

## **NORTH SOMERSET COUNCIL DECISION**

**DECISION OF: DIRECTOR OF DEVELOPMENT AND ENVIRONMENT**

**IN CONSULTATION WITH: CHIEF EXECUTIVE, EXECUTIVE MEMBER FOR PUBLIC TRANSPORT, CHAIRMAN OF THE STRATEGIC PLANNING, ECONOMIC DEVELOPMENT AND REGENERATION POLICY AND SCRUTINY PANEL.**

**WITH ADVICE FROM: MONITORING OFFICER AND S151 OFFICER**



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**DECISION NO:** 19/20 DE 345

This decision is being taken under the urgency/emergency powers provided in the officer delegations in the Constitution – General Director powers para 2.2:

To take emergency action on behalf of the Council on any matter in cases of urgency or emergency with, wherever possible, prior consultation with the Chief Executive and Director of Corporate Services and the Executive Member and the Chairman of the appropriate Policy and Scrutiny Panel or Committee and Subject to a report as soon as possible afterwards to the appropriate body.

**SUBJECT:** Bus Operator Support Package

**KEY DECISION:** YES

**REASON:** The value of this decision is over £500,000

### **BACKGROUND:**

We are working on measures to provide financial stability for the bus network, services and operators in liaison with WECA officers, DfT officials, and other Combined Authorities via the Urban Transport Group. We are seeking a rapid resolution to the mechanism of providing any additional emergency funding, drawing on the information issued by the Chancellor and subsequent Government direction. In due course we will also need to follow up with further calls related to worker transport, vulnerable persons deliveries, business support and HTST packages.

Our principal operator, First have seen a 90% patronage decline in the last week in the WoE area. Their ability to operate by the Summer is now in question, given pressures in their rail operations too (and it is to be seen how much mitigation is provided by today's rail franchise announcements). Timetable is to reduce beyond a Sunday schedule (which is around 50% timetable).

The financial offer buys time for Government to catch up and provide a cash injection, as in part announced Friday – the need is immediate and NSC (with WECA) need to demonstrate leadership and assurance in this crisis situation. We believe there may be opportunities to claim back funding later on from Central Government but these payments

are not going to be able to produce legally enforceable or contracted arrangements with First or other operators in these circumstances and at the speed we need to move.

These measures are to provide immediate certainty of cash flow to all operators, and these actions carry a low financial risk as all payments are within existing budgets, but they would provide reassurance that operators have the support from NSC for their long-term survival and future role in the region.

It remains unclear what level of public bus services will be operating. First are amending their timetable from 23 March to operate an amended Saturday timetable, and then from 30 March a further greatly reduced timetable. WoE authorities met First and have asked them to ensure peak time services and destinations feature in the revised timetable given their importance to our essential workers.

Based on these timetable changes First bus will have around 550 drivers that are on their books not required from 30 March (of 1400 in total, with 700 required to drive Sunday service buses and 150 self-isolating – these numbers will of course change).

Vehicles currently present an issue as DVSA have suspended all vehicle testing for HGVs/PCVs (i.e. MOTs), meaning that some buses are unavailable (and that this number would grow every month if not corrected). Making vehicles available to NSC might therefore be an issue for operators unless this is changed.

We are very likely to require bus, coach and driver resources for transport of key workers, social care, home to school and vulnerable needs transport, Shielding the Vulnerable, ambulance driving and so on. These valuable resources are held by operators (drivers, logistics staff, vehicles) and as the crisis develops further we would make clear our expectation of a quid pro quo agreement on this basis. This is a goodwill payment to secure their help.

It is important to note that the below has already been agreed and approved by WECA and therefore consistency across the West of England is an important consideration.

#### **DECISION:**

1. Redeployment of staff to provide bus operator business support and ITU analytical and project support.
2. Authorise the preferred option 2, as in line with Cabinet Office – Procurement Policy notice (02/20), and the Supplier Payment Principles agreed by CLT.

#### **REASONS:**

All payments are within the budgeted amounts for 20/21 and are required immediately if NSC financial support is to prevent operator collapse.

#### **OPTIONS CONSIDERED:**

##### **Option 1 – immediate spend c.£588,750k**

- Immediately pay operators from the 2020/21 concessionary travel budget the same as they would have expected to receive for Q1 April – June, irrespective of whether journeys are taken, totalling c.£419,985, in a lump sum.

- Immediately pay Community Transport providers their annual contract amounts for 20/21 totalling £131,000.
- Guarantee payment to operators for the supported service contracts in place to the end of June totalling £37,750.

Actions as proposed by WECA	NSC Financials	NSC Notes
<p>Pay operators from the 2020/21 concessionary travel budget the same as they would have expected to receive for Q1 April – June, irrespective of whether journeys are taken.</p>	<p>c£419, 985</p>	<p>Payment of 91.5% of Average Concessionary Fares Payment Amounts for 3 months.</p> <p>£459,000 was paid in April, May and June 2019 and therefore 91.5% of this is £419,985.</p> <p>Patronage has been reducing over the past year by 8.5% hence the use of the 91.5% payment amount.</p> <p>The financial resources that will be freed within the concessions budget may be required to facilitate operator as a last resort interventions or be used to arrange transport of key workers, goods or deliveries to vulnerable households. Guaranteeing it to operators is a potentially risky use of resource, especially where we have been told that routes are being de-registered as is the case with Stagecoach.</p> <p>We have extended the validity of the scheme to 24hr travel. First saw 244 uses in Fridays morning peak. At current levels there would be a 40% reduction in this budget, but there will be some travellers anyway.</p> <p>Some proportion of the amount would be paid anyway where passenger travel continues.</p>
<p>Pay Community Transport providers their expected contract sums</p>	<p>c.£131,000 Community Transport Payment in full</p>	<p>NSC usually pay the full community transport grant in April of each year, which would be £131,000 in total, deviating from is (as WECA have proposed to offer 3 months payments) would have a negative impact for groups if we were to only pay one quarter. <i>We instead recommend paying annual grants in full.</i></p> <p>It is prudent to maintain these payments as is for NSC unless there is high chance of insolvency otherwise. Many have had to reduce operations due to having high risk drivers unable to work.</p> <p>Some groups have already approached NSC offering assistance, and we expect to utilise their resources to assist with Shielding the Vulnerable and HTST needs. WDCT have stopped community services but</p>

		will be immediately setting up key worker transport with the ITU instead but are unable to do so without their grant payments.
Guarantee payment to operators for the supported service contracts in place to the end of June.	c.£37,750 Supported Bus Service payment	<p>Annual Budget is £137,000 less MTFP of £30k. We also receive S106 funding of £130k. Total £237,000 budget annually.</p> <p>25% (3 months) less Carmel is £151,000. 3 months costs are £37,750 in quarter 1.</p> <p>We are committed to paying contractual costs regardless of if they operate or not, unless the operator defaults. It is prudent to maintain these payments unless there is high chance of insolvency.</p> <p>Carmel Coaches operate 88 with £86,000 annual support and the A5 with £96,000 S106 Airport Funds. Traffic Commissioner PG13 maintenance prohibition - may mean unable to operate legally. Therefore, ITU is commissioning independent maintenance inspection to establish whether they are able to operate safely. Payment may instead be required for alternative supplier and/or be conditional on this inspection. In this case we will liaise directly with finance business partners.</p>
Payments will be made immediately to provide certainty of cash flow.	Payment 3 months in advance – all above budget areas.	<p>ITU will need finance business partners' to support and advise on how to do this within financial regulations or how to deviate from them.</p> <p>Payments are usually:</p> <ul style="list-style-type: none"> <li>• for supported bus are made monthly in arrears,</li> <li>• concessionary fares are paid monthly 3 months in arrears,</li> <li>• CT contracts paid in full in advance</li> </ul> <p>This change is to help cashflow/liquidity. The situation will be reviewed ahead of Q2 2020/21. It is vital we do this urgently to provide cash flow for these businesses.</p>
Offer all bus operators business advice to support access to	Staff redeployment complete and work to begin this week	We are treating bus operators as businesses and provide advice on the loans/grants being made available – WECA are dedicating an officer to this, we will also do likewise.

Government emergency loans and grant payments.		ITU are going to need redeployed staff (I will initially ask for business engagement support from STARS) and support from ED team to make this possible. Timescales are very tight for some operators.
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**Option 2 – spend of c.£588.5k spread over April, May and June**, as per 2019/2020 payments and table below.

- Pay the operators from the 2020/21 concessionary travel budget the same as 2019/2020, monthly however reduced by 8.5% to reflect the drop in patronage that has been seen over the past year. Totalling £419,985.
- Issue the payments for Community Transport contracts in line with the payment protocol for 2019/2020 i.e. contract amounts are paid in full at the start of the year. Totalling £131,000.
- Guarantee payment to operators for the supported service contracts in place to the end of June totalling £37,750, as per 2019/2020. On the same basis of routes/operators as option 1 above.

<b>Based on 19/20 spend</b>				
	April	May	June	Q1 Total
	£'000	£'000	£'000	£'000
Concessionary Fares	103	216	140	<b>459</b>
Less 8.5%	94	198	128	<b>420</b>
Community Transport	131	0	0	<b>131</b>
Supported Bus	12.5	12.5	12.5	<b>37.5</b>
<b>Total for month</b>	<b>237.5</b>	<b>210.5</b>	<b>140.5</b>	<b>588.5</b>

**FINANCIAL IMPLICATIONS:**

Option 1 would require forward funding, as the budget allocation is for 2020/2021. Option 2 would be in line with the Cabinet Office Procurement Policy Notice (02/20)

**Costs**

Option 1 £588,750k immediately  
 Option 2 £247.5k April, £210.5k May £140.5k June – total £588.5k

**Funding**

Option 1 would require forward funding.  
 Option 2 would be from 2020/2021 base budgets

**LEGAL POWERS AND IMPLICATIONS**

N/A

**CLIMATE CHANGE AND ENVIRONMENTAL IMPLICATIONS**

N/A

## **CONSULTATION**

The original recommendation emerged from discussions at WoE Joint Committee on Friday 20 March, and subsequent clarification discussions with Cllr Donald Davies, Executive Member for Public Transport/Leader of the Council.

We have been in wide consultation with the bus industry operators of all types, who are expressing grave and urgent concerns about their business viability. Without urgent intervention we face industry collapse from our largest to smallest operators and across all types of passenger operations (i.e. public bus, support bus, community transport, home to school transport). These measures are aiming to ensure business liquidity.

We have discussed our sector concerns with Department for Transport. We note that they are in discussion with HM Treasury and Ministers to effect a package of bus sector interventions. These are yet to be signed off but from initial indications do not seem adequate to prevent operator collapse on a widespread basis.

## **RISK MANAGEMENT**

Detailed in background information

## **EQUALITY IMPLICATIONS**

Have you undertaken an Equality Impact Assessment? No

## **CORPORATE IMPLICATIONS**

NA

## **APPENDICES**

DfT COVID-19 – Supporting the Bus and Coach Sector and its Passengers  
Cabinet Office Procurement Policy Note - Supplier relief due to COVID-19

## **BACKGROUND PAPERS**

Papers discussed at Corporate Leadership Team 20 and 23 March 2020.

## **DECISION MAKER:**

Signed:  Director of Development and Environment

Note: If electronic signature used email from Director confirming decision and allowing use of electronic signature must be attached

Date: 27 March 2020.

**With advice from:**

Signed:  Monitoring Officer

Note: If electronic signature used email from MO confirming decision and allowing use of electronic signature must be attached

Date: 27 March 2020

Signed:  S151 Officer

Note: If electronic signature used email from S151 confirming decision and allowing use of electronic signature must be attached

Date: 27 March 2020.

**Consultees:**

Signed:  Chief Executive

Note: If electronic signature used email from Chief Executive confirming consultation and allowing use of electronic signature must be attached. If consultation undertaken verbally Director must record date and time of the conversation and any agreement/concerns raised by consultee

Date: 31 March 2020.

Signed:  Executive Member for Public Transport

Note: If electronic signature used email from Executive Member confirming consultation and allowing use of electronic signature must be attached. If consultation undertaken verbally Director must record date and time of the conversation and any agreement/concerns raised

by consultee

Date: 31 March 2020

Signed: Cllr John Crockford-Hawley. Chairman of Strategic planning, economic development and regeneration policy and scrutiny panel.

Date: Agreed by email. 20 April 2020



Department  
for Transport

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Tel: 0300 330 3000

Web Site: [www.gov.uk/dft](http://www.gov.uk/dft)

To Local Authority Transport Officers

DATE 25 March 2020

via email

Dear colleague,

## **COVID-19 – Supporting the Bus and Coach Sector and its Passengers**

The onset of coronavirus in England has had a significant impact on how people travel. We understand the importance of bus services to communities, key workers and people taking essential journeys, and we are determined to support them.

### **Continuity of payment to operators**

Ministers have therefore agreed that the Department will continue to pay Bus Service Operators Grant to operators on the basis of estimated service levels before the coronavirus outbreak, and will not revise these estimates down where service levels have declined due to the coronavirus impact on the industry.

The Department appreciates that local authorities are facing a range of pressures as a result of the coronavirus. But Ministers hope, and expect, that as part of your response, you will want to support vital local bus service providers so that they can continue to play a central role in your communities after this pandemic.

In particular, we would urge you to continue to pay bus and coach operators for tendered services and home to school transport at the levels before any downturn in service provision or patronage, for at least the period of the outbreak. This will help ensure that bus operators continue to be able to provide socially necessary services once the outbreak is over. This is set out in detail in Procurement Policy Note 02/20 - Supplier Relief Due to COVID-19 (attached). This means that contracting authorities should continue to pay suppliers for the next three months (even if service delivery is disrupted//temporarily stopped) in order to ensure business continuity and protect jobs. Authorities should also pay invoices immediately on receipt to support cashflow. We would also urge you to continue to pay operators for concessionary fares at levels before any downturn.

Local authorities are well-placed to understand their local bus services and nothing in the above should stop you from, as part of this funding, seeking to ensure that bus operators make an appropriate offer to passengers, for example by protecting vital services which connect communities to lifeline services such as supermarkets, or link key workers to their employment.

We understand that local authorities are also under financial pressure, hence the recent Government announcement of an additional £1.6 billion support to local authorities to

respond to coronavirus. But we are keen to ensure that local transport services are still available to those that need them most during this period.

Without our joint support, bus services and the communities they serve will be impacted for the foreseeable future – with services at risk of being lost or requiring local authority support.

### **Changes to timetables**

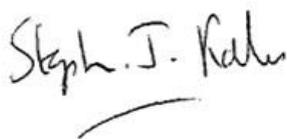
As you may be aware, we have also been working with the Office of the Traffic Commissioner (OTC) to ensure changes to bus services can be made promptly in response to a shortage of drivers or reduced passenger demand, while maintaining vital services for key workers and other making essential journeys. Operators will be able to send applications for temporary variation of services made at short notice, due to the exceptional nature of the situation, to both the Traffic Commissioner and relevant local authority at the same time and include a full timetable. As part of this process, we are asking local authorities to limit the time for consulting them to 24 hours instead of 28 days.

The Secretary of State is clear that he expects that as bus operators amend their timetables they should continue to provide appropriate service levels for key workers, most particularly to hospitals, and that buses are not heavily loaded because of reduced service patterns. In doing so we would expect bus operators to do all that they can to ensure that they are always providing the services that local authorities consider are required. We also wish to see first class communication to passengers so that they are absolutely clear about what buses will be running where and when. Please work closely with your operators to ensure that this is achieved.

As you know, as part of the Better Deal for Bus Users, we provided an additional £30 million to local authorities to help support new services or replace lost services. Given the circumstances, local authorities may wish to use this funding to support bus operators to run minimum service levels during this time. If any local authority wishes to amend proposals that they have already submitted please contact the email address [betterdeal4buses@dft.gov.uk](mailto:betterdeal4buses@dft.gov.uk).

Thank you for your support.

Yours faithfully,



Stephen Fidler  
Director of Local Transport



Cabinet Office

# Procurement Policy Note - Supplier relief due to COVID-19

Action Note PPN 02/20

March 2020

## Issue

1. This Procurement Policy Note (PPN) sets out information and guidance for public bodies on payment of their suppliers to ensure service continuity during and after the current coronavirus, COVID-19, outbreak. Contracting authorities must act now to ensure suppliers at risk are in a position to resume normal contract delivery once the outbreak is over.

## Action

2. All contracting authorities should:
- Urgently review their contract portfolio and inform suppliers who they believe are at risk that they will continue to be paid as normal (even if service delivery is disrupted or temporarily suspended) until at least the end of June.
  - Put in place the most appropriate payment measures to support supplier cash flow; this might include a range of approaches such as forward ordering, payment in advance/pre-payment, interim payments and payment on order (not receipt).
  - If the contract involves payment by results then payment should be on the basis of previous invoices, for example the average monthly payment over the previous three months.
  - To qualify, suppliers should agree to act on an open book basis and make cost data available to the contracting authority during this period. They should continue to pay employees and flow down funding to their subcontractors.
  - Ensure invoices submitted by suppliers are paid immediately on receipt (reconciliation can take place in slower time) in order to maintain cash flow in the supply chain and protect jobs.

## Dissemination and Scope

3. 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 (excluding Devolved Administrations). Together these are referred to in this PPN as 'contracting authorities'. This PPN covers goods, services and works contracts being delivered in the UK.

4. 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 finance role.

## Timing

5. With immediate effect until 30 June 2020.

## Background

6. The current outbreak of COVID-19 is unprecedented and will have a significant impact on businesses of all sizes. Many suppliers to public bodies will struggle to meet their contractual obligations and this will put their financial viability, ability to retain staff and their supply chains at risk. Contracting authorities should act now to support suppliers at risk so they are better able to cope with the current crises and to resume normal service delivery and fulfil their contractual obligations when the outbreak is over.

7. It is vital that contracting authorities pay all suppliers as quickly as possible to maintain cash flow and protect jobs. Contracting authorities should also take action to continue to pay suppliers at risk due to COVID-19 on a continuity and retention basis. Contracting authorities can consider making advance payments to suppliers if necessary.

8. Central Government organisations should note that Managing Public Money prohibits payment in advance of need in absence of Treasury consent as this is always novel contentious and repercussive. However, in the circumstances Treasury consent is granted for payments in advance of need where the Accounting Officer is satisfied that a value for money case is made by virtue of securing continuity of supply of critical services in the medium and long term. This consent is capped at 25% of the value of the contract and applies until the end of June 2020. HM Treasury will review in mid-June whether this consent needs to be extended for a further period. Consent for payment in advance of need in excess of this amount should be sought from HMT in the usual way. This consent does not alleviate Accounting Officers their usual duties to ensure that spending is regular, proper and value for money or for other contracting authorities to conduct appropriate and proportionate due diligence to ensure such payments are necessary for continuity of supply of critical services.

9. Contracting authorities should aim to work with suppliers and, if appropriate, provide relief against their current contractual terms (for example relief on KPIs and service credits) to maintain business and service continuity rather than accept claims for other forms of contractual relief, such as force majeure.

10. Continuing to make payments to at risk suppliers will present risks including that, despite these exceptional actions, a supplier may still become insolvent. These risks will need to be managed by contracting authorities on a case by case basis.

## Contact

11. Further guidance on COVID-19 for individuals, employers and organisations is available on GOV.UK.

12. Enquiries about this PPN should be directed to the helpdesk at [info@crowncommercial.gov.uk](mailto:info@crowncommercial.gov.uk).

## **SUPPLIER RELIEF DUE TO COVID-19**

### **INTRODUCTION**

The public sector must act quickly and take immediate steps to pay all suppliers as a matter of urgency to support their survival over the coming months.

Where goods and services are either reduced or paused temporarily, authorities should continue to pay at risk suppliers to ensure cash flow and supplier survival. This could include, for example situations where:

- Services are cut short / reduced at short notice due to the impact of COVID-19 and non-payment could result in supply chains collapsing and/or significant financial implications for the supplier.
- It would be value for money and important to business continuity to continue to pay suppliers in the short term (regardless of whether you are able to reconcile at a later stage). This would ensure continuity of services when services can resume.

PPN 01/20 sets out how contracting authorities can amend contracts under Regulation 72 of the Public Contracts Regulations 2015<sup>1</sup>. Changes should be captured in contract variation or change note, and make clear that the changes relate only to the COVID-19 situation, include a review provision or time limit, and that it is the authority's decision when things should return to normal.

### **PAYMENT TO MAINTAIN BUSINESS CONTINUITY**

Contracting authorities should confirm with their at risk suppliers that they will continue to pay until at least the end of June, to ensure business and service continuity. Contracting can define their 'at risk suppliers' according to need. In general, this should override provisions in contracts that might require contracting authorities to pay suppliers on a decreasing scale as a result of, for example performance, force majeure or business continuity clauses.

There are a range of ways to support suppliers in maintaining cash flow during this period. Contracting authorities can continue to pay at usual contractual rates, or consider other options such as payment against revised/extended milestones or timescales, interim payments, forward ordering, payment on order or payment in advance/prepayment. Risks associated with advance or pre payment should be carefully considered and documented.

Where contracts operate 'payment by result' or are 'output / outcome' based, payments to suppliers should be made on the basis of a calculation of the average of the last three months invoices. Where possible, any payments made to suppliers during this emergency period should be adjusted to ensure profit margin is not payable on any undelivered aspects of the contract, however this should not delay payments being made.

Suppliers should identify in their invoices which elements of the invoiced amount relates to services they are continuing to supply (i.e. business as usual) and which amounts are attributable to the impact of COVID-19.

Payments should not be made to suppliers where there is no contractual volume commitment to supply, and contracting authorities should carefully consider the extent of payments to be made to suppliers who are underperforming and subject to an existing improvement plan.

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<sup>1</sup> Or equivalent procurement regulations

## **Transparency**

Contracting authorities and suppliers should work collaboratively to ensure there is transparency during this period. Suppliers in receipt of public funds on this basis during this period must agree to operate on an 'open book' basis. This means they must make available to the contracting authority any data, including from ledgers, cash-flow forecasts, balance sheets, and profit and loss accounts, as required and requested to demonstrate the payments made to the supplier under contract have been used in the manner intended.

For example, this might include evidence that staff have been paid the right amount and on time, and that cash continues to flow through the supply chain as quickly as possible. Contracting authorities should keep records of decisions and agreements made, and ensure suppliers maintain records to enable future reconciliation if necessary.

Suppliers should not expect to make profits on elements of a contract that are undelivered during this period and all suppliers are expected to operate with integrity. Suppliers should be made aware that in cases where they are found to be taking undue advantage, or failing in their duty to act transparently and with integrity, contracting authorities will take action to recover payments made.

## **Supplier capacity**

Many suppliers will not be able to fulfil their contracts due to action taken elsewhere in the public sector. For example, transport services for school children, due to the closure of schools. Wherever possible, contracting authorities should seek to re-deploy the capacity of those suppliers to other areas of need; this can be implemented via a time-bound variation to the original contract under regulation 72 of the Public Contract Regulations (see PPN 01/20).

## **OTHER CONTRACTUAL RELIEF**

Contracting authorities should work with all suppliers to ensure business continuity is maintained wherever possible and that business continuity plans are robust and are enacted.

If a supplier seeks to invoke a clause relating to a form of contractual relief that would allow them to suspend performance, such as force majeure, contracting authorities should first work with the supplier to amend or vary contracts instead. These variations could include changes to contract requirements, delivery locations, frequency and timing of delivery, targets and performance indicators etc. Changes to the original terms should be limited to the specific circumstances of the situation, and considered on a case by case basis.

Other reliefs sought by a supplier could relate to any contractual obligation but usually takes the form of one, or both, of the following:

- an extension of time for contract performance (eg revised milestones dates or delivery dates, etc);
- a waiver or delay in the ability of the contracting authority to exercise a right and/or remedy (eg to claim liquidated and ascertained damages, service credits or terminate the contract)

Each claim for relief should be considered on a case by case basis, according to the nature of the goods/services/works being supplied, the challenges being faced, the contract terms and the constraints of any statutory requirements, for example the PCR to above-threshold contracts. You should seek specific legal advice as required.

Contracting authorities should take a pragmatic approach. These discussions and any temporary changes agreed should be recorded. The contract should return to its original terms as soon as the impact of the COVID-19 outbreak on the relevant contract is over.

Contracting authorities should not accept claims from suppliers who were already struggling to meet their contractual obligations prior to the COVID-19 outbreak.

### **Force Majeure**

Force majeure is a contractual term which may, (depending on the specific terms of the contract) allow one or both of the parties, when a specified event or events occurs beyond their control:

- to terminate the contract; or
- to be excused from performance of the contract, in whole or in part; or
- to be entitled to suspend performance for the period the event is continuing or to claim an extension of time for performance

It is important that force majeure clauses is not considered in isolation given its impact on other clauses such as exclusivity, liability, liquidated damages and termination rights. It may also be relevant to consider the governing law and jurisdiction clause as contracts subject to foreign law may be interpreted differently by the courts. It may also be an exclusion clause, which is subject to the Unfair Contract Terms Act 1977.

Contracting authorities are not bound to accept a supplier's claim for force majeure and can resist it. You should seek legal advice when dealing with a claim and continue to work with the supplier to maintain service continuity as far as possible. An attempt by a supplier to invoke a force majeure clause without valid cause may mean that the supplier is in breach of contract.

Force majeure clauses do not automatically entitle either party to claim relief. In some cases, a contract will not allow termination at all due to force majeure, and it cannot be forced.

### **Frustration**

It is unlikely a supplier will seek to frustrate a contract if they continue to be paid. However, unlike force majeure, frustration is rarely included as a provision in the contract. Instead, frustration arises where an event, for which the contract makes no sufficient provision, renders performance of the contract impossible or radically changes a party's principal reason for entering into the contract.

If a contract has been frustrated, it terminates automatically and the parties are excused from their future obligations. Any contractual obligations incurred before the time of frustration, such as for the contracting authority to pay outstanding charges to a supplier, remain enforceable. As neither party is at fault in respect of the frustration, neither may claim damages from the other for non-performance after the contract is declared frustrated.

However, the threshold for a contract being declared 'frustrated' is high and the fact that the contract will merely be more expensive to perform, or that the provider will have to perform the contract in a different way as a result of COVID-19 and/or its impact, are highly unlikely to constitute grounds for frustration in itself. You should seek legal advice if a supplier claims 'frustration'.

### **Excusing Causes, Relief Events and other options**

If included in a contract, excusing cause and relief event provisions generally give a supplier

relief from its contractual obligations, which contracting authorities may be able to use to provide relief, for example, to change the KPI regime, payment mechanism or reduce service level requirements. Some contracts may have other relief mechanisms. Whatever the regime, contracting authorities should maximising any commercial flexibilities within the contract, including agreeing new measures such as on meeting lead times, waiving or delaying exercising the authority's rights and/or remedies (e.g. to claim liquidated and ascertained damages, service credits or terminate the contract), revising milestones or delivery dates. In these circumstances, if there is one, use the contract change control procedure to keep records of any changes made and the decision making behind each one. If not, keep your own records.

## **ACCELERATING PAYMENT OF INVOICES**

Contracting authorities should pay suppliers as quickly as possible to maintain cash flow and protect jobs. The public sector must pay suppliers within 30 days under the Public Contracts Regulations 2015 but contracting authorities now need to accelerate their payment practice.

Contracting authorities should act now to ensure payment is made as quickly as possible to their suppliers, including:

- Targeting high value invoices where a prime is reliant on a supply chain to deliver the contract.
- Resolving disputed invoices as a matter of urgency; consider paying immediately and reconciling at a later date in critical situations.
- Take a risk based approach as to whether 2-way matching is always needed (rather than adopt regular 3-way matching against receipt and Purchase Order)
- Encourage suppliers to invoice on a more regular basis to help cash flow (eg every week rather than monthly)

Contracting authorities should consider the following additional contingency measures during the COVID-19 outbreak

### **Contingency measures - delegated authority to ensure invoices are not delayed**

With significant levels of staff absence possible, ensure you have appropriate contingencies in place including sufficient numbers of staff with delegated authority to promptly receipt / authorise an amount due for payment in business units as well as finance teams.

### **Contract Managers and Business Units**

Receipt for goods promptly, do not delay and ensure there is a contingency in place for delegated authority to approve in the event of staff shortages. Monitor flow down to ensure payment is cascading down the supply chain.

### **Verifying invoices as quickly as possible**

Verify an invoice as quickly as possible and do not send invoices back for minor administrative errors and risk causing delay in payment. Continue to undertake necessary checks, however, look to resolve any issues as a matter of urgency and reconcile any minor discrepancies in information at a later stage.

## **Payment Card Solutions**

Use of procurement/payment cards where possible to ensure businesses are paid as quickly as possible. Consider increasing the upper limit of spend, open up categories and ensure an appropriate number of staff have the authority to use.

## **Invoicing procedures clearly set out for your suppliers**

Be clear where suppliers should send their invoice, including email address and the process required. This should be clear on the authority's website. This will minimise the number of invoices with incorrect information and/or being issued to the wrong address. Issue a reminder to all your suppliers to help them best prepare and ask for invoices to be sent in electronically to avoid hard copies sitting in office buildings potentially unattended.