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Frameworks in a 'Post Covid' World

Disruption from Covid-19 is set to continue. A lot has been written about dealing with delay and increased costs for projects on site, but what about those in gestation? Those which are part of long-term strategic planning, and which might be covered by framework agreements.

Under a framework agreement the prices might be set by a schedule of rates or a list of time-charges, and the only permissible adjustment could be the addition of inflation up to the date when an individual contract is awarded. Public sector clients (those that form the bulk of employers using frameworks) and contractors could, therefore, be locked into a long-term agreement with no obvious means of dealing with Covid-19 issues.

Public sector clients cannot renege on existing arrangements as they have to adhere to government and EU procurement rules, and although contractors are not obliged to enter into individual contracts, refusal could mean serious reputational damage. However, there are opportunities to be flexible ...

Help from the Government

Being mindful of possible short-term and long-term impact, the government has responded quickly, issuing several 'Procurement Policy Notes ('PPNs')'. These offer guidance on how clients can balance the actions needed to protect their projects, contractors, and supply chain, with their duties under procurement and public law.

PPN 01/20 and PPN 02/20 – dealing with immediate concerns

PPN 01/20 was published in March 2020, and was designed to address the procurement of goods, services and works that were required with 'extreme urgency'. Using this guidance might have allowed some of the usual constraints applying to public sector procurement to be dispensed with. However, it is unlikely that such urgent situations could still exist – four months after lockdown, so the time for applying PPN 01/20 has passed.

PPN 02/20 was also published in March 2020 and included, amongst other things, a suite of documents including model payment terms, advice on contingent workers impacted by the pandemic, advice for state-funded schools, and model terms for construction. The guidance applied until 30 June 2020, and has now been superseded by, or subsumed into, PPN 04/2020.¹

PPN 04/20 – transition and planning for the future

PPN04/20 – entitled 'Recovery and Transition from Covid-19' - updates and builds on PPN02/20 and is effective from 1 July 2020 to 31 October 2020. The focus is on formulating transition plans.

Notably, this guidance does not have contractual force and each contract is to be considered on its merits. It warns that some contracts may not be operationally relevant due to Covid-19, or may be commercially unsustainable and may need to be terminated. Any decision to terminate should, of course, be taken with great care,

¹ There is also PPN 03/20, which describes the use of procurement cards to accelerate payments to suppliers in order to improve cash flow.

because re-tendering takes time and often the outturn cost is higher. It might be better, therefore, to negotiate to avoid this scenario.

Relief is not automatic, and contracting authorities must still consider the Public Contracts Regulations. For example, there must be no duplicated relief – such as if the workforce earmarked to deliver the project has been furloughed. In addition, the PPNs are not designed specifically for Framework Agreements and advice should be sought on their applicability.

Conclusions

Public sector clients might not be able to extract themselves entirely from framework agreements, because, quite rightly, they need to stick to government and EU procurement rules. However, there is the possibility to negotiate using the proposals set out in PPN 04/20.

PPN 04/20 demonstrates the government's desire to return to the 'new normal'.

Whatever decisions are taken, detailed records should be kept to justify future actions, and to track how and when payments are made.

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Actions for Contractors

If clients are able to negotiate, there will be some key points for consideration by contractors. Trade bodies have published a lot of information, links to which are given below.² Unsurprisingly, the advice focusses on health and safety, and to a certain extent it is a distillation of the government advice – in a digestible form. It is worth remembering that a failure to mitigate the risks arising from Covid-19 or a failure to complete appropriate risk assessments could constitute a breach of health and safety law.

Contractors could be working on sites that are not open to the public, and things that could give rise to increased costs include:

- Limiting the number of workers on site at any time. Social distancing should be observed if possible.
- Staggering start times, having one-way flows and limiting how many workers are allowed in vehicles.
- Providing handwashing facilities or hand sanitiser at every entry and exit point.
- Discouraging non-essential trips between sites, reducing job and equipment rotation, and holding meetings outdoors if possible.
- Recommending workstations are moved further apart and arranged side-by-side rather than face-to-face.
- Keeping the workplace and vehicles clean.
- Using PPE.

²<http://cic.org.uk/covid-19.php>; <https://www.fmb.org.uk/about-the-fmb/policy-and-public-affairs/responding-to-coronavirus-covid-19/>; <https://www.constructionleadershipcouncil.co.uk/>; <http://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19>

When working in occupied premises, for example when completing work in social housing, things that could give rise to increased costs include:

- Maintaining social distancing on arrival and departure.
- Keeping work areas hygienic and clean.
- Using fixed teams for each job.
- Holding daily briefings to remind workers about health and safety.
- Nominating a 'coronavirus coordinator' to be responsible for keeping records of who is on site and reporting any instances of illness or breaches of the guidance.
- Keeping written records.
- Using PPE.

Conclusions

Where possible, negotiate to take account of the effects of Covid-19. Clients are aware of the challenges, and talking is preferable to disputes.

Consider factoring the following points into the discussions: the works period or completion date; the price for the works; the quality and quantity of materials due to limited supplies; and working hours and methods.

Plan for future restrictions.

Appreciate that the climate remains uncertain and that things will continue to evolve.

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