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**Report to: Audit Committee**

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**Date of Meeting 3<sup>rd</sup> December 2020**

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**Subject: Exceptions from the Application of Contract Standing Orders**

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**Report by Strategic Director Partnership & Performance**

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**1.0 Purpose**

- 1.1 It is a requirement of Contract Standing Orders that exceptions should be reported to the next available Audit Committee. The purpose of this paper therefore is to provide detail on Exceptions to Contract Standing Orders submitted in the previous quarter.

**2.0 Recommendations**

- 2.1 The Committee is asked to note the report, commenting and challenging as appropriate

**3.0 Considerations**

- 3.1 Contract Standing Orders (CSO's) apply to all contracts entered into by Council officers. In some circumstances however, exceptions may be granted.
- 3.2 The appropriate senior manager must record their reasons in writing in the form of an exception report for a decision, which must be submitted to the Strategic Director, Partnership and Performance, for consideration.

The Strategic Director is required to consult with the Chief Finance Officer (S95) and Procurement Manager before taking any action that binds the Council. It is a requirement that any such exception shall be reported retrospectively in full to the next Audit Committee, including the reasons that fully justify the exception. A summary of CSO exemptions will also be provided as part of the Annual Procurement report to the Audit Committee.

- 3.3 Five exceptions were considered since the last report in December 2019
- 3.3.1 to permit the appointment of J.K-Tyres, Alloa to supply light vehicle MOT services to Clackmannanshire Council over a 3 year period to the value of £20,000. Referenced 2/6/1778

**Granted**

Fleet Services has previously asked various local MOT service suppliers to register with Scotland Excel and Public Contracts Scotland to enable a full

competition to be carried out. After repeated requests, just one supplier had registered an interest in supplying this service. Interest could have been sought from out with the Council boundary, however this would have a negative effect on the following:

- Increased man hours (delivery and collection of vehicle)
- Increased fuel consumption
- Increased vehicle mileage

### **Conditions of Grant**

A purchase order should be raised and a direct award notice published in Public Contracts Scotland should be undertaken:

- 3.3.2 to permit the appointment of WDM to continue to provide a Road, Street lighting and Structures Maintenance Management Platform for a twelve month period to the value of around £16,000 Referenced 2/6/1778

### **Granted**

This is a long term rolling contract that was initially put in place in 2003 in collaboration with Perth & Kinross Council. Moving to a different supplier through a tender process at this time would require significant resource and cause disruption to service delivery. The provision of the exception would allow sufficient time for a robust tender exercise to be undertaken thorough a Crown Commercial framework

### **Conditions of Grant**

A purchase Order should be raised for the requirement to cover the period 1<sup>st</sup> April 2019 to 31<sup>st</sup> March 2021 to pay outstanding invoices and

The service has agreed in consultation with the IT Manager, to go out to the market and tender to fulfil corporate requirements. A Procurement Market analysis, Strategy, project plan, risk register and business case should be completed within 6 months. The additional year should provide sufficient time to scope the services.

An update on progress should be provided by end September 2020 by the service

- 3.3.3 to permit the appointment of Delta Computing Systems to continue to supply the Council with a Leisure Booking & Management Software platform over a one year period to the value of £16,269 Referenced 2/6/1784

### **Granted**

The intention has been to replace the system to help improve the customer experience in making a leisure booking, and to increase income from increased usage of our leisure facilities. However, neither Customer Services or IT have had the resource and capacity in recent times to undertake the necessary project tasks.

It is accepted by the service that this provision should be covered by formal contract arrangements in order to be compliant with Contract Standing Orders. However the service also recognises that it requires sufficient time to work with IT colleagues to scope the services required for the Council going forward (including booking requirements beyond the leisure service) and to test the market appropriately

### **Conditions of Grant**

A purchase Order should be raised for the requirement to cover the period 1<sup>st</sup> April 2020 to 31<sup>st</sup> March 2023 to pay any invoices

The service has agreed in consultation with the IT Manager, to go out to the market and tender for leisure booking and management software to fulfil corporate requirements. A Procurement Market analysis, Strategy, project plan and risk register should be completed within 6 months and a business case completed before the end of the calendar year. The additional year should provide sufficient time to scope the services.

An update on progress should be provided by end September 2020

- 3.3.4 to permit the appointment of Openreach to make alterations to the telephone cable infrastructure over a 34 Month period to the value of £188,827 which consists of 2 visits, one before work is carried out and the second on completion of any roof/render works. Not every property in the Roof and Render contract will require Openreach works. Referenced 2/6/1786

### **Granted**

Openreach has a Government appointed statutory monopoly on installation and alteration of BT cables.

### **Conditions of Grant**

A purchase order should be raised and a direct award notice published in Public Contracts Scotland should be undertaken:

- 3.3.5 to permit the continuation of Ceannas to continue to roll out leadership development for the Extended Senior Leadership Group. Referenced 2/6/1804

### **Granted**

There has been considerable investment of time for both the Chief Executive and Ceannas in establishing an understanding of the Council's strategic priorities, culture and challenges. This work is a pre requisite for running a successful development programme and would require to be re-performed should there been an alternate supplier be sought..

### **Conditions of Grant**

A purchase order should be raised and a direct award notice published in Public Contracts Scotland should be undertaken:

## 4.0 Covid19

- 4.1 Approval was sought from the Senior Leadership Group (SLG) to give additional guidance and clarity to Contract Standing Orders exception 4 where an immediate need is created by a sudden, unforeseen, real and demonstrable emergency that requires immediate action to protect the interests of the Council.

In order to provide sufficient governance with the exception noted above during the Covid19 crisis the following mechanism was sought and approved and would therefore not be subject to the provision of an exception report.

- Above 10k and below 50k subject to satisfactory budget provision and SLG approval a purchase order raised in T1 for an identified emergency provision
- Above 50k Officers follow the guidance provided by Scottish Procurement <https://www.gov.scot/publications/procurement-regulations-during-covid-19-outbreak-sppn-4-2020/> subject to SLG approval and budget. A purchase order raised in T1 required and approved.
- All other procurements would continue to comply with Contract Standing Orders and Financial Regulations

- 4.2 From the 27<sup>th</sup> March 2020 onwards the total number of contracts which were live over the period was 152

The total number of instances where some form of supplier relief arrangement has/ had been put in place under SPPN 5/2020 was 130. Each instance is recorded as one, and a supplier may have multiple instances. This includes:

- modifying terms of contracts to offer suppliers contractual relief;
- agreeing advance/interim payment proposals; and
- accelerating payment practices to ensure suppliers are paid as quickly as possible

This number however does not include occasions where the contract is being delivered as normal.

- 4.3 Five contracts were authorised to be extended for an initial term of 6 months under exception 4. These contracts were due for renewal on the 1<sup>st</sup> April 2020

The following contracts were extended as the potential change in provider at this time would jeopardise the provision and continuity of key service provision and insufficient time to move to other arrangements.

- Care at home services for older people and under 65's with physical disability
- Quick Step provision for Care at Home services
- Dynamic purchasing system for care and support for Children
- Council Tax/ Non Domestic Rates/Housing Benefits Processing System

- Targeted support for education digital learning transformation strategy

4.4 One contract was authorised to be extended for an initial term of 6 months under exception 4. This contract was due to expire on 18th July 2020 and was extended to 17th January 2021. This was collaborative contract with Falkirk and Stirling Council's. All parties had an inability to work on a replacement renewal under the Covid 19 restrictions.

- Term Commission Contract for Professional Services

4.5 The services are continuing to review their contract arrangements to consider whether supplier relief measures already in place remain appropriate, sustainable and reflective of any transitional support that may be needed. .

They are working in partnership with their suppliers in an open and transparent manner to develop arrangements to be implemented as soon as possible and in line with the opening up of markets and the Scottish Government's Route-map through and out of lockdown.

These arrangements will enable a transition out of relief, move to a more sustainable operating model, and include agreeing contract variations, where appropriate and necessary.

This may also require continuing accelerated payment practices to support cash flow as per SPPN 5/2020.

Where necessary the services will continue to seek legal advice about all decision making, where deemed appropriate.

There will continue to be adherence to finance, governance and Procurement procedures and legislation

## **5.0 Sustainability Implications**

5.1 There are no direct sustainability implications arising from the recommendations in this report.

## **6.0 Resource Implications**

6.1 Financial Details - there are no direct implications for the Council's budget arising from this report

6.2 Staffing - there are no direct implications for the Council's establishment arising from this report

## **7.0 Exempt Reports**

7.1 Is this report exempt? Yes ☐ (please detail the reasons for exemption below) No ☒

## **8.0 Declarations**

The recommendations contained within this report support or implement our Corporate Priorities and Council Policies.

(1) **Our Priorities** (Please double click on the check box ☒)

- Clackmannanshire will be attractive to businesses & people and ensure fair opportunities for all ☒
- Our families; children and young people will have the best possible start in life ☒
- Women and girls will be confident and aspirational, and achieve their full potential ☐
- Our communities will be resilient and empowered so that they can thrive & flourish ☐

(2) **Council Policies (Please detail)**

Contract Standing Orders

Financial Regulations

**9.0 Equalities Impact**

- 9.1 Have you undertaken the required equalities impact assessment to ensure that no groups are adversely affected by the recommendations?

N/A

**10.0 Legality**

- 10.1 It has been confirmed that in adopting the recommendations contained in this report, the Council is acting within its legal powers. Yes ☒

**11.0 Appendices**

- 11.1 Please list any appendices attached to this report. If there are no appendices, please state "none".

**Policy note SPPN 4/2020 covering procurement related issues as a consequence of the coronavirus (COVID-19) outbreak.**

**Policy Note SPPN 5/2020 Coronavirus (COVID-19): supplier relief.**

**Coronavirus (COVID-19): recovery and transition from COVID-19: SPPN 8/2020**

**12.0 Background Papers**

- 12.1 Have you used other documents to compile your report? (All documents must be kept available by the author for public inspection for four years from the date of meeting at which the report is considered)

No ☒ (please list the documents below)

**Author(s)**

<b>NAME</b>	<b>DESIGNATION</b>	<b>TEL NO / EXTENSION</b>
Derek Barr	Procurement Manager	2017

**Approved by**

<b>NAME</b>	<b>DESIGNATION</b>	<b>SIGNATURE</b>
Stuart Crickmar	Strategic Director Partnership & Performance	





# Scottish Procurement

## Scottish Procurement Policy Note

SPPN 4/2020

20 March 2020



### PROCUREMENT REGULATIONS DURING COVID-19 OUTBREAK

#### Purpose

1. This Policy Note raises awareness on handling some procurement related issues as a consequence of the current COVID-19 outbreak. In such exceptional circumstances, public bodies in Scotland may need to procure goods, services and works with extreme urgency. It provides information on options available to purchasers in these circumstances.
2. This SPPN does not offer general or health-specific advice. The Scottish Government provides advice on Coronavirus on its [website](#) and has published a [Coronavirus Action Plan](#).
3. The content of this SPPN is not legal advice and should not be construed as such. Public bodies are advised to seek their own legal advice in relation to any questions and issues they may have.
4. All references to a regulation in this SPPN are to those in the Public Contracts (Scotland) Regulations 2015 unless otherwise stated.

#### Current contracts

5. If public bodies have not already done so, they may wish to contact suppliers of key contracts to seek assurance they have plans in place to ensure continuing performance of contracts over the coming weeks. The Scottish Government has already taken this step and a copy of the letter issued to suppliers is attached at Annex A to the SPPN. Public bodies may wish to adopt or adapt this letter for their own purposes.
6. To address the consequences of COVID-19 public bodies may be required to make new purchases with extreme urgency. This is permissible under the current procurement regulations. The means of doing so may vary depending upon a number of variables.

## **Procurements above the OJEU threshold values**

7. For OJEU threshold procurements, the following options may be considered as a means of making an urgent purchase:
  - call off contract from an existing framework agreement/Dynamic Purchasing System
  - modification of an existing contract
  - new procurement procedure – using accelerated timescales
  - direct award of a new contract
  - contract awarded under the light-touch regime
  - using the small lots option available in the regulations
8. Depending on the specific nature of a requirement there may be further options under the Public Contracts (Scotland) Regulations 2015 (2015 Regulations), such as the additional delivery of supplies from an existing supplier (regulation 33(4)), additional similar works or services from an existing supplier (regulation 33(8)), or using the services of a subsidiary of another contracting authority (regulation 13). These are not covered in this guidance and do have their own specific requirements.
9. It is important to note that in the absence of a competition, care must be exercised to ensure the contract terms and price are set at what can be described as the market level. Agreeing to pay above the market level/rates could be deemed to be an overpayment constituting an unlawful state aid, and if public bodies have any such concerns, legal advice should be sought.
10. The decision to award a contract without running a competition may be challenged by another supplier. Public bodies should therefore ensure they keep proper records of decisions and actions on individual contracts, as this could mitigate against the risk of a successful legal challenge. If a public body makes a direct award, they must publish a contract award notice (regulation 51) on Public Contracts Scotland (PCS) website, within 30 days of awarding the contract.
11. Public bodies procuring under the Utilities Contracts (Scotland) Regulations 2016 and the Concession Contracts (Scotland) Regulations 2016 will need to check similar provisions in those Regulations.

## **Procurements below the OJEU thresholds values**

12. Procurement officials are reminded that the procurement procedures and associated timescales set out in the 2015 Regulations do not apply to procurement exercises below the OJEU thresholds and thus there is greater flexibility to run competitions quicker for lower value requirements.
13. For contracts regulated by the Procurement (Scotland) Regulations 2016 (£50,000 goods/services £2,000,000 works) public bodies are required to advertise the opportunity on PCS, and apply exclusion and selection criteria.

14. For all contracts below these thresholds, public bodies are free to use any process or procedure they choose to run and are not required to use the standard procurement procedures (open, restricted etc) and are also free to set timescales for the competition as long as they are reasonable and proportionate.

### **Call-off contract**

15. Public bodies should check whether a framework agreement or Dynamic Purchasing System (DPS) can be used to put in place a call-off contract. Call-off procedures are a quick and efficient way to provide services, goods or works from an agreed supply chain and many have direct award ability or a quick minimum 10 day call-off period.
16. Public bodies should check within their own sectors for any framework agreements or DPSs that exist and may offer a quick means of securing any urgently needed goods/services. Annex B provides a list of collaborative resources available in sectors.
17. As always when considering the use of a framework agreement or DPS it is important that the procurement official is satisfied that it was set up in a way that entitles the purchasing body to use it.

### **Modification of an existing contract**

18. Consider whether there is an existing contract which could be modified in order to provide the goods, services or works. A contract established under the 2015 regulations can be modified to cater for the new purchase when certain grounds exist. Details of these grounds are summarised in Annex C.
19. In all circumstances where a contract modification is made, public bodies should keep a written justification and they should limit requirements to only what is absolutely necessary for the period that extreme urgency reasons apply, both in terms of what is being procured and the length of contract.
20. This justification should demonstrate that the decision related to the COVID-19 outbreak with reference to specific facts. For example, there is extreme urgency and the circumstances were unforeseen or staff are diverted by procuring urgent requirements to deal with COVID-19 consequences.

### **New procurement procedure – using accelerated timescales**

21. If there is no scope to call-off from a framework agreement or DPS or to modify an existing contract, a public body can consider whether the goods, services or works can be purchased following normal procurement procedures using reduced (sometimes referred to as accelerated) timescales. Details of timescales are at Annex D.

22. A public body must set out in the Contact Notice published on PCS their reason for accelerating timescales, for example:

“The COVID-19 outbreak has given rise to an urgent need for the supply of [description of what is being procured] because [explanation of urgency]. This does not give [name of public body] sufficient time to comply with the standard [open procedure / restricted procedure / competitive procedure with negotiation] timescales for this procurement. [Public body] considers this to be a state of urgency which it has duly substantiated. Accordingly, [contracting authority] is using the accelerated time limits permitted under the Public Contract (Scotland) Regulations 2015 (regulation [28(5) for the open procedure / 29(11) for the restricted procedure / 30(11) for the competitive procedure with negotiation]) in respect of this procurement”.

### **Direct award**

23. COVID-19 is serious and its consequences pose a risk to life. Public bodies are able to enter into contracts without competing or advertising the requirement where specific circumstances apply. See Annex E for a list of options and the tests that apply.
24. In all circumstances where a direct award is made, public bodies should keep a written justification that satisfies these tests and they should limit requirements to only what is absolutely necessary for the period that extreme urgency reasons apply, both in terms of what is being procured and the length of contract.
25. It is also important to undertake a separate assessment of the ongoing applicability of tests before undertaking any subsequent or additional procurement to ensure that they are all still met, particularly to ensure that the events are still unforeseeable. For example, as time goes on, what might amount to unforeseeable now, may not do so in future.
26. Delaying or failing to do something in time does not make a situation qualify as extremely urgent, unforeseeable or not attributable to the public body. This is because procurement rules expect a public body to plan its time in order to use a competitive procedure.
27. It is important that public bodies continue to achieve value for money and use good commercial judgement during any direct award. Whilst prices may be higher than would be expected in a regular market, public bodies should exercise caution if they consider any prices to be abnormally high and may wish to have internal processes in place to review any such pricing. Additionally, public bodies are encouraged to consider contractual mechanisms to ensure that they have the ability to secure pricing reductions through the life of the contract. Where this is not possible, it is recommended a log should be kept and reasoning provided for future auditing.

## **Light touch regime**

28. Public bodies can also consider how they apply the light touch regime in a way that is able to respond to urgent requirements. This regime applies to all social and other specific services, including health and social care related services (see regulations 74-76).
29. While public bodies are required to advertise contracts in OJEU and publish contract award notices, public bodies are free to use any process or procedure and are not required to use the standard procurement procedures (open, restricted etc) and are also free to set timescales for the competition as long as they are reasonable and proportionate.

## **Separate lots**

30. Public bodies may also wish to take account of the flexibility offered by regulation 5(3) to break down an otherwise large contract requirement into smaller contracts (sometimes referred to as lots) that can individually be awarded without requiring a competitive process under the 2015 Regulations provided:
- No smaller, individual contract exceeds £70,778 (or in the case of a works contract £884,720).
  - The estimate total aggregate value of all smaller contracts does not exceed 20% of the estimated total contract requirement.

## **Action required**

31. Public bodies are asked to note the measures and apply the procurement rules on all ongoing public contract requirements.

## **Dissemination**

32. Please bring this SPPN to the attention of all relevant staff within your field of responsibility to whom it may be of interest.

## **Contact**

Any enquiries about this SPPN should be directed to:

Email: [scottishprocurement@gov.scot](mailto:scottishprocurement@gov.scot)

Scottish Procurement  
The Scottish Government  
5 Atlantic Quay  
150 Broomielaw  
Glasgow  
G2 8LU

Dear

**Contract for the provision of XXXXXXXXXXXXXXXXXXXXXXXXXX - Supply Chain Resilience: Coronavirus - COVID-19**

We are assessing how our organisation would continue to deliver our core services if a significant number of cases of Coronavirus - COVID-19 arise in the coming weeks and months.

The principal risk to the continuity of critical business functions is the shortage of staff both within organisations and in suppliers and subcontractors.

It is not possible to say accurately how many people will be affected by COVID-19, but as a matter of good practice we are assessing how our business would cope if a significant number of cases arose. Part of this assessment includes considering potential supply chain disruption.

As a supplier to our organisation, we are seeking assurance that you have appropriate measures in place to support the continuing delivery of the above contract. I would be grateful if you could provide details of the plans that you have in place to ensure business continuity and the continuing delivery of your contractual obligations.

In relation to COVID-19, it would be helpful if your response to this letter could set out in particular:

- Do you know what processes are critical to the continuation of your business, and which are relevant to the service you provide to us?
- How would you ensure continuity of service to us in the event that a large number of your staff were absent?
- Are your suppliers resilient with their own Business Continuity Plans, which are necessary in order for you to deliver your services to us?

The Scottish Government [website](#) has published detailed advice on COVID-19.

If you wish to discuss further please do not hesitate to contact me. I would be grateful for a response within 48 hours of receipt of this letter.

Yours sincerely

## Framework agreements / Dynamic Purchasing Systems available

**Note** - it is important to check that the agreement was set up in a way that entitles the purchasing body to use it.

<p><b>Scottish Government</b></p> <p>Available for central government and the Scottish public sector  <a href="https://www.gov.scot/publications/frameworks-and-contracts/">https://www.gov.scot/publications/frameworks-and-contracts/</a></p>
<p><b>Crown Commercial Service</b></p> <p>Available for UK public sector organisations  <a href="https://www.crowncommercial.gov.uk/agreements">https://www.crowncommercial.gov.uk/agreements</a></p>
<p><b>Scotland Excel</b></p> <p>Available for local authorities and associate members  <a href="http://www.scotland-excel.org.uk/home/Contractregister/Contract-register.aspx">http://www.scotland-excel.org.uk/home/Contractregister/Contract-register.aspx</a></p>
<p><b>NHS National Procurement and NHS National Services Scotland</b></p> <p>Available for all Scottish Health Boards          For live frameworks please see Forward Plan document, go to the 'NHS NP' tab at the bottom of the page, this spreadsheet is updated on a monthly basis.  <a href="https://www.publiccontractsscotland.gov.uk/info/InfoCentre.aspx?ID=1361&amp;Type=1601&amp;Path=1601">https://www.publiccontractsscotland.gov.uk/info/InfoCentre.aspx?ID=1361&amp;Type=1601&amp;Path=1601</a></p>
<p><b>APUC</b></p> <p>Available for client institutions  <a href="http://www.apuc-scot.ac.uk/#!/contracts">http://www.apuc-scot.ac.uk/#!/contracts</a></p>

## Modification of OJEU value contracts

- for procurements subject to the Public Contracts (Scotland) Regulations 2015
- these principles also apply to the modification of below OJEU threshold value contracts

Permissible modifications	Value of the modification
<b>Contractual provision</b> The contract terms and conditions describe what modifications are permitted in what circumstances <b>and</b> the modification does not change the overall nature of the contract or framework agreement. regulation 72(1)(a)	<b>any value</b>
<b>Additional goods, services or works</b> The modification is where it is necessary for more of the same from the same supplier <b>and</b> a new supplier could be disruptive to services, goods provision or works <b>and</b> would be inconvenient or would add to costs Note: a contract award notice must be published. regulation 72(1)(b)	<b>Up to half the original contract value*</b>
<b>Unforeseeable circumstances</b> It was not possible to predict the circumstances which gave rise to the need for the change to the contract or framework <b>and</b> the modification does not change the overall nature of the contract Note: a contract award notice is must be published. regulation 72(1)(c)	<b>Up to half the original contract value*</b>
<b>Change of contractor</b> A replacement supplier is necessary, for example after a takeover. regulation 72(1)(d)	<b>n/a</b>
<b>The modification is not substantial</b> , if any of these apply <ul style="list-style-type: none"> <li>• the nature of the contract will not be changed materially.</li> <li>• if the modification had been part of the initial procurement procedure and would not have:               <ul style="list-style-type: none"> <li>○ allowed for another candidate to have been selected, or</li> <li>○ allowed another tender to have been accepted, or</li> <li>○ attracted other suppliers to have participated in the process.</li> </ul> </li> <li>• it would not change the economic balance of the contract or framework in favour of the contractor in a manner which was not provided for in the initial contract.</li> <li>• the modification does not extend the scope of the contract or framework considerably.</li> </ul> regulation 72(1)(e)	<b>any value</b>
<b>Limited in value</b> The modification does not change the nature of the contract <b>and</b> is less than 10% of the contract value for goods / services or 15% for works. regulation 72(5)	<b>below the OJEU threshold values</b>

\* - Multiple modifications are permissible, however each one should not exceed the 50% of the original contract value.



## Timescales

- for procurements subject to the Public Contracts (Scotland) Regulations 2015

STANDARD MINIMUM TIMESCALE	IF ELECTRONIC TENDER SUBMISSION PERMITTED	IF URGENT *	WHERE PIN PUBLISHED **	IF SUB CENTRAL AUTHORITY ***
<b>Open procedure</b>				
Minimum time limit for receipt of tenders 35 days	Minimum time limit for receipt of tenders 30 days	Minimum time limit for receipt of tenders 15 days	Minimum time limit for receipt of tenders 15 days	Minimum time limit for receipt of tenders 35 days
<b>Restricted procedure</b>				
<a href="#">Stage 1 – requests to participate</a>				
Minimum time limit for requests to participate 30 days	Minimum time limit for requests to participate 30 days	Minimum time limit for requests to participate 15 days	Minimum time limit for requests to participate 30 days	Minimum time limit for requests to participate 30 days
<a href="#">Stage 2 – receipt of tenders</a>				
Minimum time limit for tenders 30 days	Minimum time limit for receipt of tenders 25 days	Minimum limit for tenders 10 days	Minimum time limit for tenders 10 days	Minimum time limit for tenders may be set by agreement with tenderers. In the absence of agreement minimum time limit 10 days.
<b>Competitive procedure with negotiation</b>				
<a href="#">Stage 1 – requests to participate</a>				
Minimum time limit for requests to participate 30 days	Minimum time limit for requests to participate 30 days	Minimum time limit for requests to participate 15 days	Minimum time limit for requests to participate 30 days	Minimum time limit for requests to participate 30 days
<a href="#">Stage 2 – receipt of initial tenders</a>				
Minimum time limit for initial tenders 30 days	Minimum time limit for receipt for initial tenders 25 days	Minimum time limit for tenders 10 days	Minimum time limit for initial tenders 10 days	Minimum time limit for tenders may be set by agreement with tenderers. In the absence of agreement minimum time limit 10 days.
<b>Competitive dialogue and innovation partnerships</b>				
<a href="#">Stage 1 – requests to participate</a>				
Minimum time limit for requests to participate 30 days	Minimum time limit for requests to participate 30 days	Minimum time limit for requests to participate 30 days	Minimum time limit for requests to participate 30 days	Minimum time limit for requests to participate 30 days
<a href="#">Subsequent stages</a>				
No explicit time limits for submission of initial/subsequent tenders.	No explicit time limits for submission of initial/subsequent tenders.	No explicit time limits for submission of initial/subsequent tenders.	No explicit time limits for submission of initial/subsequent tenders.	No explicit time limits for submission of initial/subsequent tenders.

## Notes:

All of the timescales in this table are calendar days and the timescale begins at midnight at the end of the day that the notice/invitation is sent by the contracting authority and ends on midnight at the end of the last day of the specified time period. The last day of this timescale must not be a Saturday or a Sunday or a bank holiday in Scotland. In addition any period of time that is referred to here must include at least two working days.

Please also be aware that a Prior Information Notice may be used by sub-central contracting authorities as a call for competition in restricted procedures or competitive procedures with negotiation. Contracting authorities must allow at least 35 days for expressions of interest after which they must simultaneously invite the candidates to confirm their interest and must allow at least 30 days for this. When the invitation to tender is dispatched to the selected candidates contracting authorities must allow at least 30 days for submission of tenders, or at least 25 days where electronic submission tenders is permitted. There is also the option for the sub-central contracting authorities to agree the time limit with the candidates with a default time limit of at least 10 days where there is no mutual agreement.

\* This shorter time limit is allowed where a state of urgency, duly substantiated by a contracting authority, renders the minimum time limit impractical.

\*\* This shorter time limit for the receipt of tenders is allowed where contracting authorities have published a prior information notice which was not itself used as a means of calling for competition, provided that **all** of the following conditions are fulfilled:

- a) The prior information notice included all of the information required in section I of the Prior Information Notice referred to in Annex V of the Public Contracts Directive 2014/24/EU, insofar as that information was available at the time that the prior information notice was published.
- b) The prior information notice was sent for publication between 35 days and 12 months before the date on which the contract notice was sent.

\*\*\* Sub-central contracting authorities means all contracting authorities which are not central government authorities as listed within Schedule 1 of the Public Contracts (Scotland) Regulations 2015.

## Options for direct award

- for procurements subject to the Public Contracts (Scotland) Regulations 2015
- these principles also apply to below OJEU threshold value contracts

<b>Direct award – extreme urgency</b>	
Where all the following tests apply, see regulation 33(1)(c) and 33(3)	<p><b>There are genuine reasons for extreme urgency</b>, for example, you need to respond to the COVID-19 consequences immediately, for example, because of public health risks, loss of existing provision at short notice, or you are reacting to a current situation that is a genuine emergency - not planning for one.</p> <p><b>and</b></p> <p><b>The events that have led to the need for extreme urgency were unforeseeable</b>, for example, the COVID-19 situation is so novel that the consequences are not something you should have predicted.</p> <p><b>and</b></p> <p><b>It is not possible to comply with the usual timescales in the 2015 Regulations</b>, for example, there is no time to run an accelerated procurement under the open or restricted procedures or competitive procedures with negotiation; or there is no time to place a call off contract under an existing commercial agreement such as a framework or dynamic purchasing system.</p> <p><b>and</b></p> <p><b>The situation is not attributable to the contracting authority</b>, for example, you have not done anything to cause the need for extreme urgency, or you have not failed to do something which has then resulted in the need for extreme urgency.</p>
<b>Direct award - absence of competition or protection of exclusive rights</b>	
One of the following applies, see regulation 33(1)(b)	<p><b>Competition is absent for technical reasons</b> for example, there is only one supplier with the expertise to do the work, produce the product or with capacity to complete on the scale required;</p> <p><b>or</b></p> <p><b>The protection of exclusive rights, including intellectual property rights</b> for example, the supplier owns those rights (including intellectual property rights) or it has the exclusive right to exploit intellectual property rights.</p>
	<p>But this is only when: there is no reasonable alternative or substitute available;</p> <p><b>and</b></p>

	the public body is not doing something which artificially narrows down the scope of the procurement for example, by over-specifying the requirement.
<b>Direct award – supplies in specific circumstances</b>	
Where any of the following applies to the contract, see regulation 33(4)	<p><b>if the products are manufactured purely for the purpose of research, experimentation, study or development</b> – but not if the products are being manufactured for quantity production, to establish commercial viability or to recover research and development costs.</p> <p><b>or</b> <b>Additional supplies from the original supplier where it would be disruptive to change to a different product</b> - If additional deliveries are required, where <b>and</b> a change of supplier would mean that the supplies would have a different technical characteristic (for example a new specification), <b>and</b> would result in incompatibility or disproportionate technical difficulties in operations and maintenance - these supplies must be a partial replacement or extension of the supplies / installation.</p> <p><b>or</b> <b>If supplies quoted and purchased on a commodity market</b></p> <p><b>or</b> <b>If the supplies will be purchased on particularly advantageous terms</b> – these supplies <b>must</b> be from a supplier who is definitively winding up its business, or the liquidator in insolvency procedure, an arrangement with creditors, or similar under law.</p>
<b>Direct award – new work and / or service only – same supplier</b>	
Where all of the following applies to the contract, see regulation 33(8)	<p>Where the contract,:</p> <ul style="list-style-type: none"> <li>• was previously awarded following a competition run under one of the procedures of the 2015 Regulations;</li> <li>• indicated the possibility of additional works or services being awarded;</li> <li>• the original procurement process suggested the possible need for this type of modification, <b>and</b></li> <li>• the original contract was awarded within the last three years</li> </ul>

## Supplier relief due to COVID-19

### Purpose

1. This Scottish Procurement Policy Note (SPPN) sets out guidance for public bodies on options for payment to their suppliers to ensure service continuity during the current coronavirus (COVID-19) outbreak.
2. This SPPN does not offer general or health-specific advice. The Scottish Government provides advice on Coronavirus on its [website](#) and has published a [Coronavirus Action Plan](#). Advice on substantive [support packages](#) available for business and their employees including details of the [Coronavirus Job Retention Scheme](#).
3. The content of this SPPN is not legal advice and should not be construed as such. Public bodies are advised to seek their own legal advice in relation to any questions and issues they may have. All funding must be allocated in compliance with the current State aid rules or the [Temporary Framework introduced by the European Commission to further support the economy in the COVID-19 outbreak](#).

### Timing and action required

4. This SPPN applies with immediate effect and until 30 June 2020; it will be subject to review by then. Public bodies are urged to take immediate action to urgently review their current contracts and consider the options set out in this guidance to provide supplier relief. All decisions must be made on a case by case basis and take account of local governance and audit requirements.

### Key points

5. 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. This will put their financial viability, ability to retain staff and their supply chains at risk. Public bodies should act now to

support their suppliers so they are better able to cope with the current crisis and to resume normal service delivery and fulfil their contractual obligations when the outbreak is over.

6. This SPPN offers guidance on steps that public bodies can take to provide supplier relief under existing contracts. Although the guidance makes reference to the Public Contracts (Scotland) Regulations 2015 (2015 Regulations), this is not to be read as meaning that the advice applies only to contracts within scope of those Regulations; these principles also apply to lower value contracts.

### **Modifying contracts including payment terms for supplier relief**

7. It is the view of the Scottish Government that, at this time, the grounds for modifying a contract set out in [regulation 72](#) of the 2015 Regulations may exist for many contracts. Public bodies should consider using this ability to modify payment terms of contracts. Where to do so will be consistent with this regulation and will offer suppliers relief under the terms of their contract. [SPPN 4/2020](#) sets out guidance on contract modification, including the need for a contract variation notice.

8. Annex A to this SPPN provides a template of Model Interim Payment Terms that public bodies may wish to use when providing contractual relief. The Model Interim Payment Terms are designed for public contracts for the delivery of goods and services. Public bodies should seek legal advice to ensure that the Model Interim Payment Terms are consistent with the contract which they seek to vary.

9. Key points from annex A are:

- It will be for a supplier to set out proposals to vary an existing contract and/or request interim / advance payment (see para 10 below).
- Both parties will be required to explore if other changes to the contract (for example, rescheduled delivery dates) would work better.
- The supplier will not be entitled to combine a claim under the contract with any other COVID-19 related relief, grant, intervention or other measure which results in the supplier receiving more than one benefit/relief for the same underlying cash-flow issue.
- On request, the supplier will have to evidence that any monies paid out have been used as intended.
- A condition of payment will be that the supplier must also promptly pay its staff and supply chain under the contract.
- Suppliers will not be able to claim where there is no contractual volume commitment to deliver nor will not be able to claim for profit on undelivered elements of the contract.
- Monies paid can be recovered by public bodies in specified circumstances.

## **Payment to suppliers**

10. The [Scottish Public Finance Manual \(SPFM\)](#) currently discourages payment in advance of need unless in exceptional circumstances. In the current circumstances, Scottish Government (SG) central finance and procurement consent is granted for payments in advance of need where the Accountable 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. Central SG finance and procurement 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 SG central finance and procurement in the usual way. This consent does not alleviate Accountable Officers of their duties to ensure the value for money, regularity and propriety of all spending 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.

11. Those public bodies not covered by the SPFM should satisfy themselves their own accounting rules will permit payment in advance in the current environment.

12. Continuing to make payments to suppliers will present risks including that, despite these exceptional actions, a supplier may still become insolvent. These risks will need to be managed by public bodies on a case by case basis.

13. Public bodies should aim to work with suppliers and, if appropriate, provide relief against their current contractual terms. For example relief on service level expectations including key performance indicators (KPIs) and service credits. This maintains business and service continuity for example, to provide goods or services to support temporary or critical Covid-19 related public services rather than the original scope of the contract. Claims by suppliers for other forms of contractual relief, such as force majeure<sup>1</sup> should be considered as a last resort and legal advice should be sought.

14. See more guidance on payment to suppliers – annex B.

## **Prompt payment of invoices and interim applications**

15. Public bodies should pay suppliers as quickly as possible to maintain cash flow and protect jobs. Public sector organisations are bound by the Late Payments of Commercial Debts (Interest) Act 1998, which requires payment to be made with 30

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<sup>1</sup> A force majeure event is an event or circumstance which is beyond the parties' control and which prevents them from fulfilling their obligations under the contract. It can only be invoked if there is a provision in the contract for it – i.e. it is not an implicit right.

days after receipt of a valid invoice, or any other period the contract terms may specify. Public bodies should now aim to accelerate their payment practice to ensure payment is made as quickly as possible to their suppliers to maintain cash flow and protect jobs.

16. See more guidance on prompt payment of invoices – annex C

## **Dissemination**

17. This SPPN is applicable to all Scottish contracting authorities, including central government departments, executive agencies, non-departmental public bodies, local authorities, NHS bodies and the wider public sector. This SPPN covers goods and services contracts put in place by Scottish public bodies. The principles also apply to works contracts, for which further guidance will be issued.

18. Please circulate this SPPN 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.

## **Contact**

Any enquiries about this SPPN should be directed to:

Email: [scottishprocurement@gov.scot](mailto:scottishprocurement@gov.scot)

Scottish Procurement, The Scottish Government, 5 Atlantic Quay, 150 Broomielaw, Glasgow, G2 8LU.



## Annex A

### Template of Model Interim Payment Terms

[AUTHORITY LETTERHEAD]

Insert supplier name

Address

Xx/Month/Year

Dear

**Contract (as amended) between (1) [Authority] (the “Authority”) and (2) [Supplier] (the “Supplier”) dated [Date] (the “Contract”)**

**Supplier relief due to COVID-19 in accordance with Scottish Procurement Policy Note 5/2020 (“SPPN 5/2020”)**

1. We refer to the contract. Unless otherwise defined, terms defined in the contract and used in this letter shall have the meaning set out in the contract.

#### **Background**

2. The purpose of the variation is for the authority to give relief to the supplier on the terms of this variation. The authority and the supplier acknowledge that the relief is given in light of SPPN 5/2020 and that both parties shall act in good faith and work together towards the principles set out in SPPN 5/2020. The supplier acknowledges that any relief given to it is at the sole discretion of the authority.
3. The authority reasonably anticipates that the procurement regulations will apply to this Variation and the Parties shall ensure that there is a lawful basis for

agreeing the variation under the Public Contracts (Scotland) Regulations 2015 and/or any applicable procurement rules. Due to the current COVID-19 pandemic, this may include in particular justification under regulation 72 or regulation 33 of the Public Contracts (Scotland) Regulations 2015 or such other applicable equivalent.

4. The contract, including any previous variation, will remain effective and unaltered except as amended by this Variation.

## **Variation**

5. The following terms shall have the meaning as set out below and shall be incorporated into the contract:

**[Drafting note: authorities should crosscheck definitions between this variation and the contract.]**

**Terms highlighted in bold are not defined in this variation and their definition should be crosschecked in the contract.]**

<b>“Covid Related Hardship”</b>	means that as a result of the COVID-19 pandemic the supplier’s ability to meet its contractual obligations under the contract have been adversely affected.
<b>“Covid Relief Period”</b>	means the period from variation date until the relief expiry date.
<b>“Interim Payment Proposal”</b>	means a proposal for an interim payment structure pursuant to paragraph six of this variation.
<b>“Open Book Data”</b>	means the complete and accurate financial and non-financial information which is required by the authority to enable the authority to understand all COVID-19 related relief, grants, interventions or other measures received by the supplier from the Government and to verify the <b>[charges]</b> paid or the <b>[charges]</b> which would have been paid during the Covid Relief Period, including: <ol style="list-style-type: none"><li>a. the supplier’s <b>[costs]</b> broken down against each <b>[deliverable]</b>, including actual capital expenditure (including capital replacement costs) and the unit cost and total actual</li></ol>

- costs of all hardware and software.
- b. operating expenditure relating to the provision of the **[good]** or **[services]** including an analysis showing:
  - a. the unit costs and quantity of consumables and bought in services
  - b. staff costs broken down into the number and grade/role of all **[supplier personnel]** together with a list of agreed rates against each manpower grade
  - c. **[reimbursable expenses]**
  - c. **[overheads]**
  - d. all interest, expenses and any other third party financing costs incurred in relation to the provision of the **[services]**
  - e. full details of the payment of employee wages
  - f. full details of the payment of **[sub-contractors]**.

**“Procurement Regulations”**

means the Public Contracts (Scotland) Regulations 2015

**“SPPN 5/2020”**

means Scottish Procurement Policy Note 5/2020 [as updated or amended from time to time] setting out information and guidance for public bodies on how they may amend payment provisions in contracts or consider other contractual relief in order to assist suppliers to combat the impact of COVID-19.

**“Relief Expiry Date”**

means 30 June 2020, or such other date as may be notified by the authority to the supplier prior to or on 30 June 2020.

**“Variation”**

means the terms set out in this variation.

**“Variation Date”**

means the date the second party signs this variation

6. Notwithstanding any other term of the contract, the parties agree to vary the contract by incorporating the following terms into the contract:

6.1. Where the supplier is subject to Covid Related Hardship, the supplier may at any time during the Covid Relief Period, propose a change to the contract which has the aim of providing interim relief and support to the supplier, pursuant to the aims and principles set out in SPPN 5/2020.

6.2. Pursuant to the principles set out in SPPN 5/2020 and subject to this variation, the supplier shall prepare and deliver to the authority in writing, an Interim Payment Proposal which sets out details of the supplier's proposals to vary the payment profile and/or provisions of the contract to support its cash flow position during the Covid Relief Period, including:

6.2.1. details of an interim payment structure to be put in place, which may include (but not be limited to):

- 6.2.1.1. [advance payment or advance interim payment for **[goods]** or **[services]** prior to their delivery by the supplier]
- 6.2.1.2. [proposals to amend contract milestone delivery and payment profiles (including extending, delaying, cancelling or consolidating milestone activity and payments)]
- 6.2.1.3. [continued payment notwithstanding reduced or non-performance]
- 6.2.1.4. [bringing forward authority orders and associate payments]

**[Drafting note: authorities should consider which details are appropriate for each specific contract]**

and the Interim Payment Proposal shall include details of the proposed amounts payable, the timescales for payment and any other information reasonably required to enable the proposal to be considered by the authority and implemented by the parties and

6.2.2. details of how any the interim payment structure proposed by the supplier (in total and each specific payment) is to be used and how it will provide the Supplier with relief and help reduce the adverse effect of Covid Related Hardship.

6.3. The authority shall within [three] **[working days]** of receipt of an Interim Payment Proposal, consider and either reject or approve the Interim Payment Proposal. If approved, the parties shall agree in writing the effective date of the Interim Payment Proposal, which shall be dealt with under the contract as an agreed change. Where the authority rejects the proposal, the supplier shall be entitled to resubmit the Interim Payment Proposal but shall amend the proposal to take into account any changes reasonably requested by the authority.

6.4. The parties shall use reasonable endeavours to avoid the use of the Interim Payment Proposal mechanism by identifying and utilising existing contractual mechanisms and provisions under the contract to reduce the adverse impact of Covid Related Hardship under the contract, which may include:

- 6.4.1. relief against performance indicators
- 6.4.2. relief and/or delays to delivery dates
- 6.4.3. relief and/or delays to service credits
- 6.4.4. waiver or delay by the authority of its remedies and rights under the contract in whole or in part.

6.5. Where the parties agree and implement an Interim Payment Proposal, the supplier shall:

- 6.5.1. At the Authority's request, promptly provide a **[certificate of costs]** which sets out the supplier's actual costs, expenses, cash flow and profits of providing the **[goods]** and/or **[services]** over the [three months] prior to the effective date of the Interim Payment Proposal.
- 6.5.2. Ensure that the payments agreed under the Interim Payment Proposal are promptly and solely applied to the purposes for which they are paid, which may include payments to **[supplier staff]** and the supplier's contract supply chain; who are working on deliverables to be provided under or in connection with the contract so as to reduce the adverse effect of Covid Related Hardship.
- 6.5.3. Make available to the authority upon request any information and/or evidence (including the open book data) which the authority may reasonably require in order to:
  - 6.5.3.1. verify and assure that the supplier has applied the monies as agreed in the Interim Payment Proposal, including copies of accounts, ledgers, cash-flow forecasts and statements, balance sheets, profit and loss accounts and any other documentary evidence
  - 6.5.3.2. verify and assure that monies intended for **[supplier staff]** performing the Contract, have been properly and promptly paid
  - 6.5.3.3. pay invoices submitted by the supplier's **[sub-contractors]** and supply chain immediately on receipt
- 6.5.4. Ensure that all invoices clearly set out which elements of the invoice that are attributable to the Interim Payment Proposal and which elements are business as usual.
- 6.5.5. Maintain full records and a written audit trail of all Interim Payment Proposal activity in accordance with the general financial records provisions in the contract (and such records shall be made available promptly to the authority on reasonable request).

6.6. The supplier shall not be entitled:

- 6.6.1. to include any profit in the Interim Payment Proposals to the extent that such profit might apply to elements of the contract that are undelivered by the supplier during the Covid Relief Period
- 6.6.2. to include any payments in the Interim Payment Proposals where there is no contractual volume commitment under the contract
- 6.6.3. to any payments to the extent that the supplier has been underperforming under the contract and is subject to a current improvement plan or other remedial performance measure under the contract
- 6.6.4. to combine the Interim Payment Proposal with any other [government] [public sector] COVID-19 related relief, grant, intervention or other measure which results in the supplier receiving more than one benefit/relief for the same underlying cash-flow issue

6.7. The authority may at any time and in its sole discretion designate one or more additional Covid Relief Periods by notice to the supplier from time to time. Any such notice shall specify which, if any, SPPN contains the applicable rules and principles for the relevant Covid Relief Period.

6.8. **[Drafting note: authorities may need to made additional amendment to the contract.]**

7. If, in the reasonable opinion of the authority, the supplier:

- 7.1. fails to meet any obligation set out in this variation
- 7.2. receives any interim payment and fails to meet any proposal in the relevant Interim Payment Proposal
- 7.3. takes undue advantage of any relief
- 7.4. fails to act transparently and with integrity

the authority may take all action necessary to recover any payments made to the supplier during the relevant Covid Relief Period, including without limitation retaining or setting-off payment of any amount it owes to the supplier at any time under the contract or any other contract, to the extent that sub-paragraph 7.1 – 7.4 apply to such payments..

### **Miscellaneous**

- 8. The terms of this variation shall be effective from the variation date.
- 9. Except to the extent set out in this variation, this variation shall not constitute a waiver of any right or remedy of the authority or the supplier arising before, during or after this variation.

10. The authority and the supplier agree that any event arising from the COVID-19 shall not give rise to any force majeure or frustration rights set out in the contract to the extent that such rights are mitigated by any Interim Payment Proposal.

11. If there is an inconsistency between any of the provisions of this variation and the provisions of the contract, the provisions of this variation shall prevail.

Please confirm your acceptance of the variation countersigning this letter and returning a scanned copy to **[authority email address]**.

If you have any queries, please contact the team on **[authority's email address]**.

Yours faithfully

[Insert name]

[Insert role]

For and on behalf of the authority

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We hereby acknowledge receipt and accept the terms of this variation.

Signed: \_\_\_\_\_

For and on behalf of the supplier

Position: [Director]/[Authorised Signatory]

Date:



## Payment of suppliers

The public sector must act quickly and consider immediate steps to put in place appropriate arrangements to support their suppliers' survival over the coming months.

Where the performance of the contract is either reduced or paused temporarily, public bodies should consider their options to establish appropriate arrangements to pay suppliers and liaise with main suppliers to ensure they put in place suitable arrangement for payment in the supply chain, in order 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 to ensure continuity of services when services can resume.

Annex A to this SPPN provides a template document that public bodies may wish to use for this purpose.

SPPN 4/2020 sets out guidance including how public bodies can amend contracts under [regulation 72](#) of the Public Contracts (Scotland) Regulations 2015. 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 public body's decision when things should return to normal.

## Payment to maintain business continuity

Risks associated with advanced payment should be carefully considered and documented.

Where contracts operate 'payment by result' or are 'output / outcome' based, payments to suppliers could 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 could be adjusted to ensure profit margin is not payable on any undelivered aspects of the contract and that adjustments are made to reduce / remove any costs that are no longer incurred, but that are included in

pricing / costs, for example travel or delivery cost. However this should not delay payments being made.

Suppliers should be required to identify in their invoices which elements of the invoiced amount relates to services they are continuing to supply (for example, business as usual) and which amounts are attributable to the impact of COVID-19.

Suppliers must explicitly agree to follow Government guidance for businesses in respect of COVID-19, continue to pay employees and flow down payment to their sub-contractors and suppliers.

Considerations may include that 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.

Suppliers should not expect to make profits on elements of a contract that are undelivered during this period and all suppliers would be 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.

### **Transparency – ‘open book’**

Public bodies 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 public body on request any data, including from ledgers, cash-flow forecasts, balance sheets, and profit and loss accounts, as required and are 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.

Public bodies should keep records of decisions and agreements made, and ensure suppliers maintain records to enable future reconciliation if necessary.

Suppliers must be able to demonstrate transparency and follow Government guidance for businesses in respect of COVID-19, and ensure that adjustments are recorded for any additional government funding grants, for example, support from the [Coronavirus Job Retention Scheme](#) and others that apply during this period.

## **Contractual relief**

Public bodies 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, public bodies 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 (for example, revised milestones dates or delivery dates, etc.)
- a waiver or delay in the ability of the public body to exercise a right and/or remedy (for example 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 and public bodies should seek specific legal advice as required.

Public bodies 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.

Public bodies should consider not accepting 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
- to be excused from performance of the contract, in whole or in part
- 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 are 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.

Public bodies are not bound to accept a supplier's claim for force majeure and can resist it. Public bodies 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**

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 public body 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. Public bodies 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, public bodies should maximise 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 (for example, to claim liquidated and ascertained damages, service credits or terminate the contract), revising milestones or delivery dates. In these circumstances, if there is one, public bodies should consider using the contract change control procedure to keep records of any changes made and the decision making behind each one. If not, public bodies should keep their own records.

## **Prompt payment of invoices and interim applications**

Public bodies should pay all suppliers as quickly as possible to maintain cash flow and protect jobs and should act now to ensure payment is made as quickly as possible to their suppliers. Public bodies should consider:

- Targeting high value invoices where a prime contractor 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 two-way matching is always needed (rather than adopt regular three-way matching against receipt and purchase order)
- Encourage suppliers to invoice or make interim applications on a more regular basis to help cash flow (for example, every week rather than monthly)

Public bodies should also consider the following additional contingency measures during the COVID-19 outbreak:

### **Contingency measures - to ensure invoices are not delayed**

With significant levels of staff absence possible, public bodies should consider if they have appropriate contingency arrangements in place including sufficient numbers of staff with the appropriate permissions 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 consider not sending 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.







## Recovery and Transition from COVID-19

### Purpose

1. This Scottish Procurement Policy Note (SPPN) is supplementary to SPPN 5/2020 – supplier relief, which sets out guidance for public bodies on options to ensure service continuity during the current coronavirus (COVID-19) outbreak, and comes into effect on 1 July 2020. This SPPN will be kept under review.

### Key points

- As markets begin to open and it becomes safe to return to workplaces, public bodies and suppliers can now plan their transition to restart contracts.
- Supplier relief and supporting a transition to restart will continue to be important aspects of our wider economic response package.
- This SPPN is supplementary to the guidance contained in [SPPN 5/2020](#) and its associated FAQ document, which has been extended beyond its initial expiry date of 30 June 2020.
- This SPPN, like SPPN 5/2020, applies to goods, services and works contracts.

### Action - public bodies should

- Review their contract portfolio, to consider whether supplier relief measures already in place remain appropriate, sustainable and reflective of any transitional support that may be needed in preparation for restarting the contract.
- Work in partnership with their suppliers in an open and transparent manner to develop transition plans to be implemented as soon as possible and in line with the opening up of markets and the Scottish Government's Routemap through and out of lockdown. Plans should set out steps to transition out of relief, move to a more sustainable operating model, and include agreeing contract variations, where appropriate and necessary.
- Maintain accelerated payment practices to support cash flow as per SPPN 5/2020.
- Seek legal advice and consider state aid implications about all decision making, where deemed appropriate.
- Adhere to local finance and governance procedures.

## Focusing on recovery

2. The Scottish Government's [Framework for Decision Making](#), Scotland's route map through and out of lockdown, sets out the principles that will guide us out of the current lockdown arrangements. This is not a short term crisis and we must continue to be responsive to public health, restarting the economy in a safe and orderly way. Where public health evidence allows sectors to restart in line with relevant safer workplace guidance, see [Phase 1: returning to work safely](#), public contracts may be able to restart. This will enable suppliers to get back to work as soon as is safe and practicable to do so.
3. Supplier relief payments are intended to allow public bodies to consider cash flows and payment scheduling, within existing budgets, to support the continuity and retention of suppliers to ensure critical service delivery is maintained as far as possible during this exceptional period. Suppliers to the public sector are not automatically entitled to payment or other relief under this SPPN or SPPN 5/2020, and when considering the case for providing supplier relief, public bodies should take account of, and ensure suppliers are sighted on, the other sources of government support that are available.

## Transitioning to Restart

4. In response to the various forms of supplier relief set out in SPPN 5/2020 and its associated FAQ document, a number of public bodies have taken steps to provide relief where such action was deemed necessary to either secure ongoing contract delivery on modified terms, or paying for an element of contingency/retention to protect future delivery.
5. Public bodies should take steps now to review their contract portfolio (see annex A), taking into account strategic and reprioritisation needs. This should be done by working in partnership with suppliers to consider whether relief measures already in place remain sustainable and are reflective of any transitional support that may be needed in preparation for restarting the contract in full. Supplier relief measures may still continue to be appropriate and should be balanced, on a contract by contract basis, against other support arrangements that are available.
6. This should result in the development of contract transition plans which set out the steps to progress towards a sustainable operating model and an exit from relief, with a view to focusing procurement activity on the restart and recovery phases of our [four step economic recovery plan](#). See annex A for more detail on transition planning.

## Reviewing supplier relief measures

7. Where any element of supplier relief arrangements are required to remain in place, or to be put in place, this should be subject to ongoing and regular review and with a view to transitioning out of supplier relief measures as soon as relevant restrictions are lifted. This must take into account the impact of ongoing Government advice, including where restrictions may need to be reapplied to

respond to potential periodic epidemics. The public body will have the final decision on whether supplier relief is required to support the continuity of a contract and the form of any relief that is necessary, appropriate and affordable. Should ongoing supplier relief take the form of advance payments, please see paragraphs four and five in annex A.

8. In some cases, it may be possible that the basic commercial assumptions that underpinned the decision on applying supplier relief – for example, with regard to the operational or commercial viability of the original contract - can no longer be maintained, and new arrangements may have to be implemented. Unreasonable expectations around transfer of risk and cost are likely to increase the probability of contract failures and may mean suppliers exit the market and weaken competition. Public bodies and their suppliers will need to engage openly and pragmatically during this transition to ensure that contracts are commercially sustainable wherever possible and represent value for money over the medium to longer term.
9. In instances where it is determined that contracts cannot continue as normal, the public body and the supplier should discuss alternative options, for example, applying a contract variation with clear actions and timescales to adapt the commercial model where, for example existing terms would be inappropriate. All possible attempts should be taken to modify existing contracts in order to respond to changes necessary to comply with Government workplace guidance. Only where it is considered that a contract is unlikely to be deliverable, or is regarded as no longer viable once restrictions have lifted, or where a contract modification would be beyond the limit permitted in the procurement regulations, should a public body consider the need for retendering and possible early termination of the contract. For more on contract modifications, see paragraphs six and seven in annex A.
10. Where contracts are primarily revenue generating and payment relief is not available within existing budgets, for example concession contracts, public bodies should work with these suppliers to identify commercial solutions that are specific and appropriate to the contract.
11. Continuing to make payments to suppliers will present risks including that, despite these exceptional actions, a supplier may still become insolvent. These risks will need to be managed by public bodies on a case by case basis.
12. If a public body views a contract as no longer relevant or viable, after careful consideration of all factors, it should work with the supplier to pursue termination based on the existing terms and conditions of the contract and seeking legal advice as necessary.
13. In all cases, parties are strongly encouraged to seek to resolve any emerging contractual issues responsibly to avoid these escalating into formal intractable disputes.

## Transparency and open dialogue

14. Throughout the process, it will be important for both parties to strive to maintain open and transparent dialogue on the sustainability and viability of existing contracts and on how to transition to restart safely.

## Dissemination

15. This SPPN is applicable to all Scottish contracting authorities, including central government departments, executive agencies, non-departmental public bodies, local authorities, NHS bodies and the wider public sector. This SPPN covers goods, services and works contracts put in place by Scottish public bodies.
16. Please circulate this SPPN 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.

### Contact

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## **Transition planning**

1. All contract portfolios should be reviewed immediately and transition plans should be implemented with suppliers as soon as possible with a view to restarting contracts in line with the opening up of markets and the Scottish Government's Routemap through and out of lockdown. Public bodies should consider extending supplier relief to support delayed restarts of services they deem critical and supply chains.
2. Transition plans should include the following:
  - A planned exit date or conditions for when any supplier relief will end; and this should be kept under review to reflect the changing situation, for example, local restrictions being reintroduced.
  - If advanced payments have been made, the parties should agree if and when any outstanding goods or services are to be delivered.
  - The process for reconciling payments made against costs, as set out in the model interim payment terms accompanying SPPN 5/2020.
  - An assessment by both parties as to whether the contract is still operationally and commercially viable and, if not, proposals for variation or termination.

## **Contract portfolios - key considerations for transition plans**

3. When considering supplier relief, some key considerations to support a contract to restart at a later date are:
  - Consider whether COVID-19 restrictions prevent the contract from restarting in full or in part, and whether there is a need for the current supplier relief measures to continue in order to support services deemed as critical by individual public bodies and to ensure they can restart later.
  - Suppliers of services deemed critical by individual bodies, who may not previously have requested relief, may require it going forward, including circumstances where the impact of COVID-19 may be longer lasting in some areas and in respect of some contracts. New supplier relief requests should only be considered where a contract – or an element of its delivery - cannot currently be delivered as a result of the restrictions, but which will be required at some point in the future.
  - Consider where it is possible to restart the contract on existing terms or whether temporary, interim or longer term contract modifications need to be applied, alongside elements of ongoing supplier relief, for example to cover mobilisation costs.
  - Where supplier relief remains necessary, it is important to review how relief may need to be adapted to support the specific transition arrangements of the contract. There may be a requirement to change and flex contractual relief measures through the transition to a longer term operating model, for example, a phasing back in of KPI relaxations put in place; a return to usual contractual terms with a focus on accelerated payment; moving from advanced or retention payments to payment against revised/extended

milestones or timescales; or moving from retention payments to interim or advance payments.

- It may be appropriate to introduce phases as part of the transition plans, reviewing these at regular intervals in line with Government advice on the easing of the lockdown and as safer workplace guidance is able to be implemented.
- Ongoing supplier relief requirements should be balanced, on a contract by contract basis, against other support arrangements that are available.
- Where the lifting of relief is based on a return to work, it is implicit that it is considered safe to restart a contract in part or in full, based on Government advice.
- Where new or modified supplier relief requests are required, these should be considered on a case by case basis and an Interim Payment Proposal (as defined in annex A to SPPN 5/2020) should be submitted by the supplier.

## **Advance payments**

4. As was set out in SPPN 5/2020, whilst the [Scottish Public Finance Manual \(SPFM\)](#) discourages payment in advance of need unless in exceptional circumstances, Scottish Government (SG) central finance and procurement consent was granted for payments in advance of need where the Accountable Officer was satisfied that a value for money case was made by virtue of securing continuity of supply of critical services in the medium and long term. This consent was capped at 25% of the value of the contract and applied until 30 June 2020. Under this current SPPN, and to aid any relief deemed necessary, that consent is now extended until individual public bodies are satisfied that lockdown restrictions have been lifted to the extent that the contract can safely restart. Consent for payment in advance of need in excess of this amount should be sought from SG central finance and procurement in the usual way. This consent does not alleviate Accountable Officers from their usual duties to ensure value for money, regularity and propriety of all spending 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.
5. Those public bodies not covered by the SPFM should satisfy themselves that their own accounting rules and governance arrangements will permit payment in advance in the current environment.

## **Contract modifications**

6. As plans are made to transition to restart, it may also be necessary to make changes to how the contract will be delivered, with a view to establishing longer term, sustainable contract terms. It may be appropriate to consider, for example, if a face-to-face service will now be delivered remotely; or if parts of the contract can resume now and other parts at a later date; or whether temporary changes to the delivery of a contract based on social distancing and remote working, should migrate to a more permanent arrangement.

7. Any potential modification to a contract must be carefully considered against what is permitted within the limits of the Public Contracts (Scotland) Regulations 2015. [SPPN 4/2020](#) sets out procedures available and circumstances where modifications to contracts are permitted. Where modifications to a contract are beyond the scope permitted in regulations, for example, where the specification requires a significant variation, a public body will need to consider whether it is necessary to terminate the contract and undertake a new procurement procedure to meet the change to the requirement. If there is any doubt about the extent to which a contract can be modified, it is recommended that legal advice is sought.

