



Procurement Policy Note – Procurement in an Emergency

Information Note PPN 01/21

February 2021

Issue

1. This Procurement Policy Note (PPN) reminds contracting authorities of the options available to them when undertaking procurements in an emergency. This includes extremely urgent procurements required by the ongoing response to the COVID-19 pandemic and this PPN builds on the guidance in “PPN01/20 - Responding to COVID19”. It includes further information on the commercial risks inherent in direct awards without competition.

Dissemination and Scope

2. This PPN is applicable to all contracting authorities, including central government departments, executive agencies, non-departmental public bodies, local authorities, NHS bodies and the wider public sector. Together these are referred to in this PPN as ‘contracting authorities.’

3. Please circulate this PPN across your organisation and to other relevant organisations that you are responsible for, drawing it to the specific attention of those with a commercial and procurement role.

Timing

4. With immediate effect.

Background

5. There will be a range of commercial actions that must be considered by contracting authorities in responding to an emergency. In exceptional circumstances, authorities may need to procure goods, services and works with extreme urgency and without competition. This is permissible under current public procurement regulations using regulation 32(2)(c) of the Public Contracts Regulations 2015 (PCRs) but there are inherent commercial risks which authorities should take into account.

6. This PPN and accompanying guidance covers options that may be considered in relation to procurements under the PCRs (for the current financial thresholds, see PPN 06/19) including:

- call off from an existing framework agreement or dynamic purchasing system;

- call for competition using a standard procedure with accelerated timescales;
- extending or modifying a contract during its term;
- direct award due to absence of competition or protection of exclusive rights;
- direct award due to extreme urgency under regulation 32(2)(c).

7. Where required contracting authorities should publish a contract award notice on the Find a Tender service (FTS) as set out PPN 08/20. This includes emergency procurements under regulation 32(2)(c).

8. It is important that contracting authorities continue to achieve value for money and use good commercial judgement and sound decision-making in an emergency, including when making direct awards. Authorities need to manage these in the context of the broader risk of not being able to secure the required goods or services in a timely manner. Potential risks include:

- poor value for money such as abnormally high pricing;
- unequal treatment of suppliers in the procurement process;
- poor practice due to procuring at speed, such as retrospective contract awards or retrospective due diligence checks;
- lack of documentation around key procurement decisions including how conflicts of interest are identified and managed.

9. Contracting authorities must ensure they keep proper records of decisions. Regulation 84 of the PCRs states that authorities should document the progress of all procurement procedures, ensuring that they keep sufficient documentation to justify decisions taken in all stages of the procurement procedure. This includes procurements under regulation 32(2)(c).

10. Even though not required by regulation 32(2)(c), contracting authorities should consider some form of advertisement, running an informal competition and/or undertaking due diligence on the supplier market before making a direct award. This approach can have the benefit of allowing the authority to hold discussions with more than one supplier and potentially secure better value for money.

11. Contracting authorities procuring under the Defence and Security Public Contracts Regulations 2011, the Utilities Contracts Regulations 2016 and the Concession Contracts Regulations 2016 will need to check similar provisions in those regulations.

Contact

12. Enquiries about this PPN should be directed to the Crown Commercial Service Helpdesk on 0345 410 2222 or info@crownccommercial.gov.uk.

PUBLIC CONTRACTS REGULATIONS – PROCUREMENT IN AN EMERGENCY

Introduction

There will be a range of commercial actions that need to be considered by contracting authorities in responding to an emergency where the public interest is in being able to act quickly.

If you have an urgent requirement for goods, services or works due to an emergency, and you need to procure this under the Public Contracts Regulations 2015 (PCRs), there are various options available. These include:

- call off from an existing framework agreement or dynamic purchasing system;
- call for competition using a standard procedure with accelerated timescales;
- extending or modifying a contract during its term;
- direct award due to absence of competition or protection of exclusive rights;
- direct award due to extreme urgency under regulation 32(2)(c).

Where required, and this includes procurements under regulation 32(2)(c), contracting authorities should publish a contract award notice on the Find a Tender service (FTS) as set out PPN 08/20.

Depending on the specific nature of the requirement there may be further options under the PCRs, such as the additional delivery of supplies from an existing supplier (regulation 32(5)), additional similar works or services from an existing supplier (regulation 32(9)), or using the services of a subsidiary of another contracting authority (regulation 12). These have their own specific requirements and are not covered in this guidance.

Value for money

It is important that contracting authorities continue to achieve value for money and use good commercial judgement and sound decision-making in an emergency, including when making direct awards. Authorities need to manage these in the context of the broader risk of not being able to secure the required goods or services in a timely manner.

Potential risks include:

- poor value for money such as abnormally high pricing;
- unequal treatment of suppliers in the procurement process;
- poor practice due to procuring at speed, such as retrospective contract awards or retrospective due diligence checks;
- lack of documentation around key procurement decisions including how conflicts of interest are identified and managed.

In an emergency, prices may be higher than would be expected in a regular market and any abnormally high pricing should be approved by the appropriate commercial director. Contracting authorities should consider contractual mechanisms to ensure that they have the ability to secure pricing reductions through the life of the contract. If this is not possible, it should be documented.

Contracting authorities should consider whether it is possible to publish some form of advertisement, run an informal competition and/or undertake due diligence on the supplier market before making a direct award. This approach can have the benefit of allowing the authority to hold discussions with more than one supplier and potentially secure better value for money.

Contracting authorities should ensure they keep proper records of decisions. This could assist in demonstrating sound decision-making in the event of a future challenge. Regulation 84 of the PCRs states that authorities should document the progress of all procurement procedures, ensuring that they keep sufficient documentation to justify decisions taken in all stages of the procurement procedure. This includes emergency procurements under regulation 32(2)(c).

Contracting authorities should maintain documentation on any additional processes or criteria used in selecting suppliers for direct award of contracts. Selecting suppliers using evidence-based criteria can be beneficial in speeding up the procurement process while ensuring that the supplier is well-placed to meet the requirement, and it may mitigate the risk of any perception that the supplier is being treated more favourably than others. However, authorities need to ensure that the criteria are relevant, documented and applied consistently. Records should be kept to support procurement decisions and avoid perceptions of unfair treatment.

Contracting authorities should maintain documentation on how they have considered and managed potential conflicts of interest in the procurement process. Steps to manage actual and perceived conflicts of interest, for example those set out in the Ministerial Code and Civil Service Management Code, or other actions taken by awarding bodies should be documented. Particular attention should be taken to ensure award decisions are being made on the basis of relevant considerations and not personal recommendations. Proactive steps should be taken to identify conflicts of interest upfront and action should be taken to remove anyone with a conflict of interest from the decision-making process and to validate those decisions by reference to the relevant considerations.

Call off from an existing framework agreement or dynamic purchasing system

Central purchasing bodies, such as the Crown Commercial Service, offer public bodies access to a range of commercial agreements including framework agreements and dynamic purchasing systems (DPS).

It is possible to use one of these commercial agreements as long as:

- the contracting authority was clearly identified as a permitted customer in the original FTS or OJEU notice or the invitation to confirm interest;
- the goods, services or works to be procured fall within the scope of those covered by the framework agreement or DPS;
- the framework agreement was awarded or the DPS was established in accordance with the PCRs;
- the terms of the framework agreement or DPS are suitable and meet your requirements without the need for significant changes.

A framework agreement may provide for direct awards, mini-competitions or both. You must follow the procedure for awarding a call off contract set out in the framework agreement. An award under a DPS has to be by mini-competition and the minimum time for receipt of tenders is 10 days.

Suppliers on a framework agreement or DPS may legitimately use subcontractors to deliver aspects of the contract. However contracting authorities should be careful to work within the terms of the agreement and avoid using this as a method of bypassing proper process in order to secure the services of a specific subcontractor.

Using a standard procedure with accelerated timescales due to urgency

Contracting authorities can reduce the minimum timescales for the open procedure, the restricted procedure and the competitive procedure with negotiation if a state of urgency renders the standard timescales impracticable. The minimum time limits vary (see regulations 27(5), 28(10) and 29(10) respectively of the PCRs). For procurements under the open procedure, timescales can be reduced to 15 days for receipt of tenders plus the minimum 10 days for the standstill period.

There is no express requirement for the situation to be unforeseeable or not attributable to the contracting authority but you should set out in your notice a clear justification.

Contracting Authorities can also consider the use of the Light Touch Regime for specific health and social care related services (see regulations 74-77 of the PCRs). While contracting authorities are required to advertise contracts on the FTS and publish contract award notices, you are free to use any process or procedure you choose to run and are not required to use the standard procurement procedures (open, restricted, etc). You are also free to set your own timescales as long as they are reasonable and proportionate.

Extending or modifying a contract during its term

Regulation 72(1) sets out the following:

Contracts ... may be modified without a new procurement procedure ... in any of the following cases:

(c) where all of the following conditions are fulfilled:

(i) the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen;

(ii) the modification does not alter the overall nature of the contract;

(iii) any increase in price does not exceed 50% of the value of the original contract or framework agreement.

Contracting authorities should keep a written justification that satisfies these conditions, including limiting any extension or other modification to what is absolutely necessary to address the unforeseeable circumstance. This justification should demonstrate that your decision to extend or modify the particular contract was related to the emergency with reference to specific facts. You should publish the modification by way of a notice on FTS (see PPN08/20) to say you have relied on regulation 72(1)(c).

Multiple modifications are permissible, however each one should not exceed the 50% of the original contract value. You should also consider limiting the duration and/or scope of the modification and running a procurement for longer-term/wider scope requirements alongside it.

There are other grounds available under regulation 72 for extending contracts, including: if the proposed variation has been specifically provided for in the contract (regulation 72(1)(a)); where a change of contractor cannot be made for economic or technical reasons (regulation 72(1)(b)), and where the modifications are not substantial (regulation 72(1)(e)).

If more than one ground is applicable this may lower the legal risk and therefore you should ensure all relevant grounds are included in your written justification.

Direct award due to absence of competition or protection of exclusive rights

Regulation 32(2) of the PCRs also sets out that the negotiated procedure without prior publication may be used:

(b) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons: ...

(ii) competition is absent for technical reasons,

(iii) the protection of exclusive rights, including intellectual property rights,

... but only where no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement.

Therefore, a contracting authority may make a direct award where the works, goods or services needed to respond to the emergency can only be supplied by a particular supplier because:

- competition is absent for technical reasons e.g. there is only one supplier with the expertise to do the work, produce the product or with capacity to complete on the scale required; or
- the protection of exclusive rights, including intellectual property rights e.g.:
 - the supplier owns those rights (including intellectual property rights);
 - it has the exclusive right to exploit intellectual property rights.

But this is only when:

- there is no reasonable alternative or substitute available; and
- the contracting authority is not doing something which artificially narrows down the scope of the procurement e.g. by over-specifying the requirement.

Contracting authorities should keep a written justification that satisfies these tests. You should carry out a separate assessment of the tests before undertaking any repeat procurement to ensure these tests have been met on each occasion.

Direct award due to reasons of extreme urgency

Regulation 32(2) sets out the following:

The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases: ...

(c) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with.

... the circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority.

Contracting authorities may enter into contracts without competing or advertising the requirement so long as they are able to demonstrate the following tests have all been met:

- 1) There are genuine reasons for extreme urgency, e.g.:
 - you need to respond to the emergency immediately because of public health risks, loss of existing provision at short notice, etc;
 - you are reacting to a current situation that is a genuine emergency - not planning for one.
- 2) The events that have led to the need for extreme urgency were unforeseeable, e.g.:
 - the situation is so novel that the consequences are not something you should have predicted.
- 3) It is impossible to comply with the usual timescales in the PCRs, e.g.:
 - there is no time to run an accelerated procurement under the open or restricted procedures or competitive procedures with negotiation;
 - there is no time to place a call off contract under an existing commercial agreement such as a framework or dynamic purchasing system.
- 4) The situation is not attributable to the contracting authority, e.g.:
 - you have not done anything to cause or contribute to the need for extreme urgency.

Contracting authorities should consider whether these tests are met prior to making a contract award and should keep a written justification that satisfies these tests. You should carry out a separate assessment of the tests before undertaking any subsequent or additional procurement to ensure that they are all still met, particularly to ensure that the events are still unforeseeable. For example, as time goes on, what might amount to unforeseeable initially, may not do so in future.

Delaying or failing to do something in time does not make a situation qualify as extremely urgent, unforeseeable or not attributable to the contracting authority. This is because:

- the PCRs expect a contracting authority to plan its time efficiently so that it is able to use a competitive procedure;
- competitive alternatives (e.g. an accelerated open procedure) can be completed quickly;
- case law has held that knowing that something needs to be done means it is foreseeable;
- a contracting authority's delay or failure to do something is likely to mean that the situation is attributable to the contracting authority.

You should limit your requirements to only what is absolutely necessary both in terms of what you are procuring and the length of contract.

END