

Advance Contract Payments

Introduction

Contracts utilising advance payments create risks for the contracting authority. This guidance sets out ways in which this risk can be best managed.

In order to protect the Exchequer, contracting authorities are advised to include contractual provisions or provide for other measures to enable recovery of any advance payment or minimise any loss by facilitating transfer of assets, sub-contract licenses, warranties, etc. to the contracting authority or another contractor where feasible. Contracting authorities are advised to obtain appropriate legal advice when drafting such contract clauses. Any such measures should be proportionate to the value and nature of the specific circumstances. Advance payments cannot exceed the unpaid contract price. While there may be no cost to an individual contracting authority for advance payment, borrowing costs and opportunity costs may arise to Exchequer.

Under no circumstances should payments be made outside a contract.

Circumstances where Advance Payments may arise

Advance payments may arise under the payment terms of a contract in the following circumstances:

1. Emergency purchase or reservation of works, goods or services in life critical or humanitarian situations.
2. National Emergencies.
3. 'Lock-in fee' to secure future goods and services.
4. High start-up costs for major infrastructure or services contracts:
 - a. Ordering items such as equipment, plant or machinery with high cost and long lead times;
 - b. The provision of early design work;
 - c. Labour mobilisation costs.
5. To limit financial burden on suppliers, including SME's, providing goods and services to the State.
6. Discount on contracted price for advance payment (Note: payment terms, including opportunity for discounts, must be set out in any procurement procedure to ensure value for money, transparency and equal treatment).
7. Industry norm to prepay e.g. accommodation, flights, subscriptions, software licences, online purchases, etc.

Considerations to determine whether Advance Payment is appropriate

1. The general policy is to avoid advance payments whenever possible.
2. Where absolutely necessary, advance payments should be approved sparingly, even when statutory authority or Government approval has been received.
3. Each public sector body should develop its own internal sector specific processes, financial thresholds and procedures in respect of advance payments to:
 - a. Identify situations where advance payments may arise;
 - b. Set out relevant approval procedures;
 - c. Identify relevant industry norms;

- d. Specify sectoral approaches to address financial burdens on industry and/or high start-up costs.
- 4. Public bodies are responsible for ensuring robust and effective contractual clauses are included in contracts to ensure recovery of any advanced payment in the event of failure to deliver the required goods, services or works to the contracted standard.
- 5. Where required under the payment terms of a contract, advance payments should be based on an analysis of the cash flow requirements under the contract and should not exceed the interim cash needs arising such as:
 - a. Verified start-up costs for major infrastructure or services contracts;
 - b. Costs for items of equipment, plant or machinery with high cost and long lead times. Payment may be limited to expenditure for equipment or materials en route or delivered to site/agreed location;
 - c. The cost of early design work as contractor pays its suppliers to be supported by the production of invoices;
 - d. Labour mobilisation costs.
- 8. Discounts on contracted price for advance payments should be integrated into the procurement requirements for any purchases and evaluated in the total cost to ensure value for money, transparency and equal treatment for all potential and actual bidders. Where a contract is awarded through a negotiated procedure without prior publication (Regulation 32, 2106 Procurement Regulations), discounts, where appropriate and approved, should be considered at the negotiation stage with robust recovery measures for any advance payments in the event of a failure to deliver. Evidence of value for money must also be recorded in the project file.
- 9. Ensure all necessary approvals have been identified and obtained in a timely manner.
- 10. Advance payments may only be made to prime contractors. The prime contractor is, however, permitted to use advance payment to make advance payments to its sub-contractors.
- 11. Advance payment must not exceed the unpaid contract price.
- 12. Department/Agency must have the budget available for any advance payment within its own budget allocation.

Contract Provisions

Contracting authorities are advised to include contractual provisions or provide for other measures to enable recovery of any advance payment, or minimise any loss by facilitating transfer of assets, sub-contract licenses, warranties, etc. to the contracting authority or another contractor where feasible. Contracting authorities are advised to obtain appropriate legal advice when drafting such contract clauses.

Subject to appropriate legal advice, clauses for consideration could include, inter alia, those addressing the following:

1. Contractors required to provide security by way of Surety/Performance Bond/Parent Company Guarantee for any approved advance payment.
2. Any scheduled payments due to contractors will be reduced by the advance payment.
3. Provide for right to audit and review accounts relating to the service by the contracting authority or provision of annual audited accounts where a commercial service is being supplied under the contract.
4. Contractual provisions on supplier to ensure it has the necessary financial standing, funding and working capital to satisfy all of its obligations for the duration of the contract.
5. Escrow provisions to provide for access to essential Intellectual Property, where appropriate.

6. Requirement for prime contractor to exercise due skill and care in the selection and appointment of subcontractors and to assume responsibility for the management of and/or accepts liability for losses to sub-contractors who have obtained an advance payment.
7. Step-in rights to allow continuation of operation of the service, if practical.
8. Provisions to novate or otherwise transfer to the contracting authority or a replacement contractor any of its rights and/or obligations under key subcontracts relating to the contract or any IPR licences to continue the service or works.
9. Provide for novation of any 3rd Party warranties and indemnities to Contracting Authority.
10. Provisions for transfer of key personnel where it may be possible to continue delivery of the service in the event of termination.
11. Arrangements for retention or transfer of key sub-contractors' services.
12. Develop, maintain and continually update an accurate, complete, detailed and up-to-date written inventory of the ownership, location, type and, where applicable, specification and configuration of all assets in a form and manner so that it is accessible and auditable by the the Contracting Authority.
13. Provisions in relation to change of ownership approval or notification with an option to recover advance payments if dissatisfied with proposed new ownership.
14. Ensure there is appropriate insurance in favour of the contracting authority which takes account of advance payments.
15. Provisions to provide credit rating for contractor, key sub-contractor or surety and duty of contractors to notify any changes to this rating from recognised rating agencies.
16. Requirements on contractor to continue to maintain and regularly monitor (at least annually) at least one financial ratio (e.g. Net Asset Minimum Value or Minimum EBITDA Level) and notify the contracting authority of any material change:
 - a. For prime contractor;
 - b. For each key subcontractors;
 - c. Surety (where relevant).

Enquiries regarding this guidance note should be directed to the Office of Government Procurement email support@ogp.gov.ie tel. + 353 1 7738000.