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Chartered Institute of Housing

Cabinet office procurement policy note

(1 April)

Action Note PPN 02/20 – March 2020

The Cabinet Office has issued a new Procurement Policy Note (PPN) in response to the COVID-19 outbreak in order to maintain business continuity and to ensure that contracting authorities support their suppliers who are most at risk (PPN 02/20).

PPN 02/20 covers various issues including the continued payment of suppliers, contractual relief, force majeure and frustration. This briefing note does not consider the issues around contractual remedies covered by PPN 02/20 (Trowers & Hamlins has already published briefing notes on those topics here. This briefing note focusses on the payment policies contained in PPN 02/20.

Who does PPN 02/20 apply to?

PPN 02/20 sets out its scope in paragraph 3, and states that PPN 02/20 applies to "all contracting authorities, including central government departments, executive agencies, non-departmental public bodies, local authorities, NHS bodies and the wider public sector (excluding Devolved Administrations)".

Whilst paragraph 3 of PPN 02/20 refers to "contracting authorities", Trowers & Hamlins has liaised with the Crown Commercial Service (**CCS**) on this point who has confirmed that Registered Providers can decide themselves whether they want to be covered or not and each organisation can make their own determination."

In light of the CCS' statement above, RPs have a discretion as to whether they will or will not apply the best practice set out in the relevant PPN 02/20. Given the "patchwork" nature of their status as "public sector" organisations, their charitable aims and objectives, and the indirect nature of their funding from HM Treasury, it seems to us that it is reasonable for RPs to decide not to deem themselves within the scope of PPN 02/20.

Considerations for "in-scope" organisations

Where organisations consider that they are within scope of PPN 02/20, there are various payment provisions to consider. The main purpose of PPN 02/20 is to ensure that suppliers to the public sector are able to resume contract delivery once the COVID-19 outbreak is over, and to maintain business and service continuity and the key points of PPN 02/20 include:

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- Organisations are required to review all of their existing contracts to identify the suppliers who they believe are at risk. Organisations should then inform those "at risk suppliers" that they will continue to be paid until the end of June, even where service delivery is disrupted or temporarily suspended. In practice, we have seen in-scope organisations sending out questionnaires to all supply-chain members, placing the onus on suppliers to identify themselves as "at risk".
- There is no guidance as to what makes a supplier "at risk". Query whether this means at risk of insolvency or whether it means the supplier is unable to access any of the BEIS business support measures and that this payment regime could be one of last resort?
- For an "at risk" supplier, organisations should then put in place payment measures to support supplier cash flow during these advance payments. In practice, a contracting authority might maintain the existing contractual rates, or may elect to pay in accordance with revised milestones, interim payments, or forward ordering. Where a contract operates on a "payment by result" or "output/outcome" basis, pre-payments to suppliers should be calculated as an average of the last three months' invoices.
- PPN 02/20 also notes that any pre-payment in these circumstances should not include profit on any undelivered element of the contract, and all payments should be made on an open-book basis.
- In order to qualify for pre-payments, at risk suppliers will need to agree to act on an open book basis and to make cost data available to contracting authorities during this period. Suppliers should also commit to continue paying employees and flow down relevant pre-payments to their subcontractors.
- There is no requirement to make pre-payments to suppliers in respect of contracts where there is no contractual volume commitment to supply. PPN 02/20 also suggests that organisations should give careful consideration to pre-payments where a supplier has been underperforming and is subject to an existing improvement plan.
- Organisations should carefully consider the risks associated with any pre-payment, and should ensure that they carefully document those risks and the decisions taken in respect of each at risk supplier. Contract variations should be agreed and include a clear reconciliation and repayment mechanism, security such as such as advance payment bonds, vesting certificates, suspending any rights under the contract to terminate "at will" until the pre-paid amounts have been expended properly once contract performance is renewed.
- Organisations should also consider how this will impact on cash flow when the normal service provision resumes and may want to consider seeking commitments from suppliers to continue paying employees and flowing down payments to supply chains following normal service delivery (and the resultant reduction in payments to take account of the pre-payments that have been made in these special circumstances).
- Organisations should also note that the provisions of this PPN 02/20 run in parallel with contractual processes, rights and potential remedies. The contractual position should not be forgotten and any measures adopted under this PPN 02/20 needs to be agreed in accordance with the contractual provisions.

Sanctions for non-compliance

PPN 02/20 does not impose any sanctions for non-compliance. Nevertheless, aggrieved suppliers could report any failure of an organisation to adhere to the provisions of PPN 02/20 to the Cabinet Office's Public Procurement Review Service (formerly the Mystery Shopper).

Please contact Rebecca Rees (rrees@trowers.com / 07920 492655) or Stuart Brown (spbrown@trowers.com / 020 7423 8143) for further advice and information on PPN 02/20)