



Contract change under the Public Contracts Regulations 2015

As we announced on 6 February, the new Public Contracts Regulations 2015 are due to come into effect on 26 February and will introduce a number of changes and clarifications to existing procurement law.

This briefing looks at one important aspect of the new Regulations: the codification and evolution of law on material changes to public contracts.

Material Change: Back to Basics

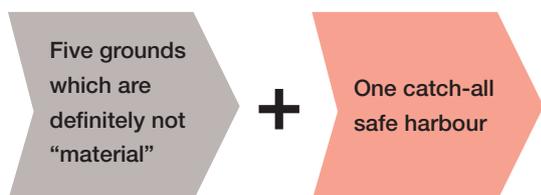
It is an established principle of procurement law that it is not permissible to make a material change to a public contract without a new competition. If a material change is made without a new competition and a challenge is brought, the contracting authority may be ordered to pay damages or fines or the contract may be shortened or declared ineffective. However, in practical terms there is difficulty in identifying clear boundaries as to when a change is material and when it is not. The new Regulations attempt to address this.

Material Change: New Regulations

In the new Regulations there are five grounds that provide examples of when a change will not be material. In addition, even if none of the five grounds are satisfied, there is a safe harbour, which may still allow a change to be permitted without a new competition.

Material Change: New Regulations

Approach in New Directive:



So, in what circumstances will a change be permitted under the new Regulations?

Ground 1: Change is provided for in the initial procurement documents in clear, precise and unequivocal clauses (such as price revision clauses or options).

It should be noted that overarching contract change provisions will not satisfy this requirement, as such clauses are general in nature and not specific to a particular change in a particular circumstance. Authorities and contractors should consider during a procurement process whether it is appropriate to anticipate changes and draft review clauses accordingly to give them the flexibility they need during the term of a contract.

Ground 2: Additional work is necessary and changing the contractor would involve significant inconvenience or duplication of cost and would not be practicable for economic or technical reasons.

Here, the challenge will be in identifying what constitutes "significant inconvenience" and what the threshold will be in terms of practicability for economic or technical reasons. In any case, no change can be greater than 50% of the original value of the contract.

Ground 3: Contract change is needed for unforeseeable circumstances, provided the nature of the contract is unaltered and the price increase is less than 50% of the original contract value.

In assessing whether a change is foreseeable, one will need to assess whether the relevant circumstances were foreseeable, having regard to the knowledge of the relevant market, at the time that the contract was entered into.

Ground 4: A new contractor may replace the existing contractor if, for example, an express clause allows for that or in the event of a takeover/restructuring.

It will be interesting to note how the interpretation of the 4th ground develops with case law. For example, we do not believe it would be permissible for contract novation clauses to provide an unfettered right for contractors to cherry-pick public contracts that they have not competed for as a means of avoiding the procurement rules.

Ground 5: Modifications are not substantial, based on changes to the scope of the contract and the changes in the economic balance of the contract. In other words, the existing test for material change established by the case of *Presstext*.

*Historically, the application of the *Presstext* test proved difficult when trying to establish clear thresholds of what is material and what is not. The 5th ground, by its nature, retains the same uncertainty.*

General “safe harbour”

If none of the five grounds above are satisfied, the safe harbour may apply. A change will not be material if:

The value of the change is within the relevant threshold value (i.e. for services and supplies, less than £172,514 for all contracting authorities other than central government, where the threshold is £111,676; and £4.32m for works contracts); **and**

The value of the change is not greater than 10% of contract value (15% for works contracts).

The very low values provided for by the safe harbour mean that use of the safe harbour is expected to be relatively infrequent.

Better on balance?

The Regulations go further than simply codifying the existing case law in relation to material change. Instead, we see an evolution of the rules, which are now based on structured rules rather than an overall assessment. Whilst welcome clarity is provided in certain areas, as can be seen above, uncertainties remain and clarification through case law will be welcomed.

Contacts

If you would like any further information on the above, please contact John Houlden, Stephanie Rickard or Patrick Parkin in our Procurement team or your usual Burges Salmon contact.



John Houlden

Partner

+44 (0)117 902 2796

john.houlden@burges-salmon.com



Stephanie Rickard

Legal Director

+44 (0)117 902 6682

stephanie.rickard@burges-salmon.com



Patrick Parkin

Associate

+44 (0)117 307 6959

patrick.parkin@burges-salmon.com

Burges Salmon LLP, One Glass Wharf, Bristol BS2 0ZX Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400
6 New Street Square, London EC4A 3BF Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7980 4966

www.burges-salmon.com

Burges Salmon LLP is a limited liability partnership registered in England and Wales (LLP number OC307212), and is authorised and regulated by the Solicitors Regulation Authority. It is also regulated by the Law Society of Scotland. Its registered office is at One Glass Wharf, Bristol BS2 0ZX. A list of the members may be inspected at its registered office. Further information about Burges Salmon entities, including details of their regulators, is set out in the “Who we are” section of the Burges Salmon website at www.burges-salmon.com.

© Burges Salmon LLP 2015. All rights reserved. Extracts may be reproduced with our prior consent, provided that the source is acknowledged. Disclaimer: This briefing gives general information only and is not intended to be an exhaustive statement of the law. Although we have taken care over the information, you should not rely on it as legal advice. We do not accept any liability to anyone who does rely on its content.

Data Protection: Your details are processed and kept securely in accordance with the Data Protection Act 1998. We may use your personal information to send information to you about our products and services, newsletters and legal updates; to invite you to our training seminars and other events; and for analysis including generation of marketing reports. To help us keep our database up to date, please let us know if your contact details change or if you do not want to receive any further marketing material by contacting marketing@burges-salmon.com.