

Report for the Chief Executive

Date: 27th April 2020

Title of report: Payment of Operators – Passenger Travel

Purpose of report:

The purpose of this report is to request an emergency decision by the Chief Executive regarding whether payments made to operators during Covid 19 and the closure of schools should continue.

Key Decision - Is it likely to result in spending or saving £250k or more, or to have a significant effect on two or more electoral wards?	N/A If yes give the reason why
Key Decision - Is it in the <u>Council's Forward Plan (key decisions and private reports)</u>?	Key Decision – No This is only applicable to Cabinet reports Private Report/Private Appendix – No
The Decision - Is it eligible for call in by Scrutiny?	No
Date signed off by <u>Strategic Director</u> & name	Karl Battersby 27/4/2020
Is it also signed off by the Service Director for Finance?	Not applicable
Is it also signed off by the Service Director for Legal Governance and Commissioning?	Julie Muscroft 27/4/20
Cabinet member portfolio	Give name of Portfolio Holder/s Cllr Viv Kendrick

1. Summary

The passenger travel team arrange school transport for children across the district. It is a vital service ensuring children arrive at school ready and able to learn.

The school transport system is supported by operators and drivers who are key to ensuring our most vulnerable children are transported to school to ensure they achieve their full educational attainment. It is essential to ensure service continuity is maintained during and after the coronavirus outbreak.

Due to Covid-19 the number of routes which are operating have significantly reduced and the service is currently continuing to pay operators in full. The temporary arrangements, such as social distancing and reduced access to schools, implemented by the Government are going to be in place for some time and as such a review of the decision to continue to pay 100% to operators is necessary.

Information from the Cabinet office states that Local Authorities should act swiftly to ensure suppliers at risk are in position to resume normal contract delivery once the outbreak is over.

This report sets out the information required to make this decision relating to, key issues and recommendations from officers.

2. Information required to take a decision

The passenger travel team arrange school transport for children across the district. The current contract in place with operators is in place until 2021 and operators are contractually obliged to provide transport which includes minibuses and taxis each day during term time for specific routes.

Following the government guidance school travel routes are operating but have reduced since schools closed to all but vulnerable children and children of key workers.

Home to school transport also tenders providers for a number of other teams within the council namely, Post 16 (Early Support Team), adult day care, social services – looked after children, respite/short breaks and YPAT (Young Peoples Activity Team - after school and holiday clubs.

The other teams listed above also require a decision regarding payment of operators, as their requirements are tendered under the same contract and the overall implications will be the same for each of these services. There is a balance to be struck between paying large amounts of money with no service running, against having operators with a viable business to utilise when normal operating service is resumed.

Contractual position

The current contract can be varied for the period that schools are closed or during Covid 19 arrangements.

Other Local Authorities

The approach by other authorities is as follows:-

Leeds (majority in house fleet)	No payment of operators and they are relying upon the in house fleet (their fleet is enhanced by operators) They are considering any claims for payment from operators who state they are 'at risk' of failing to remain a viable business concern
Wakefield	Continuing to pay operators for cancelled journeys, however, caveat that they should undertake other replacement work e.g. FSM deliveries, adult & social care work and demonstrate that they are not claiming government funding e.g. furloughing of their staff.

Calderdale (majority in house fleet)	In house fleet and they are using this provision to deliver across the council where needed Contracts with operators are suspended
Bradford	Paying 85% of suspended contract fees. Discounted for fuel purposes. Providers as a pre-condition must sign a declaration to provide assurance that payment goes to drivers. Operators who have furloughed drivers are not paid as those drivers are being paid (80% of salary) by the government. Payment of the additional 20% is not being met by the authority.
West Yorkshire Combined Authority	Continuing to pay operators – WYCA receive a transport levy received from Council to WYCA

Cost

The cost of paying operators for the routes which are not currently operating are approximately £16,300 **per day**.

Timeline

Department for Transport letter dated 25th March 2020, urges Local Authorities to continue to pay operators for home to school transport at the levels before downturn in service provision. Appendix 1-Letter to Local Authorities dated 25th March 2020

Procurement Policy Note No.2 dated March 2020, sets out information and guidance for public bodies on payment of their suppliers to ensure service continuity during and after the coronavirus outbreak. It states all authorities should 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. Appendix 2 Procurement Policy Note PPN 02/20 March 2020.

Operators were initially informed by email on 23rd March 2020 they would continue to be paid when the Covid arrangements initially began but they would be expected to help deliver goods and/or transport passengers across the council as required. The Local Authority had initially received information from WYCA (West Yorkshire Combined Authority) and this requested authorities to continue to pay and for a joint approach to be taken. At that time WYCA were keen to ensure that local authorities were not seen to be profiting from the crisis and were supporting operators that may go out of business.

It is now known the current social distancing measures will be in operation for some time and a more long-term decision is required. The cost to the Council of the routes being paid but are not operated is now clear and the viability of operators who are a key part of the school transport system needs to be considered.

Key Issues

- ❖ Significant costs to the council when the service being remunerated is not being delivered – approx. **£16,300 per day**
- ❖ Maintaining service provision and viability of operators and ensuring this continues as they will be required going forwards to continue to deliver school transport – particularly as Kirklees does not have in-house provision
- ❖ Whether non-payment of operators will cause any/some businesses to cease trading.
- ❖ The vital service the operators provide is dependent upon many drivers and it is important that payments are passed on from suppliers as per PPN 02/20 Appendix 2. An e-mail has been sent to operators reminding them they should be passing the payment onto drivers.
- ❖ Department for Transport letter dated 25th March 2020 and Public Procurement Note No.2 dated March 2020 requires consideration. Particularly regarding transparency and the requirement that suppliers in receipt of public funds during this period agree to operate on an “open book” basis.
- ❖ Alternative government funding now available to self-employed businesses and businesses with employees.
- ❖ Consistency across the Council in how other services and teams have resolved this issue with providers.

3. Implications for the Council

When the initial decision was made it included the requirement that the operators would be paid and continue to provide availability to the council and offer transport services where required across the service. A project involving the transport of care workers has been established and could be extended further should the need arise.

The initial decision taken during preliminary business continuity implementation and the changes that have since evolved means that as an authority it is right that we review the position and establish what is the right decision both for children and the citizens and communities as a whole.

- **Working with People**

The service has worked with its partners including schools and operators to ensure the service has continued to meet its statutory obligations. It has also worked well with operators and taken a very supportive stance in order to maintain business continuity. This was to ensure that vulnerable children were placed at the heart of the decisions and to continue and build relationships with suppliers.

- **Working with Partners**

Continuing to provide some payment to operators is helping sustain those businesses within a precarious economic market and also ensures that once the UK moves to post recovery the service can continue to deliver its statutory obligations as those businesses will still be available. The service has worked with various operators and undertaken other work where possible to achieve a partnership and best outcomes possible, but the

time is now right to review that and whether the same approach is still required or necessary.

- **Place Based Working**

Kirklees as a place is made up of different communities and the diversity of its communities is one of its key strengths. The service has worked with a number of partner agencies to ensure the resources achieve the best outcomes for residents, in particular vulnerable children and that the government guidance and requests to continue to transport those children have been implemented.

- **Climate Change and Air Quality**

The service will continue to ensure that vulnerable people are travelling in the most efficient and effective way as this is intrinsically linked to how the Council tackles the Climate Emergency and to carbon emissions.

- **Improving outcomes for children**

Ensuring vulnerable children are reaching their full educational potential supports the council outcomes of best start in life, independence and aspiring and achieving.

Continuing to be able to provide travel solutions and have a market to operate within will ensure the service continues to meet its statutory obligations.

- **Other (e.g. Legal/Financial or Human Resources)**

The contract in place can be varied or amended accordingly and this has been agreed by Legal Services.

4. Consultees and their opinions

- Discussions regarding the options available have been undertaken within service and at senior leadership level. Neighbouring Authorities have been consulted to ensure consistency with suppliers. Considerations of available options and legal requirements have been discussed with legal services and procurement and are set out below: -

Options available: -

- a. **Vary the contract to stop payment** to operators whilst the schools are closed, and the routes are not operating using amended contractual arrangements –
 - signpost to government funding packages on offer
 - operators continue to be paid in full for routes not affected and reimbursed if they are required for any additional routes
 - Provide an ability to consider on a case by case basis whether an operator should continue to be paid if they are unable to claim from the alternative funding schemes available and are at significant risk of remaining viable
- b. **Continue to approve the payment** of operators during Covid 19 and the closure of schools without caveat until a specific date or period
- c. **Suspend and vary the contract - Approve the payment of a reduced** percentage (85%) to operators during Covid 19 with the following caveats in line with Procurement policy note 02/20 regarding transparency:
 - On the signed condition that operators:-
 - Continue to pay drivers (where they have not been furloughed)
 - Are available to be used to transport passengers or services where required across the council
 - Understand that monies will be recovered if claimed fraudulently, found to be taking undue advantage or failing to act with due integrity and transparency

- Understand that they may be prevented from contracting with the Council in the future if found to have been acting fraudulently under the Procurement Contract Regulations 2015

Any option approved will continue to be reviewed alongside business continuity arrangements and Covid 19 to ensure it is both proportionate, appropriate and necessary.

5. Next steps and timelines

- In line with Procurement Policy Note 20/20 the Council will work collaboratively with operators to ensure transparency during this period. Operators in receipt of payment must agree to operate on an “open book” basis, this means they must make available any data including ledgers, cash-flow forecasts, the status of their business, availability of drivers, and ability to fulfil contracts.
- Once the decision is approved, this will be communicated to Legal services who will undertake the required drafting amendments to the contract and the decision communicated to the operators via a contract amendment.
- Operators will be required to sign a declaration that they will continue to pay drivers (where they have not been furloughed) and will sign to ensure they understand that if a fraudulent claim is made the Council would seek to recover the payments made and they may be barred from future contracts with the Council. Once the necessary documentation is received payments will be made as per normal arrangements.
- If the decision is to agree the recommendation set out below service delivery will continue but with operators submitting invoices for routes required and being paid a significant proportion of the usual fee with a fuel discount. It will help to ensure operators are paying drivers and that businesses continue to operate and do not become at risk. Vulnerable children will continue to be transported to school.

6. Officer recommendations and reasons

The recommendation is for the Chief Executive to approve option c, at paragraph 4. This option will enable operators to continue to receive payments to ensure the following:-

- Operators who are providing routes would continue to be paid in full for those routes.
- businesses remain sustainable and economically viable as far as they can,
- the authority benefits from an additional transport resource should this be required,
- availability of transport for children is widened to enable the service to maintain effective service delivery.
- The cost of option c would be £13,855 per day if all operators were available.

The Covid 19 arrangements have impacted on local operators and the pool of those available has reduced. This would enable the service to continue to have as many options as possible available to transport children as the numbers travelling vary on a week to week basis. This will be balanced against the authority doing all it can to ensure due diligence in that payments are made to those who are acting with transparency and integrity in terms of financial support received.

7. **Contact officer**
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8. **Background Papers and History of Decisions**
N/A
9. **Service Director responsible**
Sue Procter
Service Director – Environment

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01484 221 000
10. **Appendices**
Appendix 1 – Letter to Local Authorities dated 25th March 2020
Appendix 2 – Procurement Policy Note PP 02/20 March 2020



Department
for Transport

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Web Site: 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

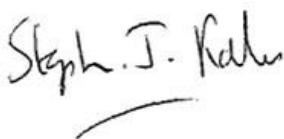
As you may be aware, we have also been working with the Office of the Traffic Commissioner (OTC) to ensure changes to bus services can be made promptly in response to a shortage of drivers or reduced passenger demand, while maintaining vital services for key workers and other making essential journeys. 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.

Thank you for your support.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Steph. J. Fidler', with a horizontal line underneath.

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@crownccommercial.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 2015¹. 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.

¹ 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.