

NAVIGATING PUBLIC PROCUREMENT IN THE COVID-19 ERA

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Legal Briefings

As with almost all areas of commercial activity, public procurement across all sectors is currently experiencing varying degrees of extreme disruption. The UK Cabinet Office has issued general guidance and support in the form of three Procurement Policy Notes: **PPN 01/20**, addressing how public authorities may meet their urgent and unexpected needs for certain goods, works or services during the COVID-19 outbreak, without infringing procurement law; **PPN 02/20**, which encourages public authorities to support their existing “*at risk*” suppliers, in particular by continuing to pay those suppliers promptly during the crisis; and **PPN 03/20** advocating the use of procurement cards to ensure the prompt payment of suppliers. The European Commission has also issued a communication, giving similar guidance to PPN 01/20 (the “**EU guidance**”).

While the UK and EU guidance give a helpful steer for public bodies and their suppliers alike, time will tell whether the legal framework will be sufficiently flexible to withstand the pressures being exerted by the pandemic.

KEY POINTS

- PPN 01/20 and the EU guidance helpfully confirm that the COVID-19 crisis is an unforeseeable emergency which will generally justify the direct award of public contracts for vital, time-sensitive supplies (such as ventilators and PPE), without any prior competitive tendering procedure.

- The existing regulations allow for such direct awards, but only where strictly necessary for reasons of extreme urgency. If the urgency is no longer acute, public authorities should instead use an accelerated version of a standard, competitive procedure.
- Contracting authorities will need to be alive to whether an emergency direct award or an accelerated ordinary procurement procedure is appropriate and lawful.
- Authorities should continue paying their vulnerable suppliers promptly during the crisis in order to ensure continuity of supply going forwards.
- The PPNs and the EU guidance are not strictly binding, but ought to be followed where possible and fact-appropriate to do so.
- Legal challenges might arise, as rival suppliers fight to survive, but courts may be even more deferential than usual towards the discretion of contracting authorities as they seek to manage the crisis.

THE UK'S FAILURE TO JOIN THE EU'S JOINT PROCUREMENT SCHEME

The challenges of procuring large quantities of essential medical equipment in a global health crisis have been highlighted by the recent headlines regarding the UK's failure to participate in the EU's joint procurement initiative.

Between 28 February and 19 March 2020, under a mechanism called the Joint Procurement Agreement, the European Commission launched four calls for tenders for personal protective equipment ("**PPE**"), ventilators and testing kits, on behalf of 25 EU Member States. The UK did not participate (despite being eligible to do so) but, as has been widely reported, the precise reason is unclear. In any event, it appears that the four calls for tenders by the Commission have had varying degrees of success and that, to date, none of them has actually resulted in the delivery of any items of equipment within the EU.

PPN 01/20 AND THE EU GUIDANCE

The headline message of PPN 01/20 and the EU guidance is that contracting authorities at a national level may deploy direct awards, without holding any advertised, competitive tendering procedure, where this is necessary to meet an urgent demand for goods, works or services triggered by the pandemic. Such urgency may well exist for medical supplies such as ventilators and PPE, including masks and gowns.

The PPN advocates recourse to regulation 32(2)(c) of the Public Contracts Regulations 2015 (**PCR**), which permits a direct award where:

- there is an extremely urgent need to procure the relevant goods, works, or services;

- such urgency was triggered by events unforeseeable by the contracting authority;
- the accelerated version of the ordinary open or restricted procedure would not be sufficiently rapid; and
- the urgency is not attributable to the contracting authority.

Reasons of extreme urgency triggered by unforeseeable events

In the immediate term, the message from the UK Government and the European Commission is that the COVID-19 crisis is clearly a circumstance of “*extreme urgency*”, which was wholly unforeseeable by contracting authorities. Procurements for goods that are urgently required for tackling the ongoing public health crisis (e.g. ventilators and PPE) will almost certainly satisfy these limbs, and will be difficult to challenge on any meritorious basis, depending on the exact circumstances.

As the crisis continues over time, it will progressively become less likely that circumstances can be considered sufficiently urgent and “*unforeseeable*” that it is lawful for a contracting authority to default to a direct award. Legal challenges to direct awards by contracting authorities could be seen in due course.

Accelerated procedure not sufficient

The recognition of urgency is not an unlimited pass for contracting authorities to make direct awards, circumventing the usual requirement for a competitive procedure. The accelerated ordinary procedures may be deemed sufficiently rapid. In particular, using a direct award is unlikely to be appropriate where it is not possible to put in place the contract in a timescale that is shorter than the minimum period permitted for completion of an accelerated competitive procedure.

Not attributable to the contracting authority

Contracting authorities are precluded from using the direct award procedure where their own actions (e.g. delay) have caused the need for an urgent process. Hence, an authority may not revert to a direct award simply because it has been slow to start the necessary procurement process.

Other options

PPN 01/20 also sets out various additional options for contracting authorities to consider when meeting the demands of the crisis. These include the options of calling off contracts from existing framework agreements and of extending their existing contracts in order to meet increased demand. Such variations to an existing public contract are permitted by Regulation 72(1)(c) of the PCR, provided that the increase in demand was unforeseeable, the overall nature of the contract is not substantially altered and any additional sum payable does not exceed 50% of the value of the original contract. It would be prudent to limit any contract modifications to what is strictly necessary in order to deal with the present crisis.

PPN 02/20

PPN 02/20 focuses on relief for the existing contractors of public bodies. The key message is that public bodies should continue to make payments to any of their suppliers who are “*at risk*”, at least until 30 June 2020. Whether a supplier is “*at risk*” is a low bar.

Contracting authorities are advised to conduct a full review of their supplier portfolio at speed, in order to identify “*at risk*” suppliers. Simultaneously, they are asked to consider carefully the risks of continuing to make payments to such suppliers, and to balance such payments against the continuing need to achieve value for money for the taxpayer; although such checks should not delay payments being made. Suppliers who were already struggling to meet performance standards pre-crisis should not benefit from the relief.

PPN 02/20 also contains advice for contracting authorities dealing with suppliers who threaten to invoke the force majeure clause in their contract, or else claim that the contract has been frustrated. Broadly, force majeure is a contractual term that may permit a party to terminate the contract, or be excused from performing it to some degree; frustration is a common law doctrine whereby a contract may be automatically terminated because an event not contemplated by it has rendered performance of the contract impossible. Both concepts have a high bar. The main takeaway from PPN 02/20 here is that contracting authorities should engage with suppliers making such claims, attempt to maintain service continuity as far as possible, and otherwise seek legal advice.

PPN 03/20 follows up PPN 02/20 by urging Central Government authorities to use procurement cards as a means of ensuring the prompt payment of their suppliers. It recommends that the spending limits for key card holders are increased to £20,000 per transaction and £100,000 per month.

THE POTENTIAL FOR FUTURE DISPUTES AND LEGAL CHALLENGES

It is easy to see how an already overstretched public body in crisis mode may struggle to comply fully with its procurement law obligations and with the guidance. The added pressures associated with managing existing contracts may also adversely affect the timetabling of future procurements addressed by PPN 01/20, particularly if resource is stretched as result of the crisis such that the same team within the public body covers both areas.

It will be key for contracting authorities and their suppliers to proceed in as open and communicative a fashion as possible, in order to avoid any potential disputes. PPN 02/20 notably provides some guidance for contracting authorities facing claims of contract frustration or force majeure. Suppliers should exercise caution in invoking a force majeure clause, or claiming the contract has been frustrated, given the high bars applicable to such claims, and instead seek to come to a mutually agreeable arrangement as far as is possible.

In the event that a dispute does arise, COVID-19 will not be a *“get out of jail free”* card for contracting authorities. Courts, which are generally already deferential to public bodies in any public law challenge, are naturally likely to view any detours from the guidance through that lens, but will nonetheless scrutinise whether the public body’s contingency arrangements were adequate in the circumstances.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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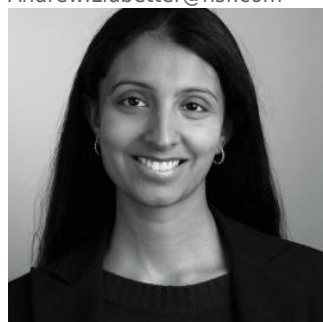
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