

Guidance on Operational PPP Projects (covering NPD Contracts, hub DBFM contracts, PPP and PFI contracts) and COVID-19

1. EXECUTIVE SUMMARY

This document provides guidance for public sector (**Contracting Authorities**) on dealing with the impact of COVID-19 on the performance of the private sector (**PPP Contractors**) under PFI, PPP hub DBFM and NPD contracts (collectively **PPP Contracts**). This guidance should be read alongside, and follows upon the Scottish Procurement Planning Note, SPPN 5/2020 Covid 19 Supplier Relief dated 26 March 2020 as updated and supplemented by [SPPN8/2020](#).

This guidance has been reviewed and reflects issues that might arise as the phases (“Phases”) of easing of lockdown progress. This guidance was first issued on 6 April and was previously updated on 29 June 2020 and again on 30 September 2020.

The key principles are:

- PPP Contractors should consider themselves to be part of the public sector response to the current emergency.
 - PPP Contractors should co-operate, including where applicable sharing resources, to ensure the continued delivery of public services (the COVID-19 emergency is not, and is not to be, regarded as an event of force majeure or an excusing cause).
 - Contracting Authorities should work closely with PPP Contractors to use all available options to maintain public services during the emergency period. This will include maintaining unitary charge payments (enabling PPP Contractors to pay their workforce and suppliers), revising contract requirements and standards (including scope changes where necessary) and moderating payment and performance mechanism regimes where appropriate, all in a manner consistent with this guidance.
 - PPP Contractors should ensure contingency plans are up to date and have been reviewed and discussed with Contracting Authorities to enable continuity of full services as far as possible to respond to the emergency and maintain vital public services, particularly across the NHS. The overriding requirement is to ensure facilities meet health & safety requirements, statutory requirements and meet revised operational standards that will need to be agreed locally.
 - All parties, including funders, must recognise that normal contractual processes may not be able to be followed in these circumstances.
 - The parties should meet regularly to review the position as the situation develops to agree any changes to the revised operational standards, mitigations of the payment mechanism or other contractual arrangements, timescales and other relevant matters until the asset and service provision is returned to business as usual.
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2. SCOPE

- 2.1 The scope of this guidance covers PPP Contracts, namely in the health, schools, colleges, office, prison service, road sectors. It is recognised that different practical considerations apply in different sectors and in this context the local agreement of operating standards will be relevant.

3. BACKGROUND

- 3.1 PPP contracts deliver vital public services that must continue to be delivered during the current COVID-19 emergency. PPP Contractors should see themselves as part of the public sector response to COVID-19 and, as such, work cooperatively with their Contracting Authorities to ensure, as far as possible, services continue.
- 3.2 Contracting Authorities must reciprocate and ensure that where services or performance are impacted due to COVID-19 despite the best efforts of the PPP Contractors, there should be a temporary moratorium on related payment and performance mechanism deductions so that PPP Contractors can continue to operate as far as possible and pay workforce and suppliers, subject to the parties agreeing and complying with the revised operational standards and other provisions of this guidance note. Likewise relevant consequential effects of the emergency should be recognised, such as the calculation of energy usage for facilities where there is a sharing of consumption or other energy risks to reflect the impact of the emergency on usage.

4. DETAIL

- 4.1 As a matter of contract, SFT does not regard COVID-19 as an event of force majeure or an excusing cause and therefore expects that best efforts are made by all parties for the continuation of service provision under PPP contracts at this time when it is vital that the facilities they support are maintained at an appropriate level of operational capacity.
- 4.2 PPP Contractors will be implementing their contingency arrangements to enable continuity of service. It is critical however that Contracting Authorities recognise that PPP Contractors may not be able to achieve full performance under their PPP Contracts due to the ongoing COVID-19 emergency, including where due to illness in the workforce and to the need to introduce revised ways of working to protect health and safety.

Where this is the case, it should be agreed locally to moderate contract by agreeing revised operational standards, that will include compliance with health & safety and statutory requirements, PPM and lifecycle replacement activities provided relevant Government guidance is met as the Phases progress. These should be deliverable and sufficient for the safe and statutorily compliant operation of the facility and support the stable delivery of vital services, applying for the duration of the emergency. In those circumstances normal unitary charge payments to PPP Contractors should be maintained and there should be a temporary moratorium on related payment and performance mechanism deductions provided the revised operational standards are met so that PPP Contractors can continue to operate and pay their workforce and suppliers. As the Phases progress the revised operational standards should be reviewed to ensure that they reflect the services that are to be provided at the relevant facilities at that time and ensure that Government guidance continues to be met.

The parties should cooperate to ensure that operational policies are put in place to reflect this position. We would expect that documentation that is as straightforward as possible (though with enough detail to be clear as to the revised standards) will be used to implement these temporary arrangements in PPP contracts rather than by the template set out in the Guidance notes on Model Interim Payment Terms – SPPN 5/2020.

- 4.3 At no point should performance standards (by agreement of revised operational standards) be relaxed to the point where health and safety and statutory requirements are compromised, and PPP Contractors should continue to comply with the performance standards where possible. Where they are unable to do so, because of the Covid-19 emergency they should communicate with the Contracting Authority immediately. PPP Contracts contain Authority remedial rights (sometimes called step in rights) in certain circumstances, such as an immediate and serious threat to the health or safety of any user of the facilities and these have contractual consequences. The expectation is that the parties will work together so that the services are provided to the required standard to avoid these requiring to be used.
- 4.4 In some cases, it is possible that performance standards may need to be increased, for example cleaning, and unitary charge payments will need to be adjusted to reflect any required increase in performance requirements and take account of developing requirements as the Phases progress. Contracting Authorities should consider provisions relating to an Emergency that allow the Authority to instruct additional or alternative services; this provision might not be available or might be differently termed in some contracts.
- 4.5 In some cases, it is possible that changes may be required to facilities, in particular healthcare facilities and also educational facilities as the Phases progress, at short notice. PPP Contractors and FM providers are expected to use their best efforts to comply with any such requests as quickly as possible and Contracting Authorities are expected to reciprocate and pay reasonable costs incurred in making any such changes. We expect any increased costs to be net costs (taking account of any savings elsewhere) and presented on an open book basis. All parties, including funders, must recognise that normal contractual processes may not be able to be followed in these circumstances.
- 4.6 Where an asset is to be temporarily closed (for example if a school has been closed during the emergency) maintenance and any other relevant work must be carried out to keep the asset in a condition so that it can be brought back into use as soon as reasonably practical as Phases progress. For example, as part of ongoing PPM and statutory compliance it is important that the water system is maintained in a compliant condition.
- 4.7 PPP Contractors must consider the potential for any available resource to be redeployed to assist in support of other critical facilities, such as healthcare.
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5. SUMMARY

- 5.1 The COVID-19 emergency requires all of us to work together to protect each other and our economy. This includes the delivery of vital public services through PPP Contracts.
- 5.2 PPP Contractors should continue to deliver agreed requirements and performance standards but, where this is not possible due to COVID-19, local arrangements as set out above should be agreed that will allow facilities and services to be provided by PPP Contractors and for those PPP Contractors to be able to pay their workforce and suppliers.

6. FURTHER ADVICE

- 6.1 Further support is available from Scottish Futures Trust on the usual basis contactable at mailbox@scottishfuturestrust.org.uk.
- 6.2 Contracting Authorities should also consider whether they should take legal or other advice on the implementation of this guidance and they should document the revised operational standards and the basis of any temporary relaxation of the contract, as referred to above.
- 6.3 This is a rapidly developing situation and this guidance may change.

7. TIMESCALE

This timescale for this guidance is from the date of publication until ~~31 March~~ 30 September 2021.

Scottish Futures Trust
30th March 2021
