

Introduction

Public procurement in the UK is governed by statutory rules, including the Public Contracts Regulations 2015 (**PCR 2015**), with which contracting authorities and their suppliers must comply if the contract value hits the necessary thresholds.

However, the ongoing COVID-19 crisis means that contracting authorities and suppliers have to adapt with extreme urgency in relation to the procurement of goods and services, whether it is the urgent need for certain goods or services (such as PPE or IT support) or a sudden requirement for delay or redeployment of others (such as school transport services).

In a welcome attempt to highlight and clarify the flexibility of the statutory rules in place, the UK government ([PPN 01/20](#) and [PPN 02/20](#)) and the European Commission ([2020/C 108 I/01](#)) issued new specific guidance on using the public procurement framework during the COVID-19 crisis in March 2020 and April 2020, respectively.

However, this guidance is not law nor statutory guidance (which a contracting authority would be required to follow unless it can demonstrate a lawful good reason not to). It is mere guidance and the statutory procurement rules are still the starting point to determine lawful conduct by contracting authorities and suppliers.

Contracting authorities and suppliers must therefore navigate through both the guidance and the rules to ensure they adapt their needs for services and goods to the ongoing COVID-19 crisis whilst complying with public procurement law. The public procurement landscape is therefore largely the same, but it is for its players to use it wisely during these unprecedented times.

Pre-OJEU Notice:

New Procurements – Options

Accelerated procurement procedures

In case of urgency, the PCR 2015 already provides the possibility to use either an open procedure or a restricted procedure to procure goods or services quickly as follows:

- **Open procedure:** 15 days for receipt of tenders, plus a standstill period of 10 days before entering into contract.
- **Restricted procedure:** 15 days for receipt of requests to participate in competition, plus 10 days for receipt of tenders, plus a standstill period of 10 days before entering into contract.

To use these procurement procedures, contracting authorities must only prove the “urgency” condition, which the COVID-19 crisis would clearly fulfil.

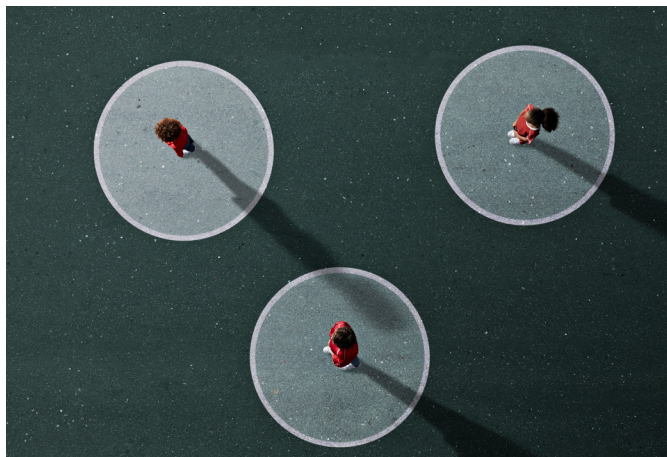
However, these procedures are still lengthy and may therefore not be appropriate for the procurement of extremely urgent services and goods (such as medical equipment).

Direct awards of contract without a procurement procedure based on urgency grounds (Regulation 32(2)(c) PCR 2015)

A contracting authority may otherwise award a contract directly to a supplier without a competition. However, it must ensure that it satisfies the following four conditions:

1. **Genuine reasons of extreme urgency:** both the European Commission and the UK government guidance confirm that the pandemic presents an extreme and unforeseeable urgency. However, not all procurement will be of extreme urgency: the European Commission guidance confirms that this condition will only be satisfied if the procurement relates to short term gaps until more stable solutions can be found, and PPN 01/20 states that the contract should not relate to foreseeable future needs arising from the pandemic.
2. **Events leading to urgency were unforeseeable:** the European Commission guidance considers that the COVID-19 crisis was unforeseeable.
3. **Impossible to comply with the accelerated procurement procedures:** contracting authorities must therefore first establish whether a procurement can take place under the open or restricted procedure.
4. **Situation not attributable to the contracting authority:** in retrospect, the courts will determine whether a contracting authority could have acted sooner in procuring the goods or services and in doing so, whether the use of an accelerated procurement procedure would have been available.

PPN 01/20 also requires contracting authorities to award contracts directly to a supplier only if they cannot place a call-off contract under an existing framework agreement (which is already entered into by a central purchasing body) by running a mini-competition rather than a full procurement procedure. A contracting authority should therefore review whether the goods or services it wants to procure can fit within an existing framework agreement (it is worth noting that there are single supplier framework agreements that can be used).



This is not a strict additional requirement, but it should be a relevant consideration for a contracting authority intending to rely on Regulation 32(2)(c) PCR 2015 above. To facilitate this, framework agreements which relate to goods or services directly required due to the pandemic could well be extended under Regulation 72 PCR 2015 (which we review and discuss [here](#)) beyond their usual four-year length to allow for call-off contracts to be placed urgently. This mechanism would avoid the need to use the direct award route, which requires strict adherence to the four conditions set out above.

Direct awards of contract due to only one supplier (Regulation 32(2)(b) PCR 2015)

Another option which does not involve running a procurement is to award a contract directly to a supplier on the basis that the goods or services can only be supplied by one economic operator because competition is absent for technical reasons or for the protection of exclusive rights (including intellectual property rights).

Extension of a current contract coming to an end

If a current contract is coming to an end and the goods or services supplied under that contract are urgently required due to the COVID-19 crisis, a contracting authority could seek to extend the term of the current contract by way of a modification rather than running a tender process or directly awarding a new contract to a supplier (for which it would have to show fulfilment of the strict conditions).

That being said, varying current contracts which have been awarded to a supplier following an OJEU notice and a procurement procedure must also be justified. We look more closely at the conditions which must be satisfied and the guidance provided by the UK government on variations of current contracts [here](#).

In any event, regardless of the option chosen to procure goods or services urgently during the pandemic (or to directly award the supply of those without a tender process), contracting authorities should:

1. keep robust written records of their decision-making and rationale for their procedures. This is required by Regulation 84(7) PCR 2015 and is reiterated in the specific UK government guidance at PPN 01/20.
2. publish all contract awards in the OJEU within 30 days as this is a legal obligation.

In doing so, contracting authorities will reduce the risk of ineffectiveness of their decision (there is a 30-day time limit from the award notice in the OJEU to bring a legal challenge for ineffectiveness) or the risk of a claim for judicial review due to non-compliance with their broader duties.

Post-OJEU Notice / Pre-Contract Award: Current Procurement Procedures – Adapting to the COVID-19 Crisis

Procurement procedures advertised in the OJEU and started before the outbreak of the pandemic may need to adapt to the new requirements and challenges brought by COVID-19: there may not be a need to contract anymore, supplier requirements may be very different or contracting authorities may need to promise support and relief to future successful suppliers. Once again, assistance is available within the public procurement framework in place.

Modifying supplier requirements mid-procurement

Whilst the UK government guidance is largely silent on the Post-OJEU Notice / Pre-Contract Award stage, the statutory rules allow contracting authorities to make changes in contract requirements during a procurement procedure to deal with COVID-19 such as additional (related) services, modified timings of the contract and modified KPIs, provided they are within the scope of the OJEU notice.

Recent case law took a relaxed approach to determine what is considered to be “in scope”. Even if a material change is made during the procurement procedure, the OJEU notice would still be valid provided it:

- i. “related to” the contract awarded/to be awarded; and
- ii. “sparked” competition,

and therefore could not lead to a declaration of ineffectiveness of a decision to award the contract (*AEW Europe LLP v Basingstoke and Deane Borough Council*¹). This provides comfort that current procurement procedures may be modified to provide flexibility to contracting authorities and suppliers in order to best adapt to the situation once a contract is awarded.

Modifications may also include the re-assessment of pre-qualification questionnaire (PQQ) criteria as, for example, discretionary grounds for exclusion may have arisen or performance against the initial financial standing criteria may be more difficult for suppliers to meet. It is crucial that contracting authorities consider the application of their PQQ criteria in light of possible changes of circumstances to ensure they conduct a fair and transparent tender process.

Abandoning a current procurement procedure

It may make sense, in light of the situation, to abandon the procurement altogether. Recent UK case law provides contracting authorities with a broad discretion to do so². A contracting authority’s need to procure different services or its changed financial circumstances seem to be lawful grounds to abandon a procurement procedure.

¹ [2019] EWHC 2050 (TCC).

² *Amey Highways v West Sussex CC* [2019] PTSR 1995; *Ryhurst v Whittington Health NHS Trust* [2020] EWHC 448 (TCC).

However, if the rationale for abandonment is to dispense with a procurement procedure and award a contract directly to a supplier, a contracting authority should be aware that a direct award to one of the bidders in the procurement could invite legal challenges from other bidders.

Amending future contract terms to provide supplier relief

PPN 02/20 asks that contracting authorities review their contract portfolio and grant relief to “at risk” suppliers due to the COVID-19 crisis (see our review of this new requirement [here](#)).

As a precaution, and to avoid the need to vary contracts further down the line, it may be useful to include elements of supplier relief in future contract terms whilst a procurement procedure is ongoing such as a price revision clause or the potential for varied KPIs. As we discuss [here](#), variation of a contract post-contract award will require compliance with the statutory rules despite the UK government’s guidance that granting supplier relief should be considered. Therefore, if flexibility is already provided for within the future contract terms, the potential introduction of supplier relief post-contract award will be much easier and carry more legal certainty.

Contacts



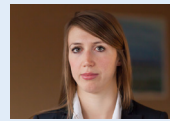
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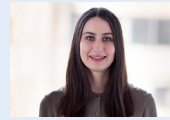
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