

CORONAVIRUS: IMPLICATIONS FOR UK GOVERNMENT SUPPLIERS

Governments across the globe face unprecedented requirements for critical medical countermeasures and emergency care services to halt the coronavirus (Covid-19) pandemic and protect the health and wellbeing of their citizens. The private and third sectors are set to play a vital role as shortages in personal protective equipment (PPE) for front-line healthcare workers (e.g. respirators, goggles, gowns and gloves), ventilators and other goods and services mount. Here we look at the public procurement rules and the latest UK government policy that UK public bodies must navigate when urgently sourcing goods and services.

Public Procurement in the UK

The UK public procurement market is valued at £292 billion per annum¹, of which £67 billion is spent by the UK government on a range of NHS services and goods². That figure is likely to grow as a result of this crisis. For example, government officials have asked UK industry to deliver 5,000 ventilators within the next month³ in order to meet a forecast shortfall.

EU public procurement rules, which the UK adopted whilst still an EU Member State, continue to apply to UK public bodies during the Brexit transition period, which is set to continue until at least 31 December 2020. The EU rules are designed to ensure that bidders – whether SMEs, larger corporations or social enterprises – from across the EU and certain other non-EU countries benefit from secure and equal access to EU procurement markets. These rules govern both new and existing ‘public contracts’.

New Contracts

Generally speaking, UK public bodies must advertise new opportunities and hold competitions before entering new public contracts. This creates tension when goods and services are required urgently.

¹ https://www.instituteforgovernment.org.uk/sites/default/files/publications/government-outsourcing-reform-WEB_0.pdf

² <https://www.kingsfund.org.uk/sites/default/files/2018-04/Rising-cost-of-medicines.pdf>

³ <https://www.ft.com/content/51ac1c14-6bb1-11ea-89df-41bea055720b>

Procurement exemptions and flexibilities in times of crisis

On 18 March, the UK government published a Procurement Policy Note (01/20) ("Responding to COVID-19") ("**PPN 01/20**") that offers a timely reminder to public bodies that a number of procurement exemptions may be available during times of crisis. In particular, a public body may simply approach its provider of choice and negotiate and conclude a contract with that provider (a 'direct award'):

- due to extreme urgency (Regulation 32(2)(c) of the Public Contracts Regulations 2015 ("**PCR**") (the "**Extreme Urgency Exemption**");
- due to absence of competition or protection of exclusive rights (Regulation 32(2)(b) of the PCR); or
- by calling off contracts under an existing framework agreement or dynamic purchasing system.

Where a direct award is not available, public bodies can run an accelerated competitive procurement process if a state of urgency renders standard timescales impracticable.

Extreme Urgency Exemption

The Extreme Urgency Exemption applies when four conditions are satisfied:

1. That there are genuine reasons for extreme urgency. The public body must be 'reacting' immediately to a genuine emergency (e.g. public health risks or loss of service provision) rather than 'planning' for one;
2. That the events that have led to the need for extreme urgency were unforeseeable;
3. That it is impossible to comply with the usual timescales. This means that the public body must first consider alternatives (e.g. call offs under framework agreements or accelerated procurements); and
4. That the situation is not attributable to the public body. This might be relevant if the public body delays in invoking the exemption.

PPN 01/20 advises that the coronavirus pandemic is serious and poses a risk to life, and may justify use of the Extreme Urgency Exemption. However, it warns that its availability is not automatic, and public bodies must take care to ensure that all four tests are genuinely satisfied and keep a written justification for this.

Choice of supplier for direct awards

Public bodies enjoy wide discretion when selecting a supplier and a court is unlikely to interfere provided that the decision is rational and evidence-based.

Implications

PPN 01/20 is a policy note rather than a legal instrument. Rather than relaxing existing law or introducing new exemptions, it is intended to help public bodies to navigate the complexity and uncertainty of procurement exemptions and flexibilities in the context of the coronavirus pandemic. We expect an increased number of direct awards and accelerated procurements as a result.

The increase will have mixed implications for industry. Those companies handpicked by public bodies to provide goods, services and works will of course benefit from new contracts, and avoid the need to engage in competitive tendering processes. Companies that are less fortunate face being 'frozen out' of government procurement (and may indeed not even be aware of this until contract awards made to their competitors are announced, which may be as many as 30 days following the direct award).

In the absence of open competition and transparency, public bodies face paying a premium for goods and services obtained through direct awards. PPN 01/20 acknowledges that current prices may be higher than would be expected in a regular market, but advises public bodies to address value for money concerns and continue to exercise commercial judgement. Public bodies are encouraged to consider contractual mechanisms to ensure that they can secure pricing reductions through the life of a contract.

The public body is ultimately responsible and liable for procurement law breaches (e.g. unlawful use of an exemption). A supplier's procurement exposure is generally limited to the consequences of its contract possibly being prematurely terminated. As a precautionary measure, suppliers may insist on satisfying themselves that justifications for a procurement exemption exist.

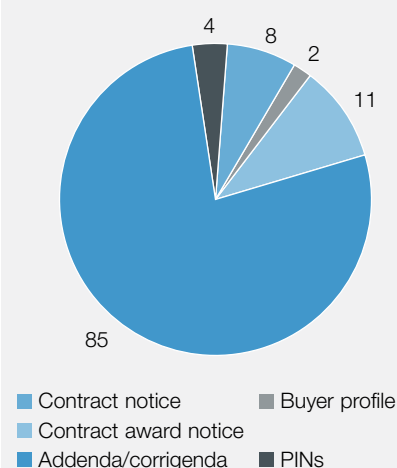
Based on data from the Official Journal of the European Union, coronavirus is mostly affecting live, business as usual procurements, as evidenced by the number of corrigenda issued notifying bidders of coronavirus-related tender extensions and changes of requirements. Comparatively few mentions of the virus occur in the context of contract award notices (which might include direct awards) and even fewer appear in respect of contract notices for new contracts. We expect this to change over the coming weeks and months.

Existing Public Contracts Modifications and Extensions

Public bodies may look to existing suppliers to source critical goods and services. EU public procurement rules regulate the extent to which existing public contracts can be modified. Flexibilities exist in the event of an emergency, and allow for the modification of contracts without a new procurement procedure in certain circumstances.

Any changes to extend or modify existing contracts during their term should be made in accordance with Regulation 72 of the PCR 2015, and further detail on this is provided in PPN 01/20.

112 'Coronavirus' references in the Official Journal of the European Union (1 October 2019 – 24 March 2020)



Relevant Regulation 72 Grounds

Contracts may be modified without a new procurement procedure where:

- (c) the need to modify has arisen due to foreseen circumstances; the modification does not alter the overall nature of the contract; and price increases do not exceed 50% of the original value;
- (e) modifications, irrespective of value, are not substantial (e.g. the supplier would still have won the original procurement had the modifications formed part of the original contract)

Relief (financial and contractual)

The coronavirus pandemic is likely to affect the conduct and viability of existing suppliers' businesses. In this context, the UK government published a further policy note ("Procurement Policy Note – Supplier relief due to COVID-19") ("**PPN 02/20**") on 20 March, setting out guidance for public bodies on ensuring service continuity during and after the pandemic.

PPN 02/20 recommends that public bodies consider ways of supporting suppliers identified as being 'at risk' in maintaining cash flow during the crisis, including by making interim payments, or making payments in advance. In order to qualify for financial relief, 'at risk' suppliers should:

- act on an 'open book' basis, making cash-flow and payment data available to the public body;
- continue to pay their staff correctly and on time; and
- flow down funding to their subcontractors and suppliers as quickly as possible.

PPN 02/20 is accompanied by a model contract variation agreement – the "Model Interim Payment Terms" – that includes a suggested mechanism for agreeing interim payments. Suppliers are free to propose any amount that can be linked to supporting their cash flow, subject to a number of limited exceptions (e.g. profits on elements of the contract that are not delivered during the relief period and amounts payable where there is no contractual volume commitment under the contract). But, ultimately, the public body has the final say on whether to accept or reject the proposal.

Interim payments are only available once the supplier and public body have considered whether other forms of relief from contractual controls might be more appropriate. PPN 02/20 advises public bodies to work with suppliers to ensure business continuity by enacting robust business continuity plans. Where a supplier seeks to invoke contractual relief that suspends performance obligations, such as force majeure (a Clifford Chance briefing on coronavirus and force majeure is available [here](#)), PPN 02/20 recommends that public bodies "*should first work with the supplier to amend or vary contracts instead...[including] changes to contract requirements, delivery locations, frequency and timing of delivery, targets and performance indicators etc*". Public bodies are advised to consider claims for relief on a case by case basis and in light of legal constraints. For example, early termination and financial settlements arising from

performance issues⁴ can amount to unlawful modifications under EU public procurement rules.

PPN 02/20 demonstrates that the government wants public bodies to demonstrate flexibility to support external suppliers, but without incurring unacceptable commercial and legal risk.

Pan-EU Procurements

Governments ordinarily procure for themselves, but joint mechanisms have become of a feature of emergency public procurements. The EU Joint Procurement Agreement (JPA), established following the 2009 H1N1 influenza pandemic, is intended to strengthen signatories' bargaining hands by allowing them to negotiate as a bloc. The JPA has 27 signatories (Sweden, Poland, and Norway have joined since February in response to the coronavirus pandemic). On 2 March, the EU Commission announced an emergency public procurement process for PPE under the JPA. That process failed because "no tenders or requests to participate were received or all were rejected". We understand that a new EU Commission- led, joint emergency tender for such PPE has been called, alongside a further tender for ventilators.

The UK remains eligible to participate in JPA procurements, but has elected not to do so. The reasons for its decision remain unclear. It has been speculated that this reflects the government's unwillingness to ask Brussels for assistance. However, as France, Italy and Spain also elected not to participate – amid concerns that the joint procedure is too slow – it is equally plausible that the UK government believes that existing sourcing processes can deliver better results, which aligns with the view expressed in Dame Deirdre Hine's independent review into the UK's response to the 2009 swine flu pandemic.⁵

She said: "Procurement negotiation at [EU] level would not necessarily drive down prices, but could in fact give the UK a worse deal on pricing. I therefore consider full joint procurement with other EU countries unwarranted. However, the UK has excellent expertise in this area, and should look for ways to share this with those EU countries that have need for greater capacity."

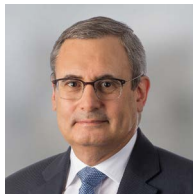
⁴ *Finn Frogne A/S v Rigspolitiet ved Center for Beredskabskommunikation* (C 549/14) (C 549/14)

⁵ <https://www.gov.uk/government/publications/independent-review-into-the-response-to-the-2009-swine-flu-pandemic>

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