



## Brief 38

September 2016

### Public Procurement

# Contract Modifications

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## Introduction

Contracting parties that are not subject to the public procurement rules enjoy the freedom to modify contracts. As long as they are able to reach an agreement, the contract may be amended as they see fit.

Contracting authorities subject to the public procurement rules are in a different position. When a public contract needs to be modified, the starting assumption is that the modification will trigger the requirement for a new competitive public tender process.

It is not generally permitted for a contracting authority and an economic operator to agree to change an existing contract. 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 performed without modifications. Where an existing contract is altered by an agreement, there is a risk that other economic operators lose an opportunity to compete for what is effectively a new opportunity. The agreement to change the contract will be a breach of the principles of transparency and equal treatment. The procurement rules seek to prevent this type of behaviour, which can distort the market.

In practice, however, the limited modification of an existing public contract can be necessary. Contracting authorities and economic operators might be faced with legitimate situations that require changes in the contract. Practical examples include situations where price indexes have changed, genuine unforeseeable circumstances have occurred, or technical difficulties have arisen during the operation or maintenance phase of a contract.

The Public Sector Directive (the Directive)<sup>1</sup> explicitly regulates the circumstances where modifications to a contract or framework agreement while it is being carried out are possible without a requirement to start a new tender process.

### Case law

The provisions in the Directive on the modification of contracts (or framework agreements) are based on the case law of the Court of Justice of the European Union (CJEU).

The 2008 *presstext* case (*presstext Nachrichtenagentur v Republik Österreich Bund C-454/06*) is the leading CJEU case on contract modifications. This case concerned a contract for press agency services that existed between the Austrian Republic and the Austria Press Agency (Austria Presse Agentur – APA), which was subject to various adjustments during its term. In 2004 the company *presstext Nachrichtenagentur GmbH* offered news agency services to the Austrian Republic, but this offer did not lead to the conclusion of an agreement. Subsequently, *presstext Nachrichtenagentur GmbH* challenged the adjustments that had been made to the contract between APA and the Austrian Republic, contending that the adjustments were unlawful.

The CJEU considered the circumstances where a variation<sup>2</sup> to a contract would constitute the award of a new contract, which should be the subject of further competition. The Court emphasised the importance of how “material” the changes were to the original contract:

"In order to ensure transparency of procedures and equal treatment of tenderers, amendments to provisions of a public contract during the currency of the contract constitute a new award of a contract ... when they are materially different in character from the original contract and, therefore, are such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract."

<sup>1</sup> Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC, 26 February 2014.

<sup>2</sup> In the text of the judgement the term “variation” is used. The Directive uses the term “modification”.

The CJEU provided guidelines on the circumstances where a variation to a contract may be regarded as “material”. A variation may be considered as material when:

It introduces conditions that, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted, or would have allowed for the acceptance of a tender other than the one initially accepted.

It extends the scope of the contract considerably, encompassing services that were not initially covered.

It changes the economic balance of the contract in favour of the contractor in a manner that was not provided for in the terms of the initial contract.

The Directive incorporates and expands on the principles developed by the CJEU.

For further discussion of this case, see chapter 9, “Changes to contracts”, in SIGMA’s publication on selected judgements of the CJEU on public procurement<sup>3</sup>.

## Permitted or non-substantial modifications of contracts during their term – no procurement procedure required

Under the Directive, modifications of the contract (or framework agreement) are permitted without having to conduct a new procurement procedure, but within very strict boundaries and only in specified situations. In general, contracts may be modified when the modifications are not substantial. What constitutes a substantial modification is explained below.

In Article 72, the Directive sets out six permitted, or non-substantial, modifications of a contract during its term.

### 1) Modifications expressly provided for in the initial procurement documents

Article 72 (1)(a):

“1. Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive (...)

(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. They shall not provide for modifications or options that would alter the overall nature of the contract or the framework agreement.”

Modification is permitted where it is expressly provided for in review clauses set out in the initial procurement documents. Review clauses can provide a certain degree of flexibility in the terms of the contract. Modifications to the contract cannot be permitted simply because they were mentioned in the procurement documents in advance.

**Review clauses in procurement documents must be clear, precise and unequivocal.** Review clauses must not be drafted in broad terms with a view to covering all possible changes. A review clause that is too general is likely to breach the principle of transparency and entails the risk of unequal treatment.

<sup>3</sup> SIGMA (2014), *Selected Judgements of the Court of Justice of the European Union on Public Procurement (2006-2014)*, OECD Publishing, Paris. <http://www.sigmaxweb.org/publications/Judgements-CourtJustice-31July2014-Eng.pdf>

Where the modification of the contract is dealt with in clear, precise and unequivocal review clauses, any changes made under those clauses do not generally constitute a new contract but merely involve the implementation of the existing contract. For example, in the *presstext* case mentioned above, the parties agreed to a new price index, replacing an original index. The use of a replacement index was specifically provided for in the contract. The CJEU confirmed that the use of the new price index did not give rise to a new contract. The supplemental agreement merely applied the stipulations of the basic agreement with regard to maintaining the indexation clause up to date.

**Review clauses must specify the scope and nature of possible modifications or options as well as the conditions under which they may be used.** This reduces the scope for abuse. Any modification will be a reflection of the original contract and competition. If the tenderers are able to take into account the possibility of future modifications at the tender stage, any subsequent implementation of these possibilities should not constitute a change in the contract but a modification in accordance with the terms of the contract.

For example, if a contract for the supply of 100 laptop computers clearly stipulated the possibility of an option for 30 additional laptop computers, the exercise of this option is merely a modification pursuant to the terms of the contract and not a new contract. It is important to note that the possibility of this option must be explicitly provided for in the initial procurement documents and its value included in the calculation of the estimated value of the procurement, even if it may not be exercised.

Review clauses that have been sufficiently and clearly drafted may mean that equipment to be delivered over a given period could be updated to incorporate updated technology. It could also be possible, with sufficiently clear clauses, to provide for modifications of the contract should any technical difficulties appear during the operation or maintenance of equipment.

**Review clauses must not alter the overall nature of the contract.** Another relevant aspect to consider is the nature of the modification. The review clause may not provide for modifications or options that would alter the overall nature of the work, services or supplies that are the subject matter of the contract.

The more substantial the modifications are in relation to the nature of the original contract, the more likely it is that a new contract will be required. For example, a new contract is likely to be drawn up if the nature of the contract is modified in such a way that the delivery of different products or the provision of services of a different kind is required in comparison to those set out in the original contract. In these circumstances, a modification will not be permitted, even if the scope, nature and conditions for different products or new services have been established in advance in a clear, precise and unequivocal manner.

**The monetary value of modifications made under this provision is irrelevant.** The monetary value of the modification is not limited. However, care must be taken to ensure that an increase of the original value of the contract due to the modifications does not alter the overall nature of the contract.

## 2) Additional works, services or supplies

Article 72 (1)(b):

“(1) Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive (...)

(b) for additional works, services or supplies by the original contractor that have become necessary and that 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; and
- 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. 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 this Directive.”

The above provision applies when the circumstances requiring a modification were foreseeable, but the contracting authority failed to foresee them or failed to provide for them for other reasons.

### **Cumulative conditions apply to these modifications for additional works, services or supplies.**

These grounds for modification can be used only where the two conditions indicated above in points (i) and (ii) are **cumulatively** met. In accordance with the general rules, “significant inconvenience” and “substantial duplication of costs” are to be strictly interpreted.

This provision might apply, for example, where additional works are required on an uncompleted building where the original contractor is still present. In this case, it is likely that there will be economic or technical interoperability problems, for example with insurance and risk management, in the event of the handover of the site to a new contractor. The introduction of a new contractor in these circumstances is also likely to result in the duplication of costs.

**Any increase in costs should not exceed 50% of the value of the original contract.** In addition to satisfying the two cumulative conditions, the modification may not involve a cost increase of more than 50% of the value of the original contract.

Where more than one modification is made, the 50% limit applies each time, provided that the change is not aimed at avoiding the procurement rules. It should be noted that the maximum rate of increase remains at 50% of the value of the original contract, not 50% of any increased value of the contract resulting from any earlier modification. When the contract includes an indexation clause, for the purpose of the calculation of the cost, the updated cost shall be the reference value.

**A transparency requirement applies to this type of modification.** Contracting authorities that have used this provision to modify a contract must publish a modification notice in the *Official Journal of the European Union (OJEU)*. The modification notice must contain the information set out in Annex V, part G of the Directive and is to be published in accordance with Article 51. The European Commission (EC) has published a standard form modification notice<sup>4</sup>. For more information, see SIGMA Public Procurement Brief 6, *Advertising*.

<sup>4</sup> Implementing Regulation (EU) 2015/1986 of 11 November 2015 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) No 842/2011.

### 3) Modifications due to unforeseen circumstances

Article 72 (1)(c):

“(1) Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive (...)

(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 foresee;

(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. Such consecutive modifications shall not be aimed at circumventing this Directive.”

Note: A similarly-worded provision was included in the 2004 Directive, but in that Directive “unforeseeable circumstances” were grounds for use of the negotiated procedure without prior publication of a contract notice.

When an unforeseeable event occurs that requires a modification of the contract that would be disproportionate in terms of the continuation of the contract concerned and the costs associated with a procedure to award a new contract, the existing contract can be modified without a new procurement procedure.

**Circumstances that a diligent contracting authority could not foresee could justify a modification of the contract.** The recourse to modification of a contract under this provision of the Directive must be justified on the grounds that the need for modification has been brought about by circumstances that a diligent contracting authority could not foresee.

Recital 109 of the Directive clarifies this provision:

“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 the award and its foreseeable value.”

To properly modify a contract under this provision of the Directive, the contracting authority therefore needs to prove the existence of an unforeseeable event. In accordance with the general rules, “circumstances that a diligent contracting authority could not foresee” must be strictly interpreted.

**The modification must not alter the overall nature of the contract.** The use of these grounds for modification is not allowed in cases where that modification results in an alteration of the overall nature of the contract. The more substantial the modification is in relation to the nature of the original contract, the more likely that a new contract will be required.

**The modification does not involve a price increase of more than 50% of the value of the original contract.** Under this provision, the modification may not involve a price increase of more than 50% of the value of the original contract. Where more than one modification is made, the 50% limit applies to each modification, provided that the change is not aimed at avoiding the procurement rules. It should be noted that the limit remains at 50% of the value of the original contract and not 50% of any increased value of the contract resulting from an earlier modification. When the contract

includes an indexation clause, for the purpose of calculating the price, the updated price will be the reference value.

**A transparency requirement applies to modifications made under this provision.** Contracting authorities that have used this provision to modify a contract must publish a modification notice in the *OJEU*. The modification notice must contain the information set out in Annex V, part G of the Directive, and it is to be published in accordance with Article 51. A standard form modification notice has been published by the EC<sup>5</sup>. For more information, see SIGMA Public Procurement Brief 6, *Advertising*.

#### 4) Replacement of a contractual partner

Article 72 (1)(d):

“(1) Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive....

(d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of either:

(i) an unequivocal review clause or option in conformity with point (a);

(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 Directive; or

(iii) 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 pursuant to Article 71.”

As a general rule, the replacement of a contractual partner constitutes a substantial modification of the contract. In line with the principles of equal treatment and transparency, another economic operator should not replace the successful tenderer without the contract being re-opened to competition.

However, the Directive treats the change of contractor as a non-substantial modification in three specific situations.

**Change of contractor in situation 1:** The replacement of a previous contractor is the consequence of an unequivocal review clause or option that (1) is clear, precise and unequivocal; and (2) sets out the scope and nature of the replacement as well as the conditions under which it may be used.

This provision allows the parties concerned to agree that the contracting authority may change the contractor. It can be argued that this possibility is very limited in that it is difficult to foresee how a contractual review clause can be unequivocal in terms of the substitution of a contractor without actually naming the contractor’s successor. An example of the use of this provision may be found in public-private partnership projects, where a new private partner or contractor is appointed as a result of “step-in” rights exercised by a funder. Where a funder has been granted step-in rights, it has an opportunity to cure the breach, thereby avoiding the termination of the contract and safeguarding the investment by substituting a new contractor for an existing contractor.

<sup>5</sup> SIGMA (2014), *Selected Judgements of the Court of Justice of the European Union on Public Procurement (2006-2014)*, OECD Publishing, Paris. <http://www.sigmaxweb.org/publications/Judgements-CourtJustice-31July2014-Eng.pdf>

**Change of contractor in situation 2:** The legal identity of the contractor changes, but in fact the contractor remains the same. The successful tenderer performing the contract may be facing structural changes during the performance of the contract, such as internal re-organisations, takeovers, mergers and acquisitions, or even insolvency. Such structural changes should not automatically require new procurement procedures for all public contracts performed by that tenderer. In prescribed cases, therefore, the replacement of the contractor is considered to be a permitted modification.

The above situation occurred in the *pressetext* case, where the contract was transferred on the same terms to a new legal entity, which was a company within the same group as the original contractor.

The successor must also fulfil the criteria for qualitative selection that were initially established by the contracting authority.

A modification on these grounds is not permitted where any other substantial modifications are to be made to the contract (see below). The modification must not be aimed at circumventing the application of the Directive.

**Change of contractor in situation 3:** The contracting authority itself assumes the main contractor's obligations towards its subcontractors, in circumstances where this possibility is provided for under national legislation, pursuant to Article 71.

## 5) Low value (*non-substantial*) modifications

Article 72 (2):

“(2) ...without any need to verify whether the conditions set out under points (a) to (d) of paragraph 4 are met, contracts may equally be modified without a new procurement procedure in accordance with this Directive being necessary where the value of the modification is below both of the following values:

- i. the thresholds set out in Article 4; and
- ii. 10% of the initial contract value for service and supply contracts and below 15% of the initial contract value for works contracts.

However, the modification may not alter the overall nature of the contract or framework agreement. 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 permits the modification of a contract where the financial value of the modification is low and the modification does not alter the overall nature of the contract.

The financial value of the modification must satisfy both financial conditions, which means that it must be (1) below the relevant EU financial threshold for the contract in question **and** (2) less than 10% of the initial contract value of a services/supplies contract or less than 15% of the initial contract value of a works contract.

### Example

A contracting authority proposes to modify two contracts.

Contract 1 concerns the supply of school meals. The value of the initial contract was EUR 550 000. The value of the proposed modification is EUR 50 000. This modification qualifies as a low-value modification because its value is below the EU threshold for a supplies contract and also less than 10% of the value of the initial contract.

Contract 2 relates to the construction of a new school. The value of the initial contract was EUR 6 million. The value of the proposed modification is EUR 950 000. This modification does not qualify as a low-value modification. Although the value of the modification is below the EU threshold for a



works contract, it is more than 15% of the value of the initial contract. The contracting authority will need to consider whether any of the other provisions of the Directive permitting contract modification will apply to this case. If they do not apply, then the contract modification will not be permitted.

The reasons for a proposed low-value modification could include minor omissions, discrepancies or errors in the initial project. There are no legal impediments to making a low-value modification, even in the case of errors, provided that the impact is not substantial – in terms of both its value, as measured according to the two conditions referred to above, and its impact on the overall nature of the works contract.

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

When the contract includes an indexation clause, for the purpose of calculating the price, the updated price, increased according to the indexation clause, will be the reference value.

## 6) Other non-substantial modifications

Article 72 (1)(e):

“(1) Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive

(e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph 4.”

The Directive generally reiterates the rules laid down in the *presstext* case, and it states that contracts (and framework agreements) may be modified where the modifications are not substantial.

Therefore, in addition to the modifications permitted specifically to the contract described above, all other modifications that are not substantial are also permitted, regardless of their value.

An explanation of a modification that is considered to be a “substantial” modification is provided below.

### Prohibited or substantial modifications of contracts during their term – new procurement procedure required

When the needs of a contracting authority can no longer be satisfied without introducing substantial modifications to the contract, the only option is to terminate the current contract and to conduct a new procurement procedure under the new conditions.

Article 72(4) states that modifications are considered to be substantial and to require a new procurement procedure where they render the contract or framework agreement “materially different in character from the one initially concluded”.

Recital 107 of the Directive clarifies this definition:

“A new procurement procedure is required in case of material changes to the initial contract, 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 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.”

The Directive provides that, in any event, a modification is to be considered as substantial where one or more of four conditions is met, as described below.

### **Substantial modification, condition 1 – impact on the initial procurement procedure**

According to Article 72(4)(a): “the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure”.

**Comment:** This condition is important in preventing contracting parties from changing elements of the original contract that, had they been a part of the procurement procedure that resulted in the conclusion of that contract, would have influenced the outcome. For example, it cannot be ruled out that a change in the starting date of the contract or in the length of the contract from that initially advertised would have attracted other economic operators to the initial procurement procedure.

According to this condition, the proposed modification should be assessed with a view to establishing whether it would have allowed the following, had it been included as part of the initial procurement procedure:

- other candidates than those initially selected to be admitted, such as those candidates that were not capable according to the initial procurement procedure;
- a different tender to be accepted;
- additional participants to be attracted to the process, such as those candidates that had no interest in participating in the initial procurement procedure.

If the assessment shows that a modification would have had any of the above impacts on the initial procurement procedure, then the modification is considered to be substantial and the contracting authority must conduct a new procurement procedure. If, on the other hand, the modification would have had no influence on the initial procurement procedure, then the modification is not to be considered as substantial.

### **Substantial modification, condition 2 – change in economic balance**

According to Article 72(4)(b): “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”.

**Comment:** This condition concerns the economic balance of the contract (or framework agreement). If the modification is in favour of the contractor, then the modification is substantial. If the modification is in favour of the contracting authority, then the modification is not substantial.

This limitation on modifications to the contract is needed to ensure that the performance of the contract continues to reflect the outcome of the initial procurement procedure and to avoid the risk of favouring a particular economic operator. For example, an economic operator could offer a tender with a very low price in order to win the contract, on the presumption that it will be allowed to improve the terms later.

This rule does not preclude the possibility of all price increases. A price increase is permitted, for example, if it is made in accordance with a clear, precise and unequivocal price indexation clause that was included in the initial contract or framework agreement.

In the context of changes in economic balance, price is not the only factor that should be considered. If, for instance, a modification reduces the contractor’s risk of incurring penalty payments, the consequences of the modification should be taken into account when the economic balance is assessed.

### **Substantial modification, condition 3 – extended scope**

According to Article 72(4)(c): “the modification extends the scope of the contract or framework agreement considerably”.

Comment: This condition applies where a considerable extension of the scope of the contract (or framework agreement) is made in order to encompass products, works or services that were not covered by the initial contract. The modification may include a quantitative extension (more products or services than those covered by the initial contract) or a qualitative extension (products or services of a different quality than those previously covered by the contract). Only considerable extensions are considered as substantial modifications. It is not possible to define the term “considerably” used in Article 72(4)(c) of the Directive in a way that would apply in all cases. Contracting authorities will need to use their judgment on a case-by-case basis, taking legal advice as necessary.

#### **Case law**

What constitutes a “considerable extension” of a contract was considered by the CJEU in Case C-160/08, *Commission v Germany*, which concerned a contract for ambulance services.

The CJEU considered the extension of an existing contract for ambulance services to cover a new ambulance station. The CJEU found that the extension of the initial contract by approximately EUR 673 000 could not be done without a new contract award procedure. As the value of the contract was EUR 4 450 000, the extension thus amounted to 15% of the value of the original contract. The CJEU emphasised that the value of the extension was considerably higher than the threshold value for a services contract.

### **Substantial modification, condition 4 – new contractor**

According to Article 72(4)(d): “where a new contractor replaces the one to which the contracting authority had initially awarded the contract in other cases than those provided for under point (d) of paragraph 1”.

This condition merely confirms the general rule that the replacement of the contractual partner constitutes a substantial modification of the contract. In accordance with the principles of equal treatment and transparency, the successful tenderer should not be replaced by another economic operator without re-opening the contract to competition, unless the change of contractor falls within the permitted modification for a change of contractor, as described above in this brief.

### **How to handle contract modifications**

The following section contains a short summary of information that is more fully discussed in SIGMA Public Procurement Brief 22, *Contract Management*.

It is advisable for a contracting authority to have a clear, stated policy so as to avoid contract modifications wherever possible. It is also important to ensure that only thoroughly investigated modifications, i.e. those that are permitted or non-substantial, will be agreed, and then only in writing by the authorised procurement officer.

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

- increased/decreased cost of the contract;
- contract over/under budget;
- delays for supplies or works contracts.

Indirect impacts may include:

- wasted or additional design work;

- wasted or unnecessary other activity;
- changes, additions or cancellation of orders that the economic operator may have placed with its own supply base;
- increased/decreased time, delays and re-programming of the contract;
- unproductive labour costs;
- additional head office time and money spent by the economic operator, which may seek to recover its fixed costs.

For any major contract, it is good practice to hold a formal inaugural or initial meeting soon after the contract has officially been awarded. At this meeting, representatives of both the economic operator and the contracting authority will come together for the first time in the context of the agreed contract. It is vital that both sides move from a competitive to a co-operative approach, as they will be working together for the life of the contract and both will want a successful outcome.

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

- 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 modification would no longer be needed?
- Is this modification really needed, or would it simply be "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?

If a modification is really necessary and permitted, the contract should contain a change control provision. The change control procedure should ensure that an authorised person, and only that authorised person, has the responsibility for agreeing to a modification. Some contracting authorities invoke a high-level committee to review the need for modifications and to search for alternatives.

To minimise the impact of a modification, the same diligence should be used in agreeing to a modification as would be used in awarding a contract:

- A firm quotation should always be obtained for the cost of the modification.
- The concept of marginal costing must be understood.
- A modification to the contract should not be agreed before both parties have agreed in writing to the total consequences of the modification in terms of time and cost.
- The maintenance of full records must be assured as from the start of the contract.
- All relevant stakeholders must be kept involved in the consideration of any modifications.

For more information, see SIGMA Public Procurement Brief 22, *Contract Management*.

## Utilities

The Utilities Directive<sup>6</sup> contains practically identical provisions as the Directive on the modification of contracts.

Article 89 of the Utilities Directive is the equivalent of Article 72 of the Directive (“Modification of contracts during their term”).

The Utilities Directive does not include a limitation of 50% of the value of the initial contract as a price increase with regard to the equivalent permitted modifications, as described above, for the following two substantial modification conditions:

- substantial modification, condition 2 – additional works, services or supplies;
- substantial modification, condition 3 – modifications necessitated by unforeseen circumstances.

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<sup>6</sup> Directive 2014/25/EU on procurement by entities in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, 26 February 2014.

## Further information

### Publications

SIGMA (2015), *Public Procurement Training Manual* – Module E3, OECD Publishing, Paris,  
<http://www.sigmaweb.org/publications/public-procurement-training-manual.htm>

SIGMA (2014), *Selected Judgements of the Court of Justice of the European Union on Public Procurement (2006-2014)*, OECD Publishing, Paris.

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SIGMA (2016), *Advertising*, Brief 6, OECD Publishing, Paris

SIGMA (2016), *Contract Management*, Brief 22, OECD Publishing, Paris