

## public procurement - legal changes published in August 2017

**Instruction of the National Agency for Public Procurement no. 3/2017 on amendments to the public procurement / sector procurement / framework agreement and the classification of these changes as substantial or non-substantial** was published in the Official Gazette of Romania, Part I, no. 673 of 17 August 2017.

The Instruction regulates how to resolve situations where, during a public procurement / sector / framework agreement, a change in the conditions of implementation set out in the initial terms of the contract appears necessary. The contracting authority / entity will establish, prior to the approval and implementation of this amendment, whether the envisaged change is, in relation to the specific circumstances of the contract, or the direct application of the contractual clauses, which does not require interpretation according to the factual situation found in the implementation, either a change in exceptional circumstances, either a non-substantial or a substantial one. Thus, the following aspects are provided:

- In order not to represent a change to the original contract but merely to apply its provisions, the changes: (a) must be anticipated by the contracting authority / entity in the original contract by "review clauses" and (b) result solely from direct application of the "review clauses" of the original contract, excluding any other changes to its requirements.
- the non-substantial changes to the public procurement / sectoral / framework agreements in progress are not a new assignment and do not require a new award procedure to be implemented, being of two kinds: a) non-substantial contractual changes - adaptations to the practical context ", regulated by the provisions of art. 221 par. (1) let. e) of Law no. 98/2016, with subsequent amendments, and by the provisions of art. 240 par. (2) of the Law no. 99/2016 and b) "non-material - value threshold" contract changes, regulated by the provisions of art. 221 par. (1) let. f) of Law no. 98/2016, with subsequent amendments, and by the provisions of art. 241 par. (1) of Law no. 99/2016.
- Modifications in exceptional circumstances should be considered as stand-alone changes, independent of non-substantial changes, consisting in (i) the "impossibility of changing the original contractor", as it results from the provisions of Art. 221 par. (1) let. b) of Law no. 98/2016, with subsequent amendments, and of art. 237 of the Law no. 99/2016 and (ii) the occurrence of "unforeseeable circumstances for a diligent contracting authority / entity", as it results from the provisions of Art. 221 par. (1) let. c) of Law no. 98/2016, with subsequent amendments, and of art. 238 of Law no. 99/2016.
- any substantial change to the terms of the original contract is assimilated to a new contract which must be subject to a new award procedure in order to avoid the initial conditions of the competition being affected. In the event of a substantial change, the contracting authority / entity is required to award a new contract for the remaining work to be performed (or, as the case may be, only for the works / services

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/ products related to the substantial change, provided that they can be executed independently of the initial contract) through an award procedure.