OVERVIEW

Government – Procurement 21.03.20

COVID-19

This guidance is to enable ECA Members to better consider the latest position from the UK Government on payment for goods, services and works within the current coronavirus emergency landscape.

1. Policy Procurement Notes

UK Government produces PPNs as statements of how public sector contracting authorities should go about the procurement of goods, services and works in a compliant and cost-effective way.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874178/PPN_02_20_Supplier_Relief_due_to_Covid19.pdf

**Note: Government cannot force its hundreds of procures to follow the same advice as to do so would be to undermine local democracy and behave in an anti-competitive way.*

Also note, that some procurement authorities within Government may remain outside the definition of a 'contracting authority' for security, public interest and other reasons,

2. Procurement Policy Note - COVID-19 02/20

A new PPN has been produced to allow the public sector procurement authorities to act effectively and efficiently and not be precluded from doing so by bureaucracy during these unprecedented times. It addresses payment of public sector contracting authorities' suppliers to ensure service continuity during and after the current coronavirus outbreak and expires on **30 June 2020**.

It has been published to ensure suppliers to authorities who are at risk are in a position to resume normal contract delivery once the outbreak is over – at risk is defined below and will be determined by the authority.

It is applicable to all public sector contracting authorities, including central government departments, executive agencies, non-departmental public bodies, local authorities, NHS bodies and the wider public sector (excluding Devolved Administrations). This PPN covers goods, services and works contracts being delivered in the UK.

It covers the authority:

- Urgently reviewing their contract portfolio and informing suppliers who they believe are at risk that they will continue to be paid as normal (**even if service delivery is disrupted or temporarily suspended**) until at least the end of June.
- Putting in place the **most appropriate payment measures** to support supplier cash flow; this might include a range of approaches such as **forward ordering,**

payment in advance/pre-payment, interim payments and payment on order (not receipt).

In the circumstances Treasury consent is granted for payments in advance of need **where the Accounting Officer is satisfied that a value for money case is made by virtue of securing continuity of supply of critical services in the medium and long term**. Ordinarily managing public money rules prohibit payment in advance of need in absence of transaction specific Treasury consent.

This consent is **capped at 25% of the value of the contract** and **applies until the end of June 2020**.

Payments **must** be **necessary for continuity of supply of critical services**.

- To avoid situations of supplier breach of contract where payment is currently linked to performance (e.g. KPIs or service credits), authorities are expected to maintain business continuity by putting in place temporary arrangements.
- Ensuring **invoices submitted** by suppliers **are paid immediately** on receipt (reconciliation can take place in slower time) in order to maintain cash flow in the supply chain and protect jobs.
- Continuing to pay at risk suppliers to ensure cash flow and supplier survival. Specifically, where:
  - contracts are reduced or temporarily suspended
  - non- payment could result in supply chains collapsing and/or significant financial implications for the supplier.
  - It would be value for money and important to business continuity to continue to pay suppliers in the short term (regardless of whether the authority is able to reconcile at a later stage).
  - Changes should be captured in contract variations and made clear that the changes relate only to the COVID-19 situation, include a review provision or time limit, and that it is the authority's decision when things should return to normal.

To qualify for these extraordinary measures, suppliers should agree to act on an **open book basis and make cost data available to the contracting authority during this period**. They should continue **to pay employees** and **flow down funding to their subcontractors** and be prepared to be audited in due course to ensure compliance.

Authorities are still expected to manage the **risk of supplier insolvency** during this period. Authorities are urged to take a pragmatic approach. The contract should return to its original terms as soon as the impact of the COVID-19 outbreak on the relevant contract is over. Authorities should not accept claims from suppliers who were already struggling to meet their contractual obligations prior to the COVID-19 outbreak.

Suppliers should therefore seek to prove their financial probity, but for the COVID19 outbreak.

The PPN is ultimately there to mitigate against the risk to Government of legal challenges later in the aftermath of the current situation.

3. Supplier capacity

Wherever possible, authorities should seek to re-deploy capacity of suppliers to other areas of need; this can be implemented via a time-bound variation to the original contract under regulation 72 of the Public Contract Regulations (see PPN 01/20 ECA guidance).

4. Payment to maintain business continuity

Authorities should identify their 'at risk suppliers'.

Authorities should then confirm with those suppliers that they will continue to pay until **at least the end of June** regardless of contractual delivery.

The PPN specifically states these arrangements can override existing contractual terms, but to make these arrangements operational the supplier must agree to them.

Recommended ways for authorities to support suppliers are:

- continue to pay at usual contractual rates
- payment against revised/extended milestones or timescales
- interim payments
- forward ordering
- payment on order/payment in advance/prepayment – which could presumably for works include the early release of cash retentions to (money withheld in respect of labour and materials already delivered) as a means of easing an authority's contractor's cash-flow
- For contracts which are 'output/outcome' based (e.g. KPIs or service credits - often FM contracts and maintenance systems can be priced this way), payments to suppliers should be made on the basis of a calculation of the average of the last three months invoices (provided it does not delay payment, profit margin will not be payable on any undelivered aspects of the contract).
- Suppliers will need to identify in their applications/invoices which elements of amounts due relate to services still being supplied, as opposed to payments being made for business continuity/survival during COVID19 (ex gratia).
- Payments should **not** be made to suppliers where there is no contractual volume commitment to supply – this will be the case in framework/call-off contracts, but this will not preclude the authority from continuing to issue orders under those frameworks/call-off arrangements where essential for business continuity or critical for COVID19 reasons exist – see PPN 01.20 ECA guidance.

Authorities are however asked to carefully consider the extent of payments to be made to suppliers who are underperforming.

5. Transparency

Suppliers in receipt of public funds on this basis during this period must agree to operate on an '**open book' basis** – this includes the supply on request of:

- any data - including from commercial ledgers
- cash-flow forecasts
- balance sheets

- profit and loss accounts, and
- demonstration that the payments made to the supplier under contract have been used in the manner intended - including evidence that staff have been paid the right amount and on time, and that cash continues to flow through the supply chain as quickly as possible.

Authorities should keep records of decisions and agreements made, and ensure suppliers maintain records to enable future reconciliation if necessary.

Suppliers should **not** expect to make profits on elements of a contract that are undelivered during this period.

If a supplier is found not to be compliant with their obligations under the temporary measures, an authority may seek to recover payments made.

6. Accelerating payment

Authorities should pay suppliers as quickly as possible to maintain cash flow and protect jobs. The public sector must pay suppliers within 30 days under the Public Contracts Regulations 2015, but authorities now need to accelerate their payment practice.

Authorities should act now to ensure payment is made as quickly as possible to their suppliers, including:

- an extension of time for contract performance (e.g. revised milestones dates or delivery dates, etc);
- Targeting high value applications/invoices where a prime is reliant on a supply chain to deliver the contract.
- Resolving disputed invoices as a matter of urgency; consider paying immediately and reconciling at a later date in critical situations.
- Take a risk-based approach as to whether 2-way matching is always needed (rather than adopt regular 3-way matching against receipt and Purchase Order)
- Encourage suppliers to invoice on a more regular basis to help cash flow (e.g. every week rather than monthly) – shorten payment periods

Authorities have been told to consider the following:

- Application/invoicing procedures should be clearly set out by the authority for suppliers – Ensure online clarity and process on who, what, where, when and how payments will be managed. This should be clear on the authority's website. Authorities should drive online electronic paperless payment management.
- Application/invoice verification – should be ASAP and include contingency staff approval systems - do not risk causing delay of payment by rejecting payments for minor administrative errors. Undertake only necessary checks and resolve issues as a matter of urgency and reconciling any minor discrepancies in information at a later stage.
- Contingency measures – finance, contract managers and business units – e.g. sufficient numbers of staff with delegated authority to promptly process and authorise an amount due for payment in business units as well as finance teams.

- Monitor flow down to ensure payment is cascading down the supply chain.

Payment Card Solutions - Use of procurement/payment cards where possible to ensure businesses are paid as quickly as possible. Consider increasing the upper limit of spend, open up categories and ensure an appropriate number of staff have the authority to use

7. Contractual issues

Business continuity is paramount.

If a supplier seeks to invoke a clause relating to a form of contractual relief that would allow them to suspend performance, such as force majeure, authorities should first work with the supplier to amend or vary contracts instead.

This can include changes to:

- contract requirements
- delivery locations, frequency and timings
- targets and performance indicators etc
- extensions of time for contract performance (e.g. revised milestones/sectional completion dates or delivery dates, etc)
- a waiver or delay in the ability of the contracting authority to exercise a right and/or remedy (e.g. to claim liquidated and ascertained damages, KPI related service credits or termination of the contract)

Each claim for relief should be considered on a case by case basis, according to the nature of the goods/services/works being supplied, the challenges being faced, the contract terms and the constraints of any statutory requirements.

Whilst the threat of claims/breach by the authority may be ordinarily be leverage in negotiations from a contractor/supplier's perspective, Government is attempting to facilitate constructive collaborative dialogue to ensure continuity of contracts for both the authority and the supplier. There is no point having leverage if the supplier is not around or able to use it.

- **Force majeure -** Authorities are reminded in the PPN that they are not bound to accept a supplier's claim for force majeure and can resist it. Authorities are encouraged to take a more proactive approach as opposed to negotiating new arrangements based on potential existing force majeure claims.
- **Frustration -** Frustration arises where an event, for which the contract makes no sufficient provision, renders performance of the contract impossible or radically changes a party's principal reason for entering into the contract. Whilst if a contract has been frustrated, it terminates automatically, and the parties are excused from their future obligations. However, the drawback of this remedy is that neither party may claim damages from the other for non-performance after the contract is declared frustrated, and being more expensive to perform, or that the supplier will have to perform the contract in a different way as a result of COVID-19 and/or its impact, is not likely to constitute grounds for frustration in itself.
- **Collaboration -** Authorities should maximise on any commercial flexibilities within the contract, including agreeing new measures such as on meeting lead times, waiving or delaying exercising the authority's rights and/or remedies (e.g. to claim liquidated and ascertained damages, service credits

or terminate the contract), revising milestones or delivery dates. In these circumstances, if there is one, authorities should use the contract change control procedure to keep records of any changes made and the decision making behind each one. If not, they keep their own records.

ECA
Excellence in Electrotechnical
& Engineering Services

ECA, Rotherwick House, 3 Thomas More Street, St. Katharine's & Wapping, London E1W 1YZ
Tel: 020 7313 4800 **Email**: info@eca.co.uk **www.eca.co.uk**