

Payment of contracts during Covid 19

The latest Procurement Policy Note (PPN) 02/20, is asking contracting authorities within England to play their part in keeping businesses up and running, by continuing to pay suppliers, even where, in some cases, the services, goods or works being delivered will not be the same.

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

I feel like this should start with the World War 2 poster saying “Your Country Needs You” with the big finger pointing out! In so many different ways our public services are being asked to step up and support the country while we fight Coronavirus. So, thank you, from Browne Jacobson, to all of our public services for the amazing work you are doing.

In particular, this article is about the latest Procurement Policy Note (PPN) 02/20, the second in as many days. PPN 02/20 is asking contracting authorities within England to play their part in keeping businesses up and running, by continuing to pay suppliers, even where, in some cases, the services, goods or works being delivered will not be the same. The PPN is asking for emergency changes to be made to contracts, where necessary, to ensure sensible payment arrangements are made. This PPN comes into effect immediately and, for now, runs until 30 June 2020, but that will be kept under review.

Why is this necessary? The way that public bodies set budgets and receive income means that their finances for the next few months are already secure – to a greater or lesser extent, recognising that it is almost a new financial year and a lot of budgets for next year have only just been agreed and may have included some cost cutting measures. But for contracts already in place, the budget should be there to pay the suppliers. So the public sector is in the best position to support other areas of our economy who are reliant on the monthly payments from contracts.

So what should public bodies in England be doing?

1. Triage your contracts to see which ones are being run by suppliers that may be “at risk”. The PPN does not include guidance on what “at risk” means but we can assume that it is suppliers who are already known to have finely balanced financial positions or who may be providing services to the private sector that will now be stopped. Additionally, providers who may lose lots of workers because they cannot work remotely or those suppliers that support a large supply chain. Basically, suppliers who may not be able to continue to perform all of their contractual duties but shouldn’t be allowed to fail as companies. These suppliers who are “at risk” should be contacted and reassured that they will still get paid.
2. Once you have triaged to get a list of at risk suppliers, contracting authorities should assess the payment provisions of those contracts and see how a reduced performance would impact payments. For example, if a contract is payment by results, then could those payment provisions be changed so that until the end of June they are paid a monthly (or weekly, see below) payment based on an average of the last three months payments? The advice in the PPN is that they should.
3. Clearly one of the big worries for the government is the impact on the supply chain. For this reason, the PPN suggests reviewing business continuity for the at risk suppliers and ensure that wherever possible business continuity is supported and encouraged over the use of other contractual provisions that would allow the supplier to either permanently or temporarily suspend performance. If the latter happened then there is the knock-on effect on the supply chain of lack of payment. So contracting authorities should be discussing business continuity of some sort with their suppliers and looking to amend contract terms to allow for continued service provision wherever possible.
4. Payments due should be “accelerated”, meaning that invoices should be paid quicker than the usual contractual timescales wherever

possible. In particular, high value invoices should be targeted to ensure they are paid as soon as possible. Potentially, suppliers should be asked to invoice on a weekly, rather than monthly, basis to keep cash flow going.

5. What should amendments to contracts look like? Helpfully, [on the webpage for the PPN](#) there is also some suggested drafting. The main suggestions are:

- The onus is on the supplier to state that it is suffering “Covid Related Hardship” and propose a change to the payment terms because of this, called an Interim Payment Proposal. This needs to state clearly what it needs and why;
- The Interim Payment Proposal could include advance payment against goods or services, changes to milestone delivery dates and continuing to be paid even when performance is not meeting the thresholds in the contract;
- The contracting authority has three working days to review and either agree or propose amendments to the Interim Payment Proposal;
- Where possible the wording asks the parties to use other methods of relief under the contract;
- The supplier cannot include any elements of profit in the Interim Payment Proposal and it must be able to show, through the use of open book accounting what it is asking for related to Coronavirus impacts;
- The contracting authority retains the right to challenge the supplier against any claims for payment during this period and to review whether the supplier is still eligible for payment if it does not perform as agreed in the Interim Payment Proposal.

So what does this mean for contracting authorities?

- Clearly there is a short term requirement to spend time reviewing contracts and triaging them for the “high risk” ones. Contract managers and heads of service should be asked to come up with lists of contracts they see as potentially “high risk” and then these need to be reviewed. Think of those that have large supply chains, are high value, or are delivered by suppliers likely to be impacted in other areas by Coronavirus;
- Get your legal teams involved to assist with the reviewing of the contracts so that payment, performance and business continuity terms are fully understood and that you can agree a single approach to amendments, that may be based on the standard terms proposed in the PPN (on the basis that all contracts will need them to be bespoke to a certain extent);
- Ensure that finance teams understand the accelerated invoicing. This will require additional resources in the finance teams of contracting authorities;
- Identify absolutely critical contracts that must be performed as they are and do a risk analysis of what the back up option is and prepare for that as well;
- Remember that you are spending public money and ultimately you cannot make decisions that are totally unreasonable. If a supplier cannot perform at all, they should not be paid – but if they have subcontractors, could you pay them directly instead to continue service delivery?
- Overall, be open minded about what could be done, talk honestly with your suppliers and be prepared to make some short term adjustments.
- Finally, do not forget to record these things, you must be able to account for it later!

If you would like to discuss any of the issues in this article please contact [Anja Beriro](#) or [Peter Ware](#) in the first instance.

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