

Procurement & coronavirus: how will the current crisis impact of your ability to secure & retain public sector contracts?

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22 April 2020

Please note: the information contained in our legal updates are correct as of the original date of publication

In the space of a few short weeks the priorities of public authorities across the UK have shifted dramatically. Planned procurement pipelines are being revisited and a substantial amount of non-essential projects and spend has been temporarily suspended.

The impact of this will inevitably filter down to suppliers to Government and the wider public sector. This will vary from sector to sector with some suppliers in the health sector seeing a drastic upturn in demand with others such as development housing projects grinding to a temporary halt. Many public sector procurement professionals are currently working through contract portfolios and making decisions about how to resource contracts and place awards during this pandemic.

In this briefing we have set out what those considerations are likely to be, how this aligns with the Public Contract Regulations 2015 (the PCR) and how this could impact on you as an organisation over the coming months.

Emergency Requirements

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. If you hold current contracts that are crucial in supporting the ongoing crisis (such as delivery of health services or providing personal protective equipment) this may well mean that you are asked to change or increase the scope of your current contracts to meet this unprecedented threat.

Regulation 72(1)(c) of the PCR 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. It is important that suppliers understand their contractual commitments before simply agreeing to an extension of an existing contract. An increase in capacity or duration may trigger other commercial obligations such as a requirement to upgrade equipment, routine maintenance, increase staffing requirements or changes to service level. These costs could be substantial and need to be factored into any negotiations in terms of the duration of such extension to ensure that the costs are not disproportionate for the public sector and your organisation. These negotiations can be tricky as parties need to navigate the boundaries of the PCR and reach a commercially acceptable position.

It is very possible the boundaries of Regulation 72 will be pushed to the point that it will not be considered a permitted modification of the contract and trigger the need to re-procure the service.

Does this mean suppliers must agree to an extension on the same terms?

If it is not commercially sustainable to run the revised service on the same terms it could lead to service continuity issues. This would not be beneficial to either suppliers or the public sector in meeting this increased demand.

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 provision is useful where a need arises for which there is not a current contract (or the current contract is unable to be modified in accordance with Regulation 72), 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 so will not be entered into lightly by public authorities. 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. But could be used in circumstances where commercial terms need to be substantially negotiated to meet the needs of the pandemic and the deal with the immediate consequences.

While the situation is changing very rapidly the use of these provisions is likely to 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 is likely to be applied as to whether or not the contracting authority ought to have pre-empted the need.

One thing not being talked about at the moment is whether contracts unrelated to the pandemic will also need to be awarded in this way to cover need when “normal life” resumes. As we discuss below, if a public authority cannot run a procurement process but still needs services to start in September, with a lead in time for implementation, then it may be necessary to consider awarding “urgently”. However, the risks that come with this decision mean that public authorities will not use this route lightly.

Current procurements

Your organisation may be in the process of bidding for a contract. Whilst there is no live contract there are still practical considerations for suppliers to be mindful of. Public authorities who continue with processes should be thinking about how these need to be adjusted to ensure that the bidders are treated fairly and equally. Suppliers should look out for the following:

- What has the authority done to make alternative provisions for bidders’ days or presentations? For example delivering sessions by online seminar allowing for questions, or a paper-based submission of questions. If you feel that adequate information has not been provided to enable the submission of a meaningful bid this will need to be highlighted now.
- Do the delays to the process result in you not being able to submit a bid? For example, do you need to suggest to the authority that changes to the commencement date and mobilisation period are changed to avoid incumbent suppliers having an advantage in the process (i.e. being the only providers who could mobilise in time).
- If you anticipate changes in scope as a result of the pandemic, then suggest changes to the specification or contractual terms now and communicate these to the authority. These are unprecedented circumstances which the authority could not have foreseen when the process was started. If the market highlights these concerns to an authority it may take steps to amend its requirements during the process. An authority might be more amenable to suggestions early in the process when there is still an element of competition. If changes are proposed post bidder deselection or after the award of proposed bidder this could be more problematic for authorities to align with the PCR.
- Authorities may request bidders to confirm the statements provided at selection stage remain valid, especially around financial stability and meeting any minimum requirements specified in the tender documents. Authorities may be seeking comfort that your position has not materially altered to the point it will impact on your ability to deliver the contract.
- Suppliers must address any concerns immediately to avoid being time barred from bringing a challenge at a later date.

Abandoned processes, can suppliers recover costs?

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.

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

Where a process cannot be supported or is no longer required it may be abandoned, but the authority will need to 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 to 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. Recent case law (*Amey Highways v West Sussex CC* 2019) confirmed that abandonment becomes more difficult if the process is challenged. It also confirmed that an abandonment will be lawful provided that the authority took a rational view that it was expedient and in the public interest. An authority's changed priorities and financial budgets due to COVID-19 will be considered a lawful ground. It is very unlikely that a supplier would be able to recover wasted bid costs in this scenario, especially where the tender documents are clear that all costs are not recoverable.

If you have any questions about the issues raised or would like to share your experiences with us please contact [Peter Ware](#), [Anja Beriro](#), [Rachel Whitaker](#) or [Louise Bennett](#).

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