



Cabinet Office

APPENDIX 4

Procurement Policy Note - Supplier relief due to COVID-19

Action Note PPN 02/20

March 2020

Issue

1. This Procurement Policy Note (PPN) sets out information and guidance for public bodies on payment of their suppliers to ensure service continuity during and after the current coronavirus, COVID-19, outbreak. Contracting authorities must act now to ensure suppliers at risk are in a position to resume normal contract delivery once the outbreak is over.

Action

2. All contracting authorities should:
- Urgently review their contract portfolio and inform suppliers who they believe are at risk that they will continue to be paid as normal (even if service delivery is disrupted or temporarily suspended) until at least the end of June.
 - Put in place the most appropriate payment measures to support supplier cash flow; this might include a range of approaches such as forward ordering, payment in advance/pre-payment, interim payments and payment on order (not receipt).
 - If the contract involves payment by results then payment should be on the basis of previous invoices, for example the average monthly payment over the previous three months.
 - To qualify, suppliers should agree to act on an open book basis and make cost data available to the contracting authority during this period. They should continue to pay employees and flow down funding to their subcontractors.
 - Ensure invoices submitted by suppliers are paid immediately on receipt (reconciliation can take place in slower time) in order to maintain cash flow in the supply chain and protect jobs.

Dissemination and Scope

3. This PPN is applicable to all contracting authorities, including central government departments, executive agencies, non-departmental public bodies, local authorities, NHS bodies and the wider public sector (excluding Devolved Administrations). Together these are referred to in this PPN as 'contracting authorities'. This PPN covers goods, services and works contracts being delivered in the UK.

4. Please circulate this PPN across your organisation and to other relevant organisations that you are responsible for, drawing it to the specific attention of those with a commercial and finance role.

Timing

5. With immediate effect until 30 June 2020.

Background

6. The current outbreak of COVID-19 is unprecedented and will have a significant impact on businesses of all sizes. Many suppliers to public bodies will struggle to meet their contractual obligations and this will put their financial viability, ability to retain staff and their supply chains at risk. Contracting authorities should act now to support suppliers at risk so they are better able to cope with the current crises and to resume normal service delivery and fulfil their contractual obligations when the outbreak is over.

7. It is vital that contracting authorities pay all suppliers as quickly as possible to maintain cash flow and protect jobs. Contracting authorities should also take action to continue to pay suppliers at risk due to COVID-19 on a continuity and retention basis. Contracting authorities can consider making advance payments to suppliers if necessary.

8. Central Government organisations should note that Managing Public Money prohibits payment in advance of need in absence of Treasury consent as this is always novel contentious and repercussive. However, in the circumstances Treasury consent is granted for payments in advance of need where the Accounting Officer is satisfied that a value for money case is made by virtue of securing continuity of supply of critical services in the medium and long term. This consent is capped at 25% of the value of the contract and applies until the end of June 2020. HM Treasury will review in mid-June whether this consent needs to be extended for a further period. Consent for payment in advance of need in excess of this amount should be sought from HMT in the usual way. This consent does not alleviate Accounting Officers their usual duties to ensure that spending is regular, proper and value for money or for other contracting authorities to conduct appropriate and proportionate due diligence to ensure such payments are necessary for continuity of supply of critical services.

9. Contracting authorities should aim to work with suppliers and, if appropriate, provide relief against their current contractual terms (for example relief on KPIs and service credits) to maintain business and service continuity rather than accept claims for other forms of contractual relief, such as force majeure.

10. Continuing to make payments to at risk suppliers will present risks including that, despite these exceptional actions, a supplier may still become insolvent. These risks will need to be managed by contracting authorities on a case by case basis.

Contact

11. Further guidance on COVID-19 for individuals, employers and organisations is available on GOV.UK.

12. Enquiries about this PPN should be directed to the helpdesk at info@crowncommercial.gov.uk.

SUPPLIER RELIEF DUE TO COVID-19

INTRODUCTION

The public sector must act quickly and take immediate steps to pay all suppliers as a matter of urgency to support their survival over the coming months.

Where goods and services are either reduced or paused temporarily, authorities should continue to pay at risk suppliers to ensure cash flow and supplier survival. This could include, for example situations where:

- Services are cut short / reduced at short notice due to the impact of COVID-19 and non-payment could result in supply chains collapsing and/or significant financial implications for the supplier.
- It would be value for money and important to business continuity to continue to pay suppliers in the short term (regardless of whether you are able to reconcile at a later stage). This would ensure continuity of services when services can resume.

PPN 01/20 sets out how contracting authorities can amend contracts under Regulation 72 of the Public Contracts Regulations 2015¹. Changes should be captured in contract variation or change note, and make clear that the changes relate only to the COVID-19 situation, include a review provision or time limit, and that it is the authority's decision when things should return to normal.

PAYMENT TO MAINTAIN BUSINESS CONTINUITY

Contracting authorities should confirm with their at risk suppliers that they will continue to pay until at least the end of June, to ensure business and service continuity. Contracting can define their 'at risk suppliers' according to need. In general, this should override provisions in contracts that might require contracting authorities to pay suppliers on a decreasing scale as a result of, for example performance, force majeure or business continuity clauses.

There are a range of ways to support suppliers in maintaining cash flow during this period. Contracting authorities can continue to pay at usual contractual rates, or consider other options such as payment against revised/extended milestones or timescales, interim payments, forward ordering, payment on order or payment in advance/prepayment. Risks associated with advance or pre payment should be carefully considered and documented.

Where contracts operate 'payment by result' or are 'output / outcome' based, payments to suppliers should be made on the basis of a calculation of the average of the last three months invoices. Where possible, any payments made to suppliers during this emergency period should be adjusted to ensure profit margin is not payable on any undelivered aspects of the contract, however this should not delay payments being made.

Suppliers should identify in their invoices which elements of the invoiced amount relates to services they are continuing to supply (i.e. business as usual) and which amounts are attributable to the impact of COVID-19.

Payments should not be made to suppliers where there is no contractual volume commitment to supply, and contracting authorities should carefully consider the extent of payments to be made to suppliers who are underperforming and subject to an existing improvement plan.

¹ Or equivalent procurement regulations

Transparency

Contracting authorities and suppliers should work collaboratively to ensure there is transparency during this period. Suppliers in receipt of public funds on this basis during this period must agree to operate on an 'open book' basis. This means they must make available to the contracting authority any data, including from ledgers, cash-flow forecasts, balance sheets, and profit and loss accounts, as required and requested to demonstrate the payments made to the supplier under contract have been used in the manner intended.

For example, this might include evidence that staff have been paid the right amount and on time, and that cash continues to flow through the supply chain as quickly as possible. Contracting authorities should keep records of decisions and agreements made, and ensure suppliers maintain records to enable future reconciliation if necessary.

Suppliers should not expect to make profits on elements of a contract that are undelivered during this period and all suppliers are expected to operate with integrity. Suppliers should be made aware that in cases where they are found to be taking undue advantage, or failing in their duty to act transparently and with integrity, contracting authorities will take action to recover payments made.

Supplier capacity

Many suppliers will not be able to fulfil their contracts due to action taken elsewhere in the public sector. For example, transport services for school children, due to the closure of schools. Wherever possible, contracting authorities should seek to re-deploy the capacity of those suppliers to other areas of need; this can be implemented via a time-bound variation to the original contract under regulation 72 of the Public Contract Regulations (see PPN 01/20).

OTHER CONTRACTUAL RELIEF

Contracting authorities should work with all suppliers to ensure business continuity is maintained wherever possible and that business continuity plans are robust and are enacted.

If a supplier seeks to invoke a clause relating to a form of contractual relief that would allow them to suspend performance, such as force majeure, contracting authorities should first work with the supplier to amend or vary contracts instead. These variations could include changes to contract requirements, delivery locations, frequency and timing of delivery, targets and performance indicators etc. Changes to the original terms should be limited to the specific circumstances of the situation, and considered on a case by case basis.

Other reliefs sought by a supplier could relate to any contractual obligation but usually takes the form of one, or both, of the following:

- an extension of time for contract performance (eg revised milestones dates or delivery dates, etc);
- a waiver or delay in the ability of the contracting authority to exercise a right and/or remedy (eg to claim liquidated and ascertained damages, service credits or terminate the contract)

Each claim for relief should be considered on a case by case basis, according to the nature of the goods/services/works being supplied, the challenges being faced, the contract terms and the constraints of any statutory requirements, for example the PCR to above-threshold contracts. You should seek specific legal advice as required.

Contracting authorities should take a pragmatic approach. These discussions and any temporary changes agreed should be recorded. The contract should return to its original terms as soon as the impact of the COVID-19 outbreak on the relevant contract is over.

Contracting authorities should not accept claims from suppliers who were already struggling to meet their contractual obligations prior to the COVID-19 outbreak.

Force Majeure

Force majeure is a contractual term which may, (depending on the specific terms of the contract) allow one or both of the parties, when a specified event or events occurs beyond their control:

- to terminate the contract; or
- to be excused from performance of the contract, in whole or in part; or
- to be entitled to suspend performance for the period the event is continuing or to claim an extension of time for performance

It is important that force majeure clauses is not considered in isolation given its impact on other clauses such as exclusivity, liability, liquidated damages and termination rights. It may also be relevant to consider the governing law and jurisdiction clause as contracts subject to foreign law may be interpreted differently by the courts. It may also be an exclusion clause, which is subject to the Unfair Contract Terms Act 1977.

Contracting authorities are not bound to accept a supplier's claim for force majeure and can resist it. You should seek legal advice when dealing with a claim and continue to work with the supplier to maintain service continuity as far as possible. An attempt by a supplier to invoke a force majeure clause without valid cause may mean that the supplier is in breach of contract.

Force majeure clauses do not automatically entitle either party to claim relief. In some cases, a contract will not allow termination at all due to force majeure, and it cannot be forced.

Frustration

It is unlikely a supplier will seek to frustrate a contract if they continue to be paid. However, unlike force majeure, frustration is rarely included as a provision in the contract. Instead, frustration arises where an event, for which the contract makes no sufficient provision, renders performance of the contract impossible or radically changes a party's principal reason for entering into the contract.

If a contract has been frustrated, it terminates automatically and the parties are excused from their future obligations. Any contractual obligations incurred before the time of frustration, such as for the contracting authority to pay outstanding charges to a supplier, remain enforceable. As neither party is at fault in respect of the frustration, neither may claim damages from the other for non-performance after the contract is declared frustrated.

However, the threshold for a contract being declared 'frustrated' is high and the fact that the contract will merely be more expensive to perform, or that the provider will have to perform the contract in a different way as a result of COVID-19 and/or its impact, are highly unlikely to constitute grounds for frustration in itself. You should seek legal advice if a supplier claims 'frustration'.

Excusing Causes, Relief Events and other options

If included in a contract, excusing cause and relief event provisions generally give a supplier

relief from its contractual obligations, which contracting authorities may be able to use to provide relief, for example, to change the KPI regime, payment mechanism or reduce service level requirements. Some contracts may have other relief mechanisms. Whatever the regime, contracting authorities should maximising any commercial flexibilities within the contract, including agreeing new measures such as on meeting lead times, waiving or delaying exercising the authority's rights and/or remedies (e.g. to claim liquidated and ascertained damages, service credits or terminate the contract), revising milestones or delivery dates. In these circumstances, if there is one, use the contract change control procedure to keep records of any changes made and the decision making behind each one. If not, keep your own records.

ACCELERATING PAYMENT OF INVOICES

Contracting authorities should pay suppliers as quickly as possible to maintain cash flow and protect jobs. The public sector must pay suppliers within 30 days under the Public Contracts Regulations 2015 but contracting authorities now need to accelerate their payment practice.

Contracting authorities should act now to ensure payment is made as quickly as possible to their suppliers, including:

- Targeting high value invoices where a prime is reliant on a supply chain to deliver the contract.
- Resolving disputed invoices as a matter of urgency; consider paying immediately and reconciling at a later date in critical situations.
- Take a risk based approach as to whether 2-way matching is always needed (rather than adopt regular 3-way matching against receipt and Purchase Order)
- Encourage suppliers to invoice on a more regular basis to help cash flow (eg every week rather than monthly)

Contracting authorities should consider the following additional contingency measures during the COVID-19 outbreak

Contingency measures - delegated authority to ensure invoices are not delayed

With significant levels of staff absence possible, ensure you have appropriate contingencies in place including sufficient numbers of staff with delegated authority to promptly receipt / authorise an amount due for payment in business units as well as finance teams.

Contract Managers and Business Units

Receipt for goods promptly, do not delay and ensure there is a contingency in place for delegated authority to approve in the event of staff shortages. Monitor flow down to ensure payment is cascading down the supply chain.

Verifying invoices as quickly as possible

Verify an invoice as quickly as possible and do not send invoices back for minor administrative errors and risk causing delay in payment. Continue to undertake necessary checks, however, look to resolve any issues as a matter of urgency and reconcile any minor discrepancies in information at a later stage.

Payment Card Solutions

Use of procurement/payment cards where possible to ensure businesses are paid as quickly as possible. Consider increasing the upper limit of spend, open up categories and ensure an appropriate number of staff have the authority to use.

Invoicing procedures clearly set out for your suppliers

Be clear where suppliers should send their invoice, including email address and the process required. This should be clear on the authority's website. This will minimise the number of invoices with incorrect information and/or being issued to the wrong address. Issue a reminder to all your suppliers to help them best prepare and ask for invoices to be sent in electronically to avoid hard copies sitting in office buildings potentially unattended.