

LG Alert – Council contracts – dealing with suppliers during COVID-19 restrictions

The impact that COVID-19 is having is far-reaching. We are being inundated with information about it and what we should and should not be doing. In addition to the public health issues, there are a number of very real legal issues which arise from the situation, being issues of which our client councils need to be aware.

Councils which choose to keep public facilities open will, presumably, be seeking to increase the frequency or the scope of the cleaning services provided at those facilities. Councils which choose to close facilities, have a separate range of issues to consider, whether in relation to the reduction or cessation of services to the facilities meaning dealings with a contractor which is not going to be required to perform its contract in full or at all.

In this Alert we address some of the issues which councils need to consider in changing commercial arrangements with third parties.

Variations to contracts

Whether a council wishes to increase the scope of a contract, for example, to increase or decrease the frequency of cleaning of a facility, or to suspend a contract, it needs to carefully consider the terms of the contract. This is to determine if there is a process in the contract which sets out how such change should be made. If a process exists, it must be followed. In many cases, there will be provision for the council, as the customer, to propose a variation to the contract and for the contractor to provide a costing for the variation. This could result in a reduction in the fees payable if there is a decrease in the scope of works. Depending on the terms of the contract though, it may not be possible for the council to require a contractor to alter the terms of the contract.

If there is no process for variations, the only way to vary a contract is by agreement between the parties. Councils should proceed with caution in these situations. This is to ensure that they do not, inadvertently, take action which might give rise to a claim against the council, including for repudiation of the contract. In the absence of a clear process in the contract, councils should contact the contractor to discuss the options and to ensure that they do not pre-empt any such discussions.

Force majeure

Many contracts have '*force majeure*' clauses. These protect the parties if the contract cannot be performed by one or other of the parties for defined reasons outside of their control.

If a contract does not have a *force majeure* clause and the contract is unable to be performed due to circumstances surrounding the COVID-19 pandemic, councils should consider whether it has any other rights to terminate the contract, if that is the objective, or whether the contract is, legally, frustrated. In either of these situations, councils should consider obtaining legal advice to formalise arrangements and to understand their legal position before taking any action.

Where a contract does have a *force majeure* clause, there is no guarantee that the current situation will fall within the definition of a *force majeure event*. These are, usually, defined as acts of god, natural disasters, war, riots and the like. It is not clear whether COVID-19 will fall within any of these categories, let alone the precise wording contained in a contract that a council is reviewing. Therefore, councils must be cautious if seeking to rely on a *force majeure* clause, unless the parties agree that the situation does qualify as such and, even then, the parties should carefully document this agreement.

Other considerations

Finally, councils may wish to consider the commercial arrangements which they put in place, particularly if they choose to reduce contracted services. Although councils may be entitled to refunds or a reduction in fees, another option is to accept credits towards future services as part of a strategy to assist with issues of solvency through the next period, which will be extremely difficult for many businesses. This type of concession should only be considered with regard to the council's objectives and in a broad-based way, so that the risk of any impropriety is minimised. Where these types of arrangements are agreed, they must be properly documented and, depending on the amounts involved, the council may wish to consider whether it requires any form of security.

Recommendation

We recommend that councils review their current contractual arrangements to confirm if there are any obligations which may not be fulfilled in the short to medium term, so that the resultant issues can be proactively managed. Arrangements with suppliers which may need to change in the current circumstances should also be reviewed and managed appropriately.

If you would like to discuss any of these issues, or have any queries about your existing arrangements, please contact:

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