Cabinet Office

Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency

7 May 2020

Key guidance in this note

1. The guidance in this note is that parties to contracts should **act responsibly and fairly**, **support the response to Covid-19** and **protect jobs and the economy**.

Purpose of this note

2. The Covid-19 emergency requires all of us to work together in the national interest to protect the health and safety of everyone in the United Kingdom, our vital public services including the NHS, jobs and our economy.

3. This note sets out guidance and recommendations for contractual behaviour where impacted by the Covid-19 emergency. In summary, the Government is strongly encouraging all individuals, businesses (including funders) and public authorities to act responsibly and fairly in the national interest in performing and enforcing their contracts, to support the response to Covid-19 and to protect jobs and the economy.

4. At a time when individuals in the UK are being asked to act responsibly in their personal and work lives – by staying at home, social distancing and self isolating – it is also right that individuals, businesses (including funders) and public authorities who are parties to active contractual arrangements which are materially impacted by Covid-19 should consider their behaviour as part of the national response to the public health emergency we are currently facing.

5. Responsible and fair behaviour in contracts now – in particular in dealing with potential disputes – will result in better long-term outcomes for jobs and our economy. In complex contracting arrangements, this should apply throughout the contracting chain. It will in the long term protect businesses, supply chains and opportunities in the economy. Bad behaviour will be bad for jobs and will impair our economic recovery.

Status and scope of this note

6. This note sets out guidance and recommendations for parties to contracts, in both the public and private sectors, where the performance of contracts (including an obligation to make payment) is materially impacted by the Covid-19 emergency. It is non-statutory guidance but Government strongly encourages parties to contracts to follow this guidance for their collective benefit and for the long-term benefit of the UK economy. This note does not apply in the devolved administrations.

7. Whilst this guidance has general application to all active contractual arrangements materially impacted by Covid-19, it is guidance only and is not intended to override:

(a) specific guidance or procurement policy notes issued by the Government (or any public or regulatory authority);

(b) any specific support or relief available:

(i) in the relevant contract (for example relief given in express provisions in the contract),

(ii) in law, custom or practice (including any equitable relief), or

(iii) from the Government in response to the Covid-19 emergency, including loans and grants, guarantees, financial support for workers and revised tax arrangements; or

(c) any other legal duties or obligations with which a party to a contract is bound to comply and any national security interests.

8. It is not intended to override specific contracts whose primary purpose is to make express and clear provision for, and allocate risks in respect of, the effects of global or national public health emergencies or pandemics, especially contracts of insurance, although the Government would encourage responsible and fair behaviour where possible.

9. This guidance does not apply to contracts or transactions which are speculative in nature in respect of risks similar to the Covid-19 emergency or to financial market transactions.

Objectives of responsible and fair behaviour

10. The Government strongly encourages responsible and fair performance and enforcement of contracts during this public health emergency. The circumstances we collectively find ourselves in are unprecedented and exceptional.

11. The Government is asking for an extraordinary response from everyone in the UK in their personal and work lives to overcome the emergency. An extraordinary response is also required from individuals, businesses (including funders) and public authorities in their contractual arrangements. Contractual arrangements play an important role in the functioning of our country and our economy – including providing vital works, goods, services and premises, supporting our public services and enhancing and maintaining our national infrastructure. The continued provision of vital services and support through contracts (and supply chains) is essential as part of our national response to the Covid-19 emergency, including to the NHS and care homes.

12. It is recognised that parties to some contracts may find it difficult or impossible to perform those contracts in accordance with their agreed terms as a result of the impact of Covid-19 – including through illness in the workforce, the effects of restrictions on movement of people and goods, revised ways of working necessary to protect health and safety, the closure of businesses or the reduction in a party's financial resources available to make payments otherwise due under the contractual arrangements.

13. Responsible and fair behaviour in contractual arrangements, described more fully in paragraphs 14 and 15, will contribute to the following objectives being met:

(a) where possible, maintaining contractual performance which is required to support the immediate response to Covid-19, protect public health, jobs and the economy;

(b) ensuring cashflow in those contracts is maintained, including to pay the workforce and individuals and businesses throughout the supply chain;

(c) where continued contractual performance is not possible or is not essential, ensuring those contracts, supply chains and markets can be preserved during the public health emergency, avoiding destructive disputes and insolvencies; and

(d) generally, ensuring that contractual and economic activity can be preserved and will be ready to continue in a sustainable way once the current emergency is over, supporting the restart of the economy and maximising UK productivity and growth.

Responsible and fair contractual behaviour

14. Responsible and fair behaviour is strongly encouraged in performing and enforcing contracts where there has been a material impact from Covid-19. This includes being reasonable and proportionate in responding to performance issues and enforcing contracts (including dealing with any disputes), acting in a spirit of co-operation and aiming to achieve practical, just and equitable contractual outcomes having regard to the impact on the other party (or parties), the availability of financial resources, the protection of public health and the national interest.

15. In particular, responsible and fair behaviour is strongly encouraged in relation to the following:

(a) requesting, and giving, relief for impaired performance, including in respect of the time for delivery and completion, the nature and scope of goods, works and services, the making of payments and the operation of payment and performance mechanisms;

(b) requesting, and allowing, extensions of time, substitute or alternative performance and compensation, including compensation for increased cost or additional performance;

(c) making, and responding to, *force majeure*, frustration, change in law, relief event, delay event, compensation event and excusing cause claims;

(d) requesting, and making, payment under the contract;

(e) making, and responding to, claims for damages, including under liquidated damages provisions;

(f) returning deposits or part payments;

(g) exercising remedies in respect of impaired performance, including enforcement of security, forfeiture or repossession of property, calling of bonds or guarantees or the initiation or continuation of insolvency or winding up (or equivalent) proceedings;

(h) claiming breach of contract and enforcing events of default and termination provisions (including termination rights arising by reason of the insolvency or potential insolvency of a party);

(i) making, and responding to, requests for information and data under the contract;

(j) giving notices, keeping records and providing reports under the contract (recognising that the need to keep records of contractual behaviours and

decisions, including the behaviours referred to in this guidance, is important);

(k) making, and responding to, requests for contract changes and variations;

(l) making, and responding to, requests for consents (including funder consents);

(m) commencing, and continuing, formal dispute resolution procedures, including proceedings in court;

(n) requesting, and responding to, requests for mediation or other alternative or fast-track dispute resolution; and

(o) enforcing judgments.

16. The responsible and fair behaviour described in paragraphs 14 and 15 should continue to apply in circumstances where the relevant contract is materially impacted by Covid-19, so that fair and equitable outcomes can be achieved in contractual arrangements and the objectives described in paragraph 13 can be met.

17. It is recognised in particular that disputes, especially a "plethora of disputes", can be destructive to good contractual outcomes and the effective operation of markets. Further to paragraphs 15(m) and 15(n), the Government would strongly encourage parties to seek to resolve any emerging contractual issues responsibly – through negotiation, mediation or other alternative or fast-track dispute resolution – before these escalate into formal intractable disputes. For example, the Construction Industry Council and the Royal Institution of Chartered Surveyors (RICS) have developed the Low Value Disputes Model Adjudication Procedure. RICS also developed the Conflict Avoidance Pledge (and an associated Conflict Avoidance Procedure) for early resolution of disputes and is expected to launch a fast-track (15-day) adjudication service which will have capped fees.

18. For the construction sector generally, the Construction Leadership Council is expected to issue further guidance and recommendations on or around the date of this guidance.

19. For insolvency, proposed changes to the insolvency rules to help businesses impacted by the Covid-19 emergency, including a proposed moratorium on creditor action, were announced by the Government on 28 March 2020.

Future state of contractual arrangements

20. The Government will continue to review behaviours in contracting, including public sector procurement, performance, prompt payment and contract management arrangements, as we emerge from this public health emergency to ensure that contractual arrangements can function effectively and maximise their contribution to jobs and the economy.

Further information and advice

21. Further information and advice is available from the Cabinet Office, Crown Commercial Service, Department for Business, Energy and Industrial Strategy and Infrastructure and Projects Authority.

22. The following sources of information may also be helpful.

For Government information on the Covid-19 emergency:
www.gov.uk/coronavirus

For public health information:
www.nhs.uk/conditions/coronavirus-covid-19

For public sector suppliers:
www.gov.uk/government/collections/procurement-policy-notes

For housing:
www.gov.uk/government/publications/covid-19-and-renting-guidance-for-landlords-tenants-and-local-authorities

For PFI and PF2:
www.gov.uk/government/publications/supporting-vital-service-provision-in-pfipf2-contracts-during-the-covid-19-emergency

For regulated sectors, including financial institutions:
contact the relevant market regulator

For construction:
www.constructionleadershipcouncil.co.uk/news/site-operating-procedures-version-3-published
www.cic.org.uk
www.rics.org

For insolvency:
www.gov.uk/government/organisations/insolvency-service

23. This is a rapidly developing situation and this guidance may therefore be revised and reissued as necessary. Further measures may be taken in respect of the guidance and recommendations in this note, including legislation.

24. This guidance may be supplemented by a set of Frequently Asked Questions and Answers as the situation develops.

Timing

25. This guidance applies with immediate effect and will be reviewed on or before 30 June 2020, together with any feedback on compliance with the behaviours set out in this note and the need for further measures.

Cabinet Office
7 May 2020