



Coronavirus (COVID-19): managing disputes and cashflow - CPN 4/2020

Purpose

1. This Construction Policy Note (CPN) sets out how contracting authorities can address the management of disputes held over from site suspension arising from COVID-19 and such matters emerging on any project upon restart.
2. This CPN is part of a suite of procurement guidance related to COVID-19, which includes the following:
 - CPN [1/2020](#); [2/2020](#); and [3/2020](#)
 - SPPN [4/2020](#); [5/2020](#); and [6/2020](#)

Key message

3. Contracting authorities can take steps now to progress outstanding final accounts and inject fresh impetus into settling disputes in order - where possible - to reinforce main contractors' and, by association, supply chain cashflow.

Timing and coverage

4. 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](#) (SPFM).

Background

5. On 21 April 2020 the Cabinet Secretary for Economy, Fair Work and Culture set out Scottish Government's framework of principles by which sectors of business and industry can stage safe progress towards economic productivity¹. This construction policy note provides guidance to assist contracting authorities towards making a contribution to boost business cashflow and recovery by reviewing current disputes and implementing procedures to avoid recurrence.

Principles

6. Disputes should where possible be disaggregated into elements which are less contentious than others and potentially capable of agreement so that as much of

¹ <https://www.gov.scot/publications/coronavirus-covid-19-update-economy-secretarys-statement-economic-impact-covid-19-tuesday-21-april-2020/>

what is due under the contract can be paid as quickly as possible to the contractor and, as quickly as possible thereafter, to the supply chain. Contracting authorities should therefore seek assurances and, where appropriate, evidence, that subcontractors are also being paid promptly.

7. Contracting authorities and contractors should seek to reach an agreement on the volumes and values of unfixed materials on site and the status (for example, still under manufacture, packaged for despatch etc) and ownership of materials offsite.

Dispute resolution

8. Disagreements should be resolved as quickly as possible within the terms of the contract in order to unlock cashflow. Depending on the urgency of the cashflow and the complexity of the dispute, the full timescales involved in a statutory adjudication procedure raised under the Construction Act may not be conducive to early agreement. The parties should therefore seek to implement a form of dispute resolution procedure that is timely and effective in the current circumstances.
9. Areas of greater contention should be looked at afresh. Contracting authorities should consider the means through which they can obtain evidence of progress on site, unfixed materials etc, including the following:
 - discussion and reports from Clerk of Works, contract administrator, resident engineer etc.
 - photographic and video evidence - using new capture technologies, such as drones to avoid unnecessary site access where doing so would risk compromising safety.
 - delivery notes for unfixed materials on site and production logs, storage dockets, ownership information, etc, for materials offsite.
 - where unavoidable and only where safe to do so, a physical site inspection by at one representative each from the contracting authority and the contractor.

Conflict avoidance

10. Where matters arise on site during the period in which national pandemic mitigation measures apply, which either party feel could escalate to a become a dispute, they should look at implementing an appropriate conflict avoidance procedure to seek to “head off” such issues in order to maintain site progress and regular cashflow. The principles set out in [CPN 1/2020](#) seek to create an approach whereby positive mutual agreement can be achieved.

Cashflow

11. Cashflow is more important than ever to the supply chain in current circumstances. Contracting authorities should ensure that progress payment valuations are fair and reasonable should ask the contractor to show that they are also paying their subcontractors as regularly, as promptly and as fairly. Recurring

caution may hasten insolvency which otherwise would not have happened and have wider implications for project deliverability, subsequent market competition and the industry's broader recovery.

12. Where liquidated damages were being charged to the contractor before the pandemic, this should be re-examined where contractors cannot access the site to undertake such remedial work which would alleviate the charge.
13. Contracting authorities should also consider working with contractors to devise payment schedules for new and current projects looking into the foreseeable future, which outline estimated payment amounts in broad terms in relation to safe progress and productivity in current circumstances. This may help assure smaller firms that measures are being implemented to help protect their current and prospective viability insofar as is reasonably possible in current circumstances.

Project bank accounts

14. Contracting authorities for which SPFM is not applicable guidance are strongly encouraged to implement project bank accounts (PBAs) on new construction projects, which will assure prompt and protected payment for subcontractors. Any contracting authority irrespective of its status in relation to SPFM may, if it wishes, choose to use apply a PBA as a condition of tender on a project whose estimated award value is less than the named thresholds for building and civil engineering works².

Dissemination

15. Please bring this CPN to the attention of all those staff involved in the procurement of relevant construction projects.

Contact

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

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² <https://www.gov.scot/publications/construction-projects-implementing-project-bank-accounts/>