

Stay safe when applying the Covid-19 response PPNs

The UK Cabinet Office has published a number of Procurement Policy Notes (“PPNs”) in response to the current Covid crisis. PPN 04/20 indicates the Government’s overall intended direction of travel to the “new normal”, but it will be important to consider and ensure that you are able to comply with your wider obligations, including from a governance and procurement law perspective, when deciding how to implement the recommendations.

Background

We have previously issued newsflashes in relation to [PPN 01/20 \(Responding to Covid-19\)](#) and [PPN 02/20 \(Supplier Relief Due to Coronavirus\)](#).

PPN 04/20 was published on 9 June 2020. Its purpose is to modify and build on the provisions of PPN 02/20. It reflects the overall change in Government policy and emphasis towards ending current supplier relief measures. It encourages working towards a “new normal”.

PPN 04/20 applies from 1 July to 31 October 2020. Its key message is to encourage public bodies and their suppliers to agree commercially viable plans to transition away from the current relief measures as soon as practicable, but before 31 October 2020 in any event. The guidance does not deal with what should occur with a “second wave”, but it is possible that it may be updated or additional guidance issued from time to time if further measures are required.

A copy of PPN 04/20 can be found [here](#).

PPN 04/20 – Key messages

PPN 04/20 confirms that policy direction does not necessitate the immediate removal or withdrawal of supplier relief measures that are currently in place. It instead recommends that public bodies continue to provide supplier relief, where appropriate, until the end of October 2020.

As described below, the PPN also encourages both the public body and the supplier to consider transition planning towards (1) reinstating the original contracting arrangements; (2) varying them; or (3) in the appropriate circumstances, terminating the relevant contract.

PPN 04/20 also reminds public bodies that they should work collaboratively and transparently with suppliers in receipt of relief. The PPN notes that suppliers should operate “with integrity” and should not make profits as a result of the relief given. Such suppliers should also provide financial information on an “open book” basis and must not claim relief under PPN 02/20 and PPN 04/20 that would result in them “double recovering” due to the operation of other relief measures, such as the Coronavirus Job Retention Scheme. The onus will be on public bodies, however, to ensure that their relief measures are not abused and to protect the public purse.

PPN 04/20 warns that suppliers that do not act with transparency and integrity may face action from public bodies seeking to recover relief payments made, although the resources and appetite of the public bodies in question to take such action in practice is yet to be revealed. It would be advisable for public bodies to ensure appropriate governance over offering relief, rather than trying to recover this later.

Transition planning: reinstating, varying or terminating?

PPN 04/20 strongly encourages public bodies to actively support suppliers with the aim to returning to “business as usual” as soon as reasonably possible. It encourages public bodies and suppliers to work together to agree a plan to transition away from the current relief, and to make that plan as clear and specific as possible.

For example, the parties are expected to agree a planned date upon which the current relief will end, the date upon which outstanding goods and/or services will be delivered (particularly where advance payments have been made for such goods and/or services) and on the reconciliation process and mechanisms concerning payments made using the model interim payment terms provided for within PPN 02/20.

PPN 04/20 also recognises that the underlying position may have changed such that returning to the original contracting arrangements might not be appropriate or possible. It therefore directs that where the assumptions underpinning the original contractual arrangement have changed significantly, it is likely to be appropriate for the parties to consider and discuss variations.

There may be circumstances where a contract is no longer viable at all, and in such cases the PPN makes it clear that the parties should consider options for termination – particularly in line with the provisions of the relevant original contract. Whilst of more general relevance and not a Covid specific guidance document, the parties may also seek direction from the recently updated Outsourcing Playbook, highlighted in PPN 05/20, which can be accessed [here](#).

PPN 04/20 in practice

We have summarised the key messages arising from PPN 04/20 above. Applying the guidance may involve resolving some difficult decisions in practice.

Competing duties and demands

The clear recommendation and policy direction from PPN 04/20 is that both parties should focus on transitioning away from existing Covid specific support. The clear message is that they must move towards “business as usual”, whatever that might look like in the aftermath of the immediate Covid response.

It is notable however that several competing duties and demands are likely to be at play when addressing the management of each supplier relationship and contract, not all of which are fully considered or addressed by PPN 04/20 or the approach recommended within it. For example:

- Whilst PPN 04/20 encourages providing supplier relief, NHS bodies must at the same time comply with:
 - their statutory duties (e.g. the duty on CCGs, NHS Trusts and NHS FTs to exercise their functions “...effectively, efficiently and economically”);
 - the requirements of their Standing Orders (including their Standing Financial Instructions) and other internal governance requirements; and
 - other more general obligations on public bodies to act reasonably and transparently.
- In the event of a potential divergence between guidance and various statutory duties, what should take precedence and why? What governance is in place to ensure decisions are appropriate, and does this comply with any Standing Orders?
- Whilst the PPN recommends that variations are considered, would such variations fall within one or more of the “safe harbours” within Regulation 72 of the Public Contracts Regulations 2015 (“PCR”)? The PPN is silent on how to deal with this point. If a variation would not fall within a Regulation 72 ground, how will NHS bodies address any material variation challenge risk?
- Do NHS bodies have the appetite and capacity to terminate current contractual arrangements and to face any associated litigation risk? How might such risks be managed?
- How will any replacement services be secured, again considering capacity constraints within procurement teams, the requirements of the PCR, and the extensive statutory duties (especially if these involve changes to healthcare services for patients)?
- How will public bodies manage the increased procurement challenge risk that is likely to arise in relation to any direct awards that are expressed as being made for reasons of extreme urgency as time continues to pass after the initial, unanticipated Covid outbreak?

Updated 3/7/2020. All information correct at the time of publishing and is subject to change.

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All of these factors will need considering on a case by case basis, and the solution and risk level is likely to differ with each contract, supplier and sector.

As matters start to ease, we are seeing increased scrutiny (by regulators, the public and other suppliers) of decisions being taken about contracts during the Covid period. It therefore remains crucially important that public bodies keep clear audit trails documenting decisions made, the matters considered and the rationale for taking them.

We predict and are already beginning to experience increased use of mechanisms to gather information relating to decisions, including through use of the Freedom of Information Act 2000, making it even more important that organisations are able and prepared to explain and defend their actions.

How we can help

Whilst PPN 04/20 contains an indication of the Government's overall intended direction of travel, it will be important to consider and ensure that you are able to comply with your wider obligations, including from a governance and procurement law perspective, when deciding on the most appropriate manner in which to implement the recommendations within PPN.

We can assist you with:

- Navigating the decision making process relating to each supplier and contract;
- Deciding how and what to prioritise in circumstances where the guidance and your statutory duties and/or internal governance processes conflict;
- Amending or terminating contracts;
- Timely and cost effective dispute resolution;
- Ensuring compliance with the PCR, whether when varying existing contracts or procuring to secure replacement or fresh requirements; and
- Ensuring that your decisions and their underlying processes are as robust and defensible as possible, which will assist you when responding to information requests and/or defending against potential challenges.

Contact us

Please do not hesitate to contact us should you wish to discuss or require advice on any of the topics referred to within this article.



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