contract (a 20% increase in duration), but the modification does not increase the estimated value of the contract by more than 10%, then the below-threshold ground may be available as a ground on which to make the modification. Alternatively, one of the grounds in Schedule 8 may be available, depending on the situation. Contracting authorities should note that, when relying on the non-substantial ground, the maximum (10%) change to the duration of the contract (if relevant) is based on the original maximum duration provided for in the contract, not the maximum duration provided for immediately prior to the modification (i.e. ignoring any previous modifications that have increased the duration beyond the maximum originally provided for).
22. A modification on the non-substantial ground is also only permitted if the modification would not materially change the scope of the contract or materially change the 'economic balance' of the contract in favour of the supplier. Section 74(5) provides that the reference to a material change to the scope means a change to the type of goods, services or works to be supplied under the contract that was not already provided for in the contract.
23. Whether there is a material change in the economic balance in favour of the supplier is concerned with whether the supplier is put in a better place under the contract that materially benefits the supplier economically and should be assessed by reference to the contractual bargain agreed between the contracting authority and the supplier in the context of the whole

contract. Each modification will need to be considered on its own facts, but additional goods, services or works to be provided at the same price as that agreed for the original goods, services or works, for example, may not, in the particular circumstances, materially change the economic balance in favour of the supplier. However, a modification that resulted in an increase in the supplier's profit under the contract from 8% to 16%, or which transferred ownership of intellectual property rights to the supplier, where those rights had value, or repeated modifications that resulted in the purchase of a significant amount of additional goods, services or works over a period of time would, for example, be likely to materially change the economic balance in favour of the supplier.

The below-threshold ground

24. Section 74(4) provides that a below-threshold modification is only permitted if it would not increase or decrease the estimated value of the contract by more than 10% in case of a contract for goods or services or 15% in case of a contract for works. The total value of all below-threshold modifications must also be less than the threshold amount for the type of contract. This means that contracting authorities may only be able to make a limited number of below-threshold modifications. For example, in the case of a goods contract, a number of below-threshold modifications could be made, but the total value of those modifications must not exceed the threshold for goods contracts in Schedule 1 of the Act (£139,688<sup>3</sup>).
25. As with a non-substantial modification, a below-threshold modification must not materially change the scope of the contract and, as set out at paragraph 14 above, the below-threshold modification must not be permissible under section 74(1)(a) (Schedule 8) or section 74(1)(b) (non-substantial modification).

#### Use of the grounds in Schedule 8

Modification is provided for in the contract

26. Schedule 8, paragraph 1 permits a modification if it is unambiguously provided for as an option in the original contract and original tender or transparency notice and the modification would not change the overall nature of the contract. It is important that as much information as possible is provided about the potential modification to ensure that the ground can be relied upon.

Modification is due to urgency and the protection of life, etc

27. Schedule 8, paragraphs 2-3 permit a modification only if the purpose of the modification (for example, to respond to an emergency event) could, alternatively, be achieved if the contracting authority made a direct award (of a separate contract) under section 41, Schedule 5, paragraph 13 (urgency) of the Act or regulations made under section 42 (direct award to protect life, etc.). (Further information on these specific direct award justifications can be found in the guidance on direct award.) This ground enables contracting authorities to act swiftly and efficiently in extraordinary circumstances to adapt to urgent requirements. It

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<sup>3</sup> The thresholds in this guidance are the current thresholds. Schedule 1 of the Act will be updated when it comes into force to include these thresholds.



may be useful where the circumstances require a rapid response and it is quicker and/or better value to modify an existing contract than directly award a new contract. Modifications made on this ground are not capped, so contracting authorities have sufficient flexibility to procure what is necessary in such circumstances.

Modification has arisen due to unforeseeable circumstances

28. Schedule 8, paragraph 4 permits a modification if the circumstances giving rise to the modification could not reasonably have been foreseen by the contracting authority before the contract was awarded, the modification would not change the overall nature of the contract and the modification would not increase the estimated value of the contract by more than 50%.

Modification is due to materialisation of a known risk

29. Schedule 8, paragraphs 5-7 permit a modification where it is to deal with a known risk which materialises during the life of the contract and allows contracting authorities to better manage potential risks in their procurements that otherwise may have resulted in legal uncertainty or an impact on delivery. The Act defines a known risk as a risk which the contracting authority considers could jeopardise the satisfactory performance of the contract but could not, due to its nature, be addressed in the contract from the outset. The risk must have been identified in the tender notice or transparency notice for the award of the contract, which means it must have been identified before the award of the contract. Paragraph 5 provides that the modification is permitted only if the known risk did not materialise due to any act or omission of the contracting authority or the supplier and the existence of the risk means that the contract cannot be performed to the satisfaction of the contracting authority. The modification must go no further than is necessary and it must be in the public's interest to modify the contract, rather than award a new contract. In addition, the modification must not increase the estimated value of the contract by more than 50%.
30. For example, if, due to emerging cyber threats, a contracting authority needs to ask its supplier to make changes to the software system it provides to enable the system to operate safely and adequately protect personal information stored on the system, the contracting authority could modify the contract to include this requirement, provided the specific risk of emerging cyber threats was identified and detailed in the relevant notice and the other requirements of Schedule 8, paragraphs 5-7 are met.
31. Contracting authorities should be specific and highly selective when identifying known risks; the ground is not intended to capture all risks that may emerge during the lifetime of a contract.

Modification is for additional goods, services or works

32. Schedule 8, paragraph 8 permits a modification if: it is for the supply of goods, services or works in addition to those already provided for in the contract; and using a different supplier would result in the supply of goods, services or works that are different from, or incompatible with, those already provided for in the contract; and the contracting authority considers that this would result in disproportionate technical difficulties in operation or maintenance or other

significant inconvenience and the substantial duplication of costs for the authority. In addition, the modification must not increase the estimated value of the contract by more than 50%.

Modification is to enable the transfer of a contract on corporate restructuring

33. Schedule 8, paragraph 9 provides that a novation or assignment (or in Scotland, an assignation) of a public contract to a supplier that is not an excluded supplier is a permitted modification if it is required following a corporate restructuring or similar circumstance. A corporate restructuring could include sale of a business as part of a planned strategy, or one that has been required following the insolvency of the supplier. There is no intention for this ground to be narrower than in the previous legislation.

Modification to defence authority contracts

34. The two grounds which are available to modify defence authority contracts are available to defence authorities, in addition to the other grounds in the Act. A modification to a defence authority contract is permitted to:
- a. ensure the contracting authority is able to keep up with developments in technology or prevent or mitigate any adverse effect of such developments; or
  - b. ensure the continuous provision of goods, services or works where that is necessary to ensure the Armed Forces maintain their operational capabilities, effectiveness, readiness, safety, security or logistical capabilities.

Modification of frameworks, call-off contracts and dynamic markets

35. If a framework, a call-off contract under a framework or contract awarded under a dynamic market is a public contract or a convertible contract, the contract modification provisions in the Act apply; this includes those relating to the publication of contract change notices and the publication of modifications (see below for publication requirements).
36. However, there are some points that are specific to frameworks and call-off contracts:
- a. with regard to frameworks, if a contracting authority wishes to modify a framework to extend the term beyond the timeframe set out under section 47(1)<sup>4</sup> of the Act, then it would, in addition to satisfying one of the permitted grounds in section 74(1), also need to satisfy the test in section 47(2). See the guidance on frameworks;
  - b. with regard to call-off contracts:
    - i. if a contracting authority wishes to rely on the ‘materialisation of a known risk’ ground (Schedule 8 paragraphs 5-7) to make modifications to call-off contracts, it must sufficiently identify the specific risks that may require a

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<sup>4</sup> Which provides that the maximum term of a framework is either four years, or, in the case of defence and security or utilities frameworks, eight years.

modification in the tender notice or transparency notice for the framework (because these notices are not used when awarding a call-off contract).

For example, in order for call-off contracts under a framework for the maintenance of school buildings to be modified to deal with RAAC crumbling concrete being discovered in a site survey, the tender notice or transparency notice for the framework would need to specify that the risk may arise in particular call-off contracts.

For this reason, this modification ground in relation to call-off contracts is likely to be of greater use where frameworks are designed to be relatively specific in their nature and have a particular group of contracting authorities in mind;

- ii. similarly, if a contracting authority wishes to rely on the 'provided for in the contract ground' (Schedule 8, paragraph 1) to make a modification that is unambiguously provided for in a call-off contract as awarded, it must provide sufficient information about the possible modification in the tender notice or transparency notice for the framework.

For example, the tender notice or transparency notice for a framework for road upkeep and resurfacing could set out that possible modifications that enable their duration to be extended or ancillary road maintenance services to be purchased may be unambiguously provided for in the call-off contracts.

### Convertible contracts

37. The Act provides for the concept of a 'convertible contract' at section 74(1). A convertible contract is a below-threshold contract that, as a result of the modification, will become a public contract.
38. Because a convertible contract will become a public contract after modification, it is treated as a public contract prior to the relevant modification being made for the purposes of section 74 (and section 75 and section 77 dealing with contract change notices and the publication of modifications (see paragraphs 40-49 below). This means that a modification that would result in a below-threshold contract becoming a public contract can only be made if the modification is permitted under section 74(1).
39. After modification, the contract will be subject to all of the provisions in the Act that apply to public contracts, for example, the various notice requirements, rather than just the provisions in Part 6 of the Act that are specific to below-threshold contracts. Contracting authorities should note that when a convertible contract becomes a public contract, there is no requirement to set and assess performance against key performance indicators (KPIs) for that contract even if, once modified, the contract is valued at over £5 million. This is because the requirement to set key performance indicators under section 52(1) arises before a public contract is entered into. See guidance on KPIs and guidance on contract performance notices.

Transparency requirements

40. The first transparency requirement (set out in section 75) is that before modifying a public contract or a convertible contract, a contracting authority must publish a contract change notice on the central digital platform unless one of the following exemptions apply:

Exemptions from the requirement to publish a contract change notice	
<p>The modification is below the threshold for publication (section 75(2))</p>	<p>If the modification increases or decreases the</p> <ul style="list-style-type: none"> <li>• estimated value of the contract by 10% or less for goods or services or 15% or less for works; or</li> <li>• contract term by 10% or less of the maximum term provided for on award,</li> </ul> <p>contracting authorities generally do not need to publish a contract change notice.</p> <p>In effect, these publication thresholds mean that non-substantial and below-threshold modifications do not require a contract change notice.</p> <p>Modifications made under Schedule 8, paragraph 1 (Provided for in the contract) are also likely to be exempt in effect in most cases. This is because if the option to modify the contract under Schedule 8, paragraph 1 would increase the contract value, the estimated value of the option will be included in the estimated value of the contract (which is the maximum amount the contracting authority expects to pay, assessed in accordance with Schedule 3, paragraph 1) assessed immediately prior to the modification being entered into. If the option to modify the contract would extend the term of the contract, this would be within the maximum duration permitted on award. Consequently, when these options are exercised, the value or term of a contract are not increased beyond the estimated value or maximum term provided for. The exception to this is if an option to modify a contract under Schedule 8, paragraph 1 would reduce its value or term. In these cases, if the option is exercised, a contract change notice is required if there is a decrease in the value or term of the contract by more than the percentages in section 75(2).</p> <p>Contract change notices are required only where modifications are made to a contract. If there is any increase or decrease in contract value that is not as a result of a modification, such as a natural underspend on a contract, a contract change notice is not required.</p> <p>To note: if the modification is made under Schedule 8, paragraph 9 (novation or assignment on corporate restructuring), the exemptions in section 75(2) do not apply and a contract change notice must be published. This is to ensure that a conflicts of interest assessment is carried out under section 83<sup>5</sup> and that confirmation that it has been prepared and revised is recorded in the contract change notice.</p>
<p>The type of contract is exempt</p>	<p>Section 75 (and therefore the requirement to publish a contract change notice) does not apply to a contract that:</p>

<sup>5</sup> See section 83(5) and the definition of a 'relevant notice' in section 83(8).

<p>from the provision (section 75(6))</p>	<ul style="list-style-type: none"> <li>● is a defence and security contract; or</li> <li>● is a light touch contract; or</li> <li>● was awarded by a private utility; or</li> <li>● was awarded by a transferred Northern Ireland authority, unless awarded as part of a procurement under a reserved procurement arrangement or a devolved Welsh procurement arrangement; or</li> <li>● was awarded as part of a procurement under a transferred Northern Ireland procurement arrangement.</li> </ul>
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41. Section 75(4) and (5) prohibit contracting authorities from dividing modifications into smaller ones to fit below the publication threshold and avoid publishing a contract change notice.
42. The second publication requirement (set out in section 77) is that the contracting authority must publish a copy of the contract as modified or the modification itself where it has made a 'qualifying modifications'.
43. A qualifying modification is a modification to a contract which:
- a. requires the publication of a contract change notice under section 75; and
  - b. modifies, or results in, a public contract with an estimated value of more than £5 million (including the value of the modification).
44. The copy of the contract as modified or the modification must be published within 90 days of the qualifying modification being made (beginning with the day on which it was made). The central digital platform requires that these are published as an attachment to the contract change notice.
45. A contracting authority could choose to attach agreed drafts of the modification or modified contract to the contract change notice at the time the notice is published. Where this is the case, the final modification made or modified contract must be attached to the contract change notice before the end of the 90 day deadline in section 77(1).
46. Where a modification or modified contract is published, it may be redacted in accordance with section 94 (General exemptions from duties to publish or disclose information). See the guidance on publication of information for further information.
47. Where the value of the modification takes the total value of the contract over the £5 million publication threshold, the contracting authority will not have been required to publish a copy of the original contract under section 53(3) of the Act. In this instance, contracting authorities are encouraged to publish the contract as modified, rather than just the modification, in order to enable interested parties to better understand the modification.
48. To note, as contract change notices are not required to be published prior to modifying the contracts referred to in section 75(6) (see the table at paragraph 40 above), this means any modifications to those contracts are not qualifying modifications and therefore the requirement to publish the modification or a copy of the modified contract does not apply.

49. The requirement to publish a qualifying modification does not apply to a modification to a contract that was awarded by a devolved Welsh authority, unless it was awarded as part of a procurement under a reserved procurement arrangement (the latter would be the case if, for example, a devolved Welsh authority is awarding a call-off contract over £5 million under a framework established by a reserved contracting authority, such as the Cabinet Office) or was awarded as part of a procurement under a devolved Welsh procurement arrangement, for example where a contracting authority that is not a devolved Welsh authority is awarding a contract under a framework or dynamic market established by a devolved Welsh contracting authority. Devolved Welsh authorities should refer to the Welsh-specific guidance.

#### Voluntary standstill

50. Contracting authorities may choose to implement a 'voluntary standstill period' prior to making a contract modification.

51. A standstill period in the context of a contract modification is the period of time between publication of the contract change notice and making the modification. The standstill period gives suppliers and other interested parties the opportunity to consider the proposed modification and validity of the grounds relied on. It is important to note that during this period contracting authorities are only prohibited from making the modification; delivery of the extant contract continues. For more information on standstill, see guidance on contract award notices and standstill.

52. Where a voluntary standstill applies, section 76 provides that:

- a. the contracting authority may not modify a public contract or a convertible contract before the end of the standstill period stated in the contract change notice; and
- b. the standstill period must not be less than a period of eight working days, beginning with the day on which the contract change notice is published.

53. Where there is no requirement to publish a contract change notice prior to modifying the contract, but the contracting authority wishes to implement a voluntary standstill period, a contract change notice must be published. This is because it is the contract change notice that formally triggers the start of the voluntary standstill period.

54. Contracting authorities must state in the contract change notice whether a voluntary standstill period applies, and if so, the duration of that period (noting the minimum period in section 76(2) (see above)) and set out the date that the contract will be modified, and the date that the modification will have effect. By applying a voluntary standstill period, contracting authorities can protect themselves from risk of the modification being set aside or post-contractual damages being awarded if there is a successful legal challenge.

55. A contract change notice can be published and a voluntary standstill period commenced whilst negotiations on the modification are ongoing, provided that the contracting authority includes all of the information required by the regulations in the contract change notice (this

might not be feasible if, for example, the change to the value or term of the contract are part of that negotiation). When a contract change notice can be published early, this provides the added benefit that the contracting authority will not need to pause the process of making the modification in order to observe the standstill period.

56. If proceedings are commenced to challenge a modification and notified to the contracting authority during the standstill period, the 'automatic suspension' will apply and the contracting authority will be unable to modify the contract until the claim has been resolved or the suspension lifted by the court. Publishing the contract change notice as early as possible means any challenges can be managed at a less disruptive stage and potentially resolved outside of formal court processes.
57. The nature of the modification (for example, if it needs to be completed urgently) may justify accepting the risk of the modification being set aside and not implementing a voluntary standstill period. Therefore, whilst a voluntary standstill period is best practice in most circumstances, there may be other factors to consider. It is up to individual contracting authorities to make a risk-based decision whether to apply it or not.

#### **What notices are linked to this aspect of the Act?**

58. The key notice relating to contract modifications is the contract change notice which informs suppliers and other interested parties that a contract is to be modified.
59. The information that must be included in a contract change notice is set out in regulation 40 and includes the applicable ground(s) for modification, an explanation of why the modification falls within the specific ground(s) used, and details of any changes to the value and term of the contract resulting from the modification. To note it is not the intention that legally a ground does not or cannot apply because it is not included in the contract change notice.
60. If the modification is made under Schedule 8, paragraph 9 and the contract is being transferred to a different supplier as a result of a corporate restructure, the details of any new supplier as well as the details of any supplier that is no longer party to the contract must also be included in the contract change notice.
61. Following the publication of a contract change notice and subsequent modification of the contract, the next notice that a contracting authority may be required to publish will be one of the following:
  - a. contract change notice: a contracting authority must publish a contract change notice each time it modifies the contract again (unless an exemption applies);
  - b. contract performance notice: multiple contract performance notices may be required to be published during the lifetime of the contract;
  - c. contract termination notice: publication of this notice will inform interested parties that a contract has been concluded. Private utilities contracts and user choice contracts are exempt from this requirement.

**What other guidance is of particular relevance to this topic area?**

Guidance on valuation of contracts

Guidance on competitive tendering procedures

Guidance on direct award

Guidance on contract award notices and standstill

Guidance on publication of information



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