

# Covid-19: Impact on current commercial relationships with Government

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# Some scenarios

- Have a contract & performance difficulties
- Have a contract & covid-19 necessitates changes to the terms
- Have a contract & seek to justify changes/new contract
- Want a contract & bid to provide goods/services required
- Competitor has won a contract; you object

# Performance Difficulties (1)

Key issues are likely to be:

- Whether or not force majeure clause is triggered
- Whether the contract is frustrated
- Whether liquidated damages clause is triggered

# Performance Difficulties (2)

## Measures to alleviate difficulties:

- Note the application of the (Procurement Policy Notes) PPNs
- Deals with:
  - exceptional circumstances to procure goods, services, works – contracting arrangements under Public Contracts Regulations 2015 (PCR)
  - Supplier relief
- Also note specific guidance for Construction industry

# Performance Difficulties (3)

What else is possible?

- Anything else Government can do will be circumscribed by ordinarily applicable legislative regimes and public law principles
- Deviation from issued guidance should be considered carefully

# Change of circumstance = change to contract (1)

The need to change the contract might be driven by:

- Change to volume required
- Need to structure operations differently
- Decrease in ability to service contract/increased costs associated with Government requirements
- Pricing no longer suitable for new circumstances

# Change of circumstance = change to contract (2)

Changes have to take place within the scope of applicable regimes:

- PCR 2015 (e.g. rules on modification or extending a contract)
- Competition law: regime largely unchanged; specific exceptions
- State aid: Temporary Framework; otherwise business as usual
- (To the extent applicable) regulatory regime or local government powers

# Change of circumstance = change to contract (3)

Otherwise, risk:

- Not completing
- Provoking challenge on grounds of (at least) illegality/unlawfulness
- Audit of compliance by relevant government department
- Some of those risks manifest potentially years later; risk of financial sanction/damages claims



# Opportunities? (1)

- Can you use the ongoing performance of your contract to influence the outcome of a dispute with a different part of government?
  - Framing of the issue is important; significant difficulties
  - Likely to be subject to policy (e.g. Litigation Settlement Strategy for HMRC)
  - Likely to face difficulties as to regulatory regime (where applicable)
  - Likely to face practical issue of avoiding a precedent/procedural unfairness
  - Likely to be a more proportionate way to deal with impact

# Opportunities? (2)

- Can you use a pause in work to shore up your position? e.g. underperforming on a grant funded project
  - Expect any relaxation of approach to link directly to covid-19
  - Different where dealing with same department/circumstances
  - Beware of:
    - Whether the arrangement could look like state aid
    - Careful recording of reasoning

# Want to contract

Bidding to provide services/goods currently needed to respond to outbreak:

- Work within specific frameworks – PCR 2015
- Plenty of flexibility; within the rules
- Webinar on Procurement Regime on our website

# Competitor has won contract; you object

Possible courses of action:

- Examine whether a procedure was used
- Examine whether choice of procedure was within reasonable range of decisions
- Any specific aspects unsatisfactory; seek information asap
- Consider whether own criteria/guidance complied with
- Consider broad application of competition principles

# Competition Principles

## UK:

- Regime remains, apart from specific let outs
- Enforcement unlikely to be different in principle
- Resourcing

## EU:

- Note Commission concerns on global competition
- State aid restricted to companies not in a “tax haven”?