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# White Paper Procurement Conference - Variations

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# Introduction

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# Today's question

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- Variations
  - What practical steps can you take to de-risk contracts or frameworks that reach or exceed their thresholds, and you are faced with an unwanted variation?

# Overview

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- When are variations/modifications permitted?
  - A look at Regulation 72
  - Review clauses and the James Waste Case
- Could any of the gateways apply in this scenario?
- Some practical steps to consider

# Permitted Modifications - Regulation 72

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## **Regulation 72(1)(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 framework agreement;*

# Review Clauses

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- *James Waste Management LLP v Essex County Council* [2023] EWHC 1157 (TCC)
  - Reg 72 gateways should be interpreted narrowly because they amount to derogations from the general rule set out in Reg 72 (9).
  - “if an Authority can establish that a modification falls within Reg 72 (1) (a) it then avoids the need to rely upon the other gateways which involve, as we have seen, a considerable amount of evidence argument and analysis.”
  - Making use of a review clause “involves a strong element of overt transparency which, in my view, is the price to be paid for being able to invoke it, quite apart from the substantive constraints set out in Reg 72 (1) (a).”
  - “Had it been necessary for the Council to rely upon Reg 72 (1) (a) I would have found that it was unable to do so.”

# Permitted Modifications - Regulation 72

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## Regulation 72(1)(b)

*to provide for additional works, supplies or services 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; and*

*(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 initial contract value;***

# Permitted Modifications - Regulation 72

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## Regulation 72(1)(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 or framework;*
  - (iii) any increase in price does not exceed 50 % of the initial contract value or framework agreement;***

# Unforeseeable/emergency variations

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- “Where an unforeseeable event occurs that requires an adjustment to the contract and it would be disproportionate in terms of disruption to the service in question and the costs of a new procedure to award an entirely new contract, an existing contract can be modified without competition, the extent necessary.”

*Arrowsmith, The law of Public and Utilities Procurement: Regulations in the EU and UK para 6-283*

- *London Underground Public Private Partnership* [2002] O.J. C-309/15: increase in the likelihood of terrorist attack on London Underground following 11/09/2001 was constituted an acceptable unforeseen event that enabled variation.

# Permitted Modifications - Regulation 72

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## Regulation 72(1)(d)

- *where a new contractor replaces one to which the contracting authority had initially awarded the contract or framework as a consequence of—*
  - (i) an unequivocal review clause or option in conformity with sub-paragraph (a);*  
*or*
  - (ii) complete or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, by another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract or framework and is not aimed at circumventing the application of this Part;*

# Permitted Modifications - Regulation 72

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- **Regulation 72(1)(e)** where the modifications, **irrespective of their value, are not substantial** (as defined in paragraph (8));
- **Regulation 72(1)(f)** where paragraph (5) applies.

*72(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 (thresholds); and*

*(b) 10 % of the initial contract value for service and supply contracts or frameworks and 15% of the initial contract value for works contracts or frameworks,*

*provided that the modification does not alter the overall nature of the contract or framework agreement.*

# Permitted Modifications - Regulation 72

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## Regulation 72(8)

*(8) A modification of a contract or a framework agreement during its term must be considered substantial for the purpose of paragraph (1)(e) where—*

*(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 candidates other 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; or*

*(e) a new contractor replaces one to which the contracting authority had initially awarded the contract or framework in cases other than those provided for in paragraph (1)(d).*

# Considering Relevant Gateways

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- A number are not tied to value:
  - Express review clause (Regulation 72(1)(a))
  - Modifications that are not “substantial” (Regulations 72(1)(e) and 72(8) – however be careful around changing economic balance etc.
- For those that are tied to value, it is the value of the variation that the Gateway considers:
  - Additional works, services or supplies by the original contractors (Reg 72(1)(b))
  - Unforeseen modifications (Reg 72(1)(c))
  - De minimis changes (Reg 72(1)(f) and Reg 72(5))

# Practical considerations

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- Facts need to be considered carefully; must ensure the variation:
  - would not change the character of the contract
  - would not have attracted different participants
  - does not change the economic balance in favour of the contractor
  - does not considerably extend the scope of the contract or framework
  - doesn't replace the contractor other than envisaged in Regulation 72(1)(d)
- Bear in mind that for Regulation 72(5) the value is the *“net cumulative value of the successive modifications”*
- Check whether publication of a notice is required.

# Practical considerations (continued)

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- Consider the contract terms - can you reject or reduce the impact of the variation?
- Do you have multiple Framework providers?
- If none of the gateways apply, there should be a new procurement:
  - If so, could you make use of any of the reduced timescales in the Regulations?
  - If it is a new contract, is it possible to use the negotiated procedure without prior publication?
    - e.g. where the works, services and supplies can only be provided by one supplier due to the protection of exclusive rights, including intellectual property rights; or
    - for reasons of extreme urgency?

If considering Regulation 33 be aware of the limitations around the grounds.



# Questions



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