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Welsh Government

GUIDANCE, DOCUMENT

Procurement Act 2023 guidance: modifying a competitive procurement

Technical guidance for modifying a competitive procurement.

First published: 25 July 2024

Last updated: 11 July 2024

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What are modifications to a competitive procurement and why is it important to regulate them?

1. During the course of a competitive tendering procedure it may be necessary to make amendments or clarifications to information in the tender notice or associated tender documents to deal with circumstances that were not anticipated.
2. Modifications during a procedure may be necessary for a number of reasons. For example, it could be that a supplier has raised a clarification question which requires an amendment to the associated tender documents or something was omitted from the tender notice. Any modifications must be made in accordance with section 31 of the Procurement Act 2023 (the Act).

What is the legal framework that governs modifications during a procurement?

3. Section 31 of the Act (Modifying a section 19 procurement).
4. Section 54 of the Act (Time limits).

What has changed?

5. The previous legislation allows suppliers to request information before submitting their tender but does not make specific provision for modifications during a procurement. The contracting authority must provide this information

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within a set time period before tenders are to be submitted. The Act makes specific provision in section 31 which sets out when the terms of a covered procurement may be modified, the extent of those modifications and how suppliers must be notified of those changes.

Key points and policy intent

6. Section 31 of the Act provides that a contracting authority may, provided the section is complied with, make changes to the ‘terms of a covered procurement’, which is defined in section 31(7) as ‘anything set out in a tender notice or associated tender documents, including any requirements of a competitive tendering procedure, conditions of participation or award criteria’. Modifications may be made under section 31 in 2 scenarios, as set out below.

Modifications to a procurement prior to submission of requests to participate or first/only tenders

7. Section 31(1) of the Act sets out when a contracting authority is permitted to make any changes to the terms of a covered procurement:

- a. in an open procedure, changes are permitted before the deadline for submitting tenders (in an open procedure, as the tender notice is the invitation to submit a tender, a modification can only be made prior to the end of the tendering period when tenders must be submitted)
- b. in a competitive flexible procedure, changes are permitted:
 - i. before the deadline for submitting a request to participate, or
 - ii. where there has been no invitation to submit such requests, the deadline for submitting the first or only tender

8. This allows for changes in the early stage of the procedure when suppliers

have not yet submitted a tender or request to participate. If a contracting authority wishes to modify the procurement in these circumstances, the tender notice and any associated tender documents affected by the modification must be updated and republished or provided again (section 31(5)) and the contracting authority must consider the time limits (see paragraph 15 below). This allows all interested suppliers to see the revised information and decide whether they wish to submit a request to participate or a tender in light of the modification.

9. The provisions within the Act aim to achieve an appropriate balance between permitting changes to the terms of a covered procurement and allowing suppliers sufficient time to consider the modification and prepare their requests/tenders.

Modifications to a procurement after submission of requests to participate or first tenders in a competitive flexible procedure

10. Once a competitive flexible procedure is in progress, i.e. once a contracting authority has received requests to participate or has received initial tenders, there is still scope to modify the terms of a procurement, as long as the relevant requirements out in section 31 are met. Under section 31(2), contracting authorities are permitted to make modifications prior to the deadline for submitting final tenders for assessment under section 19, but limits any changes to those that are not 'substantial' (unless the procurement relates to the award of a light touch contract: see paragraph 14 below).

11. A modification is 'substantial' if:

- a. it would permit suppliers that are not 'participating suppliers' to submit a tender, or
- b. the contracting authority considers that, had the modification been reflected

in the tender notice or associated tender documents before a deadline referred in section 31(1)(b) had passed (see paragraph 7(b) above):

- i. one or more participating suppliers would not be a participating supplier, or
- ii. one or more suppliers that are not participating suppliers would be a participating supplier.

A participating supplier is a supplier that has submitted a request to participate in, or has submitted a tender as part of, the competitive tendering procedure, and has not been excluded.

12. As an example, a change to a condition of participation would be a substantial modification if it would have had an impact on which suppliers were invited to submit tenders and which did not progress any further in the procurement. To illustrate, a contracting authority publishes a tender notice for a 2-stage competitive flexible procedure and sets a condition of participation in the tender notice that requires suppliers to meet a particular technical standard in order to progress in the procedure. Following submission of requests to participate, the contracting authority changes the condition of participation to a different technical standard. Such a change would be substantial if the contracting authority considers that other suppliers may have submitted a request to participate or suppliers that did not meet the condition would have been invited to progress had that different technical standard been set out in the original tender notice.

13. Where a non-substantial modification is made prior to the deadline in section 31(2), the contracting authority must notify each participating supplier, for example by writing to them or updating the tender notice, of the modification and the contracting authority must consider the time limits (see paragraph 15 below).

Modifications to a procurement for the award of a light

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touch contract

14. For procurements relating to the award of a light touch contract there are fewer restrictions on modifications after a contracting authority has received requests to participate or has received initial tenders. In contrast to other types of public contract, there is no requirement for a modification to not be substantial. The nature of the services for which a light touch contract may be used warrants this greater flexibility.

What impact does a modification have on time periods?

15. Section 31(4) of the Act requires that whenever a modification to the terms of a covered procurement is made, the contracting authority must consider whether any tender deadlines and other time limits need to be revised in order to provide additional time for suppliers to take the change into account. Any revision of the deadlines or time limits must be in accordance with section 54 of the Act. In particular, section 54(1)(d) requires the contracting authority to have regard to the nature and complexity of any modification of the tender notice or any associated tender documents.

What other guidance is of particular relevance to this topic area?

- Guidance on covered procurement objectives
- Guidance on competitive tendering procedures
- Guidance on time periods

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