

## Procurement in a pandemic – top tips for tricky issues

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Procuring Organisations (Buyers) are currently grappling with a number of tricky issues arising from the COVID-19 pandemic and level 4 lockdown, including issues relating to both live and planned procurement processes. Buyers who are facing significant uncertainty, or who are without the resources to effectively staff procurement processes at this time are faced with difficult decisions such as:

- Whether to continue with live procurement processes or commence new ones
- What to do if procurement processes are cancelled or delayed
- Whether and how to address the impact of COVID-19 in any tender documentation – both in relation to the tender process itself and the contract that is released (in particular any proposed force majeure clauses).

### Amending or cancelling procurement processes - considerations

Buyers who cannot operate remotely or are seeking goods or services from businesses who cannot operate remotely, may find that some aspects of their planned procurement process (eg demonstrations, site visits) need to be modified or delayed in response to the lockdown. Even those Buyers who could continue with their procurement processes with limited disruptions may wish to at least revisit their timeframes to ensure that they are not obliged to transition to a new supplier in the next few months when the pandemic alert level may be at its highest.

Of course, many tender terms will provide flexibility for Buyers to vary some aspects of their procurement process (eg by changing the manner in which evaluations are undertaken or extending timeframes) and may even allow for the tender process to be cancelled altogether.

In deciding whether to vary or cancel a procurement process, public sector Buyers who must follow, or are encouraged to follow, the Government Procurement Rules (Rules) will need to be particularly mindful of the 'Five Principles of Government Procurement' (Principles).

The Principles include obligations to treat all suppliers equally, to be fair in how suppliers are assessed (including by not stringing them along), to make balanced decisions, to stay impartial and to be accountable, transparent and reasonable. Of course, this means that a Buyer will need to consider the impacts of COVID-19 on respondents as well as on their own operations. For example, when deciding to vary timeframes in a process, Buyers should consider whether those new timeframes are reasonable to potential respondents operating under pandemic conditions.

In this context, it is also worth considering:

- The availability of Buyer resources (for both internal and external advisers and key decision makers)
- The availability of supplier resources
- Whether it is possible to follow standard approval processes during the pandemic
- The prospect of limited market participation
- Whether any supplier presentations can be delivered remotely
- Whether the supplier's financial viability may be impacted by the pandemic
- The likely impact of a prolonged evaluation process and/or mobilisation process on the Buyer
- The likely need for the services in the short to medium term, when it is largely unknown how long the lockdown will last (or whether it may recommence at a later date), and how the economy will react when lockdown is lifted.

If Buyers keep the Principles in mind and communicate in a clear and timely manner with respondents about what they are doing and why, in most circumstances the legal risks of amending or cancelling a procurement process should be minimal. However, every procurement process is different and when in doubt, seek advice.

### What to do if procurement processes are cancelled or delayed

Cancelling or delaying procurement processes will present a number of choices to Buyers such as:

- Whether to go directly to a particular supplier to source what is needed
- Whether to hold off and make do without the particular goods or services
- Whether to extend an existing contract to ensure continuity of supply.

Extending an existing contract can often require a negotiation if no unilateral renewal right has been included in the contract. Therefore, before making decisions to cancel or extend planned or live procurement processes, Buyers should:

- First analyse whether they have a unilateral right to extend their existing contracts
- If not, confirm that the existing supplier will agree to an extension on acceptable terms
- Carefully consider the interrelationship between price and term. The longer the renewal term the Buyer commits to, the more likely that it will get a better price (and perhaps terms) with the supplier. However, a longer renewal term may restrict the Buyer in restarting its procurement process in the future. In light of this, we have found that many Buyers are looking to extend contracts for a series of short renewal terms (eg six months with two further renewal terms of six months each), and
- Consider the extent to which any contract extension negotiation might be an opportune time to clarify for both the Buyer and the existing supplier the parties' disengagement obligations – particularly in light of what may be specifically needed in pandemic conditions.

Of course, for public sector Buyers, simply going directly to a new supplier or extending an existing contract is not straightforward. These Buyers need to be careful not to fall foul of Rules 6 or 7 of the Rules, which require open procurement for contracts over the prescribed value thresholds, unless there is an exception to open procurement under Rule 14.

Helpfully, Rule 14(9) provides a range of exemptions – one of which is an emergency. In our view, the legal risk of non-compliance with the Rules should be relatively minimal if:

- The relevant Buyer's procurement is genuinely and significantly affected by the pandemic
- That Buyer documents its rationale for extending the existing contract (or going directly to a new supplier), and
- The relevant extension or new contract is proportionate to the emergency.

When considering what is proportionate to the emergency, the Buyer needs to avoid locking itself into a contract for a longer period than it might feasibly need to procure and transition to a new set of services or provider in the ordinary course once the pandemic conditions abate. MBIE's "[Quick Guide to Emergency Procurement](#)" sets out some of the issues to be considered by Buyers in this context, and MBIE has also issued additional guidance specific to COVID 19 which can be found [here](#).

## **What to do with those pesky force majeure clauses?**

Whether or not force majeure applies to relieve the Buyer or seller of their contractual obligations will depend on the terms of the particular contract. However, many contracts (including draft contracts prepared for procurement processes) will be drafted in a way that means that, at first blush, the pandemic could be a force majeure event.

The problem is that no Buyer wants to select a supplier who turns around and on day one of the contract term asserts a force majeure event and claims relief from any failure to meet its obligations. Whether a supplier could, in fact, do that will depend on the contract terms, the relevant pandemic impacts they claim are preventing their performance and whether those impacts were known and could have been addressed in their proposal or the contract.

It may be tempting to simply take the view that COVID-19 is a known event that should be factored in to a tender response and therefore excluded from the definition of force majeure under the contract. However:

- That is not likely to be palatable to supplier respondents and won't always be achievable or reasonable – particularly in relation to procurements that are heavily dependent on the duration of restrictions on international travel and the impact on supply chains
- COVID-19 may have an effect that is not anticipated by the Buyer, and so the Buyer may also need the benefit of force majeure protection in the future
- If suppliers are forced to take the risk of COVID-19, they may well look to price that risk and effectively pass at least some of that back to the Buyer.

An alternative approach worth considering is for Buyers to ask respondents, as part of the procurement process, to clearly identify in some detail:

- What part or parts of their proposal may be affected by the pandemic and how
- What steps/arrangements they are putting in place to mitigate the potential impact of the pandemic on their ability to deliver in accordance with their proposal.

This information can then potentially form part of the Buyer's assessment/evaluation process. It can also lead to some concrete contractual commitments (particularly around business continuity arrangements) that can usefully and appropriately allocate a level of risk to the supplier. This may also give the Buyer greater certainty that delivery of the services will actually be possible in the immediate future if the supplier puts in place such pandemic mitigations.

Many force majeure clauses will include a carve out for events (or the effects of events) that could have been mitigated or avoided through the exercise of reasonable precautions. This exclusion could be 'bolstered' so that suppliers will not be able to claim force majeure relief to the extent that their failure to perform would have been avoided if they had implemented the arrangements they identified in their proposals to address the known risks and likely effects arising from the pandemic.

## **Conclusion**

These issues are challenging and require a balance to be struck between the needs of the Buyer in the short-to-medium term and the long term benefits of running robust procurement processes and building and maintaining good relationships with both existing suppliers and potential future suppliers.

For Buyers operating in both the public and private sectors, the Principles set out in the Rules can provide a marker of best practice and a useful touchstone when considering a way forward. In particular, if Buyers remain impartial, honest and transparent, in these extraordinary times, unforeseen and potentially disruptive procurement decisions are more likely to be well-received and understood.

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