



Coronavirus (COVID-19): impact on construction contracts

Introduction

1. This Construction Policy Note (CPN) complements Scottish Procurement Policy Notes which have recently issued as a consequence of the current COVID-19 outbreak. [SPPN 4/2020](#) raises awareness on handling some procurement related issues, and [SPPN 5/2020](#) sets out guidance for contracting authorities on payment to their suppliers to ensure service continuity. This CPN should be read in conjunction with both.
2. It should be noted that this CPN 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 Scottish Government has also published [Coronavirus \(COVID-19\): construction sector guidance](#) which provides specific guidance on the operations of sites and associated works. This CPN should be considered along with that guidance, while it remains in place.

Key message

4. Scottish Government's objective for the construction sector during the COVID-19 pandemic is to help ensure that Scotland as a whole takes a responsible approach to the containment of COVID-19, while being in a position to respond to both critical and longer term recovery requirements.
5. This will help ensure that the construction sector retains the capability and capacity necessary to effectively recommence work and deliver current and future construction project pipeline.
6. These measures will be reviewed along with general procurement guidance noted above on 30 June 2020.

Target audience

7. This note is intended for all those contracting authority staff involved in the planning and delivery of public works projects. It is applicable guidance under the [Scottish Public Finance Manual](#).

Project pipeline continuity

8. Contracting authorities should, in conjunction with their suppliers, determine if it is practicable to maintain their current project pipeline including the related programme of procurement activity for construction contracts. Furthermore, for all non-essential works, after having identified the successful participant, contracting authorities should also, in conjunction with the supplier, determine if it is necessary to introduce a hold point at contract award to delay the commencement of any on-site works for a suitable period. Agreement should be reached on any costs arising from such a delay prior to its implementation.
9. This will assist suppliers to plan for and schedule recommencement of operations as soon as practicable.

Procurement procedures

10. Procurement procedures for public contracts must still adhere to both the Public Contracts (Scotland) Regulations 2015 and the Procurement Reform (Scotland) Act 2014. Further information on how public procurement legislation can be used effectively at this time is noted at [SPPN 4/2020](#). Contracting authorities using competitive procedures must therefore continue to identify the most economically advantageous tender on the basis of the best price-quality ratio, which must be assessed on the basis of criteria linked to the subject-matter of the public contract in question and must include the price or cost, using a cost-effectiveness approach. General guidance on construction procurement is contained in [Chapter 7 of Client Guide for Construction Projects](#)
11. This can include delivery conditions such as delivery date, delivery process and delivery period or period of completion. Therefore contracting authorities can request bidders to propose their suggested programme for the works, which can then be evaluated in all the circumstances relating to when the finished project can best be commissioned into public service in relation to the COVID-19 pandemic.
12. Contracting authorities should in particular consider what, in these prevailing circumstances, will be the most efficient and effective procurement procedures which can produce a quick and lawful outcome followed by a safe transition to site operations. In many instances this may not be compatible with commencing an open procedure for above-threshold projects. For lower value works, (for example those below £2m), Quick Quote is designed to deliver an efficient compliant outcome. Guidance on the operation of Quick Quote is contained in [Chapter 6 of Client Guide for Construction Projects](#).
13. Contracting authorities should engage with prospective bidders in any procurement procedure to ensure insofar as is reasonably practicable that they remain capable and possess the necessary capacity both to participate in the procurement procedure and to undertake the scope of proposed works. This also applies to any possible increased frequency of call-off arrangements under existing framework agreements in order to maintain and/or accelerate project pipeline delivery.

14. Contracting authorities should give consideration to suspending any requirement for “wet” signatures on contract documents in favour of a typed signature or an electronic facsimile or scan of the appropriately-designated signatory’s true manuscript. Such a requirement should be undertaken on the clear understanding of both parties (a) that it is a temporary measure relating only to contracts executed during any restrictions on movement resulting from COVID-19, or until such time as both parties agree that “wet” signatures can be safely obtained; and (b) that neither the suspension of the need for “wet” signatures nor their reintroduction affects the parties’ rights and obligations under the contract nor the interpretation of the terms in it.

Programme flexibility

15. Where the contracting authority is planning a hiatus between practical completion and occupancy/operational readiness, there may be scope to potentially prolong the construction programme to accommodate anticipated but unforeseeable site disruption due to COVID-19.

16. It is recommended that contracting authorities seek to agree with the contractor, a process for identifying and recording prolongation and disruption directly attributable to COVID-19. This should minimise the potential for doubt to arise in the interpretation of prevailing circumstances on site. An example, insofar as the circumstances which currently apply are known at the date of this CPN, would be where workers or trades (whether from the same or separate businesses) that would normally work concurrently in enclosed spaces can only now do so consecutively due to the imperative for social distancing. Clearly if more stringent national measures are introduced which ban activities in which people would otherwise have been occupying the same space even at the recommended minimum distance of two metres, then this too would be directly attributable to COVID-19. Care should be taken to ensure that appropriate care and maintenance is agreed and carried out on any project impacted by such prolongation in order to avoid unnecessary defect remediation work.

17. In all construction procurement procedures forthcoming in these circumstances, contracting authorities are entitled to expect that bidders (before contract award) and contractors (after contract award) are open and honest with respect to their prospective and continuing ability to perform the contract. Contracting Authorities may refer to the model letter provided in [SPPN 5/2020](#), and consider how assurances are best applied within their specific contract structure.

Key staff

18. Contracting authorities may also request details of organisation, qualification and experience of staff assigned to perform the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract. In particular contracting authorities may wish to request details of bidders’ contingency plans in the event that key staff become unavailable due to COVID-19 (either through direct infection or through other imposed isolation).

19. Contracting authorities should take a pragmatic view of staff who may be uniquely-identifiable with particularly specialist or rare matters for which contractors employ no-one else with equivalent knowledge or expertise, and consider re-programming work on site to maintain overall continuity without detriment or liability to the contractor.

Common relevant provisions of construction contracts

20. Contracting authorities must look at the provisions in live contracts or construction projects in order to fully understand terms relating to the following, including but not limited to:

- suspension of work other than that necessary for ensuring site safety and security the responsibility for which must remain with the contractor
- insurance cover including but not limited to suspension of work
- safe resumption of work when COVID-19 restrictions are suitably relaxed, and /or robust operating procedures are in place
- extension of time
- loss and expense
- liquidated and ascertained damages
- rules governing retentions or equivalent form of defects' liability assurance
- force majeure (please refer to SPPN 05/2020)

Existing contracts

21. Contracting authorities should urgently engage with contractors in order to ascertain their current status on a range of key matters including:

- progress to date on site relative to programme
- value of work executed on site
- impact of supply chain disruption and supporting payments
- applications made to Her Majesty's Government and/or Scottish Government for emergency loans, grants and the like, including for supply chains
- any other matters of importance and relevance in light of COVID-19

22. Engagement should progress honestly, openly and constructively, recognising the mutual need of clients and contractors to pragmatically address issues relating to COVID-19. COVID-19 should not be exploited as an opportunity to gain from the loss of another party. In progressing engagement, clients and contractors should consider the applicable guidance in annex B of SPPN 5/2020, including transparency, contractual relief, force majeure, frustration and excusing causes.

23. The objective of any measures taken should be to help ensure that Scotland, both locally and nationally, retains a viable construction sector through these unprecedented times and that businesses emerge ready to resume work on existing projects and new opportunities.

Corporate governance rules and potential COVID-19 mitigations

24. Contracting authorities should in a positive supportive manner consider what flexibility exists within their corporate governance to enable actions which would be substantive in meeting the guidance provided. This may include the following:

- the introduction of typed, facsimile or scanned manuscript signatures to expedite contract execution in lieu of “wet” signatures meantime
- securing continuance on site of those projects’ categorised as essential
- where social distancing cannot be achieved, making arrangements for their orderly suspension and effective resumption
- payment of overheads and establishment costs on sites not at full capacity
- avoiding the application of liquidated and ascertained damages where at all possible
- granting extensions of time where necessary
- initiating mid-monthly or weekly interim payments
- where a project bank account is not in place, ensuring that payments are disbursed by the main contractor fully and promptly to their subcontractors
- making direct payment to subcontractors
- the prompt and proportional release of retentions taking cognisance of work done in order to aid contractors’ cash flow and, where a project bank account is not in place, to require this to be effected and evidenced down the supply chain in public works contracts to which it is applied
- maintaining constant contact with contractors and monitoring progress on site.

25. While it is recognised that contracting authorities themselves will be affected by staff absences and consequent attrition to their corporate capability and responsiveness, Scottish Government expects every reasonable effort to be made to safeguard the workforce and to be ready to work towards achieving full capacity when this also becomes possible.

Dissemination

26. Please bring this construction policy note to the attention of all those staff involved in the procurement or delivery of construction activities.

Contact

27. If you have any questions about this CPN please contact:

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