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Insights

PLAY FAIR CHILDREN! - UK CABINET OFFICE PUBLISHES CONTRACT MANAGEMENT GUIDANCE ENTREATING ALL PARTIES TO ACT "REASONABLY" IN MANAGING COVID-19 ISSUES

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SUMMARY

On Thursday, 7 May the Cabinet Office published 'Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency ' (the "Responsible Behaviour Guidance"). What does it say? Why has it been produced? And will it work? This blog explores all three questions.

The Responsible Behaviour Guidance is a follow up to PPN 02/20 which sought to give permission to public bodies to consider contractual variations in the current crisis if the contracts do not provide suitable relief. This guidance entreats parties to all contracts (both public and private in nature) to "*act responsibly and fairly…in performing and enforcing their contracts*". Contract parties whose contracts are "*materially impacted by Covid-19*" are, it insists, part of the national response to this emergency.

The Responsible Behaviour Guidance stresses that "*revised way of working [are] necessary*" in respect of contracts which, due to Covid-19, have become difficult or impossible to perform. Responsible and fair behaviour will contribute to the Government's objectives of: maintaining contractual performance; ensuring cash flow protection in businesses; protecting the UK economy and supporting the response to the Covid-19 emergency; preserving supply chains; avoiding destructive disputes and insolvencies; and, to the extent possible, ensuring that the economy is in the best position possible after the Covid-19 has receded.

Little is given by way of specific detail on what the Government expects in terms of example actions for contract parties, but a wide range of examples of asset management and performance activities (including in respect of payments and reliefs) are listed and parties are encouraged to find "*practical, just and equitable contractual outcomes*", and use alternative dispute resolution where possible – litigation is, in particular, specifically called out as potentially "*destructive*".

While this is general and non-statutory guidance, the Government "*strongly encourages*" parties to follow it. However, it does **not** override specific guidance or procurement policy notes (PPNs), any particular contract terms (including as to relief), law, custom or practice or other duties or obligations to which a party to a contract to bound to comply. The Responsible Behaviour Guidance is also explicitly not intended to apply to financial market transactions or contracts "*speculative in nature in respect of risks similar to the Covid-19 emergency*" (presumably insurance contracts or those relating to hedging agreements) .

So what is it for and why has the Cabinet Office felt the need to produce it? Surely most contract managers would argue they *always* act reasonably?

On the face of it, it's a well-meaning attempt by the Government to persuade parties to avoid a situation akin to Dickens' *Jarndyce v. Jarndyce* - all value lost in lengthy and, ultimately, counterproductive litigation. But perhaps the key point that can be inferred in this context is the Government's message to public authorities – that is, when the courts are likely to be under significant strain, consider the wider economic implications before strictly enforcing your contractual rights and (even more than usual) also consider whether negotiated settlements can be reached.

Clearly some public authorities are **not** making full use of PPN 02/20 in the spirit of which it was intended and we would speculate as to whether this has precipitated the Responsible Behaviour Guidance. That is certainly our experience when acting for suppliers seeking assistance in the current crisis. We have found many public bodies have complied while others have dallied and fretted about whether they should throw a life line to struggling suppliers; often asking for unreasonable financial information or denying that the relevant supplier has any contractual remedies at all (whether under Force Majeure or otherwise) and even implying that shareholders should be injecting further cash funds to prop up unviable contracts before they agree changes. In such circumstances how can suppliers *not* look to enforce their contractual rights?

Of course, the key concerns from the perspective of civil servants and officers (of which we have sympathy) is that they will be damned if they do and damned if they don't. If they *don't* agree relief and/or beneficial contract variations they may be severely criticised when that key service fails – why were they not more "reasonable"? However if they *do* give the relief sought, will they face a state aid challenge from a third party? Will their audit trail be strong enough to support it? Are they complying with their fiduciary duties to the tax payer?

It is certainly a balancing act which we are not convinced this note will alleviate. It may fortify some, but in practice funders may rightly need to use available contractual mechanisms to restructure debts, the private sector must look to maintain and protect value, assets and employees – if it believes it has contractual rights it has a duty to shareholders to try to enforce them. The public sector cannot ignore state aid law; albeit the likelihood of challenge may be low now, who can tell what claims may arise once the UK is through the worst of the crisis.

The Responsible Behaviour Guidance explicitly stresses that, perhaps now more than ever, public policy is to promote alternative dispute resolution. It summarises a range of ADR resources which may be available including offered by RICS and the Royal Construction Council. But while those mechanisms can have a useful role in traditional contractual interpretation disputes we would question whether they can really assist if the key question for a public authority party is whether it could and should exercise its discretion under PPN 02/20 to *vary* a contract to financially assist a private contractor in a manner never envisaged under the contract.

Alas, that is not a question that RICS or any third party can settle for the public sector and if the Cabinet Office wishes to see more being done the most effective way to do that would perhaps be a swift and decisive government appeal process for suppliers which would relieve individual civil servants and officers of having to walk their tight rope unaided.

And where does this leave private sector clients and contacts who have public sector contracts? These contracts should be treated no different to those where your counterparties are private sector, in particular principles of good contractual management hygiene should prevail. We are regularly advising clients who are faced with substantial, sometimes (purported) oral variations, waivers and amendments often “on the ground”. Now, more than ever, it is particularly important to practice good contract management hygiene – the equivalent of keeping your hands regularly washed – making records contemporaneously, sending emails (including confirming conversations) in a timely manner, and where appropriate submitting letters/notices to reserve your contractual rights and positions pending resolution/until a less fraught operational period prevails.

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