

CORONAVIRUS: HOW TO DEAL WITH CONTRACTS WHERE THE UNIVERSITY CANNOT GET THE BENEFIT OF THE WORK TO BE DONE BY A SUPPLIER

Supplementary to the University's May 2020 High-level guidance for University departments and institutions during the Coronavirus outbreak

<https://www.finance.admin.cam.ac.uk/covid-19-dept-guidance-re-third-party-contracts>

This note aims to set out practical steps to consider when dealing with a supplier whose agreed service cannot be carried out or the University can no longer receive the service due to COVID-19 restrictions. It outlines the questions the Legal Services Division would ask and offers suggestions to help you address the problem.

Please read the High Level Guidance and individual contract carefully. Explore practical solutions to the problem before seeking advice. The first port of call for advice should be your departmental administrator or procurement adviser.

For further guidance on construction projects affected by coronavirus, see the Construction Leadership Council's COVID-19 Contractual Best Practice Guidance:

<https://www.constructionleadershipcouncil.co.uk/wp-content/uploads/2020/05/Construction-Leadership-Council-Covid-19-Contractual-Best-Practice-Guidance-7-May-2020-Amended-28-May.pdf>

On 9 June 2020, the Government released Procurement Policy Note 04/20, which recommends that contractors review their contract portfolio and consider whether it is possible to transition away from relief arrangements with suppliers (recommended to be considered by Procurement Policy Note 02/20) and establish longer term sustainable payment plans and operating models.

STEP 1: STUDY THE CONTRACT AND CONSIDER THE IMPLICATIONS OF NON-FULFILMENT

Consider the contract drafting and take advice as needed from your departmental administrator or procurement adviser. Each contract must be read individually but don't forget to consider whether there are any related supplier contracts that might be similarly impacted.

Key actions:

- **Read the contract carefully so you are aware of the legal context, paying particular attention to clauses on payment, variation, termination, suspension, liability, service levels and timings, and 'force majeure'. The contract may not provide an unarguable basis for refusing to pay.**
- **Be aware that the University's overall financial position is very constrained. As a charity, money is to be spent on its primary purposes (teaching, research and learning) and it can only consider making concessions to suppliers where there is a sound commercial reason to do so.**
- **Identify the risks arising from the contract, their nature and impact(s) on the University.**
- **Look for ways to manage or reduce those risks.**
- **Before considering action under the contract conditions, look at the overall context and see if a pragmatic solution is possible; this is best done by reaching an agreement with the supplier.**

A. Consider the implications/risks of any possible actions:

1. What are the long-term consequences for the University? It faces a very constrained financial situation so accepting supplier claims or requests for support is likely to be difficult. On the other hand, will there be alternative suppliers if you do not support the supplier and will these alternative suppliers be ready to resume supply immediately after lock-down?
2. Will there need to be a procurement process?
3. How business critical is the supply?
4. Think about how to provide a positive message to suppliers consistent with the funding constraints. These are tough times for everyone.
5. What are the potential challenges to decisions you might take regarding suppliers? How strong is the supplier's claim for payment or support? See the following sections.

B. Consider the following contract basics:

1. **What is the contract for?** Each contract is different. Is it for the supply of an item such as paper clips which could or would have to be paid for before they are needed? Or is this a supply of services where the supplier has an ongoing wage bill but University premises are shut meaning that the services cannot be delivered/used?
2. **What is our liability/obligation under the contract?** For example, how big is the payment you face making without being able to receive the goods or services?
3. **How long is left until completion?**
4. **Is it possible, practically speaking, to suspend performance (i.e. pause contract delivery)?** Is anything perishable? Is it a critical supply to the University?

C. Study the following clauses closely:

1. Is the **payment obligation** expressed as dependent on the contractor meeting its obligations? E.g. invoices can only be sent when the University confirms acceptance of goods or achievement of a milestone, or when the services have been performed (e.g. "For the satisfactory performance of the Services the University shall pay the Contractor the Fees...").
2. The **right to cancel/terminate on notice** – If the contract contains this right, it should be straightforward to use it; but you need to comply carefully with the wording of the clause, citing it, and giving any required notice.
3. The **right to suspend** – apply the same steps as when using a cancellation clause.
4. Is **time for delivery** stated as being "of the essence"? (Use Ctrl F to search the contract for "essence" and "time" and "performance".) If so, the University should be entitled to terminate if goods/services are not delivered on time. In this case, while trying to find a pragmatic solution, you must state that the University is 'reserving its rights', not 'waiving' them and not accepting the supplier's failure. Note however that the University's right to terminate could be subject to other clauses, in particular relief for non-performance (see section D para 2).

D: Consider the other contractual possibilities that may be useful, including the following:

1. A **right to vary**. This may be the best route to try if none of the above possibilities (section C) are available and the supplier remains willing and able to provide the service. Read the clause carefully so you understand and follow the process outlined.
2. A clause granting **relief for non-performance** (i.e. a force majeure clause) or one allowing a party not to perform if prevented by events beyond reasonable control. *NB do not seek to base your argument for the University not paying the sum demanded on such a clause without careful consideration and consultation with the Legal Services Division.* Making a weak argument or making a good one badly will undermine your position. **But please be aware that the Division's resources are stretched and advice cannot always be given. It must not be expected for low value contracts.**
3. Is there a **dispute resolution** clause. Might it be appropriate to use it?

STEP 2: TALK TO THE SUPPLIER

A. When speaking with suppliers remember:

1. If you consider that a payment might and should be made, reserve your position by saying that the University needs to be judicious in how it operates and you will need to consult/take advice before reaching any agreement. Do not give assurances or create expectations until you are sure of what you can and will do.
2. You will probably want to continue with the contract and maintain the supplier relationship because keeping good relations, particularly in a time of crisis, is often important for long-term goals. Achieving this in the context of financial constraints is likely to be challenging, so think carefully about tone: do not be dismissive; aim to be as supportive as you can, even if ultimately unable to provide cash.
3. You don't need to give an immediate answer to the supplier. It is possible to make sympathetic comments, find out their view and scope out any room for a pragmatic approach on the basis that this is a time when, unfortunately, clear answers are not obvious and you will need to take advice from higher up before taking action.

B. Identify the following:

1. The challenges that the supplier is facing in fulfilling the contract and how they would prefer to proceed. It may help to find a practical way forward.
2. Is it apparent when the supply can be resumed?
3. What exactly is the supplier seeking, e.g. a delay, a continuation of payments for a month or two until they receive money from the government to aid cash flow, cancellation of the service etc. For example, a contractor on site may wish to be paid to the end of the week and then vacate/close the job for the time being to protect their staff or because they cannot get the supplies needed to carry on with the work.

4. If the issue lies with the inability of the University to receive goods due to closure of University buildings, are alternative arrangements* possible? For example:
 - a. Can delivery be postponed?
 - b. Can the goods be put into storage/kept by the contractor and evidence provided to confirm all items are present and correct, including all parts, accessories and user manuals?
 - c. Can the supplier deliver to a different location?
 - d. Could they move to virtual services?

*Any alternative arrangements would need to be properly documented as an amendment to the contract.
5. What are your payment options?
 - a. Will assisting with cash flow by making payments on account ensure the service will continue as needed when lock down ends?
 - b. Can payment or partial payment be made pending delivery and acceptance (perhaps to cover immediate cash flow problems) subject to reclaim if acceptance testing fails?
 - c. Is the supplier financially sound, and will it remain so for the period of anticipated lock-down, such that making payments ahead of time will be relatively risk free?
6. Are there other pots of money available to help the supplier?
 - a. Does the supplier have business interruption insurance?
 - b. The government furlough scheme covers 80% of the costs of employees stood down. There is also relief for the self-employed. See <https://www.gov.uk/government/collections/financial-support-for-businesses-during-coronavirus-covid-19>.
7. What if the supplier asks the University to top up the furlough scheme? Arguments against could include:
 - a. The Government has provided the furlough scheme to help suppliers so that *workers* and *businesses* are relieved of the main impact on a shared basis. The scheme does not assume full payment or that third parties will make up the rest of a contractor's costs.
 - b. Is the supplier seeking support to top up wages above the 80% furlough amount? Whilst in principle the University would be sympathetic, in current circumstances this has to be regarded as a business decision for the supplier.
 - c. The scheme anticipates that the employer will meet certain employment-related costs themselves, on the basis that this is a reasonable sharing of burden between government and business.
 - d. All businesses, including the University, are having to reduce costs where they can and dip into other funds to keep their operations alive.
 - e. The University's overall financial position is very constrained; it is not in a position to meet the supplier's additional employment costs or central overheads, those items it costed into the service charge, or depreciation of equipment.
 - f. The University is a charity and subject to legal obligation as to what it can spend money on. Money is to be spent on its primary purposes (teaching, research and learning) and it can only consider making payments to a supplier where there is a sound commercial reason to do so.

STEP 3: IDENTIFY THE BEST SOLUTION, TAKING INTO ACCOUNT THE CIRCUMSTANCES OF THE SUPPLIER AND THE UNIVERSITY'S BUSINESS NEEDS AND FINANCIAL CONSTRAINTS

Consider the following:

1. Is this a shared problem (i.e. the University does not want to pay for nothing but the supplier cannot perform) rather than one where the supplier is the only victim of the circumstances? If so, it might make it easier to win an argument for avoiding the costs associated with stepping down the supplier or splitting them if in the best interests of the University.
2. If an external funder funds the contract, consider bringing them on side and buying into the proposed solution (the research may have to be delayed anyway – consult ROO about the overall approach).
3. Is a parent company guarantee in place? If so, ensure that it will not be prejudiced by assisting the supplier e.g. with immediate cash flow. The guarantor may need to agree, since any payment made could increase the impact on it or its guarantee.
4. In devising your solution, take into account/anticipate/provide for the fact that further lock downs may occur. Reserve the University's position accordingly. If new contracts/agreed amendments are put in place to address the problems of the current lock down, ensure that no guarantees or expectations are created or allowed to be assumed about future flexibility.
4. If you cannot find a practical solution, avoid issuing threats or final rebuttals; express regret for not having been able to find a solution and say you will consult internally. Take advice from your departmental administrator or procurement adviser in the first instance. ***If further advice is required, the Legal Services Division can advise, but please be aware that its resources are stretched and advice cannot always be given. Assistance with low value contracts should not be expected. If you do need to seek legal advice, email legal@admin.cam.ac.uk You will need to provide:***
 - a. A brief summary of the nature of the contract and its value
 - b. A copy of the contract
 - c. Copies of all correspondence and notes of conversations with suppliers
 - d. A report addressing the questions above, with an initial summary to outline the current state of play and your reason for seeking advice.
 - e. A draft note of what you would like the Legal Services Division to say to the supplier at the point at which you seek the Division's advice, including a response to any points the supplier has made (even if you have already made them).

If the papers are well organised, a lawyer may be able to take a quick look and write a letter or email on your behalf. **If legal action is required or taken against the department (e.g. court proceedings or legal claims), the legal costs are likely to escalate quickly beyond the value of small and moderately sized claims.**