



Bristol City Council: Coronavirus (Covid-19) procurement and contracts protocol. 27 March 2020

Background

Coronavirus (COVID-19) will have an unprecedented impact on public procurement activities for the foreseeable future, including on delivery of existing contracts and on tendering for new contracts. The COVID-19 Procurement and Contracts Protocol sets out how the Council intends to respond to these challenges.

The protocol aims to provide guidance for officers responsible for tendering and / or managing existing contractual arrangements, on how we can:

- ensure continuity of service, particularly for services for our most vulnerable citizens and those that are statutory, and business as usual
- ensure timely, and sometimes extremely urgent, provision of supplies, works and services: both to respond to new demands as a result of COVID-19 or continued needs
- recognise and react to the challenges suppliers will face
- relieve resourcing demands by streamlining arrangements: focusing on outcomes ahead of process
- provide necessary, proportional and suitable flexibility as required

It must be recognised that the unprecedented situation created by COVID-19 means that adoption of typical and expected processes related to procurement and contracting matters will be difficult to maintain in whole or in part. Accordingly this Protocol addresses the following key features

- How the authority can change its approach to public procurement activities, amend the Council's own procurement Rules and make use of flexibility contained within the [Public Contracts Regulations 2015](#) in order to address the emergency measures required to respond to COVID-19.
- This protocol will be subject to review but as a minimum it is anticipated that it will be in place until 30 September 2020. This protocol will end in its entirety when the government indicate COVID-19 is deemed to be in a recovery position.

Approach

The Council's formal approach to undertaking procurement and contract arrangements is governed both by the Council's own Procurement Rules as well as the Public Contracts Regulations 2015.

This Protocol sets out principles to make use of existing provisions, as well as defining additional flexibility whilst this protocol is in force, within the Council's own Procurement Rules in order to meet the significant challenges presented by COVID-19. Where it is proportional and appropriate to do so, steps can thereby be taken that would not be considered in normal times.

With immediate effect the following approach is to be applied:

- i. If tendering activity has not yet commenced and can be put back without impact to business continuity, then this should be delayed until further notice. Consideration must also be given to whether the activity is required at all.
- ii. Urgent requirements should be met as expediently as possible. In the first instance, existing contracts or existing established frameworks should be used wherever possible and practical. Due consideration to collaborating with or using partner organisations' contracts should also be considered.
- iii. Where there are no suitable existing arrangements, or where this approach would not meet the necessary timelines, direct approaches to suppliers would be permitted. The duration and scope of a contract placed in these circumstances must be the minimum reasonable to see us through the immediate period and allow sufficient time for a compliant procurement process to be run and implemented to follow on from the direct award. The maximum duration for contracts entered into following a direct award on grounds of COVID-19 disruption is 12 months. Exceptions to this limit would require sign-off by the s151 officer.
- iv. In situations where a procurement process has already commenced, then a balanced view should be taken on whether to:
 - a. continue to formal award and commencement;
 - b. continue to formal award, but pause with the commencement date to be confirmed;
 - c. delay or postpone the procurement process; or
 - d. abort the current process if necessary.
- v. Where the tender that's in progress is to replace an existing contract, the decision on how to proceed should take into account any implications on business continuity; whether statutory, essential or continuity of service is critical in the current

situation; and any detrimental implications on resources. Extending the existing contract may be the best course of action, with the tender process being paused, delayed or even aborted.

- vi. Where existing contracts are due to expire before 1 April 2021 and future service provision is required beyond this date, then (assuming performance to date has been satisfactory) the default position should be to work to extend the existing contract through a direct award. The maximum extension awarded in this way on grounds of COVID-19 disruption will be 12 months, resulting in a maximum revised end date of March 2022. Exceptions to this limit would require sign-off by the s151 officer.

Supplier relief due to COVID-19: The Council may also choose to take one or more of the following actions to provide support to suppliers:

- Put in place appropriate payment measures to support supplier cash flow;
- Give due discretion on payment-by-results contracts, including transparency with suppliers agreeing to act on an open book basis and make cost data available;
- Ensure invoices submitted by suppliers are paid immediately on receipt in order to maintain cash flow in the supply chain and protect jobs.

Whilst this protocol looks to ensure that we make use of the flexibility within the Council's Procurement Rules, it remains important to apply proportional and necessary checks and balances when applying the above approaches, including:

- ensuring that the Strategic Procurement and Supplier Relations service are involved in decisions to form new contracts or amend existing contracts
- ensuring that the COVID-19 coordination group is involved and aware of decisions taken regarding contracts when appropriate (e.g. emergency action)
- taking reasonable steps to ensure that the Council obtains Value for Money and Best Value;
- Prevention of corruption, fraud or the suspicion of it;
- Undertaking necessary due diligence in respect of essential contractual requirements (such as but not limited to Health and Safety, Safeguarding, contractor viability checks, Fraud, General Data Protection Regulations, etc.);
- Use of approved / agreed Procurement Request Forms;
- Wherever possible, ensuring contractual arrangements still meet or are close to our normal requirements (e.g. formal terms and conditions).

Auditable records must be kept of:

- Decision making (in-line with the Scheme of Delegation), including where actions have been undertaken in connection with the Council's Emergency Powers;
- Any procurement activity and / or amendments to or forming of contracts;
- Contracts formed or amended (on the Council's Contract Register).

Where Public Contract Regulations 2015 apply then the due regard will be had to Procurement Policy Note, in particular:

[Responding to COVID-19: Information Note PPN 01/20 March 2020](#). This sets out provisions available to contracting authorities, including around:

- Procuring under urgency considerations through direct award;
- Relaxing of timescales to shorten procurement timelines;
- Provisions to direct award to a supplier where competition is not present, plus;
- Provision on extending and modifying contracts.

The intention should be to work within the spirit of PPN 01/20, but interpreted to meet specific situations locally.

Other considerations

General considerations or risks that need to be taken into account when applying this protocol.

Supply chain

With the exceptional circumstances represented by COVID-19 it must be recognised that usual and expected practices around procurement and commercial processes and how suppliers and supply chains respond are highly likely to be significantly disrupted and disjointed.

Disruption experienced by the supply chain is likely to include:

- Delays or non-availability of goods, supplies or services;
- Potential for increased costs of business;
- Fluctuations in performance - including rationing or limiting of goods, supplies or services;
- Suppliers refocusing priorities, including not responding to formal requests for tender;
- Supply chain failure, including suppliers insolvency; winding up; bankruptcy; administration.

Different sectors may respond differently so it will be important to understand differences across markets. This may include understanding the wider economic impact on local suppliers of the Council limiting formal tendering opportunities (e.g. through more direct awards). With this in mind, in certain situations there may be opportunities to commission supplies, services or works that would ordinarily be difficult.

Social Care Provider Resilience

Shared guidance to local authority commissioners from the Association of Directors of Adult Social Services (ADASS), the Local Government Association (LGA) and the Care Provider Alliance (CPA) has been provided for commissioners to help ensure provider resilience during the COVID-19 outbreak.

The guidance places direct focus on ensuring:

- Collaboration and communications;
- Business continuity plans;
- Maintaining cashflow;
- Workforce availability (including sick leave);
- Adjustment of support;
- Managing infection control and funding (including self-funders); plus
- Use of non-contracted providers.

[Social care provider resilience during COVID-19: guidance to commissioners](#)

Existing contracts

Where suppliers are unable to deliver existing services (or to the contract standard) due to events surrounding COVID-19, consideration should be given to alternative means for retaining services of suppliers. For example, continuing to pay supplier in instances when we feel the supplier is still delivering as much value as possible, but where they need to deliver it in a different way.

If a supplier is unable to deliver the service then consider whether the Council should encourage the supplier to use central government's employee retainer scheme, pay in full anyway (on credit), or stop paying entirely. Due consideration of the risk and implications need to be taken when these options are being explored (including an assessment of the viability of the business), particularly where there is a need to retain and support staff.

Consideration should also be given to [Bristol City Council – Coronavirus Guidance on Delivery and Performance of Contracts – 17 March 2020](#).

Frustrated contracts

It is possible that due to COVID-19 performance of some contracts may become impossible and thereby “frustrated” without fault of either party. If applicable the contract is, in effect, discharged i.e. the parties are under no further obligations to one another.

In addition, we might anticipate that claims of Force Majeure-1 are made by suppliers. However this will only be possible where the contract contains a force majeure clause. It is important to note that the Council also would be able to seek consideration of Force Majeure where it felt relevant and proportional to do so.

Any frustration or FM claims need to be discussed with Legal Services to consider the various merits, obligations and implications.

Contractual terms

Care must be taken that in responding to these unprecedented conditions in the short term, decisions are not taken that could tie the Council into unfavourable contractual arrangements on a longer-term basis.

Wider due diligence

Care must be taken to give due consideration to key risk areas, including but not limited to Health and Safety considerations, including legislation such as Construction Design Management (CDM) Regulations; Safeguarding matters; General Data Protection Regulation (GDPR), fraud, Business Continuity etc. to name but a few.

Timescales

In reviewing different options and approaches regarding procurement and contract activities, speed will be crucial. For example, some contracts are time critical, so if delayed it may result in requirements no longer being required, such as providing of catering for a cancelled event.

Business continuity and recovery

In making decisions around the immediate approach, due regard must be given to the longer term implications around any recovery phase post the immediacy of the current situation. This should include planning around future service delivery and any necessary contracts.

Force majeure⁻¹

- A force majeure clause will usually provide details as to what happens if
- certain unforeseen events arise,
- which impact on a contractual party and
- which events were beyond the control of the party relying on the clause.

The party suffering from the event is excused from, or entitled to suspend, performance of all or part of its obligations under the contract.

The events are usually extreme events, not caused by either contracting party - and could include outbreak of war or natural disasters. The party seeking to rely on the force majeure clause must prove

1. that the force majeure event falls within the clause and
2. that non-performance was due to the event.

Force majeure cannot be implied into contractual terms, it must be specifically drafted.

Because a force majeure clause will attempt to exclude a defaulting party from liability under a contract, the courts will look to interpret the clauses quite strictly and will ask what the parties intended at the time of making the contract. The courts will give general words their wider and natural meaning where appropriate.

Even if there is a force majeure clause, the detail is still critical. A high-level general force majeure clause may not include excusing the defaulting party due to the impact of the coronavirus on that party.

Common wording included within force majeure contracts frequently require the party relying on the clause to evidence:

- that the event was beyond its reasonable control;
- that the event has significantly prevented or delayed its ability to perform the required terms. Under English law just because the event renders the performance more expensive or less economical on a performing party will not in itself mean that it falls within force majeure; and
- it has taken mitigation steps.

Whether the contractual force majeure clause includes the coverage to cater for the coronavirus outbreak and/or any resulting government restrictions will really depend on the wording and scope of the particular clause. It is usual to see further drafting in these clauses dealing with contract pricing, suspension of payments and services, resumption requirements, and a potential to terminate.