

Contract modifications

Contract modifications during PCP

PCP falls outside the scope of the Procurement Directives.

However, the fundamental principles of the TFEU apply: **transparency, equal treatment, non-discrimination and proportionality.**

To remain compliant with these principles, the conditions under which contract modifications to the PCP Framework Agreement may occur must be clearly and explicitly foreseen in the tender documents, including in the contract notice. This may include, for example, review clauses, adaptations during the phases, selection mechanisms between phases or predefined budget ceilings per phase.

PCP inherently involves uncertainty and a phases approach to R&D. Therefore certain modifications are expected and permissible, provided that they were:

- Clearly foreseen in the contract documents;
- Objectively justified;
- Applied equally to all participating contractors.

However, modifications that *substantially* alter the essential provisions of the framework agreement, such that the amendment would effectively constitute the award of a new contract, are in breach of the principles of transparency and equal treatment. In such cases, a new procurement procedure may be needed.

Contract modifications during PPI

PPIs are fully subject to EU public procurement rules.

To determine whether a modification to a PPI contract is permissible, you first need to determine whether the intended modification is substantial.¹

This assessment must be made on a case-by-case basis.

Where a modification is considered substantial, a new procurement procedure is required. By contrast, non-substantial or minor modifications may be implemented without triggering a new procurement procedure.

A modification is considered substantial if it renders the contract materially different in character from the one initially concluded, demonstrating the parties' intention to renegotiate the essential terms of the contract.

When is this the case?

- When the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;
- When the modification changes the economic balance of the contract in favour of the contractor in a manner that was not provided for in the original contract;
For example: an increase in price or remuneration benefitting the contractor
- When the modification extends the scope of the contract considerably;
For example: extending the contract term for an unreasonably long period of time or on an indefinite basis
- When a new contractor replaces the one to which the public procurer had initially awarded the contract and this replacement is not the consequence of:
 - o An unequivocal review clause or option provided in the initial procurement documents;
 - o Universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established;
 - o The event that the contracting authority itself assumes the main contractor's obligations towards its subcontractors where this possibility is provided for under national legislation.

Non-substantial modifications may include, for example, minor technical adjustments, limited timeline adaptations or clarifications that do not affect the competition, the economic balance of the contract or its overall scope.

¹ Art. 72(1)(e) Directive 2014/24.