

Conditions applicable to applications to Fife Council for Supplier Relief during the Covid-19 Crisis in accordance with Scottish Procurement Policy Note 5/2020 (“SPPN 5/2020”).

These conditions will vary any contract which is the subject of any application made to Fife Council under their Covid-19 Supplier relief scheme.

Background

1. The purpose of the variation is for the Council to give relief to suppliers on the terms of this Variation. The Council and the Supplier acknowledge that the relief is given in light of SPPN 5/2020 and that both parties shall act in good faith and work together towards the principles set out in SPPN 5/2020. The Supplier acknowledges that any relief given to it is at the sole discretion of the Council.
2. The Council reasonably anticipates that the procurement regulations will apply to this Variation and the Parties shall ensure that there is a lawful basis for agreeing the variation under the Public Contracts (Scotland) Regulations 2015 and/or any applicable procurement rules. Due to the current COVID-19 pandemic, this may include in particular justification under regulation 72 or regulation 33 of the Public Contracts (Scotland) Regulations 2015 or such other applicable equivalent.
3. The Contract, including any previous variation, will remain effective and unaltered except as amended by this Variation.

Variation

4. The following terms shall have the meaning as set out below and shall be incorporated into the contract:

“Application”

means the application submitted by the Supplier under the Council’s Covid-19 supplier relief scheme.

“Contract”

means the contract between the Supplier and the Council specified in the Application.

“Council”

means The Fife Council constituted in terms of the Local Government etc. (Scotland) Act 1994 and having their principal offices at Fife House, North Street, Glenrothes, Fife

“Covid Related Hardship”

means that as a result of the COVID-19 pandemic the Supplier’s ability to meet its contractual obligations under the contract

“Covid Relief Period”

have been adversely affected.

means the period from variation date until the relief expiry date.

**Interim Payment
Proposal”**

means a proposal for an interim payment structure pursuant to paragraph six of this variation.

“Open Book Data”

means the complete and accurate financial and non-financial information which is required by the Council to enable the Council to understand all COVID-19 related relief, grants, interventions or other measures received by the Supplier from the Government and to verify the charges paid or the charges which would have been paid during the Covid Relief Period, including:

- a. the Supplier’s costs broken down against each deliverable, including actual capital expenditure (including capital replacement costs) and the unit cost and total actual costs of all hardware and software.
- b. operating expenditure relating to the provision of the goods or services including an analysis showing:
 - a. the unit costs and quantity of consumables and bought in services
 - b. staff costs broken down into the number and grade/role of all Supplier staff together with a list of agreed rates against each manpower grade
 - c. reimbursable expenses
- c. overheads
- d. all interest, expenses and any other third-party financing costs incurred in relation to the provision of the goods or services
- e. full details of the payment of employee wages
- f. full details of the payment of sub-contractors.

**“Procurement
Regulations”**

means the Public Contracts (Scotland) Regulations 2015

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| “SPPN 5/2020” | means Scottish Procurement Policy Note 5/2020 [as updated or amended from time to time] setting out information and guidance for public bodies on how they may amend payment provisions in contracts or consider other contractual relief in order to assist suppliers to combat the impact of COVID-19. |
| “Relief Expiry Date” | means 30 June 2020, or such other date as may be notified by the Council to the Supplier prior to or on 30 June 2020. |
| “Variation” | means the terms set out in this variation. |
| “Variation Date” | means the date the Supplier submits its Application |

5. Notwithstanding any other term of the contract, the parties agree to vary the Contract by incorporating the following terms into it:

5.1. Where the Supplier is subject to Covid Related Hardship, the Supplier may at any time during the Covid Relief Period, propose a change to the Contract which has the aim of providing interim relief and support to the Supplier, pursuant to the aims and principles set out in SPPN 5/2020.

5.2. Pursuant to the principles set out in SPPN 5/2020 and subject to this variation, the Supplier shall prepare and deliver to the Council in writing, an Interim Payment Proposal which sets out details of the Supplier's proposals to vary the payment profile and/or provisions of the contract to support its cash flow position during the Covid Relief Period, including:

5.2.1. details of an interim payment structure to be put in place, which may include (but not be limited to):

- 5.2.1.1. advance payment or advance interim payment for goods or services prior to their delivery by the Supplier;
- 5.2.1.2. proposals to amend contract milestone delivery and payment profiles (including extending, delaying, cancelling or consolidating milestone activity and payments);
- 5.2.1.3. continued payment notwithstanding reduced or non-performance;
- 5.2.1.4. bringing forward authority orders and associate payments.

and the Interim Payment Proposal shall include details of the proposed amounts payable, the timescales for payment and any other information reasonably required to enable the proposal to be considered by the Council and implemented by the parties and

5.2.2. details of how any the interim payment structure proposed by the Supplier (in total and each specific payment) is to be used and how it will provide the Supplier with relief and help reduce the adverse effect of Covid Related Hardship.

5.3. The Council shall consider the Interim Payment Proposal and issue a decision as soon as is reasonably practicable. If approved, the parties shall agree in writing the effective date of the Interim Payment Proposal, which shall be dealt with under the Contract as an agreed change. Where the Council rejects the proposal, the Supplier shall be entitled to resubmit the Interim Payment Proposal but shall amend the proposal to take into account any changes reasonably requested by the Council.

5.4. The parties shall use reasonable endeavours to avoid the use of the Interim Payment Proposal mechanism by identifying and utilising existing contractual mechanisms and provisions under the contract to reduce the adverse impact of Covid Related Hardship under the contract, which may include:

- 5.4.1. relief against performance indicators
- 5.4.2. relief and/or delays to delivery dates
- 5.4.3. relief and/or delays to service credits
- 5.4.4. waiver or delay by the Council of its remedies and rights under the contract in whole or in part.

5.5. Where the parties agree and implement an Interim Payment Proposal, the Supplier shall:

- 5.5.1. At the Council 's request, promptly provide a certificate of costs which sets out the Supplier's actual costs, expenses, cash flow and profits of providing the goods and/or services over the three months prior to the effective date of the Interim Payment Proposal and/or the three months prior to 24th March 2020.
- 5.5.2. Ensure that the payments agreed under the Interim Payment Proposal are promptly and solely applied to the purposes for which they are paid, which may include payments to Supplier staff and the Supplier's contract supply chain; who are working on deliverables to be provided under or in connection with the contract so as to reduce the adverse effect of Covid Related Hardship.

- 5.5.3. Make available to the Council upon request any information and/or evidence (including the open book data) which the Council may reasonably require in order to:
 - 5.5.3.1. verify and assure that the Supplier has applied the monies as agreed in the Interim Payment Proposal, including copies of accounts, ledgers, cash-flow forecasts and statements, balance sheets, profit and loss accounts and any other documentary evidence
 - 5.5.3.2. verify and assure that monies intended for Supplier staff performing the contract, have been properly and promptly paid
 - 5.5.3.3. pay invoices submitted by the Supplier's sub-contractors and supply chain immediately on receipt
 - 5.5.4. Ensure that all invoices clearly set out which elements of the invoice that are attributable to the Interim Payment Proposal and which elements are business as usual.
 - 5.5.5. Maintain full records and a written audit trail of all Interim Payment Proposal activity in accordance with the general financial records provisions in the contract (and such records shall be made available promptly to the Council on reasonable request).
 - 5.6. The Supplier shall not be entitled:
 - 5.6.1. to include any profit in the Interim Payment Proposals to the extent that such profit might apply to elements of the contract that are undelivered by the Supplier during the Covid Relief Period
 - 5.6.2. to include any payments in the Interim Payment Proposals where there is no contractual volume commitment under the contract
 - 5.6.3. to any payments to the extent that the Supplier has been underperforming under the contract and is subject to a current improvement plan or other remedial performance measure under the contract
 - 5.6.4. to combine the Interim Payment Proposal with any other government/ public sector COVID-19 related relief, grant, intervention or other measure which results in the Supplier receiving more than one benefit/relief for the same underlying cash-flow issue
 - 5.7. The Council may at any time and in its sole discretion designate one or more additional Covid Relief Periods by notice to the Supplier from time to time. Any such notice shall specify which, if any, SPPN contains the applicable rules and principles for the relevant Covid Relief Period.
6. If, in the reasonable opinion of the Council, the Supplier:

- 6.1. fails to meet any obligation set out in this variation
- 6.2. receives any interim payment and fails to meet any proposal in the relevant Interim Payment Proposal
- 6.3. takes undue advantage of any relief
- 6.4. fails to act transparently and with integrity

the Council may take all action necessary to recover any payments made to the Supplier during the relevant Covid Relief Period, including without limitation retaining or setting-off payment of any amount it owes to the Supplier at any time under the Contract or any other contract, to the extent that sub-paragraph 6.1 – 6.4 apply to such payments..

Miscellaneous

- 7. The terms of this variation shall be effective from the variation date.
- 8. Except to the extent set out in this variation, this variation shall not constitute a waiver of any right or remedy of the Council or the Supplier arising before, during or after this variation.
- 9. The Council and the Supplier agree that any event arising from the COVID-19 shall not give rise to any force majeure or frustration rights set out in the contract to the extent that such rights are mitigated by any Interim Payment Proposal.
- 10. If there is an inconsistency between any of the provisions of this variation and the provisions of the contract, the provisions of this variation shall prevail.

State Aid

- 11.1 No applications shall be approved by the Council unless it is satisfied it falls within the scope of the UK-wide National Temporary Framework for State Aid which was approved by the EU Commission under the State aid [Temporary Framework](#) adopted by the Commission on 19 March 2020, as [amended on 3 April 2020](#).
- 11.2 If, in the Council's opinion, the payments (or any part of them) made under the Interim Payment Proposal is State Aid and it considers it is required to recover such sum to ensure compliance with its legal obligations , the Council may require immediate repayment of the payments (or any part thereof) together with interest at such rate and on such basis as may be determined from time to time in accordance with the law.
- 11.3 The Applicant should obtain its own legal advice in relation to state aid.