

New COVID-19 UK Government guidance for construction contracts and PFI/PF2 specific guidance

8 April 2020

The following UK Government guidance is intended to sit alongside and expand on previous guidance issued by the Government on how contracting authorities are to support Government suppliers through the COVID-19 outbreak, including in particular the guidance set out in [PPN 02/20: Supplier relief due to COVID-19](#) (our summary of which can be found [here](#)):

- On 2 April 2020, the Infrastructure and Projects Authority issued [guidance](#) on supporting vital service provision in PFI /PF2 (and related) contracts during the COVID-19 emergency. It is specific to PPP/PFI contractors and sets out how PFI contracting counterparties should co-operate to ensure the continued delivery of public services.
- On 6 April 2020, the Cabinet Office issued an additional guidance [note](#) specifically dealing with how PPN 02/20 should be applied in the context of construction contracts and contracts for works and the relief to be provided to such contractors in response to COVID-19. This additional guidance supports contracting authorities in implementing PPN 02/20 under existing works contracts to explain how contractual relief should be provided to at risk government suppliers (and their supply chain) that have been affected by COVID-19.

Guidance in relation to PFI/PF2

In summary, the applicable guidance states that:

- PFI contracting counterparties should co-operate to ensure the continued delivery of vital public services during the COVID-19 emergency, including the delivery of vital public services to the NHS through PFI contracts.
- Government does not regard COVID-19 as an event of force majeure and therefore expects that best efforts are made for the continuation of services.
- PFI contractors should ensure contingency plans are up to date and have been reviewed and discussed with contracting authorities to enable continuity of full services as far as possible.
- If PFI contractors cannot achieve full performance, contract standards and requirements should be moderated to enable stable delivery of vital services. Normal unitary payments should be maintained and there should be a temporary moratorium on related payment and performance mechanism points.

- Contract requirements and performance standards may need to be increased and unitary charge payments may need to be adjusted to reflect any required increase in requirements/ standards. PFI contractors must use best efforts to deliver any new requirements/standards.
- Where an asset is temporarily closed, the asset must be kept in a condition that it can immediately be brought back.

Guidance in relation to construction contracts

The guidance in PPN 02/20 generally applies to all contracts let under the Public Contracts Regulations 2015, Defence and Security Public Contracts Regulations 2011, the Utilities Contracts Regulations 2016 and the Concession Contracts Regulations 2016 and includes engineering, building and construction works contracts. However, the additional guidance issued on 6 April 2020 is intended to clarify specifically how that PPN should be applied to construction and works contracts.

In summary, the applicable guidance states that:

- Contracting authorities should identify their suppliers at risk and this should be taken on a case by case basis. Authorities do not need to undertake a detailed assessment of suppliers' financial viability.
- The contracting authority should continue to pay these at risk suppliers on a continuity and retention basis until at least the end of June 2020.
- Various forms of relief that an authority may agree with a supplier include accelerated payment of invoices, certification of interim valuations based on previous valuations and amendment to payment mechanisms. The guidance includes points for consideration by the authority and practical notes on the implementation of each relief.
- Not all relief options will be necessary or appropriate and the authority should consider the circumstances applicable to each supplier.
- Any relief granted will need to be accompanied by provisions around open book transparency and the provision by the supplier of supporting information.
- Implementation of any relief will require continued payment of employees and supply chain and to do so promptly within any specified time scale.
- Suppliers are prevented from also claiming under Coronavirus Job Retention Scheme (for some or all of the same employees) or other COVID-19 support schemes if the effect is that the supplier claims relief twice for the same hardship.
- Suppliers may be required to warrant that it will not be in breach of any financial covenants by accepting the relief and suppliers will not be able to enforce any security against a third party after receiving relief.
- Contract terms should be amended to reflect the relief agreed. Cabinet Office will publish Model Terms setting out examples under JCT and NCE contracts. Model Terms were included in the additional guidance note itself, so will presumably apply unless and until further Model Terms are published.
- The authority may consider early release of retentions and use of project bank accounts on a case by case basis.
- Model deeds of variation which aim to provide a set of terms that contracting authorities can use for NEC3 and JCT standard forms of contracts to allow a supplier, which the authority has identified as at risk because of COVID-19, to obtain relief in the manner agreed.

If you have any questions on any of the UK Government guidance or would like to talk about the consequences of the relevant policies and their impacts on your existing contracts, please let us know.

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