



# Guide to Contract Variation Request (July 2012)

All parties (“Contractors”) who hold a Sound Broadcasting Contract (“Contract”) with the Broadcasting Authority of Ireland (“the BAI”) are obliged to operate in accordance with the contractual requirements of the Contract as agreed with the BAI. Accordingly, the holder of a Contract is obliged to consult with the BAI prior to making any amendments to the Contract.

In this regard, the Contractor is obliged to make a submission to the BAI for its consideration and decision, detailing the proposed change/s including the impact the change/s has/have on the Contract.

This Guide has been drafted to assist Contractors, who hold a commercial sound broadcasting contract, in making a submission for a contractual variation to its Contract. Please note, in order for the BAI to respond in full, and in a timely manner, the Contractor should ensure that all the required information and documentation are delivered

The Executive of the BAI are available to assist you in making a submission. If you require assistance, please call Rachel on 644 1200 or e-mail [info@bai.ie](mailto:info@bai.ie)



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## 1. Introduction

All radio broadcasters licensed by the Broadcasting Authority of Ireland (“the BAI”) enter into a Sound Broadcasting Contract (“the Contract”) with the BAI. The broadcasters are obliged to adhere to the requirements of the Contract and any amendments to the Contract are only permissible on approval by the BAI. Accordingly, no contractual amendments should be made by a broadcaster prior to consultation with, and approval by, the BAI.

In order to assist broadcasters in making a submission for a contractual variation, this document includes information on what is required for submitting a request. There is also a form available for making a contractual variation submission on the BAI’s website, [www.bai.ie](http://www.bai.ie), or on request for the BAI’s offices on 644 1200.

## 2. Contractual Variations

Any change requested by the broadcaster to its Contract is a request for a contractual variation. Such changes require approval from the BAI. Through the work of the BAI, it has emerged that contractual variation requests are most commonly submitted for two main contractual areas namely, the Second Schedule (Status of Contractor) and the Third Schedule (the Programme Policy Statement and the Programme Schedule).

While there are many types of potential contractual variations, this document has been drafted to assist with the contractual variation requests that occur most regularly. Broadcasters should note that the BAI Executive staff are available to offer guidance on the drafting of a request and if a broadcaster is not clear on what is required, s/he should contact the BAI for clarification prior to making a submission.

### 2.1 Second Schedule (Status of Contractor)

The Second Schedule of a Contract details the ownership and control structure of the Contractor, including its Board of Directors, its senior staff and also, details of media ownership, if relevant. The main sections of this schedule are as follows: -

3.1.1. Certificate of the Secretary

3.1.2 Management; MD/CEO, General Manager, Head of Programmes, Head of Finance, Head of Compliance

3.1.3 Shareholders Agreement

3.1.4 Statement Pursuant to Clause 3.2 i.e. **Statement.** *The statement to be made pursuant to this Clause 3.2 shall set out the manner and degree (if any) to which: -*

3.2.1 *a Relevant Person<sup>1</sup> has a Substantial Interest in the Contractor [(and, for the removal of doubt, for the purpose of this Clause 3.2.1 a person may be deemed to be a Relevant Person where Clause 3.7 applies)];*

3.2.2 *the Contractor is or has an Interest in a Media Operator*

<sup>1</sup> A Relevant Person shall be a terrestrial radio and/or television broadcaster; a cable operator; a person engaged in the re-transmission of radio and/or television services; a person engaged in the broadcast of audio and/or audio-visual material by satellite or via the Internet; a programme or advertisement production company; a newspaper; a magazine; an advertising agency; a communications or telecommunications enterprise; a music publisher; a distributor of recorded music; a person (not being the Authority) which is party to the Contract; a person who is not a national of a Member State of the European Union.



If the Contractor wishes to make a change to the Membership of the **Board of Directors**, s/he should notify the BAI of the details of the change and satisfy herself/himself that the Director appointed meets with requirements of the BAI's *Ownership and Control Policy* ("Policy"). In particular, the BAI has regard to the character, experience, and expertise of the proposed Director and that of the Board of Directors as a collective. This test applies to Directors, management positions approved by the BAI and shareholders whose shareholding constitutes a substantial interest, or control, as defined in the Policy.

The BAI also has regard to the financial resources and business practices of the Contractor and the level of media concentration in the franchise area, if relevant. The Contractor should clearly set out in the contract variation request if the proposed change has an impact on the media concentration, both in the context of sound broadcasting and all other forms of communications media such as newspapers or journals, in the franchise area. The Contractor should have regard to the requirements of the Policy and in particular, the definitions of what the BAI considers to be a 'substantial interest' and a position of 'control' in a sound broadcasting service or another communications media entity. The BAI has regard to media concentration matters in order to ensure that a reasonable range and number of different voices are available to the public.

When making a submission, Contractors are advised to address the matters as detailed in the Policy and in particular, in Section 2 Policy Provisions:

- (a) Interpretation of terms
- (b) Character, Expertise and Experience
- (c) Financial Resources
- (d) An undue number of sound broadcasting services
- (e) An undue number of sound broadcasting services in a specified area
- (f) An undue amount of communications media in a specified area
- (g) Assignment of Contracts
- (h) Programming
- (i) Competition Act 2002
- (j) Non-EU Entities
- (k) Concrete indicators of diversity

Regarding **Senior Management** positions, Contractors must submit a rationale for such changes, having regard to the requirements of Section 2 of the *Ownership and Control Policy 2012* and should include a curriculum vitae with a submission.

## **2.2 Third Schedule (Programme Policy Statement & Programme Schedule)**

The Third Schedule of a Contract details the philosophy of the station and defines its purpose and its character in a programming context. In this regard, the programming commitments and aims of the station are detailed in the Programme Policy Statement ("PPS") and the Programme Schedule arises from the commitments stated therein. As the PPS is part of the sound broadcasting contract with the BAI, it cannot be changed without BAI approval. Also, changes to the Programme Schedule should be approved by the BAI if such changes do not align with the station's PPS.



In order to submit a request for such a change, the BAI would encourage Contractors to use the BAI's 'Programme Change Request Form'. This form has been drafted to assist the Contractor in making a submission.

When submitting a request for a change to the PPS and/or Programme Schedule the Contractor should have regard to, *inter alia*, the following:

1. Submit details of the proposed change, including a copy of the current PPS and/or Programme Schedule and a copy of the proposed new PPS and/or Programme Schedule. The proposed amendment/s should be clearly marked.
2. Set out clearly the rationale for the proposed change. This should include regard to the type of licence held by the Contractor, the intended audience to be served by such a licence and the stations overall philosophy.
3. Submit evidential material that supports the proposed change such as audience research, JNLR analysis and the diversity of content provided by other services and other communications media in the relevant franchise area.
4. If the change concerns:
  - a. The statutory news and current affairs percentage / minuteage;
  - b. Opt-out programming (FM Radio only);
  - c. Opt-out advertising (FM Radio only);
  - d. Programme automation and Networking (FM Radio only);
  - e. Sharing of non-programme functions (FM Radio only); and/or
  - f. Studio Location;

please provide the rationale for such proposed changes having regard to the BAI's *Broadcasting Services Strategy*. This document is available on the BAI's website, [www.bai.ie](http://www.bai.ie), or on request from the BAI's offices, tel. 01 644 1200, e-mail [info@bai.ie](mailto:info@bai.ie)

5. Include an indicative date on which you envisage the proposed change/s will be implemented if approved.

### **3. Processing a Request**

**3.1** The BAI would encourage Contractors to use the relevant request form drafted by the BAI for a contractual variation request and complete the form in full. If a Contractor chooses not to use the form, then the BAI would request that the Contractor follow the format as detailed in **section 4 of this Guide**.

**3.2** The contract variation request submitted will be reviewed initially by the Executive. This review will include determining if sufficient information has been submitted by the Contractor to enable the BAI to fully assess the request. The review will also include assessing the nature of the request and whether it can be fully processed by the Executive or whether it will require consideration and approval by the Authority.

**3.3** The BAI will endeavour to process a request in an expedient manner and no longer than 90 days from the date of the receipt of the request, unless the matter concerns Ownership & Control media concentration issues and in such an instance, the relevant contractual timeframe will apply.



**3.4** In the event that the Contractor does not submit sufficient information, the BAI will clearly detail the further information that is required. The BAI's committed timeframe for processing a request applies only when all sufficient information has been submitted by the Contractor.

**3.5** If the request is such that it requires Authority consideration and approval, the Executive will inform the Contractor of same and the date of the scheduled Authority meeting.

**3.6** The Executive will inform the Contractor of the Authority's decision no later than five days after the relevant meeting.

**3.6** The Contractor will be fully informed of the reasons for the decision reached, either by the Executive and/or the Authority.

**3.7 Confidential Information:** The BAI may seek to withhold public access to material forming part of a request where the BAI considers it appropriate that such material should be treated as confidential. Information that may be deemed to be of a confidential nature includes, *inter alia*, information that is commercially sensitive and information, the disclosure of which, would involve a breach of a confidentiality obligation which the Incumbent owes to a third party.

**Note:** Information considered by a Contractor to be confidential must be presented in an annex to the request. The annex should be marked "confidential". The reasons for believing that the information is confidential must be set out. Where the BAI believes material placed in a confidential annex should be made available for inspection, it will seek to reach an agreement with the Contractor regarding the extent of disclosure of the information. If an agreement cannot be reached within such a period as determined by the BAI, at its sole discretion, to be reasonable, the BAI will treat such information as having been withdrawn and it will not be considered as part of the request.

**3.7.1 Freedom of Information:** Information may be made available to the public pursuant to requests under the Freedom of Information Act, 1997 and the Freedom of Information (Amendment) Act, 2003. The BAI will comply with its obligations under the FOI Acts to consult with the Contractor about the publication of any information treated as confidential at the time of submission, before making a decision on any Freedom of Information request received.

**3.7.2** Any agreements between the BAI and the Contractor regarding confidential and/or commercially sensitive information are without prejudice to the BAI's obligations under law including, under the 2009 Act and the FOI Acts referred to in the preceding section 3.7.1. The BAI therefore cannot warrant that information alleged to be confidential by a Contractor or treated as such might not be disclosed as required by law.

#### **4. Format of Request**

There is a contractual variation form available to Contractors from the BAI's website, [www.bai.ie](http://www.bai.ie) or on request from the BAI's offices at (01) 6441200. If you choose not to use the form please ensure that your submission includes all the details as referred to in Section 2 of this Guide.