

Updated Frequently Asked Questions (FAQs) – Scottish Procurement Policy Notes 5/2020 and 8/2020

Before reviewing this document, please read:

- Scottish Procurement Policy Note 4/2020 – Coronavirus (COVID-19): procurement regulations for public bodies
- Scottish Procurement Policy Note 5/2020 – Coronavirus (COVID-19): supplier relief
- Scottish Procurement Policy Note 6/2020 - Coronavirus (COVID-19): making best use of procurement resources during COVID-19 outbreak
- Scottish Procurement Policy Note 8/2020 - Coronavirus (COVID-19): recovery and transition from COVID-19
- Any Construction Policy Notes published on how Coronavirus (COVID-19) impacts on construction contracts

Purpose of the FAQs

The Scottish Government has published a suite of four Scottish Procurement Policy Notes (SPPN 4/2020, SPPN 5/2020, SPPN 6/2020 and SPPN 8/2020) to support public bodies in their response to COVID-19.

This document brings together a set of frequently asked questions (FAQs) regarding the scope and application of SPPN 5/2020 and SPPN 8/2020 on supplier relief and recovery and transition from COVID-19.

These FAQs apply equally to works contracts, taking into account any specific guidance in Construction Policy Notes (CPN) published on how Coronavirus (COVID-19) impacts on construction contracts.

The FAQs will be updated as required and published on www.gov.scot.

Who should use the FAQs?

These FAQs are relevant to any public body in scope of SPPN 4/2020, SPPN 5/2020, SPPN 6/2020 and SPPN 8/2020 and any CPN published.

Contact

Email: scottishprocurement@gov.scot

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

Frequently Asked Questions.

Q1 What organisations are in scope of these SPPNs?

SPPN 5/2020 and SPPN 8/2020 are 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.

The term 'contracting authority' is a legal one, found in procurement legislation. Any reference in SPPN 5/2020 and SPPN 8/2020 or this FAQ to 'public body' is to be read as 'contracting authority'.

Q2 What contract types are in scope of these SPPNs?

SPPN 5/2020 and SPPN 8/2020 cover procurements carried out under the Public Contracts (Scotland) Regulations 2015 ("2015 Regulations"), the Utilities Contracts (Scotland) Regulations 2016 and the Concession Contracts (Scotland) Regulations 2016.

In addition, the principles of these SPPNs also apply to contracts not within scope of these Regulations due only to the fact that their value is below the financial thresholds of them.

Q3 When does SPPN 5 and SPPN 8 guidance expire? (UPDATED)

SPPN 8/2020, which is supplementary to SPPN 5 is effective from 1 July 2020.

SPPN 8/2020 urges public bodies to develop transition plans to be implemented as soon as possible, to restart contracts in line with the opening up of markets and the Scottish Government's Routemap through and out of lockdown.

SPPN 5/2020 has been extended beyond its expiry date of 30 June.

SPPN 5/2020 and SPPN 8/2020 do not have expiry dates, they will be kept under review.

Q4 Is the guidance mandatory? (UPDATED)

These SPPNs are not mandatory. Suppliers of contracts affected by the outbreak are likely to need some form of supplier relief, for example a contract modification to timescales or scope, a focus on accelerated payment practices or interim/advance payment relief, in order to ensure continuity of service delivery and supply chains in the short, medium and longer term.

Public bodies are urged to take immediate action to urgently review their current contract portfolio and to consider whether the supplier relief options set out in SPPN 5/2020 remain appropriate, sustainable and reflective of any transitional support that may be needed in preparation for restarting the contract.

Public bodies are also urged to 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.

All decisions to provide supplier relief must be made on a case by case basis, take account of local governance and audit requirements and ensure that financial authority protocols are followed.

Q5 What is the scope of the guidance? (UPDATED)

The guidance has been published for public sector organisations to support suppliers during the COVID-19 outbreak.

The guidance in SPPN 5/2020 provides advice on a range of options to provide supplier relief. These include:

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

SPPN 8 provides guidance on focusing on recovery, transitioning and reviewing supplier relief with a view to restart contracts where ever this is possible and in line with the opening up of markets and the Scottish Government's Routemap through and out of lockdown.

Q6 Do these SPPNs apply to grants or other forms of funding?

No. These SPPNs cover goods, service and works contracts put in place by Scottish public bodies. Supplementary guidance on this matter relating specifically to construction contracts has been issued in Construction Policy Notes.

Q7 What suppliers should be considered as requiring supplier relief? Who determines this? (UPDATED)

Public bodies are responsible for considering the options set out in SPPN 5/2020 to provide supplier relief where appropriate. Relief may take different forms; for example 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. Public bodies may choose not to undertake a detailed assessment of suppliers' financial viability. Clearly suppliers that are not impacted by COVID-19 do not need to benefit from supplier relief terms.

The key point is that we expect public bodies to apply this as broadly as possible to ensure service continuity and protect infrastructure, supply chains and jobs.

Suppliers to the public sector are not automatically entitled to payment or other relief 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.

All decisions to provide supplier relief must be made on a case by case basis, take account of local governance and audit requirements and where the relief is in financial terms, ensure that financial authority protocols are followed.

Q8 How do public bodies implement the guidance? (UPDATED)

Public bodies are urged to take immediate action to urgently review their contract portfolio taking into account strategic and reprioritisation needs. This should be done by working in partnership with suppliers to consider whether the supplier relief options set out in SPPN 5/2020 remain appropriate, sustainable and reflective of any transitional support that may be needed in preparation for restarting the contract.

How the guidance is applied will differ on a contract by contract basis, taking into consideration individual supplier's circumstances and the risks associated with the supply chain continuity in the short, medium and longer term.

When applying this guidance, public bodies must take account of local governance and audit requirements and where the relief is in financial terms, ensure that financial authority protocols are followed.

Annex A to SPPN 5/2020 offers a model variation of contract letter together with terms and conditions that public bodies can use. The terms and conditions require a supplier to propose a change to the contract and to set out the reasons. The terms and conditions also set out details of open book accounting, requiring the supplier to provide details of all COVID-19 related relief, grants, interventions or other measures received from the Government.

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 should result in the development of contract transition plans which set out the steps towards a sustainable operating mode and an exit from supplier relief, 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.

More information about how the Coronavirus Job Retention Scheme (CJRS) might affect decisions to provide supplier relief is provided in Q16.

Q9 A supplier is unable to continue fully delivering its contract due to the COVID-19 outbreak – does the public body still pay them? (UPDATED)

The public body and the supplier should agree what form of supplier relief is appropriate and as part of developing transition plans, agree a planned exit date for when any supplier relief will end:

- If the supplier is able to continue delivering the contract as normal, then the public body should continue to pay the supplier and aim to accelerate payment as quickly as possible.
- Where a supplier confirms commitment to deliver on their contract, albeit late or through a variation to contract, then the public body may agree to pay in full and should aim to accelerate payment as quickly as possible alongside an agreed plan to transition to restart the contract as normal. This might be more appropriate for a goods contract.
- Where contractual delivery is expected but is not yet due, payment in advance of need may be deemed appropriate and an interim/advanced payment could be made for the next three months. Parties should agree in transition plans, if and when any outstanding goods or services are to be delivered.
- If the supplier is unable to deliver part or all of their contract due to the COVID-19 outbreak and the supplier relief measure agreed means that a public body are in effect paying for an element of contingency/retention to protect future delivery, then payment should not include a contribution to profit or variable costs for the elements of the contract not delivered. Parties should agree the process for reconciling payments made against costs, as set out in the model interim payment terms accompanying SPPN 5/2020, as part of an agreed plan to transition to restart the contract. This might be more appropriate for service or works related contracts.

In any event, the amount paid in advance must not exceed the permitted cap limit, which is 25% of the contract value (see question 12), and the relevant Accountable Officer must be satisfied that to do so represents value for money. See also the answer to question 10.

All decisions to provide supplier relief must be made on a case by case basis, consider the sustainability of the contract and be reflective of any transitional support that may be needed in preparation for restarting the contract. A public body must also take account of local governance and audit requirements and ensure that financial authority protocols are followed.

Any supplier continuing to deliver a contract as normal or with modifications and who is in receipt of some form of supplier relief must ensure staff on the contract are retained and paid in full, including full sick pay, and that sub-contractors are also paid as quickly as possible. Evidence of this may be required by the public body.

Any supplier intending to make staff cuts and redundancies on the contract should set this out to the public body in advance of taking any action as this may affect payments being made during this period. The Model Interim Payment Terms at annex A to SPPN 5/2020 provide provisions for this.

Q10 If a public body makes an interim/advance payment to a supplier, will that supplier still be expected to provide the goods/services/works that it had been contracted for and not get extra money for it? (UPDATED)

Yes. Making an interim/advance payment to a supplier would be to ensure service continuity during and/or post crisis. Being in receipt of an interim/advance payment does not excuse the supplier from their contractual obligations to deliver nor allow them to claim payment a second time after delivery. In these circumstances it may be appropriate to modify the contract, for example, to provide for contract delivery at a later date or in a different way. Parties should agree in transition plans if and when any outstanding goods or services are to be delivered.

Further advice on contract modifications is contained in SPPN 4/2020 - Coronavirus (COVID 19): procurement regulations for public bodies.

Q11 What is the best way to agree short term changes to contracts with suppliers?

Changes, or variations to contracts should be agreed in accordance with the change control clauses contained in the contract and documented and agreed by both parties.

The Model Interim Payment Terms at annex A to SPPN 5/2020 can be used as the basis for agreeing payments.

Further advice on contract changes is contained in SPPN 4/2020 - Coronavirus (COVID 19): procurement regulations for public bodies.

Q12 What is the maximum interim/advance payment permitted? (UPDATED)

Public bodies and suppliers should consider the most appropriate form of supplier relief.

Where payment in advance of need is considered appropriate, for organisations covered by the Scottish Public Finance Manual (SPFM), Scottish Government 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 contract value.

Those public bodies not covered by the SPFM should satisfy themselves their own accounting rules will permit, and if so on what basis, payment in advance in the current environment.

All decisions to provide supplier relief must be made on a case by case basis, take account of local governance and audit requirements and ensure that financial authority protocols are followed.

Q13 Should public bodies continue to pay suppliers where the contract does not have a volume commitment?

Payment should not normally be made to suppliers where the contract does not commit any volumes of business to the supplier - for example, where a supplier is on a framework agreement or dynamic purchasing system but does not have a regular contracted amount. This is because in these cases the supplier is not reliant on a set amount of regular business to maintain their cash flow. However, this does not prevent a public body from paying supplier relief under a call-off contract from a framework agreement or dynamic purchasing system where there is a regular contracted service/amount/volume.

Public bodies should review their contract portfolio for such contracts and make a decision on a case by case basis.

Q14 Can public bodies ask to see evidence from suppliers at any point that the payments made results in staff and supply chain businesses being paid on time? Or should I wait?

To qualify for payment, suppliers should operate an 'open book' approach. Public bodies can agree with suppliers how frequently to undertake a review of their payments. Public bodies do not need to wait until the end of the outbreak of COVID-19 before this happens. The Model Interim Payment Terms, provided at annex A to SPPN 5/2020, include provision for this.

Q15 If public bodies need to pay suppliers 'immediately' on receipt of invoice/interim application, does this mean they can ignore the usual checks?

No. Public bodies should still continue to undertake basic due diligence checks as normal before payment is released. However, bodies should exercise more flexibility during this period to minimise payment delays. For example, do not send an invoice back for minor administrative errors when the goods/services have been delivered and it matches the Purchase Order number.

Q16 How should public bodies ensure that a supplier receiving relief under SPPN 5/2020 does not also receive equivalent relief from the Coronavirus Job Retention Scheme (CJRS) or other COVID-19 support schemes from the Government?

Suppliers cannot be paid for continuing to meet their contractual obligations or receive supplier relief under SPPN 5/2020, for example, where their ability to meet contractual obligations are adversely affected as a result of the COVID-19 outbreak as well as claiming for some or all of the same employees working on the contract under the Coronavirus Job Retention Scheme (CJRS). This is not only a double funding issue, but staff being recompensed under the CJRS would not be able to work.

Suppliers must ensure that all of the parts of the workforce identified to deliver the contract in full are not furloughed during this period under CJRS.

Where staff work a proportion of their time on public contracts and a proportion on private sector contracts, the public contracts will take precedence if they are

delivering key or critical services, goods or works. This should be discussed with suppliers before action is taken to furlough staff on those contracts.

Only staff not involved in delivering the contract in full should be furloughed under the CJRS. It should be possible for the supplier to claim CJRS for these staff if they qualify under the scheme. Advice on the Coronavirus Job Retention Scheme is available and clarifies that workers on public sector contracts should not be furloughed in the first instance.

In order to qualify for payment under SPPN 5/2020, suppliers should agree to operate on an 'open book' approach. The Model Interim Payment Terms, contained in Annex A to SPPN 5/2020, provide provisions for this. As part of this, public bodies should agree with them how frequently to undertake a review of their payments.

Any supplier found to have acted fraudulently by claiming under the CJRS (or other COVID-19 support schemes) for workers that are being paid under a public sector contract may be excluded from future public contracts on grave professional misconduct grounds under regulation 58(8)(c) of the 2015 Regulations.

Q17 SPPN 5/2020 addresses commercial agreements where the public body is the buyer. However, what about instances when a private sector organisation is the buyer and paying the public sector organisations, or public bodies are buying services from each other, and ask for payment relief (for example a flexibility with the 'normal' timescales in which they pay the public sector organisation).

Although the main objective of SPPN 5/2020 is to ensure public sector organisations maintain service continuity from their suppliers during the COVID-19 outbreak we appreciate that there are instances where public sector organisations obtain an income.

Where a public or private sector organisation seeks payment relief due to COVID-19 this should be considered with the same level of flexibility and appropriate payment plans put in place. This should be agreed between both parties on a case by case basis based on the evidence provided.

Q18 Does the supplier have to pay back any money they are paid during this period? (UPDATED)

In many cases, suppliers in receipt of the continuity and retention payments made under SPPN 5/2020 may not be required to pay back this money, even if, during the period that the supplier relief applies, they have not been able to deliver any of the goods, services or works required under the contract due to the impact of COVID-19. However, where an interim/advanced payment has been applied, the goods, services or works paid for during this period should to be delivered at a later date. Where a contingency/retention has been applied, then the supplier is expected to recommence deliveries after restrictions have been lifted.

Transition plans should agree a planned exit date for when any supplier relief will end as part of an agreed plan to transition to restart the contract. If advanced

payments have been made, parties should agree if and when any outstanding goods or services are to be delivered and where appropriate parties should agree the process for reconciling payments made against costs, as set out in the model interim payment terms accompanying SPPN 5/2020,

In some individual cases, and following reconciliation of payments made, the public body may consider a future claw-back of monies paid where delivery will not be made in the future but this will be decided on a case by case basis.

Public bodies may seek to recover all or some of those monies if the supplier has been found not to be compliant with the terms of the interim contract variation, for example not complying with open book requirements, not paying staff or sub-contractors promptly and in full etc.

Q19 What if the current supplier cannot deliver due to the impact of COVID-19 and the public body needs to seek delivery from an alternative supplier during the period? Should the public body pay twice?

No. In this situation, as the existing supplier is not able to deliver and the public body needs to seek delivery from an alternative supplier, the existing supplier should instead seek support through one of the other COVID-19 support schemes.

Q20 Are concession contracts or revenue generating contracts appropriate to be considered for supplier relief? (NEW)

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.

Q21 Can new supplier relief requests be considered? (NEW)

Yes. Public bodies should consider new supplier relief requests from suppliers of services they deem to be critical and 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.

Any new supplier relief requests should be part of a plan to transition out of relief, move to a more sustainable operating model and to restart the contract as normal.

The Model Interim Payment Terms at annex A to SPPN 5/2020 can be used as the basis for agreeing payments.

Q22 Can agreed supplier relief be modified? (NEW)

Yes. Where supplier relief remains necessary, it should be reviewed and be adapted and be reflective of any transitional support that may be needed in preparation for restarting the contract.

Supplier relief modifications may include 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.

Q23 What should be considered when reviewing contract portfolios for recovery and transition from COVID-19? (NEW)

Contract portfolios should be reviewed to consider whether the basic commercial assumptions that underpinned the decision on applying supplier relief remain appropriate and whether new arrangements are necessary.

Contract portfolios should also be reviewed to consider whether the contract remains commercially sustainable and continues to represent value for money over the medium to longer term.

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.

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, seeking legal advice as necessary.

Annex A of SPPN 8/2020 sets out some key considerations for reviewing contract portfolios.

More information on the Routemap and on returning to work safely are available here:

[Scotland's route map through and out of the crisis](#)

[Returning to work safely](#)

Q24 What should a transition plan include? (NEW)

In general terms, transition plans should set out the steps to transition out of relief, move to a more sustainable operating model, and include agreeing contract variations, where appropriate and necessary.

In particular, 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, if local restrictions were to be introduced.

- 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.

Q25 When should transition plans be implemented? (NEW)

Public bodies should now work in partnership with their suppliers in an open and transparent manner to develop transition plans to be implemented as soon as possible with a view to restarting contracts and exiting from supplier relief wherever sustainable to do so, and in line with the opening up of markets and the Scottish Government's Routemap through and out of lockdown.

Q26 How should suppliers be involved in the process of developing transition plans? (NEW)

Public bodies and their suppliers will need to engage openly and pragmatically during this transition and maintain a constructive dialogue which ensures that contracts are commercially sustainable wherever possible and represent value for money over the medium to longer term.

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.

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 existing terms would be inappropriate.

In all cases, parties are strongly encouraged to seek to resolve any emerging contractual issues responsibly to avoid these escalating into formal intractable disputes.