



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.

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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.