

Living with Covid-19 – adapting contracts to respond to the new reality

Five ways in which contracting parties can adapt their services procurement contracts in response to the challenges presented by Covid-19 and related government-imposed mobility and social distancing restrictions.

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We summarise five ways in which contracting parties can adapt their services procurement contracts in response to the challenges presented by Covid-19 and related government-imposed mobility and social distancing restrictions. These top tips will apply to both public and private healthcare providers who intend to procure health technology or research services, medical equipment, HealthTech software support services, patient data processing services and even outsourced treatment programmes. If the applicable public procurement regime restricts the ability for parties to negotiate specific NHS procurement contract, the below top tips will be useful in providing ways in which the purchasing frameworks can adapt to NHS needs as they develop.

1. Contractual flexibility

Covid-19 has highlighted the inflexibility in many commercial contracts which do not allow parties to adapt to handle these challenging circumstances. When entering into long-term commercial relationships, adaptable change control procedures and contractual governance mechanisms, relevant force majeure provisions that deal specifically with COVID-19 and related government action, flexible payment structures with possible delay payment features and amendable service levels and other performance indicators (where applicable) are a handful of contractual clauses we can target to allow the parties to secure their contracts to respond better to such difficult circumstances.

2. Installation, servicing and minimising disruption

We recognise that vital technology and potentially lifesaving equipment must be delivered, installed, maintained and serviced in a reliable and predetermined manner. Covid-19 has disrupted supply chains worldwide, which has increased the risk of services and shipments being delayed, which can have a knock-on effect for ongoing service delivery to the detriment of patients. Contracts should be clear on how regularly the procured technology is serviced and upgraded, the process to be followed for each of these stages and should ensure that the practical impact of any delays are documented. The contract should also provide for a backup process (typically service continuity or rectification plans) should particular circumstances arise that impact performance (such as government imposed 'stay in place' restrictions), to limit the impact of disruption and provide contractual mechanisms for parties to follow and enable contracts to run effectively on 'backup power' for limited periods.

3. Performance milestones and payment mechanisms

Underlying technology needs to be reliable, appropriate and efficient. Installation, ongoing maintenance and hosting, upgrades and de-commissioning are key aspects of the technological lifestyle and your services contracts should cater for all stages, including interaction with these providers and other third-party suppliers. Performance milestones allow the parties to keep track of performance (with reference to set targets). These mechanisms could be linked to payment structures and allow for payment to be delayed, and suitable extensions to be granted, if milestones aren't met, including for delays caused by Covid-19, or need to be re-tested due to failure. Suppliers should also be required to provide competitive software to keep up with the rapid and progressive nature of modern technology. Performance monitoring during the contract term ensures that the services are in line with the market and will ensure the recipient always receives the latest supported versions and operating systems.

4. Data use and protection

The processing of patient medical data (often sensitive) to tailor treatment and draw conclusions is a critical part of many service contracts in this sector and this area has become increasingly regulated in recent years as more patient data is held electronically and stored in data centres as organisations look to accelerate their digital transformation programmes. Demand for data centre space, combined with limited supply capacity and skills shortages in this sector, is likely to cause storage and hosting prices to rise and such costs will need to be factored into the contract. Whilst data centres are considered 'critical infrastructure', their construction and monitoring is characterised by cross-continent travel with various stakeholders involved which are exposed to the disruption in global supply chains, which reduce output and increase lead times. However, the ways in which this data is processed, stored, transferred and deleted must remain compliant with all relevant legislation and regulatory guidance. We must take steps at the outset to better understand the data flows involved in order to construct tailored, compliant contractual clauses and suitable mechanisms for the parties to be able to use, where needed, which can respond to such challenges.

5. Software and Intellectual Property provisions

Both the cost and value of data in the health sector is likely to rise. As a result, the licensing of software applications and other online tools have become more important, illustrated by more healthcare applications entering the market. Linked to this, it is critical for procurement and support contracts to clearly establish how software, datasets and other related intellectual property is owned and licensed between parties, particularly where the technology is subject to ongoing development during the relationship. We must invest further time at the start to understand the technology to better recognise the business case for its procurement and ongoing use.

For further information on your commercial health-tech contracts, or to discuss how we can work with you to make these contracts 'Covid-secure' please contact [Thomas Gibby](mailto:thomas.gibby@brownejacobson.com) or [Anthony Nagle](mailto:anthony.nagle@brownejacobson.com).

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