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Insights

THE ROAD TO RECOVERY? CABINET OFFICE RELEASES PPN 04/20 - RECOVERY AND TRANSITION FROM COVID-19

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SUMMARY

On 9th June the Cabinet Office released its latest procurement guidance to Contracting Authorities dealing with Covid-19 issues in their supply chain. PPN 04/20 is the follow up to PPN 02/20; which urged Contracting Authorities to grant relief, as appropriate, to struggling suppliers of critical public services. PPN 04/20 looks beyond the immediate crisis to encourage longer term solutions to be found where operating models are no longer fit for purpose or commercially viable. This may involve further variation or even termination.

The PPN is applicable to all Contracting Authorities, whether central, local, NHS or otherwise and covers all contracts for goods, services and supply, including PFI and PF2 contracts. It is effective from 1 July to 31 October 2020.

The PPN covers three main areas;

1. Continuing Relief

The relief provisions provided under PPN 02/20 need not be immediately withdrawn and may still be appropriate until 31st October. At risk suppliers should still be supported, as needed, to ensure critical services can continue. This may include cash-flow measures such as continuing to pay in advance of need and continuing other reliefs such as KPI relief. Suppliers should be paid as quickly as possible, and disputes should be resolved promptly.

Contracting Authorities are also reminded that:

1. Suppliers do not have an automatic right to any relief or contract variations. Any relief given is subject to:
   - open book accounting;

- no profit being made on any relief given; and
- no duplication of relief being claimed by suppliers under government schemes and also under contract.

2. the general approval previously given to pay suppliers in advance of need is capped at 25% of the total value of the contract until the end of October 2020. Consent can be sought however if payment in excess of this is thought appropriate.

3. Some suppliers may still fall insolvent. Any decisions should be recorded comprehensively to support transparency and future scrutiny of value for money.

2. Transition Planning

However parties must now work collaboratively to agree an exit from the relief provisions and to transition to new sustainable operating models. Transition plans should be ready to be implemented before the end of October 2020 and could cover:

1. a planned exit date for ending supplier relief;
2. the date when any goods or services must be delivered where advanced payments have been made;
3. a process for reconciling payments against costs if relevant;
4. an assessment of costs associated with implementing Public Health England Guidance as needed;
5. an assessment as to whether the contract, as a result of Covid-19 is still operationally relevant and viable and if not proposals for variation or termination.

This last point 5 is obviously the key issue. Paragraph 8 anticipates that parties may feel that the world has changed and "basic commercial assumptions that underpinned the viability of the original contract can no longer be maintained". Variations may be agreed therefore to ensure contracts are still viable and sustainable. If contracts are no longer relevant or viable then an authority may also discuss termination "based on existing contractual remedies" with a supplier.

3. Responsible Behaviour

The PPN reiterates the "play nicely" pleas set out in the Cabinet Office's earlier non-statutory guidance (see our previous blog) and stresses the need to act responsibly and proportionately, avoiding litigation wherever possible.

BCLP Comment

It is not hard to see why the Cabinet Office has included another plea for responsible behaviour – it will certainly be needed.

A number of contracts will be economically unviable in the new post-Covid-19 world, particularly where the supplier previously accepted the risk of no volume guarantee. We expect the worst affected areas to be public concession contracts where payments do not flow from the Authority.

Many contracts in this category may need to be either varied to make sure they are still viable - or terminated. If terminated, they are likely to need to be re-tendered but reference to this is notable by its absence; as indeed is all mention of Regulation 72 of the Public Contracts Regulations 2015 (Modification of Contracts During their Term) or state aid law. This will be the key difficulty for Contracting Authorities' i.e. "when is a variation so substantial the contract must be put back to the market under Regulation 72?". In respect of state aid, variations must either be justifiable as being compliant with the market economy investor principle or comply with one of the pre-approved UK schemes for relief.

Therefore despite what this PPN implies, do they really have the option to vary *or* terminate at their discretion?

It must be noted that this PPN is envisaging life *after* the immediate emergency has passed therefore many of the exemptions under the Public Contracts Regulations 2015 which may have applied to the initial relief *may* not justify long term adjustments for the remaining term (depending upon how long that is). Each contract must be reviewed carefully on its own terms and the scale of the variation considered. Risk of challenge, under both procurement law and state aid law, will be a key consideration and Contracting Authorities will require detailed guidance to avoid challenges to unwise variations.

Should you have any ongoing concerns or issues with existing public contracts please do not hesitate to get in contact with our leading procurement team.

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