
STATUTORY INSTRUMENTS

2015 No. 102

The Public Contracts Regulations 2015

PART 2

RULES IMPLEMENTING THE PUBLIC CONTRACTS DIRECTIVE

CHAPTER 2

RULES ON PUBLIC CONTRACTS

SECTION 6

Contract Performance

Conditions for performance of contracts

70.—(1) Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are—

- (a) linked to the subject-matter of the contract within the meaning of regulation 67(5), and
- (b) indicated in the call for competition or in the procurement documents.

(2) Those conditions may include economic, innovation-related, environmental, social or employment-related considerations.

Subcontracting

Giving information to contracting authorities

Giving information to contracting authorities

71.—(1) In the procurement documents, the contracting authority may ask the tenderer to indicate in its tender any share of the contract that it may intend to subcontract to third parties and any proposed subcontractors.

(2) Paragraph (1) is without prejudice to the main contractor's liability.

(3) In the case of works contracts and in respect of services to be provided at a facility under the direct oversight of the contracting authority, after the award of the contract and at the latest when the performance of the contract commences, the contracting authority shall require the main contractor to notify to the contracting authority the name, contact details and legal representatives of its subcontractors, involved in such works or services, in so far as known at the time.

(4) The contracting authority shall require the main contractor to notify the contracting authority of—

- (a) any changes to the information notified under paragraph (3) during the course of the contract; and

- (b) the name, contact details and legal representatives of any new subcontractors which the main contractor subsequently involves in such works or services.
- (5) Where necessary for the purposes of paragraph (8), the required information shall be accompanied by ESPDs in respect of the subcontractors.
- (6) Paragraphs (3) and (4) do not apply to suppliers.
- (7) Contracting authorities may extend the obligations provided for in paragraphs (3) and (4) to, for example—
 - (a) supply contracts, services contracts (other than those concerning services to be provided at the facilities under the direct oversight of the contracting authority) or suppliers involved in works or services contracts;
 - (b) subcontractors of the main contractor's subcontractors or subcontractors further down the subcontracting chain.

Excluding subcontractors

- (8) Contracting authorities may, in accordance with regulations 59, 60 and 61, verify whether there are grounds for exclusion of subcontractors under regulation 57.
- (9) In such cases, the contracting authority—
 - (a) shall require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion; and
 - (b) may require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.

Modification of contracts during their term

72.—(1) Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Part 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, provided that such clauses—
 - (i) state the scope and nature of possible modifications or options as well as the conditions under which they may be used, and
 - (ii) do not provide for modifications or options that would alter the overall nature of the contract or the framework agreement;
- (b) for additional works, services or supplies by the original contractor that have become necessary and 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, or
 - (ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority,
 provided that any increase in price does not exceed 50% of the value of the original contract;
- (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 have foreseen;
 - (ii) the modification does not alter the overall nature of the contract;

- (iii) any increase in price does not exceed 50% of the value of the original contract or framework agreement.
 - (d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of—
 - (i) an unequivocal review clause or option in conformity with sub-paragraph (a), or
 - (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 Part;
 - (e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph (8); or
 - (f) where paragraph (5) applies.
- (2) Where several successive modifications are made:—
- (a) the limitations imposed by the proviso at the end of paragraph (1)(b) and by paragraph (c) (iii) shall apply to the value of each modification; and
 - (b) such successive modifications shall not be aimed at circumventing this Part.
- (3) Contracting authorities which have modified a contract in either of the cases described in paragraph (1)(b) and (c) shall send a notice to that effect, in accordance with regulation 51, for publication.
- (4) Such a notice shall contain the information set out in part G of Annex 5 to the Public Contracts Directive.
- (5) This paragraph applies where the value of the modification is below both of the following values:—
- (a) the relevant threshold mentioned in regulation 5, and
 - (b) 10% of the initial contract value for service and supply contracts and 15% of the initial contract value for works contracts,
- provided that the modification does not alter the overall nature of the contract or framework agreement.
- (6) For the purposes of paragraph (5), where several successive modifications are made, the value shall be the net cumulative value of the successive modifications.
- (7) For the purpose of the calculation of—
- (a) the price mentioned in paragraph (1)(b) and (c), and
 - (b) the values mentioned in paragraph (5)(b),
- the updated figure shall be the reference figure when the contract includes an indexation clause.
- (8) A modification of a contract or a framework agreement during its term shall be considered substantial for the purposes of paragraph (1)(e) where one or more of the following conditions is met:—
- (a) the modification renders the contract or the framework agreement materially different in character from the one initially concluded;
 - (b) the modification introduces conditions which, had they been part of the initial procurement procedure, would have—
 - (i) allowed for the admission of other candidates than those initially selected,
 - (ii) allowed for the acceptance of a tender other than that originally accepted, or

- (iii) attracted additional participants in the procurement procedure;
 - (c) 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;
 - (d) the modification extends the scope of the contract or framework agreement considerably;
 - (e) a new contractor replaces the one to which the contracting authority had initially awarded the contract in cases other than those provided for in paragraph (1)(d).
- (9) A new procurement procedure in accordance with this Part shall be required for modifications of the provisions of a public contract or a framework agreement during its term other than those provided for in this regulation.

Termination of contracts

73.—(1) Contracting authorities shall ensure that every public contract which they award contains provisions enabling the contracting authority to terminate the contract where—

- (a) the contract has been subject to a substantial modification which would have required a new procurement procedure in accordance with regulation 72(9);
- (b) the contractor has, at the time of contract award, been in one of the situations referred to in regulation 57(1), including as a result of the application of regulation 57(2), and should therefore have been excluded from the procurement procedure; or
- (c) the contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and the Public Contracts Directive that has been declared by the Court of Justice of the European Union in a procedure under Article 258 of TFEU.

(2) Those provisions may address the basis on which the power is to be exercisable in those circumstances, for example by providing for notice of termination to be given and by addressing consequential matters that will or might arise from the termination.

(3) To the extent that a public contract does not contain provisions enabling the contracting authority to terminate the contract on any of the grounds mentioned in paragraph (1), a power for the contracting authority to do so on giving reasonable notice to the contractor shall be an implied term of that contract.