



# PUBLIC PROCUREMENT: VARYING A PUBLIC CONTRACT

**23 NOVEMBER 2022**

This session will commence in a couple of minutes, allowing time for others to join.

You may have joined a 'practice session' and not have any audio. This is the waiting room and the session will begin shortly.

You will be automatically muted, to raise any questions about the session please use the Q&A function.

A full recording of this webinar will be available following the session.

# AGENDA

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- What we will cover:

- Why is this important
- Safe harbours under Regulation 72
- Anticipated impact of Procurement Bill

- What we won't cover:

- Defence or utility contracts
- Light touch contracts
- Devolved arrangements
- Exemptions generally
- Direct awards

# PERMITTED MODIFICATIONS



# MODIFICATION PROVIDED FOR IN CONTRACT

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- Reg 72(1)(a) PCR

- Clear, precise and unequivocal
- In original procurement documents
- Clear scope and nature of possible modifications
- Clear when clause can be used
- No change to overall nature

- Sch 8 Para 1 Procurement Bill

- Unambiguous
- In (1) the contract as awarded and (2) the tender or transparency notice;
- No change to overall nature

# MODIFICATION RELATES TO ADDITIONAL GOODS, SERVICES OR WORKS

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- Reg 72(1)(b) PCR

- **Necessary**
- Change in contractor **cannot be made** for economic or technical reasons
- Significant inconvenience or substantial duplication of costs
- Increase in price less than 50% of **original contract value**
- Requires modification notice

- Sch 8 Para 8 Procurement Bill

- Different or incompatible
- **Disproportionate** technical difficulties or significant inconvenience
- **And** substantial duplication of costs
- Increase in **estimated value of contract** does not exceed 50%

# MODIFICATION REQUIRED DUE TO UNFORESEEN CIRCUMSTANCES

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- Reg 72(1)(c) PCR

- Unforeseen circumstances
- **Diligent** authority
- No change in overall nature
- Increased price less than 50%\_of **original contract value**
- Modification notice

- Sch 8 Para 4 Procurement Bill

- Not **reasonably** foreseeable
- **Prior to contract award**
- No change in overall nature of contract
- Increase in **estimated value of contract** less than 50%

# MODIFICATION TO REPLACE THE CONTRACTOR

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- Reg 72(1)(d) PCR

- Permitted by Reg 72(1)(a)
- Universal or partial succession
- **Following** corporate restructuring including takeover, merger, acquisition or insolvency provided:
  - Fulfils qualitative selection criteria
  - No other substantial modifications
  - Not aimed at circumventing PCR

- Sch 8 Para 9 Procurement Bill

- Novation or assignment
- Supplier not an excluded supplier
- **Required** by corporate restructuring or similar circumstance

# SUBSTANTIAL MODIFICATIONS

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- Not substantial Reg 72 (1)(e)
  - Below threshold
  - Reg 72 (8) PCR – what is substantial
  - And does not alter overall nature
- Reg 72 (8) PCR
  - Materially different
  - Impact on initial procurement
  - Changes economic balance in way not provided for in original contract
  - Extends the scope considerably
  - New contractor

- S.69(3) Procurement Bill
- Substantial modification if -
  - Over 10% increase/decrease to term
  - Material change to scope **or**
  - Material change economic balance in favour of contractor



# BELOW THRESHOLD MODIFICATIONS

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- Reg 72(1)(f) PCR and Reg 72(5)

## PCR

- Below
  - Threshold
  - 10/15% initial contract value
- Overall nature not altered

- S.69(4) Procurement Bill

- Estimated value not +/- 10% (goods/services) or 15% (works)
- Aggregated value less than threshold
- Scope of contract not materially changed
- Not substantial or permitted by Schedule 8

# New provisions in the Bill



# URGENCY AND THE PROTECTION OF LIFE (SCH 8 PARA 2 PROCUREMENT BILL)

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- Permitted where

- Could have been direct award s.39
  - Overriding public interest
- And award could be made as
  - Extreme and unavoidable urgency (Schedule 5, paragraph 13) or
  - Regulations under Section 40 (direct award to protect life)



# MATERIALISATION OF A KNOWN RISK (SCH 8 PARA 5 PROCUREMENT BILL)

- Identified at outset
- Not the result of act or omission of contracting authority or supplier
- Contract cannot be performed to authority's satisfaction
- Necessity and public interest
- Not more than 50% of estimated contract value
- New contract must be considered



# OTHER NEW PROVISIONS REGARDING PERMITTED MODIFICATIONS

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- Convertible contracts (s.69 (1))
- Contract change notices (s.70)
- Publish modified contract if over £2m (s.70(6))
- Voluntary standstill periods (s.71)
- Implied termination right (s.73)



**ANY QUESTIONS?**



# CONTACTS

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# THANK YOU

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