

Regulation 73 – Codifying Termination Clauses in Public Sector Contracts



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On 26 February 2015, the Public Contracts Regulations 2015 came into force, transposing into UK national legislation European Union Directive 2014/24/EU. Amongst a raft of changes, one aspect that will be of particular importance to the public and private sectors alike is Regulation 73. This places an obligation on contracting authorities to provide arrangements to govern the sometimes uncomfortable relationship between procurement and contract law.

Regulation 73 sets out three scenarios where the contracting authority must be able to terminate the contract of an economic operator:

1. The contract has been subject to a substantial modification which would have required a new procurement procedure.
2. Grounds for exclusion of the economic operator (as defined by the Directive) become applicable.
3. The contract is declared ineffective by a Court.

This is not a change in the law *per se* as various jurisprudence has created this duty for contracting authorities to terminate when the circumstances outlined above occurred. What Regulation 73 provides for is an obligation for contracting authorities to codify the right to terminate in their contracts. However, the mechanics of how this is to be achieved – notices, payment for loss and expense etc. – is at the discretion of contracting authorities. Further, and in a ‘belt-and-braces’ approach, Regulation 73 states that where a contracting authority has not included provisions for termination on one or more of the three grounds, such a right may be implied.

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To assist contracting authorities, Quigg Golden has produced exemplar amendments for two standard forms of contract NEC3 Engineering and Construction Contract and the JCT Standard Building Contract.

The *additional condition of contract* (Z clause) for use in an **NEC3 Engineering and Construction Contract**:

Z1 Additional reasons for termination

Insert new line in Termination Table:

| Terminating Party | Reason | Procedure | Amount due |
|-------------------|-----------|-----------|------------|
| The Employer | R22 – R24 | P1 and P4 | A1 and A2 |

Insert new clause 91.8

91.8 The *Employer* may terminate if:

- The effect of a compensation event is to substantially modify the contract within the meaning of Regulation 73 of the Public Contracts Regulations 2015 and the *Employer* is required to initiate a new procurement procedure (R22).
- The *Contractor*, including any person employed by the *Contractor* in an administrative, management or supervisory role and including any person who has powers of representation, decision-making or control within the *Contractor*, becomes the subject of a conviction for one of the reasons set out in Regulation 57(1) of the Public Contracts Regulations 2015 (R23).
- The contract is declared ineffective by a review body in accordance with Regulation 98(2) of the Public Contracts Regulations 2015 (R24).

If a **JCT Standard Building Contract** is used, the proposed amendment is:

Add new clause 8.6A

8.6A The Employer may by notice to the Contractor terminate that employment:

- If the effect of any adjustment to the Contract Sum in

accordance with clause 4·3·1 or the effect of any adjustment to the Completion Date in accordance with clause 2·28 is to substantially modify the contract within the meaning of Regulation 73 of the Public Contracts Regulations 2015 and the Employer is required to initiate a new procurement procedure.

- 2 The Contractor and/or the Contractor's Persons (including any person employed by the Contractor in an administrative, management or supervisory role and including any person who has powers of representation, decision-making or control within the Contractor) becomes the subject of a conviction for one of the reasons set out in Article 57(1) of the Public Contracts Regulations 2015.
- 3 The contract is declared ineffective by a review body in accordance with Regulation 98(2) of the Public Contracts Regulations 2015.

Amend clause 8·7

Delete “8·5 or 8·6” at the end of the sentence and replace with “8·5, 8·6 or 8·6A”

Amend clause 8·7·5

Delete the word “shall” in the middle of the sentence and replace with “may”.

Delete the words “or, if that sum is less, by the Employer to the Contractor”

Main Contractors should also be aware of this issue if they contract with public sector bodies. Quigg Golden's recommendation is that contracts entered into should have 'back-to-back' provisions in a similar form to the above.

For further information, please see the contact details above.

