

EU Structural Funds: Procurement Contract Modifications - additional guidance for WEFO beneficiaries/ project partners.

This note is designed to give WEFO beneficiaries/ project partners further guidance on contract modifications that may be required throughout the delivery of ESF and ERDF funded operations. It sits alongside and forms part of the following national rules for Structural Funds:

- [‘Eligibility Rules and Conditions for Support from the European Structural Funds 2014-2020’](#),
- [Ireland Wales Co-operation Programme 2014-2020 Programme eligibility rules and guidance](#)

The current economic climate in the UK (and wider) has brought about some market volatility, particularly in the construction sector, and is having several impacts on contracts, such as unforeseen price increases and significant disruption in supply chains.

In the first instance, in order to mitigate against the potential impacts, beneficiaries/ project partners are advised to consider the following:

- Include contingencies where possible in your ITT and Specifications to allow for percentage price increases or alternative products if the supply chain is disrupted once the contract has started.
- Consider using Early Contractor Involvement principles when contracting, e.g. two stage route and Design & Build approaches.
- Use benchmarking for showing up to date costs, in order to show that value for money was obtained.
- Identify potential risks upfront, wherever possible, and how these will be managed throughout the contract.

Contracting Authorities – Over OJEU (Irish beneficiary) and/ or UK Public Procurement thresholds (Welsh beneficiary). (Please note OJEU thresholds changed as from 1 January 2022. In addition, and following the UKs exit from the EU, procurement thresholds in the UK are now known as Find a Tender Service (FTS) thresholds. These were set for the UK on 1 January 2022 and are inclusive of VAT when calculating the estimated value of a contract to determine whether the regulations apply. Beneficiaries/ project partners will need to ensure compliance with the new thresholds for any procurements that commenced as from this date. Beneficiaries based within Southern Ireland, and in receipt of support from the Ireland Wales Programme, will need to continue to adhere to the EU thresholds/ directives when undertaking/ applying respective procurement policies/ directives).

All beneficiaries/ project partners who are contracting authorities (i.e. regulated by public procurement legislation) must comply with the UK Public Contract Regulations 2015 (Wales) and European Union (Award of Public Authority Contracts) Regulations 2016, European Union (Award of Contracts by Utility Undertakings) Regulations 2016,

and European Union (Award of Concession Contracts) Regulations 2017 (Ireland).
For any contract modifications:

- Regulation 72 of the UK Public Contract Regulations 2015 and European Union (Award of Public Authority Contracts) Regulations 2016 will apply, with
- Regulation 97 being the equivalent for European Union (Award of Contracts by Utility Undertakings) Regulations 2016, and
- Regulation 43 being the equivalent for European Union (Award of Concession Contracts) Regulations 2017

The EU Commission has made it clear, at the outset of the Covid-19 pandemic, that the EU public procurement framework (which the UK Public Contract Regulations 2015 and European Union (Award of Public Authority Contracts) Regulations 2016 aligns with) provides the necessary flexibility for public buyers to buy products and services compliantly within the rules set out in the directives. In the same way, contract modifications will need to be made in line with the allowances outlined in Regulation 72 of the Public Contracting Regulations 2015 and European Union (Award of Public Authority Contracts) Regulations 2016, and beneficiaries/ project partners are advised to carefully consider which option is applicable to their contract modification, to document how they made the decision, and to keep a record of all decisions and information considered when making the decision. Beneficiaries/ project partners are also advised to consider whether VAT should be included when extending the value of a contract and particularly where reliance will be placed upon the use of Regulation 72(5)(a). Appropriate authorisation (subject to the beneficiary's/ project partners own procurement policy) of any modifications should also be fully documented.

It is important that beneficiaries/ project partners retain full evidence to confirm which part of Regulation 72 they have relied upon for the contract modification, including where there have been any price increases as a result of the current market situation. Further guidance on Regulation 72 can be located at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/560262/Guidance_on_Amendments_to_Contracts_-_Oct_16.pdf,

and

<https://www.gov.ie/en/publication/c23f5-public-procurement-guidelines-for-goods-and-services/>

Contracts outside the scope of public procurement legislation (private sector and below OJEU (Irish beneficiary) and/ or UK Public Procurement thresholds (Welsh beneficiary))

Whilst there is no requirement for these contracts to follow the Public Contract Regulations, beneficiaries/ project partners are still reminded of the requirement to comply with the EU Treaty principles of non-discrimination, equal treatment and transparency when letting and managing any procured contracts. This means that any contract modifications over and above what was originally tendered for must be

genuine and the reasons must be sufficiently documented. We would also not expect these costs to be significant in value. As a general rule we would not expect such costs to exceed 50% of the total contract value, however each modification would be considered on a case by case basis and must be supported by robust evidence to support any modifications.

Although not an exhaustive list, we would expect modifications to fall into at least one of the following categories:

1. Genuinely unforeseen – costs that could not have been factored in during the initial tender exercise for justifiable reasons
2. Additional necessary costs where it can be evidenced the initial scope of the contract has not been altered and another contractor would not have been awarded the work if the additional work had been in the original procurement.
3. A change which was provided for in the initial tender documents, i.e. does not include additional work/costs which other bidders could have potentially tendered for had they been included in the initial tender exercise.
4. Unable to change contractor due to work that has been undertaken as part of the procurement – the delivery of the initial contract means that it is not genuinely possible for another contractor to do the additional works due to being unable to work with the equipment that has been installed, or the service that has been delivered through the original contract, without considerable costs being made or inconvenience.”

Where there is any doubt that the above cannot be evidenced then beneficiaries/ project partners should consider going out to tender for any additional work/expenditure that arises throughout delivery. Where in doubt please contact your WEFO Project Development Officer or Ireland Wales Operations Officer for further advice.

It is vital that all records are retained to support any contract modifications and that these are made available to WEFO/SRA/WG officials and/or WG/EU auditors.

In all cases, we would usually expect to see a variation report, or similar, which records that a modification has been fully considered, along with the potential impacts, and for the modification to be signed off with appropriate authorisation (subject to the beneficiary’s own procurement policy) at the time it was undertaken.

The information set out in this document is neither legal advice nor statutory guidance and is not intended to be exhaustive. Nor is it intended to override existing legal obligations applicable to Welsh and/ or Irish Public Sector contracting authorities – contracting parties should seek their own independent legal advice as appropriate. Please also note that the law is subject to constant change and advice should be sought in individual cases.

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