

Introduction

The COVID-19 outbreak led the UK government to provide clarification to contracting authorities and suppliers to adapt to unprecedented circumstances due to the outbreak in relation to the procurement of goods and services.

The UK government issued guidance on 18 March 2020 ([PPN 02/20](#)), which is not legally binding, advising that contracting authorities must act immediately to ensure suppliers “at risk” are in a position to resume normal contractual performance and delivery once the COVID-19 outbreak is over. As such, contracting authorities should grant relief to suppliers. However, PPN 02/20 is currently time-limited until 30 June 2020 and the UK government has not yet announced any extension of it.

The propositions in the guidance have implications on State aid issues: it is likely that assistance that has been provided by contracting authorities may constitute an advantage to suppliers. This may lead to the collision of the relationship between central government schemes and State aid rules. Therefore, it is essential for contracting authorities to have taken a nuanced approach before deciding to grant relief to suppliers. They must have considered all their legal duties, including UK public procurement rules (primarily governed by the Public Contracts Regulations 2015 (**PCR 2015**)) as discussed [here](#), and legitimate interests. Indeed, such guidance needs to be considered in conjunction with central government schemes.

There are two key limbs that need to be considered:

1. Supplier aspect – how to reconcile with central government schemes such as the Coronavirus Job Retention Scheme (**CJRS**), which is due to run until at least October 2020?
2. Contracting authority aspect – does such relief amount to State aid?

Scope of application of PPN 02/20

PPN 02/20 provides a list of current actions that contracting authorities are expected to undertake and sets out information and guidance for contracting authorities on payment of their “at risk” suppliers to ensure service continuity throughout, and after, the COVID-19 outbreak.

In particular, the guidance advises that:

- Contracting authorities should have reviewed their contract portfolio and informed suppliers who they believe were at risk that they would continue to be paid as normal (even if service delivery was disrupted or temporarily suspended) until at least the end of June (no extension of this is currently set, but it may be prolonged). This will generally override any contractual provisions that might require payment on a decreasing scale as a result of performance, *force majeure* or business continuity clauses.
- The most appropriate payment measures to support supplier cash flow should be put in place. Solutions could include forward ordering, payment in advance/pre-payment (now authorised), interim payments and payment on order (not receipt).
- If the contract involves payment by results then payment should be on the basis of previous invoices, for example the average monthly payment over the previous three months.
- Suppliers should agree to act on an open book basis and make cost data available to the contracting authority during this period. They should continue to pay employees and flow down funding to their subcontractors.
- Contracting authorities should ensure that invoices submitted by suppliers are paid immediately on receipt (reconciliation can take place in slower time) in order to maintain cash flow in the supply chain and protect jobs. Payments should be accelerated beyond the **30 day** payment period under the PCR 2015.

In circumstances where suppliers are unable to fulfil their contracts because of other public sector actions such as the closure of schools, limited public transport services and limited waste management services, contracting authorities should try to re-deploy the services of those suppliers to other areas by a variation to the original contract for a specific period.

If a supplier seeks to invoke clauses allowing them to suspend performance, such as force majeure, the contracting authority should initially attempt to agree variations of the contract instead (although it must be aware that it should comply with the procurement rules when doing so, as discussed [here](#)). Other reliefs could include an extension of time for contract performance and/or a waiver or delay in the ability of the contracting authority to exercise a right or remedy such as to terminate or claim damages.

Although the PPN 02/20 conveys an encouraging general message of collaboration between parties at all levels of the contractual chain and indeed pragmatism on the part of the contracting authority, this may lead to State aid issues which we discuss below.

This message is also time-limited and quickly coming to an end. As of yet, it is unclear what assistance struggling suppliers will be able to receive from contracting authorities after the end of June – they may well end up having to rely on the CJRS after all.

Reconciliation with the CJRS

On 20 March 2020, Rishi Sunak, Chancellor of the Exchequer, announced as part of a package of measures that businesses and the individuals would be assisted by the Coronavirus Job Retention Scheme.

The UK government expected that the CJRS will not be used by many public sector organisations, as most public sector employees are continuing to provide essential public services or contribute to the response to the coronavirus outbreak.

If relief provided under PPN 02/20 comprises payment in full then suppliers cannot make staff redundant. However, suppliers must not also be receiving support under the CJRS.¹ Thus, staff cannot be furloughed if working solely on the public contract in respect of which relief is granted.

Indeed, suppliers must commit and agree to operate on an “open book” approach. As such, contracting authorities should agree with suppliers as to how frequently they undertake a review of payment. Suppliers are required to continue to pay employees and sub-contractors.

It therefore seems that contracting authorities and suppliers should adopt a two-step approach:

1. Contracting authorities should first review, in consideration of its legal duties and legitimate interests, whether they should provide relief to suppliers as per PPN 02/20.
2. Depending on the decision taken by contracting authorities at step 1 above, suppliers may look at their options under the CJRS.

Compliance with State aid regime – risk of granting relief?

The ebbs and flow of the coronavirus outbreak mean that contracting authorities will need to continue to grant relief to suppliers. But contracting authorities may therefore be susceptible to the risk of providing unlawful State aid as such relief may constitute an “advantage”, whether being payment, variation of contract, or non-enforcement. However, relief will likely fall outside the State aid regime if the principal aim is to ensure continuity of supply and the contracting authority’s conduct is consistent with the Market Economy Operator Principle.

When determining whether such relief constitutes unlawful State aid, one must look closely at the nature and the value of relief. In particular, if the relief is modest, it may not have an effect on cross-border trade or may be *de minimis* and therefore would not constitute unlawful State aid.

Contracting authorities are therefore exposed to risks upon the granting of relief to suppliers in the form of unlawful State aid. This may come about by (i) judicial review as contracting authorities must always consider broader duties; and (ii) a receiving supplier’s competitor challenging the grant of relief under section 2 of the European Communities Act 1972.

Legal effect of PPN 02/20 – risk of not granting relief?

Contracting authorities also face legal challenges should they decide not to grant relief to suppliers. Unhappy suppliers can use judicial review to determine whether contracting authorities have failed in their obligation to grant relief.

Although PPN 02/20 is simply guidance, it may found legitimate expectation claims and it is reasonably foreseeable that a typical case of legitimate expectation is based on a central government giving guidance (i.e. PPN 02/20) that contracting authorities will make a particular decision in a particular way but then acting differently when it comes to actually making the decision.

Contracting authorities must therefore ensure they consider PPN 02/20 in deciding whether to provide supplier relief, and keep a record of doing so for the purposes of any potential legitimate expectation claim which may content a failure to have regard to government guidance.

PPN 04/20: Recovery and transition from COVID-19

A new Procurement Policy Note ([PPN 04/20](#)) issued by the Cabinet Office on 9 June 2020 provides further non-binding guidance for contracting authorities in partnership with suppliers during the COVID-19 outbreak on measures to support suppliers at risk to ensure continuity of service delivery of contracts. PPN 04/20 builds on the provisions contained in PPN 02/20 and it also looks forward to transition planning in order to eventually exit from relief in the period 1 July to 31 October 2020 with suppliers “openly and pragmatically”.

¹ FAQ 13- Frequently Asked Questions (FAQs)- Procurement Policy Note 02/20 – published 9 April 2020.

PPN 04/20 advises contracting authorities to review their contracts and determine whether it is still appropriate to provide certain at risk suppliers the relief measures that are set out in PPN 02/20. However, it makes clear that suppliers are not automatically entitled to payment or other relief.

Summary of actions for contracting authorities to take between 1 July 2020 and 31 October 2020:

- Review contracts, including those where supplier relief is being provided, and where appropriate to maintain the delivery of critical services, continue or commence measures in line with PPN 02/20.
- Work in partnership with suppliers and develop transition plans to exit from any supplier relief as soon as reasonably possible. If operational requirements have changed significantly, agree contract variations in line with the Public Contracts Regulations 2015.
- Work openly and pragmatically with suppliers during the transition to ensure that contracts are still sustainable and can deliver value for money over the medium to long term.
- Continue to accelerate payment to suppliers to maintain cash flow and protect jobs.
- Keep comprehensive records of all decisions, reasoning behind key decisions, and actions taken.

PPN 04/20 sends a clear signal that any support provided due to the COVID-19 outbreak should end by 31 October 2020. Contracting authorities should start planning now.

European Commission Temporary Framework

Another route in providing relief to suppliers is through the European Commission's Temporary Framework for dealing with the COVID-19 situation, setting out a number of measures which, on notification, can be used to provide aid in the current challenging circumstances.

Indeed, clearances have been provided extremely quickly for many Member States, including Denmark, France, Germany and Portugal, and other government measures to deal with the impact of COVID-19 under this framework will also require clearance. The advantage of such framework is its ex ante regime, providing comfort that measures taken carry legal certainty. However, despite the relatively quick turnaround, awaiting clearance may not always be possible or appropriate, in which case contracting authorities will have to rely on their robust record keeping for any potential future legal challenge.

Contacts



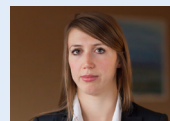
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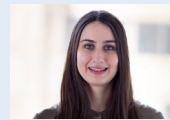
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