

Contracts with Russian and Belarusian suppliers

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We are all aware of the unfolding situation in Ukraine following the invasion of Russian forces, and the support afforded to Russia by Belarus. The UK Government has, in response to the conflict, issued sanctions on companies and individuals. Standing in solidarity with Ukraine, many public bodies outside of Central Government wish to follow suit. In a Public Procurement context, many contracting authorities (Authorities) have questioned their ability to terminate existing contracts and exclude from consideration, in future contracts, Russian and Belarusian suppliers (**Suppliers**).

UK law, in its current state, prohibits Authorities from taking into consideration non-commercial factors or acting in a way so as to not promote equal treatment and non-discrimination (see the s17 Local Government Act 1989 and the Public Procurement Regulations 2015). Equally, the World Trade Organisation, of which the UK is a member, and both the Russian Federation and Belarus enjoy rights as an observer, also prohibits discriminatory decisions based on a supplier's nationality.

Following calls for intervention, on 28 March 2022, the UK Government released a Procurement Policy Note 01/22: contracts with suppliers from Russia and Belarus. This Procurement Policy Note (**PPN**) applies to Central Government Departments, their Executive Agencies and Non-Departmental Public Bodies. Whilst the PPN does not directly apply to Local Authorities, it states that "other public sector contracting authorities should consider applying the approach set out in this PPN".

The PPN addresses the two main procurement concerns: how can existing contracts with Suppliers be terminated and how can Suppliers be excluded from tendering for new contracts?

Terminating existing contracts

The PPN is clear that existing contracts with Suppliers must be assessed on a case by case basis, and may only be terminated within the remits of existing UK law and the terms of the contract in question. Costs associated with termination (such as an early termination fee) must be accounted for out of existing budgets. Authorities may look only to the termination provisions within the contract — neither the PPN nor its accompanying FAQs indicate that Force Majeure or Frustration might apply as a result of the war.

The FAQs advise contracting authorities to be mindful of circumstances where termination may benefit a Supplier and, therefore, seeking to terminate would fail to meet the ultimate aim. The example given is that of a fixed-term energy contract with a fee lower than market value, and terminating the contract may enable them to secure a higher rate with another, willing, customer.

Excluding suppliers from tendering

An Authority may decline to consider bids from Suppliers who are organised under the law of Russia or Belarus, or whose 'Persons of Significant Control' information states either country as their place of residency, the PPN advises. Whilst this guidance will, no doubt, be welcomed by Authorities, it is qualified with the exception of a Supplier registered or having significant business operations in the UK, or a country with a relevant agreement and access to public procurement. Where these exceptions apply, the non-discrimination, equal treatment and remedy provisions outlined in the Public Procurement Regulations would be applicable, and disqualification on grounds of nationality would be unlawful.

Assessing risk

As the law remains unchanged, and terminating or excluding Supplier contracts could give rise to serious breach of UK law, the PPN sets out considerations Authorities should have when assessing risks involved. These include:

- Quantifying any costs associated with termination and ensuring there is scope within the existing budget to cover any costs associated with termination.
- Ensuring alternative supply is affordable and accessible.
- Measuring the severity of the impact termination may have on the business of the authority.
- Maintaining a clear documented audit-trail to support their decision.
- Consulting legal, financial and commercial advisers throughout the process.
- Clearly documenting the assessment of the decision-making process and receipt of approval from the “appropriate senior commercial or procurement leader”.

In summary, although the PPN sets out helpful guidance, it does not provide the public sector with a change in law or a route to sever ties with Suppliers. Calls for the Government to legislate with haste to amend or repeal domestic law remain; however, the PPN should enable the public sector to assess existing and future contracts with clarity, following the risk-based approach set out within the note.

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