



Government  
Commercial  
Function

# The Procurement Act 2023: Permitted Contract Modifications and the Materialisation of a Known Risk



A discussion paper by the  
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## Introduction

1. This paper discusses one of the new provisions available within the Procurement Act 2023 (the Act). This provision allows for a contract to be modified following the materialisation of a known risk. **Please note:** This document is a discussion paper intended to support colleagues in their commercial role and does not constitute policy or legal advice.
2. **What is a known risk?** A known risk is a risk that, prior to the award of the contract, a contracting authority considered could jeopardise the satisfactory performance of the contract, but because of its nature, the risk could not be addressed in the contract as awarded. It must have been identified in the tender or transparency notice for award of the contract.



## The Procurement Act 2023

3. Section 74 and Schedule 8 of the Act set out when it is permitted to make a modification to a public contract. Commercial Policy guidance on permitted modifications to a public contract can be found [here](#).
4. Whilst a number of these grounds existed under the previous procurement legislation, Schedule 8 paragraph 5 of the Act is a new provision. Schedule 8 paragraph 5 allows a contracting authority to modify a public contract if the contracting authority considers that:
  - 4.1. a 'known risk' (as defined in Schedule 8 paragraph 6 of the Act) 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
  - 4.2. it is in the public interest in the circumstances to amend the contract rather than award a new contract; and
  - 4.3. 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);
  - 4.4. 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
  - 4.5. goes no further than necessary to address the known risk.
5. When considering the public interest in relation to this type of modification, the contracting authority:
  - 5.1. must consider whether a new contract (rather than a modification) could provide better value for money; and
  - 5.2. may consider technical and operational matters.
6. It should be noted that to make modifications to call-off contracts awarded under a framework, a contracting authority must sufficiently identify the specific risks that may require a modification in the tender notice or transparency notice for the framework (because these notices are not used when awarding a call-off contract). It could be applied to a contract award under a dynamic market.

## How do I use this provision?

7. **Identifying Known Risks:** Prior to commencing any procurement contracting authorities are encouraged to consider if there are any known risks that could impact the performance of the contract. There are many methods for identifying known risks:
  - 7.1. Lessons learned from previous contracts;
  - 7.2. NAO, PAC and other parliamentary reports;
  - 7.3. Lessons learned by other contracting authorities with similar contracts;
  - 7.4. Review of tender notices for similar contracts;
  - 7.5. Seeking input from stakeholders, in particular subject matter experts;
  - 7.6. Using Preliminary Market Engagement to ask potential suppliers what risks may arise during the performance of the contract.
8. **It is important not to allow suppliers to use this provision as a backdoor mechanism for avoidable and costly contract change.** Likewise, contracting authorities should not use the provision to ‘kick the can down the road’, rather than addressing contractual issues as part of the procurement process. This will simply place the original business case at risk of failure. It could also lead to challenges from other suppliers if the risk could, in fact, have been addressed in the awarded contract (and was therefore not a true “known risk”).
9. **Publishing Intent:** As noted above, this new provision requires contracting authorities to publish in the tender or transparency notice for award of the contract both:
  - 9.1. The possibility of modifying the contract on this ground; and
  - 9.2. That that the contracting authority considers that materialisation of a known risk could:
    - 9.2.1. jeopardise the satisfactory performance of the contract; but
    - 9.2.2. because of the nature of the risk it could not be addressed in the contract as awarded.

**10. The provision cannot be relied upon if the known risk and the possibility of modification are not set out in the tender notice or transparency notice for award.**

11. For example, the tender notice or transparency notice could include words such as: *“The contracting authority reserves the right to modify the contract in reliance on Schedule 8 paragraph 5 of the Procurement Act 2023 where the contracting authority considers that a “known risk” has arisen. A “known risk” is a risk which could jeopardise the satisfactory performance of the contract but because of the nature of the risk it could not be addressed in the contract as awarded. The following risks have been identified as known risks: [insert list of known risks].....”*

12. The text should then go on to list known risks, for example in some contracts the following could constitute known risks (depending on the circumstances):

12.1. site surveys reveal previously unidentified ground conditions which will impact delivery timescales and cost;

12.2. Authority systems which the contractor is required to interface with change beyond the interface requirements set out in the contract.

12.3. End users require improved service levels, requiring a change to the service delivery model.



## PERMITTED MODIFICATIONS TO A CONTRACT

13. **The Competitive Flexible Procedure:** During a Competitive Flexible Procedure risks could emerge which have not been identified as known risks in the tender notice, for example during a dialogue stage. If possible, agreement should be reached and documented within the contract to provide clarity on how each risk is managed (for example, who owns and pays for consequences of the risk becoming an issue.) It should be noted that these risks would not constitute 'known risks' as defined by the Act given that they would not meet the definition in Schedule 8 paragraph 6 (see paras 2 and 4.1 above) and therefore the 'known risk' permitted modification ground would not apply to them.
14. **Business Case Justification:** Contracting authorities would be expected to have stated within their business case the known risks identified and how they would most likely be addressed. This should particularly set out who will bear the cost of the modification as a result of any of the known risks occurring.