

COVID-19: UK PUBLIC SECTOR CONSTRUCTION - CABINET OFFICE PUBLISHES FAQs REGARDING PPN02/20

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UK Construction Alert

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Further to our recent blog post "[COVID-19: UK Public Sector Construction - cash flow relief for suppliers](#)" on 31 March 2020, in which we set out guidance on the Government's *Procurement Policy Note - Supplier relief due to COVID-19 PPN 02/20* ("PPN02/20"), the Cabinet Office has published a [FAQs note](#) providing further clarity and guidance regarding implementation of PPN02/20 in practice.

The 17 initial questions addressed in this FAQ note range across providing definitional clarity on terms used, further detail on how to make use of the Model Interim Payment Terms also published, the extent to which suppliers can also make use of other relief, such as via the [Coronavirus Job Retention Scheme](#), and employers' rights in terms of repayment, continued discharge of obligations, protection from double payments and the preservation of other contractual rights and remedies.

The FAQs include the following:

- *Q4 - What is the definition of an 'at risk' supplier in PPN02/20? Who determines this?*

The response confirms that this is at the discretion of the contracting authority, but the Cabinet Office notes that it anticipates that "*the majority*" of suppliers will be at risk, and that it expects "*authorities to apply this as broadly as possible to ensure service continuity and protect infrastructure, supply chains and jobs.*"

- *Q5 - A supplier is unable to continue fully delivering their contract due to the COVID-19 outbreak, does the contracting authority still pay them?*

Although the response is that the contracting authority should continue to pay such a supplier as normal for the next three months, "*even if they are not able to fulfill all of their contractual requirements*" the answer would appear to be qualified by a number of other FAQs including the following:

- a. there is no requirement to continue payment for contracts which do not have a volume commitment, such as framework agreements (Q8);
- b. normal due diligence checks should be carried out before releasing payments (Q10);
- c. the making of an advance payment to a supplier would be to ensure service continuity, and would not excuse the supplier from their contractual obligations to deliver; such a supplier would not be paid more (Q11); and
- d. it appears from Q16 that if the current supplier cannot deliver at all and the contracting authority needs to seek delivery from an alternate supplier (and pay them) that the contracting authority would

not need to pay twice. In that situation, the original supplier should instead seek support through one of the other COVID-19 Government support schemes (such as the [Coronavirus Job Retention Scheme](#)), and Q13 also makes clear that a supplier cannot 'double-dip' and benefit from more than one COVID-19 related support scheme.

- *Q9 - If a supplier will continue to be paid in full, even where they are not able to deliver their contract in the usual way, can they make staff on the contract redundant?*

As one would expect, the answer in the FAQ is "no", and any supplier planning on making staff cuts and redundancies should set this out to the contracting authority in advance as it may affect the payments made, and the Model Interim Payment Terms provide a mechanism to address this. What remains unclear, however, is the situation for a supplier's staff on other contracts, or the situation where a group company, rather than the supplier, may be the employer.

- *Q12 - What is the best way to agree short term changes to contracts with suppliers?*

Contractual variations should be agreed in accordance with the change control clauses contained in the relevant contract. These will have to be documented and agreed by both parties (for example, using the Model Interim Payment Terms).

- *Q15 - Does the supplier have to pay back any money they are paid during this period?*

Given that the purpose of the payments is continuity and retention, it is not surprising that the Cabinet Office has confirmed that suppliers *"will not be required to pay this money back, even if they have not been able to deliver any of the goods, services or works required under the contract due to the impact of COVID-19 during the period."* This does not absolve suppliers entirely however and the goods, services or works paid for during this period may still be required to be delivered at a later date, or there may be a future claw-back of monies paid in the event delivery will not be made at all. Contracting authorities are advised to address the longer-term consequences on a case-by-case basis, and this FAQ concludes with the point that *"[c]ontracting authorities may seek to recover all or some of [their PPN02/20 payments] if the supplier has been found not to be compliant with open book requirements, not paying staff and subcontractors promptly and in full, etc."*

Our construction team is happy to advise you further regarding any questions you might have in relation to PN02/20, and we will provide a further update when the further guidance, specific to construction contract, is published shortly.

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