



BLAKE MORGAN

Procurement in a time of coronavirus

27 March 2020

On 18 March the Cabinet Office published "Procurement Policy Note – Responding to Covid-19" (the **"PPN"**) which set out information and associated guidance on the public procurement regulations in response to the unprecedented COVID-19 outbreak.

The PPN sets out possible options that may be available to contracting authorities where they may need to procure goods, services or works with extreme urgency in response to the pandemic. Such options are likely to be useful and utilised by the health and social care sector and local authorities, and include:

- Direct award due to urgency
- Additional delivery of supplies from existing supplier
- Call-off from existing framework agreements or dynamic purchase systems
- Using accelerated procedures
- Extending or modifying existing agreements

We have set out some of the options available to contracting authorities below together with the key consideration they should have when considering such options. Our public law, commercial and procurement experts are available to help you use these options if needed.

Practical points

There are a number of practical points that contracting authorities should keep in mind when considering the options available in relation to public contracts:

- Ensure that the conditions for each option are satisfied on a contract-by-contract or case-by-case basis – whilst one option may be suitable now or in relation to a particular set of services, goods or works, that option may not necessarily be suitable at a later date or to a different set of services, goods or works.
- Ensure you keep proper and robust records and audit trails of all decisions and actions you take in relation to individual contracts. Whilst this may be time consuming where time is scarce at the moment, contemporaneous records of decisions made will be key in mitigating the prospect of any successful challenge to the decision made.
- The Public Contracts Regulations 2015 (**"PCR 2015"**) do not require below threshold contracts to be published or subject to procurement procedures (albeit contracting authorities may need still be required to publish them on Contracts Finder or follow their internal policies). As such, if the contract is below threshold then you may be justified in awarding those contracts without following any procurement procedures.
- If there is a current tender already underway, subject to the terms of the tender documents, you may be able to amend the procedures or requirements. If doing so, you would need to comply with the principles of transparency, equal treatment and non-discrimination. The smaller the changes required the less risky this approach would be; the greater the changes required the riskier amending the tender would be, especially if any entities have decided not to bid.

Direct award

Above threshold contracts are required to be published in OJEU and be awarded subject to competition in accordance with the procedures set out in the PCR 2015.

However, the PCR 2015 allows contracting authorities to make direct awards without competition where, for reasons of extreme urgency brought about by events unforeseeable by that contracting authority, the time limits for the use of ordinary procedure cannot be complied with. The circumstances justifying the extreme urgency must not be attributable to the contracting authority.

Whilst the PCR 2015 and case law has limited the use of this ground, the courts have generally allowed direct awards where there has been a natural catastrophe requiring immediate action or there is an imminent risk to health.

When considering whether to directly award due to urgency, contracting authorities should consider (and keep written records of their justification) the following points:

- **There must be reasons of extreme urgency** – The circumstances must be a current situation and a genuine emergency, and not planning for something which may happen in the future. The immediate risk to health of individuals and the need to urgently obtain goods, services or works as a result would clearly justify the reasons of extreme urgency. COVID-19 clearly currently poses immediate and serious risks to life and health and therefore fits the requirement.
- **The events must be unforeseeable** – a novel and quickly emerging situation such as COVID-19 is clearly unforeseeable.
- **Is it possible to comply with the usual or accelerated timescales for the ordinary procurement procedures?** This should include consideration as to when the goods, services or works will be required – for example if the goods, services or works will not be required for a few months or more then it may be the case that you can use the accelerated procedures. This may be particularly the case the longer the crisis continues.
- **Is the situation attributable to the contracting authority?** COVID-19 clearly will not be attributable to any contracting authority.

There are several key practical points contracting authorities should consider when considering making direct purchases without a tender:

- Delaying or failing to do something in time does not make a situation qualify as extremely urgent, unforeseeable or not attributable to the contracting authority
- Contracting authorities should undertake a separate assessment of the above in relation to each procurement to ensure that the test continue to be met. As above, the longer circumstances continue, the less likely that event will be considered unforeseeable.
- Contracting authorities should limit their requirements (in respect of direct awards without tender) to what is absolutely necessary – both in terms of *what* they are procuring and the *length* of any contract they are procured. For example, a short-term contract for the provision of goods or services commensurate with the likely duration of the crisis or until a full procurement procedure can be completed is likely to mitigate the risk of any challenge. Awarding a long term contract for goods, services or works which are not limited to what are immediately needed will carry a significant risk of a successful challenge.
- Consider your longer term needs for the services, goods or works – if there is a long term requirement consider your long term procurement plan and where possible run a procurement for a longer-term contract in addition to the direct award
- The PCR 2015 does not remove the requirement to publish a contract award notice when you make a direct award. You should do this within 30 days of awarding the contract.
- Even where you rely on the "urgency" ground, the closer you are able to follow the normal procurement procedures the better. This could include writing to known suppliers with details of what you require and allowing them the opportunity to submit pricing details as a matter of urgency – this would help you act in a transparent and non-discriminatory way and mitigate the risk of a successful challenge.
- In particular, the PPN states that it is important that contracting authorities continue to achieve value for money and use good commercial judgement during any direct award. Whilst prices may be higher than would be expected in a regular market, any abnormally high pricing should be approved by the appropriate commercial director. Contracting authorities are encouraged to consider contractual mechanisms to ensure that they have the ability to secure pricing reductions through the life of the contract.

Supply contracts - additional deliveries by the original supplier

Where contracting authorities need to procure a contract for the supply of goods (not services or works), the PCR 2015 also allows contracting authorities to directly award without competition to an existing supplier where the goods are required as a *partial replacement* for existing goods or for goods that are required as an *addition* to existing goods.

This ground applies where a change of supplier would oblige the contracting authority to acquire goods with different technical characteristics resulting in either incompatibility with the existing supplies or disproportionate technical difficulties in their operation and maintenance.

This ground may be particularly useful in relation to health equipment. For example, whilst there may be a number of suppliers who could provide a particular piece of equipment, awarding a contract to anyone other than the current supplier would mean that the equipment would not be compatible with the contracting authority's current systems or require the contracting authority to make changes to its technical infrastructure at a time when time is scarce.

As an alternative to this ground, contracting authorities may also wish to consider whether they can amend, extend or expand their current agreements with the current supplier (see below).

Call-off from existing framework agreements or dynamic purchase systems

Central purchasing bodies, such as the Crown Commercial Service and the National Procurement Service in Wales, offer public bodies access to a range of commercial agreements via their framework agreements and dynamic purchasing systems ("**DPS**"). Such agreements are likely to have been subject to a formal procurement procedure and therefore the risk of using these should be minimal.

Therefore contracting authorities may be able to benefit from calling-off the required supplies, services or works from existing arrangements. This may be less time consuming and mean that you can quickly secure what is required.

Contracting authorities should consider the following points when considering whether they can or should call-off current framework agreement or DPS:

- Is the contracting authority clearly identified in the OJEU notice as someone who may call-off from the relevant framework agreement or DPS?
- Do the goods, services or works the contracting authority requires fall within the scope of those covered by the framework agreement or DPS?
- Are the terms of the framework agreement or DPS suitable for the contracting authority's needs?
- Does the framework agreement provide for a mini-competition or allow for direct award? (DPS always requires a form of mini-competition but this is short and straightforward – see below)
- An award under a DPS is by mini-competition and the minimum time for receipt of tenders is 10 days, but sub-central contracting authorities may reduce this period by mutual agreement between the contracting authority and all selected candidates, provided that all selected candidates have the same time to prepare and submit their bids.

Using accelerated procedures

The PCR 2015 allows contracting authorities to reduce the usual minimum timescales for the open, restricted and competitive procedures with negotiation where there is a state of urgency that renders the normal timescales impracticable. There is no need for the events to be unforeseeable or not attributable to the contracting authority.

The timescales can be reduced as follows:

Procedure	Step	Standard timescales	Accelerated timescales	Possible total timescale
Open	Contract notice to receipt of tenders	35 days	15 days	25 days
	Standstill period	10 days	-	
Restricted	Contract notice to receipt of requests to participate	30 days	15 days	35 days
	Invitation to tender to receipt of tenders	30 days	10 days	
	Standstill	10 days	-	
Competitive procedure with negotiation	Contract notice to receipt of requests to participate	30 days	15 days	35 days
	Invitation to tender to receipt of tenders	30 days	10 days	
	Standstill	10 days	-	

Contracting authorities may also be able to benefit from the light touch regime in relation to specific health and social care related services. Whilst still subject to publication in OJEU and contract award notices and the principles of transparency, equal treatment and non-discrimination, where the light touch regime applies this allows contracting authorities the flexibility to use any process or procedure and set their own timescales so long as they are reasonable and proportionate.

Extending or modifying existing agreements

The PCR 2015 allows contracting authorities to modify current agreements without having to re-advertise or re-procure those contracts. These include the possibilities of extending the scope of goods, services or works under those agreements or the duration of the agreements.

Regulation 72 provides 6 grounds allowing existing agreements may be modified. The ground which is most likely to apply in relation to COVID-19 is regulation 72(1)(c). This allows a contracting authority to modify an agreement where the need for modification has been brought about by circumstances which

a diligent contracting authority could not have foreseen. The same considerations as noted about unforeseeability above apply here. To rely on this ground, the modification must not alter the overall nature of the contract and any increase in the price must not exceed 50% of the value of the *original agreement*. Multiple modifications are allowed as long as the increase of price of each modification does not exceed 50% of the value of the original contract. If relying on this ground, contracting authorities must publish a contract award notice within 30 days of the modification. You should also consider limiting the duration and/or scope of the modification and running a procurement for longer-term/wider scope requirements alongside it.

If more than one ground is applicable this may lower the legal risk and therefore you should ensure all relevant grounds are included in your written justification. The other grounds under regulation 72 allow contracting authorities to modify an agreement in the following circumstances:

- where the modifications were provided for in the initial procurement documents in clear, precise and unequivocal review clauses;
- where additional works, services or supplies by the original contractor have become necessary and not included in the original procurement documents, where a change of contractor cannot be made for economic or technical reasons or would cause significant inconvenience or substantial duplication of costs for the contracting authority (so long as any increase in price does not exceed 50% of the value of the original contract and publication of contract award notice);
- where a new contractor replaces the original contractor as a result of succession into the position of the original contractor;
- where the modifications, irrespective of their value, are not substantial (that is, they do not (i) render the agreement materially different (ii) does not introduce conditions which would have allowed other bidders to be selected, other tenders to be accepted or additional participants, (iii) does not change the economic balance in favour of the contractor (iv) extends the scope of the agreement considerably or (v) another contractor replaces the original contractor).

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