

Introduction

In addition to reviewing procurement procedures (for which we provide an overview [here](#)), contracting authorities are having to review their current contracts and the options available to adapt them as a result of the COVID-19 crisis.

The pandemic has led to different needs, both for contracting authorities and suppliers: additional deliveries of certain goods have been needed, the scope of a contract will have reduced or changed, suppliers may need more favourable terms in order to meet their obligations (advance payments, forward ordering etc.), a contract may not be suitable or appropriate anymore whereas another contract coming to an end may need to be extended as long as the pandemic continues.

The main change that may be required is the grant of supplier relief to “at risk” suppliers, as introduced by the UK government’s guidance published on 18 March 2020 ([PPN 02/20](#)). Whilst we explore this further (and its relationship with the central government’s scheme and State aid rules) [here](#), it is clear that the grant of supplier relief, whichever form it may take, is likely to lead to a variation of current contracts.

However, public procurement in the UK is governed by statutory rules, including the Public Contracts Regulations 2015 (PCR 2015), which must still be complied with despite the COVID-19 pandemic. We set out below the considerations to take into account when varying a current contract and what clarifications are brought by the UK government’s guidance on public procurement in the context of the pandemic

Rationale for variation – does it fall within the safe harbours of Regulation 72(1) PCR 2015?

Whether a variation to a contract takes place formally or *de facto* in response to the COVID-19 outbreak, it will likely trigger a substantial modification under Regulation 72(8) PCR 2015. Indeed, new supplier relief provisions may be construed as modifications which change “*the economic balance of the contract...in favour of the contractor*” (Regulation 72(8)(c) PCR 2015). Variations may also render “*the contract materially different in character from the one initially concluded*” (Regulation 72(8)(a) PCR 2015) or extend “*the scope of the contract...considerably*” (Regulation 72(8)(d) PCR 2015).

If this is the case, a variation (whether formal or *de facto*) must be justified by one of the safe harbours listed at Regulation 72(1) PCR 2015:

1. Contracting authorities should **first** review the existing contract and check whether **express modifications** can be made, as provided for in the contract pursuant to Regulation 72(1)(a) PCR 2015 (through price revision or force majeure clauses for example). If there is any room for variation/relief to the supplier within the current contract terms, this should be used as a first step. This is why contracting authorities with new or current procurement procedures are advised to review the terms of their future contracts and ensure they provide scope for variations (as mentioned [here](#)).
2. If the contract does not provide any room for manoeuvre, the most appropriate reason for varying the contract during the pandemic will likely be that the variation is made to meet unforeseeable events (Regulation 72(1)(c) PCR 2015), as confirmed by the European Commission in its own [guidance on public procurement during the pandemic](#) (paragraph 2.3.1), provided that:
 - a. A diligent contracting authority could not have foreseen these circumstances;
 - b. The modification does not alter the overall nature of the contract. If this condition cannot be met, the direct award of a new contract to the supplier on urgency grounds (as set out [here](#)) may be more appropriate; and
 - c. Any increase in price does not exceed 50% of the value of the original contract.
3. Another safe harbour for any price variation is if the value of the modification is below 10% of the initial contract value for service and supply contracts and 15% of the initial contract value for works contracts (Regulation 72(1)(f) PCR 2015).

What clarifications are brought by PPN 01/20 and PPN 02/20?

[PPN 01/20](#) and [PPN 02/20](#) are two Public Policy Notes published by the UK government in March 2020. They aim to assist contracting authorities and suppliers in navigating the public procurement framework in these unprecedented times. However, whilst they give some insight, they do not replace the statutory rules: they are merely guidance notes and provide no legal basis on which contracting authorities may act. The statutory procurement rules are still the starting point to determine lawful conduct.

PPN 01/20 confirms that the COVID-19 outbreak was an unforeseen event and therefore Regulation 72(1)(c) can be used to vary current contracts, as long as reference to specific facts are made (e.g. staff is diverted by procuring urgent requirements to deal with the pandemic, staff is sick etc.). It is clear that a contract awarded before the COVID-19 crisis substantially began will fulfil this condition. However, the UK government guidance is silent on the variation of contracts which were awarded during this pandemic. It is much less clear whether this would be protected by the safe harbour of Regulation 72(1)(c) PCR 2015.

PPN 01/20 also adds to the statutory rules by stating that any extension or modification of a current contract should be limited to **what is absolutely necessary** to address the unforeseeable circumstances. This requirement seems stricter and at odds with the UK government guidance at PPN 02/20 on supplier relief, which advises that contracting authorities should first work to try to vary contracts instead of suppliers invoking contractual relief (such as a force majeure clause) that would allow them to suspend performance.

According to the PPN 02/20 guidance, these variations are also temporary: the contract should return to its original terms as soon as the impact of the COVID-19 outbreak on the relevant contract is over. In practical terms, this could already be the case in some sectors such as transport (some school transport has resumed as some schools have gradually re-opened). However, the economic context and the financial circumstances of the supplier may be radically different and it may prove difficult or impossible to return to the original contract terms.

As with new and ongoing procurement procedures ([here](#)), the UK government has reminded contracting authorities that they must keep an audit trail of the variations in current contracts and the reasons for them, as well as publish an OJEU notice (there is no specified time for doing this, but it is good practice to publish the notice within 30 days of the variation). This will reduce the risk of a legal challenge brought under the PCR 2015. Complete transparency therefore seems to be the main safe harbour for contracting authorities whilst they assist in providing relief to struggling suppliers.

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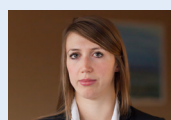
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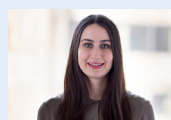
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