

# Modification of contracts existing before the go-live date of the Procurement Act 2023

27 September 2024  Jan Cumming

## Modifying contracts procured under the Procurement Act 2023

When the [Procurement Act 2023](#) goes live on 24 February 2025, public contracts procured **after** that date can only be modified in accordance with section 74 where:

- The modification is a permitted modification under Schedule 8
- The modification is not a substantial modification, that is:
  1. Would not increase or decrease the term of the contract by more than 10% of the maximum provided for on award
  2. Would not materially change the scope of the contract
  3. Would not materially change the economic balance of the contract in favour of the supplier
- The modification is a below-threshold modification, being an increase or decrease of estimated contract value of not more than (in the aggregate with other modifications) 10% for goods or services or 15% for works

Before modifying a [public contract](#), a contracting authority will first need to publish a contract change notice, subject to certain exceptions such as light touch contracts or where the value of the modification is 10% or less for goods or services or 15% or less for works (and there is no novation or assignment on corporate restructuring). That contract change notice will need to set out that the contracting authority intends to modify the contract together with the information required by regulation 40 of the Procurement Regulations 2024 (section 75) with a voluntary standstill period of at least 8 working days beginning with the day of publication (section 76).

## Modifying pre-existing contracts

The situation differs for contracts entered into or for which the procurement commenced *before* the go-live date. The Procurement Act (Commencement No. 3 and Transitional and Saving Provisions) Regulations 2024 provide that these contracts will continue to be dealt with under the Public Contracts Regulations 2015 ("**PCR2015**") (or the Concession Contracts Regulations 2016, Utilities Contracts Regulations 2016 or Defence and Security Public Contracts Regulations 2011 if applicable).

Regulation 72 of the PCR2015 provides that a contract or framework agreement can be modified during their term without a new procurement procedure if:

- The modifications were provided for in the initial procurement documents in clear, precise and unequivocal review clauses that would not alter the overall nature of the contract
- Where additional works, services or supplies have become necessary and a change of contractor cannot be made for economic or technical reasons and would cause significant inconvenience or substantial cost duplication, so long as the price increase does not increase the original contract value by more than 50%
- The modification is needed because of circumstances which a diligent contracting authority could not have foreseen, would not alter the overall nature of the contract and the price increase does not increase the original contract value by more than 50%

- A new contractor following corporate restricting so long as the new contractor would have fulfilled the original qualitative selection criteria
- The value of the modification would not alter the overall nature of the contract and is below both threshold and 10% of the original contract value for goods or services and 15% for works
- The modification is not substantial because it does not:
  - Render the contract materially different in character or
  - Introduce conditions which, had they been part of the initial procurement procedure, allowed for the admission of other candidates from those initially selected, or allowed for the acceptance of another tender, or attracted additional participants in the procurement procedure or
  - Change the economic balance of the contract in favour of the contractor or
  - Extend the scope of the contract considerably

No contract change notice is necessary.

## Challenge of modifications to pre-existing contracts

What then if a contract procured prior to the go-live date of the Procurement Act 2023 is modified during its term but the modification was not permitted by one of the grounds set out in regulation 72 of the PCR2015?

A modification of a pre-existing contract that *is not* permitted by regulation 72(1) of the PCR2015 would require a new procurement procedure. Accordingly, it could be challenged as a direct award without a procurement process under the law in force at the time, so the challenge would be brought under Part 9 of the Procurement Act 2023 if the impermissible modification were made after 24 February 2025.

The challenge would need to be brought not later than the earlier of:

- The end of the 30-day period when the supplier first knew or ought to have known about the circumstances giving rise to the claim or
- The end of the 6-month period beginning with the day the contract was modified (section 106)

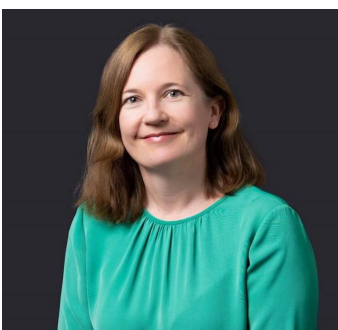
The Government Commercial Function Procurement Act 2023 Guidance: Remedies (September 2024) states at paragraph 34:

*Setting aside the contract or modification means that the **contract has no effect from the date of the order** (i.e. it is of no effect from that point onwards, but not retrospectively).* [emphasis added]

However, section 104(2)(a) of the Procurement Act 2023 states that the court “*must, if a set aside condition in section 105 is met, make an order setting aside the contract **or** modification*” [emphasis added] and not the contract as modified so it is open to the court to set aside only the modification and not the contract as a whole under the post-contractual remedies in section 104 of the Procurement Act 2023.

If the modification were set aside, it would be treated as without effect from the date of the order. Setting aside a modification would remove it from the pre-existing contract, with that contract effectively blue-pencilled or put back to its original provisions to remove the impermissible modification. However, it would depend on the facts of the particular case as not all contracts can be put back to how they were before they were modified so in some circumstances the appropriate order would be to set aside the contract as a whole.

## Key contact



Jan Cumming

Legal Director

jan.cumming@brownejacobson.com

+44 (0)330 045 2189

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