



SIGMA

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Creating Change Together

SIGMA

Public Procurement

Training Manual

Update 2015

Module G

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SECTION 1 – INTRODUCTION

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1.1 OBJECTIVES

On page PDF G-2

Search and replace “variation” with “modification”

Search and replace “variations” with “modifications”

PDF G-3

1.3 LINKS

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1.5 LEGAL INFORMATION HELPFUL TO HAVE **AT** HAND

The main legal requirements relating to advertising are set out in Directive 2014/24/EU:

- Article 70 confirms that the contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject matter of the contract and indicated in the call for competition or in the procurement documents.
- Article 71 covers the general rules applying to subcontracting.
- Article 72 sets up the rules and limits on the extent to which the contracting authority may modify contracts during their term.
- Article 73 sets out general circumstances for terminating the contract during its term.

Recitals 104-112 are also relevant in this context.

Additional information

SIGMA Public Procurement Briefs:

No. 29, Detecting and Correcting Common Errors in Public Procurement

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[No. 30, 2014 EU Directives: Public Sector and Utilities Procurement](#)

SECTION 2 – NARRATIVE

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2.2.1 The inaugural or initial meeting

- An approach that is too soft may be interpreted as weakness, signalling to the economic operator that the procurement officer may be easily exploited. Giving this impression could lead to many contractual claims and requests for modifications throughout the life of the contract.

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2.3.1 The need to be able to measure

Control is vital, and it is true that you cannot control what you cannot measure. Measurement and control are discussed in Module G3. Control is also discussed in Modules B2 and B3.

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2.3.4 Areas where controls are necessary

Between the award of a contract and its conclusion, controls are necessary at the following steps of the procurement process. The nature of these controls will be discussed in Module G3.

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2.3.5 Service-level agreements

Amendment in paragraph 1, line 6

Module G3 will discuss this issue in more detail.

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2.3.6 Special conditions relating to the performance of the contract

Special attention must be paid to environmental, social or employment-related considerations. Such considerations must be indicated from the beginning, in the contract notice, in the prior information notice as a call for competition, or in the procurement documents, as mandatory conditions for contract performance.

The obligation to take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by European Union law, national law, collective agreements or by the international environmental, social and labour law provisions is now explicitly provided in the 2014 directives. Such obligations are also extended to the level of subcontractors.

It is for that reason that the contracting authority, at the latest when the performance of the contract commences, shall require the main contractor to indicate the name, contact details and legal representatives of its subcontractors involved in works or in respect of services to be provided at a facility under the direct oversight of the contracting authority, in so far as the information is known at that point in time. The contracting authority shall require the main contractor to indicate any changes in this information during the course of the contract and the required information concerning any new subcontractors that the main contractor might subsequently involve in such works or services.

Contracting authorities may verify whether the subcontractors are subject to any of the situations that are defined as grounds for mandatory exclusion. Where such measures are applied to subcontractors, the main contractor shall be required to replace the subcontractor concerned. Under national rules, such a verification procedure may also be extended to non-compulsory grounds for exclusion.

2.4 MODIFICATIONS OF CONTRACTS DURING THEIR TERM

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2.4.1 NOT USED

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2.4.2 When is a contract modification necessary?

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The contracting authority must conclude a contract with the winning tenderer in accordance with the terms and conditions of that tenderer’s offer. In other words, the terms of the concluded contract should reflect the commitments made in the offer that was selected as the most economically advantageous. Ideally, if contracts are well founded, they should be fulfilled without modifications, but in practice contracting authorities may be faced with situations where additional works, supplies or services become necessary.

A modification to a contract may be necessary in the following circumstances:

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2.4.2 Behind the need for modifications

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Behind the need for modifications are circumstances where:

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- price indexation is needed;
- the price of the contract is determined based on the unit prices of the estimated quantities;
- obsolescence has occurred;
- adaptations to the contract are rendered necessary by technical difficulties that have appeared during operation or maintenance;
- legislative changes have been made;
- genuine unforeseeable circumstances occur;
- upstream planning has been inadequate;
- assessment and evaluation of economic operators’ tenders have been inadequate;
- poor contract management occurs.

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Deleted: <#>genuine unforeseeable circumstances occur;¶
<#>there are legislative changes.¶

Price indexation

In particular when the performance of the contract covers a long period, well-defined price modification mechanisms/methods (provided in the tender documents and regulated in the contract) may serve as useful tools for achieving a reasonable balance in the contract's economy.

Good practice note – price indexation

A contractual price indexation formula may take the following general pattern:

$$P_{final} = P_{initial} * (C1 * I1 + C2 * I2 + ... + Cn * In)$$

P_{final} = the indexed contract price

$P_{initial}$ = the initial contract price

$C1, C2, ... Cn$ = weighting coefficients dependent on the specifications of the contract, as defined and published by the contracting authority

$I1, I2, ... In$ = technical price indexes dependent on the specifications of the contract, as usually computed and published by statistical institutions

Price of the contract is determined based on the unit prices of the estimated quantities

It is rarely possible to perform a large construction project exactly as foreseen in the original proposals and drawings. In practice, marginal variations of the quantities provided for the project have a huge potential to generate difficulties, if this issue is not diligently regulated in the contract. In such cases, payments may be made according to the bill of (real) quantities for approved work executed, multiplied by the relevant unit prices stated in the tender for each item.

Obsolescence

The supply market may have moved on and the equipment as specified in the contract may now be obsolete and unobtainable. Computer hardware and software are classic examples. However, the specification should be forward-looking and anticipate a development roadmap. In this type of situation, a framework agreement, with mini-competitions or a dynamic purchasing system, may be a better approach so as to reflect the changing needs.

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Legislative changes

Changes in legislation may entail contract modifications.

Genuine unforeseeable circumstances

With the wide variety of contracts established with contracting authorities, it is inevitable that some contracts will require modifications, either to meet changing requirements or to meet a reasonable request from the economic operator. The notion of unforeseeable circumstances refers to circumstances that could not have been predicted, despite reasonably diligent preparation of the initial award by the contracting authority, taking into account its available means, the nature and characteristics of the specific project, good practice in the field in question, and the need to ensure an appropriate relationship between the resources spent in preparing for the award and its foreseeable value.

Inadequate upstream planning

Inadequate upstream planning is a major cause of modifications.

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Inadequate tender assessment

Modifications may originate from an insufficient analysis of economic operators

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Good practice note – variations
 Economic operators will sometimes bid low in the tender in an attempt to secure the contract and then afterwards generate increased profits through modifications.

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 Here the supply market may have moved on and the equipment as specified may now be obsolete and unobtainable. Computer hardware and software are classic examples. However, the specification should be forward-looking and anticipate a development roadmap. In this type of situation a framework agreement with mini-competitions may be a better approach so as to reflect the changing needs.

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Poor contract management

Naïve procurement officers and other stakeholders may be subjected to arguments, from persons working for the economic operator, that a particular part of the service is not within the contract and that a modification is therefore necessary. Care needs to be taken not to pay additionally for items that are already included in the contract.

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The wording of the contract may be ambiguous, despite all of the previous attempts at clarity, and a modification may have to be agreed. These cases must be fed back into the learning from this contract in order to avoid such issues in future contracts.

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 With the wide variety of contracts established with contracting authorities, it is inevitable that some contracts will require variation, either to meet changing requirements or to meet a reasonable request from the economic operator.

2.4.3 When and how a contract may be modified during its term

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 Changes in legislation may entail contract variations.¶

The 2014 directives clarify when the modifications to a contract during its performance are possible and how to proceed to make these changes.

Taking into account the relevant case law of the Court of Justice of the European Union, the general rule remains unchanged, namely that **a new procurement procedure is required in case of material changes to the initial contract (or framework agreement), in particular to the scope and content of the mutual rights and obligations of the parties (including the distribution of intellectual property rights). Such changes demonstrate the parties' intention to renegotiate the essential terms or conditions of that contract. This is the case in particular if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure.**

Deleted: **2.4.4 - Helpful case law relating to variations¶**
 ¶
 Variations cannot be used as a mechanism to re-let, lengthen, amend or develop a contract between a contracting authority and an economic operator. Variations must by nature be of a relatively minor nature in the context of the overall contract size and scope. One public sector procurement manager commented that "increasing the work by 50,000 GBP on 5,000,000 GBP is a variation but perhaps not materially different, whereas increasing the work by 50,000 GBP on 100,000 GBP is a major material difference". This comment assumes that the increase is also within the scope of the original contract. Even where there is a small change in cost, this may shift the risk between the parties and could as such be regarded as a 'material' change.¶

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Insert after case note on Presstexte case

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Compared to the 2004 directives, the 2014 directives provide much more legal certainty with regard to the situations where contracts may be modified without having to start a new procurement procedure. These situations can be divided into two main categories:

- modifications that meet certain conditions that are not necessarily linked with a specific value
- modifications having values that are below certain *de minimis* thresholds

Modifications subject to certain conditions

Contracts and framework agreements may be modified without a new procurement procedure 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. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used".

According to the above-mentioned conditions, the contracting authority has the possibility to provide for modifications to a contract by way of review or option clauses. Such clauses should not give unlimited discretion to the contracting authority. "Such clauses shall not provide for modifications or options that would alter the overall nature of the contract or the framework agreement".

Review or option clauses that have been sufficiently and clearly drafted may, for instance, provide for price indexation or ensure that communication equipment to be delivered over a given period will continue to be suitable so that it meets updated communication protocols or other technological changes. It should also be possible, with sufficiently clear clauses, to provide for adaptations of the contract that may be rendered necessary by technical difficulties appearing during operation or maintenance. It should also be recalled that contracts could, for instance, provide for both ordinary maintenance as well as extraordinary maintenance interventions that may become necessary in order to ensure the continuation of a public service.

(b) "for additional works, services or supplies by the original contractor that have become necessary but were not included in the initial procurement and 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; and

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(ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority."

However, any increase in price shall not exceed 50% of the value of the original contract (this condition is not applicable for contracts awarded by entities operating in the water, energy, transport, and postal service sectors). Where several successive modifications are made, that limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing the Directive.

(c) "where all of the following conditions are fulfilled:

(i) the need for modification has been brought about by circumstances that 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 is not higher than 50% of the value of the original contract or framework agreement. Where several successive modifications are made, that limitation shall apply to the value of each modification (this condition is not applicable for contracts awarded by entities operating in the water, energy, transport, and postal service sectors)."

The situations that may occur due to unforeseen circumstances are regulated by the 2014 directives in a different way than they were by the old 2004 directives. One of the main differences is that the 2004 directives included this type of situation within the cases justifying the use of the negotiated procedure without publication of a contract notice, whilst the 2014 directives do not impose a new procurement procedure for modifying the contract. However, this provision cannot apply in cases where a modification results in an alteration of the nature of the overall procurement, for instance by replacing the works, supplies or services to be procured by something different or by fundamentally changing the type of procurement.

Modifications without particular conditions

Without any need to verify whether the conditions set out above are met, contracts may be modified without a new procurement procedure being necessary where the value of the modification is below both of the following values:

_____ - below the EU thresholds; and

_____ - below 10% of the initial contract value for service and supply contracts and below 15% of the initial contract value for work contracts.

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The 2014 directives address more pragmatically and more efficiently the approach to minor modifications that may be made during the performance of contracts.

In this context, it is worth mentioning that the possibility to make such modifications to an ongoing contract does not depend on the nature of the reasons that may determine the modifications. For instance, certain minor omissions/discrepancies (even errors) of the initial project may generate the need for minor supplementations/changes to some of the work items that have to be performed. Such omissions/discrepancies may have a disputable predictability/unpredictability nature, but there are no legal impediments to making modifications if their main characteristic remains their non-substantiality – both in terms of value and in terms of the impact on the overall nature of the work contract (see the “Presstexte” case).

Where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications. This provision means that limitations shall not apply to the value of each modification, but to the cumulative value of all of the modifications.

On the other hand, the text of the 2014 directives refers to the **net** value, which means that for calculating the value of the modifications (in relation to the two limitations), **the value of new works minus the value of works waived** should be taken into account. However, it should also be kept in mind that the net impact of the modification must not affect the overall nature of the contract. For these reasons, a net modification of price of 5% (consisting in 40% of new works and 35% of abandoned works) shall be considered as a substantial modification if such changes affect the initial nature of the contract.

Warning note

A new procurement procedure, in accordance with the 2014 Directive, is required for any modification of the provisions of a public contract or framework agreement during its term other than those modifications provided for in the above-mentioned exceptions.

Contracting authorities must be very careful when considering the possibility of introducing modifications to an agreed contract, in particular outside the scope of a pre-agreed, transparent and contractual cost-variation mechanism. Such modifications run a significant risk and could result in the award of a new contract for the purposes of the Directive, even where an exception apparently applies. If the changes render the contract materially different in character from the one initially concluded, they shall be tantamount to the award of a new contract, and a new procurement procedure must be organised, in compliance with the Directive. The failure to comply with the provisions of the Directive where the changes amount to the award of a new contract would be considered as an illegal direct award.

2.4.4 When and how the contracting authority may be replaced during the term of the contract

In line with the principles of equal treatment and transparency, the successful tenderer should not be replaced by another economic operator without reopening the contract to competition. However, the successful tenderer performing the contract will be able to make, in particular where

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the contract has been awarded to more than one undertaking, certain structural changes during the performance of the contract, such as purely internal reorganisations, takeovers, mergers and acquisitions, or insolvency. This approach is logical, since such structural changes should not automatically require new procurement procedures for all public contracts performed by that tenderer.

In accordance with the 2014 directives, contracts and framework agreements may be modified without a new procurement procedure in the case where a new contractor replaces the economic operator to which the contracting authority had initially awarded the contract as a consequence of:

- “an unequivocal review clause or option” in the initial procurement documents; or
- “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 Directive”; or
- “in the event that the contracting authority itself assumes the main contractor’s obligations towards its subcontractors where this possibility is provided for under national legislation”.

In any event, for any cases other than those mentioned above, the modification of a contract or framework agreement during its term shall be considered to be substantial where a new contractor replaces the economic operator to which the contracting authority had initially awarded the contract.

2.4.5 **The impact of modifications**

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Modifications can have direct and indirect impacts. Direct impacts can include:....

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2.4.6 **Managing modifications – minimising the number of modifications**

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Deleted: Variations have been described as a disease. The best remedy to the disease is one of prevention – by trying to minimise the likelihood of variations arising in the first place. . ¶

Stated policy should be to avoid modifications wherever possible, and this should be made clear at the inaugural meeting. Another policy must be that only thoroughly investigated modifications, i.e.

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those that are permissible under the EU *acquis*, will be agreed and then only in writing by the authorised procurement officer.

The inaugural meeting should also be used to advise the economic operator of the [modification](#) procedure (see the sample agenda in 3.2 below).

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When an economic operator submits a request for a [modification](#), procurement officers must ask themselves and other stakeholders a number of searching questions:

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- Is this request clearly within the scope of work that was agreed and understood?
- Is the request a misinterpretation of the existing specifications or of the terms and conditions? Would clarification mean that the need for the [modification](#) would disappear?
- Is this [modification](#) really needed, or is it [simply](#) "nice to have"? Work out the direct and indirect implications.
- Is there another way of proceeding that might be more cost-effective?
- Is the [change](#) really a modification to the current contract or is it new work requiring a new contract?
- Will the [modification](#) breach national procurement regulations or conflict with any policy on competitive tendering?

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2.4.7 Managing [modifications](#) – minimising the impact of [modifications](#) that cannot be avoided

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2.4.8 A simple change control procedure

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▽Responsibility for authorising [various](#) types of changes may rest with different [persons](#) in the contracting authority, and documented internal procedures will need to reflect this shared responsibility. ▽ *In particular, changes in the overall contract, such as changes in prices that are outside the scope of agreed price [indexation](#) mechanisms, must have senior management approval.*

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2.5 PAYMENT

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[The 2014 directives set out explicitly that the contracting authority may transfer due payments directly to the subcontractor for services, supplies or works provided to the economic operator to which the public contract has been awarded \(the main contractor\), but such payments will be without prejudice to the main contractor’s liability. Such an arrangement may include appropriate mechanisms permitting the main contractor to object to undue payments and, in any event, must be applied according to the rules advertised from the beginning in the procurement documents.](#)

2.6 PERFORMANCE REVIEW AND CONTINUOUS IMPROVEMENT

▽Performance review (step 37 of the procurement process)..... ▽ Modules A4 and G3 include more details on performance measurement,.....

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2.8 TERMINATION OF CONTRACTS

[Contracting authorities may sometimes face circumstances that require the early termination of a public contract in order to comply with obligations under European Union law in the field of public procurement.](#)

[According to the 2014 Directive, contracting authorities must have the possibility, under the conditions determined by national law, to terminate a public contract during its term, at least under the following circumstances:](#)

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- [Where the contract has been subject to a substantial modification that would have required a new procurement procedure \(which has not been organised\);](#)
- [Where the contractor has, at the time of the contract award, been in one of the situations defined as mandatory grounds for exclusion and should therefore have been excluded from the procurement procedure;](#)
- [Where the contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the treaties and the directives, which has been declared by the Court of Justice of the European Union in a procedure pursuant to article 258 TFEU.](#)

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SECTION 2 - NARRATIVE – APPENDIX SAMPLE DOCUMENTS

3 Performance and Administration

3.1 [Procedures for contract modifications](#)

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SECTION 3 – EXERCISES

Note on amendments to Exercises: The Trainer’s Manual has not been updated to reflect the amendments below.

EXERCISE 3: MINIMISING THE NUMBER OF [MODIFICATIONS](#) AND THEIR IMPACT WHEN THEY OCCUR

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Search and replace “variation” with “modification”

Search and replace “variations” with “modifications”

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SECTION 4 – CHAPTER SUMMARY

SELF-TEST QUESTIONS

Note on amendments to Self-Test Questions: The Trainer's Manual has not been updated to reflect the amendments below.

9. Are modifications *normally* good news for the contracting authority or the economic operator?

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10. What are the possible circumstances behind the need for a permitted modification?

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SECTION 1 – INTRODUCTION

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1.5. LEGAL INFORMATION HELPFUL TO HAVE AT HAND

▽ This module is not governed by any specific legal requirement, except for the possible implications of national contract law concerning performance measurement of contract execution. ▽ However, indirectly, the principles and objectives laid down in the EU Directives and the Treaty

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SECTION 2 – NARRATIVE

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Benchmarking

As discussed above, benchmarking is another important management tool that can help contracting authorities understand how their performance measures up in relation to that of their peers. It helps them compare their own internal processes with those of similar projects managed by contracting authorities of verified excellence, with a view to identifying priorities for improvement.

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