

Procurement and Coronavirus

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Please note: the information contained in this legal update is correct as of the original date of publication

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The UK is preparing for high rates of sickness, voluntary or imposed absence from work and the possibility of more severe measures from central government to prevent the spread of the virus; but how will this impact upon your current procurement schedules and requirements?

We have considered below which provisions under the Public Contract Regulations 2015 (the PCR) can assist you in your contracting and procurement requirements in the coming months.

What is permitted under the PCR when changing contracts in the current challenging environment?

It is predicted that the movement, shopping habits and needs of the population will change over the coming months which is likely to result in a shift of focus from ongoing projects to additional support in the care and health sectors. This may well mean that you need to change or increase the scope of your current contracts to deal with this.

The PCR allows, through regulation 72, a number of "safe harbours" when contracting authorities need to modify existing contracts in a way which does not require a fresh procurement.

Before looking at the specific safe harbours it is always worth considering whether the modification is substantial at all. Regulation 72 (1) (e) provides that modifications that do not amount to substantial modifications (as defined in regulation 72 (8)) will be permitted. This is not normally easy to justify but you should do that first before looking at the other parts of 72.

Regulation 72 (1) (a) allows modification made by way of a clear and unequivocal review clause. The level of specificity needed for this provision means that this is unlikely to be usable in this unprecedented situation but of course your contract should be checked to see whether this kind of pandemic event was covered off.

Regulation 72 (1) (b) allows modifications to accommodate additional works, services or supplies by the original contractor, which have become necessary but were not included in the initial procurement, where a change of contractor, can't be made for economic or technical reasons, would cause significant inconvenience and substantial duplication of costs for the contracting authority and any increase in price must also not exceed 50% of the value of the original contract. This provision does not require any degree of foreseeability so provided you meet the tests you can utilise this to make the change to your contract. Regulation 72 (1) (c) allows a modification to an above threshold contract where the need for the modification has been brought about by circumstances which a diligent contracting authority could not have foreseen; the modification does not alter the overall nature of the contract and the price increase does not exceed 50% of the value of the original contract or framework agreement.

This provision will be helpful where there is a contract for existing services, but the need is increasing. While some variation of service can take place, the services purchased should be of the same 'nature' as those covered in the original contract.

Regulation 72 (5) also allows for minor changes i.e. below threshold and 10% of contract value (goods and services) or 15% (works).

If in your circumstances regulation 72 is not available for your situation what can you do? Regulation 32 allows a direct award of a contract without publication (a direct award) when for "reasons of extreme urgency brought about by events unforeseeable by the contracting authority" there is not enough time to undertake one of the procedures under the PCR.

This may be useful where a need arises for which there is not a current contract, or if the existing service provider cannot meet demand, so a new provider and contract is required. The threshold for the use of this regulation is higher than for Regulation 72, and a lack of staff capacity to run a procurement process is not sufficient to justify the use of this provision. This provision should only be used to meet short term need and should not be relied upon to enter into a contract intended to continue materially beyond the containment of the outbreak.

When entering into a contract under this provision the authority must still prepare a report in accordance with Regulation 84, and this must set out the circumstances referred to in Regulation 32 which justify the use of this procedure.

While the situation is changing very rapidly the use of these provisions may be acceptable, but as we build up more information on the transmission and effective actions, which are being shown through other countries' actions, more scrutiny may be applied as to whether or not the contracting authority ought to have pre-empted the need.

Current procurements

For ongoing procurements, the following practical steps may need to be considered to allow the process to continue and to ensure that the bidders are treated fairly and equally:

- Making alternative provisions for bidders' days, for example delivering this by online seminar allowing for questions, or a paper-based submission of questions
- Generally time limits may need to be extended and or you may have to consider the exercise of discretion in relation to process more.
- Whether changes are required to implementation or mobilisation timescales, or the commencement date for the contract, to ensure non-incumbent suppliers are not prejudiced
- If you anticipate changes in scope as a result of the pandemic, then the specification should be amended as early as possible and consider an extension to response deadlines

Procurement processes may be delayed or suspended by giving notice to all potential providers ensuring transparency and equal treatment. We anticipate that non business critical procurements are likely to be suspended to allow resource to be assigned to more urgent requirements where there are workforce shortages.

Bidders will also be affected by higher rates of absence, so unless the procurement is for a service required urgently then it is advisable to extend the procurement timetable for ongoing processes to ensure you receive the highest quality responses.

If a provision timetable was published as part of the ITT this should be republished with extended timescales so that all parties can clearly see the new intended timescales. If it is not possible to give updated timescales we would recommend setting a date for the next communication so that bidders are clear on when they will receive the next update.

Where a process cannot be supported or is no longer required it may be abandoned, but the authority should carefully consider a range of factors to ensure this is lawful.

When abandoning a procedure, the authority must notify all possible bidders of its decision, and any grounds for the decision not complete the process or appoint a provider (Regulation 55 (1) PCR). The grounds for abandonment must be consistent with the general EU principles of transparency and equal treatment. Abandonment becomes more difficult if the process is challenged and should be navigated sensitively.

Any changes made during the procurement process should be set out, along with the reasons for making the change, in the Regulation 84 report.

Existing Contracts and Force Majeure

Where there are existing contracts in place and either party is prevented from meeting their obligations under this, the 'force majeure' provisions of the contract should be considered. Please see our article [HERE](#) on force majeure.

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