

Procurement Policy Note - Responding to COVID-19 (PPN 01/20) (1 April)

In response to the COVID-19 outbreak, the Cabinet Office has published Procurement Policy Note (PPN) 01/20 which sets out information and guidance on how the public procurement regime can be used to address potential supply-chain challenges arising. The PPN takes effect immediately and applies to all contracting authorities.

It should be noted that the PPN does not suspend any requirements on contracting authorities to comply with the full scope of the procurement regime. Instead, it reminds contracting authorities of some exemptions that they may seek to rely on (but these will still be strictly interpreted) and of pre-existing procurement solutions (eg framework agreements) that they can use.

Overall, the message seems to be that unless a contracting authority can say that its procurement need has been created by the COVID-19 outbreak (eg the need to purchase additional quantities of hand-sanitiser or other requirements to respond to public health risks), it is business as usual.

The PPN sets out five options that contracting authorities might consider when there is an urgent need for supplies, services and/or works.

1. Use of the negotiated procedure without prior publication for reasons of extreme urgency (regulation 32(2)(c))

Contracting authorities may be able to justify a direct award where:

- a) There are genuine reasons for extreme urgency;
- b) The circumstances giving rise to the extreme urgency were unforeseeable;
- c) It is impossible to comply with the usual procurement timescales; and
- d) The contracting authority has not contributed to the need for extreme urgency.

As an example, extreme urgency must relate to the procurement requirement and the PPN gives the examples of the urgent need to respond to the consequences of COVID-19 for public health risks or a loss of existing provision at short notice as constituting a genuine reason for extreme urgency. Currently, it could be said that the COVID-19 outbreak was unforeseeable and therefore could not be anticipated by relevant procurement activity. However, the test of "unforeseeability" will become more difficult to demonstrate as time goes on.

Contracting authorities should carefully consider whether they have time to run a procurement procedure (including under accelerated timescales or by an award under

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an existing framework agreement). If this can be achieved, the conditions above are not met. Additionally, a contracting authority's inaction might limit its ability to justify extreme urgency.

2. Use of the negotiated procedure without prior publication where there is an absence of competition or protection of exclusive rights (regulation 32(2)(b))

Contracting authorities may rely on regulation 32(2)(b) to make a direct award where their requirements can only be supplied by a particular supplier because:

- a) Competition is absent for technical reasons;
or
- b) The protection of exclusive rights (including IP rights).

Interestingly, the PPN indicates that this justification may be available where there is a lack of market capacity (which may occur due to panic-buying or cross-border supply-chain disruption due to employees in isolation or lockdown). Again, this will be interpreted strictly and contracting authorities must ensure that they do not artificially narrow the scope of the procurement to meet the requirement.

3. Call-off from an existing framework agreement or DPS

The PPN sets out that the usual requirements around the use of framework agreements still apply, and, if awarding a call-off contract, contracting authorities should check that the agreement has been validly established (with them being identified as a permitted customer in the procurement documents).

Contracting authorities should also ensure that the scope of their requirement is covered by the framework agreement, and that the terms laid down in the framework agreement are suitable without substantial amendment.

4. Accelerated procurement procedure

Contracting authorities are able to reduce the minimum timescales of procurement procedures where a state of urgency makes the original timescales impractical.

Using the open procedure, contracting authorities could reduce timescales for receipt of tenders to 15 days plus the 10 day standstill period. If contracting authorities elect to follow this option, they should set out the justifications for accelerated timescales in the OJEU notice.

5. An extension or modification of an existing public contract during its term (regulation 72).

There are a number of safe-harbours for variations to existing contracts under Regulation 72 but the PPN only notes one of them: existing contracts can be modified where (1) the need for modification arises from circumstances which a diligent contracting authority could not have foreseen, (2) where the modification does not alter the overall nature of the contract, and (3) where any increase in price does not exceed 50% of the value of the original contract.

If all three conditions are met, contracting authorities are permitted to modify existing contracts within such limits without running a new procurement procedure. As explained above, what is unpredictable at the outset of the COVID-19 outbreak might be considered foreseeable by a diligent contracting authority as time goes on and this safe-harbour may be time-limited.

Contracting authorities should always keep written justifications for the decisions taken (including the justifications for any urgent measures, and why other options were considered impractical) and should ensure that they conduct separate assessments before undertaking repeat procurements.