

1. Summary and Background

- 1.1 On 6 January 2021, the Government announced public health measures aimed at limiting the spread of the Covid-19 pandemic (the ‘closure order’). *Inter alia*, the public health measures required non-essential construction sites to close between 6pm on 8 January 2021 and 31 January 2021.
- 1.2 On 26 January 2021, the Government extended the application of the closure order until 5 March 2021. As a result, the affected construction sites must remain closed until that date, unless the closure order is amended to permit the affected construction sites to open on an earlier date.
- 1.3 As in its Covid-related 2020 publications, the Office of Government Procurement (OGP) continues to encourage Contracting Authorities and Contractors to take a collaborative approach to dealing with the impacts of the closure order on public works contracts.
- 1.4 This note (‘Note’):
- a) outlines the provision for delay and cost in the standard forms of public works contracts (‘Public Works Contracts’) arising from the current circumstances for those sites impacted by the closure order (‘affected pwc construction sites’);
 - b) sets out recommendations for Contracting Authorities in relation to affected pwc construction sites where the works were procured using Public Works Contracts (Sections 2 and 3 of this Note); and
 - c) outlines a forthcoming amendment to the Public Works Contracts (Section 5 of this Note).

2. Provision for Delay and Costs in Current Contracts

2.1 General Provisions for Delay in PW-CF1-7

PW-CF1 to PW-CF7 (inclusive) make provision for delay arising from an order such as the closure order and both parties should work within the applicable conditions of contract with respect to the notification and management of delay arising from constraints consequent to the effort to avoid the spread of Covid-19. The specific provisions are identified in paragraphs 2.2 to 2.4 of this Note.

2.2 PW-CF1 - PW-CF5 (inclusive)

Where PW-CF1 to PW-CF5 inclusive are in use, Item 15 of the Schedule, Part 1K, provides that a Delay Event is *‘Delay to the Works caused by the order or other act of a court or other public authority exercising authority under Law, that did not arise as a result of or in connection with an act, omission or breach of Legal Requirements of the Contractor or the Contractor’s Personnel or a breach of the Contract by the Contractor’*. ‘Law’ is defined as *‘enactments and statutory instruments, each as defined by the Interpretation Act 2005, and regulations, directives and decisions of the European Union having direct effect in Ireland’*.

Where the Contractor has closed the site, the Contractor should, in accordance with sub-clause 9.3 (Delay and Extension of Time) notify the ER as soon as practicable of the delay and its cause.

2.3 PW-CF6

Where PW-CF6 is in use, sub-clause 2.7 provides that an extension of time may be granted for a delay due to an *'order or other act of a court or other public authority'*.

The Contractor should give notification under sub-clause 4.8 of PW-CF6 of the delay and its cause.

2.4 PW-CF7

Where PW-CF7 is in use, under sub-clause 4.5, the Performance Period for a Task may be extended by an amount corresponding to any delay to the completion of the Investigation due to an *'order or other act of a court or other public authority, unless resulting from or in relation to anything done or not done by the Contractor or Contractor's Personnel'*.

The Contractor should give notification to the ER under sub-clause 4.5 of PW-CF7 of the delay and its cause.

2.5 PW-CF8 and PW-CF11

Where PW-CF11 is in use, the Contractor should notify the ER as soon as practicable of the delay and its cause under sub-clause 4.3 of the contract. Where PW-CF8 is in use, the Contractor should notify the ER as soon as practicable of the delay and its cause.

2.6 Communication

To the extent not already done, the Employer should request the ER to discuss with the Contractor the measures taken to close the site and to comply with ongoing obligations on the Contractor with respect to, and notwithstanding, the closure.

2.7 Period of Delay

Subject to proper notification having been given of the site closure, the delay should be treated as having commenced from the date the Contractor closed the site, falling after 8 January 2021.

2.8 Cost

In relation to cost, the Public Works Contracts **do not** provide an entitlement to the Contractor to recover costs associated with a delay arising from site closure in the current circumstances.

However, having regard to the exceptional circumstances currently facing Contractors on publicly funded projects, the OGP recommends that Contracting Authorities consider implementing the measures outlined in Sections 3 and 4 of this Note.

3. Ongoing Contracts Made Before 14 April 2020

For Public Works Contracts made before 14 April 2020 and where work was ongoing in January 2021.

Contractors in these Public Works Contracts may previously have received *ex gratia* payments in respect of certain costs relating to the closure of construction sites between 12 April 2020 and 4 May 2020, in accordance with the *Form of Letter Agreement for Covid-19 Ex-Gratia payment by Employer* published by the OGP at the time¹ (the ‘Form of Letter Agreement’).

Contractors in these Public Works Contracts may also have previously availed of the Covid Co-operation Framework (‘the Framework’), as set out in the OGP note of 24 June 2020. While the primary purpose of the Framework Agreement is to consider certain costs associated with the implementation of the Return to Work Safety Protocol, Section A4 of the OGP Note of 24 June 2020 provides that ‘*Other measures, as may be introduced by Government from time to time to control the spread of Covid-19, may be considered but only by agreement between the parties*’.

In consideration of the additional financial burden the closure order will likely place on Contractors engaged under these Public Works Contracts, the OGP recommends that parties to the Public Works Contracts seek agreement to use the Framework to determine and make *ex gratia* payments in respect of certain permissible costs arising from the closure order. Parties should note that permissible costs are subject to the ‘burden share’ approach contained in the Framework. The OGP recommends that Employers approach such *ex gratia* payments as follows:

Subject always to any specific provisions that Employers may have made in the pwc contract in relation to site closures by Government order:

Such *ex gratia* payments are to **commence** on the day falling after the later of:

- a) 8 January 2021; or
- b) the date on which the affected pwc construction site closed (after the 8 January 2021)²;

Such *ex gratia* payments are to **cease** to apply from the earlier of:

- a) midnight on 4 March 2021; or
- b) the permitted date of re-opening of the affected pwc construction site³;

The OGP will publish supplementary guidance in relation to the permissible costs arising from the closure pursuant to the closure order under the Framework.

¹ See guidance published on constructionprocurement.gov.ie on 14 April and 8 May 2020 for further details.

² Where, for whatever reason, the affected pwc construction site remained open after 8 January 2021 but closed at a later date.

³ i.e. where the affected pwc construction site is permitted to re-open **before** 5 March 2021.

4. Ongoing Contracts Made After 14 April 2020

For Public Works Contracts made after 14 April 2020 and where work was ongoing in January 2021.

In consideration of the financial burden the extension of the closure order will place on Contractors engaged under these Public Works Contracts, the OGP recommends that Employers consider making *ex gratia* payments in respect of certain permissible costs as follows:

Subject always to any specific provisions that Contracting Authorities may have made in the Public Works Contract in relation to site closures by Government closure orders:

Such *ex gratia* payments are to **commence** on the day falling after the later of:

- a) 31 January 2021;
- b) the date on which the affected pwc site closed; or
- c) the expiry of any stated period of site closure by closure order for public health reasons in the Public Works Contract⁴ for which the Contractor is not entitled to recover costs;

Such *ex gratia* payments are to **cease** to apply from the earlier of:

- a) midnight on 4 March 2021; or
- b) the permitted date of re-opening of the site⁵;

For the avoidance of doubt, any costs arising from the period of site closure falling after 8 January 2021 and until 31 January 2021 **are not** permissible costs.

The OGP will publish a model form of Letter Agreement and supplementary guidance in relation to permissible costs arising from the closure pursuant to the closure order.

5. Forthcoming Amendment to the Public Works Contracts

For future Public Works Contracts.

The OGP wishes to provide advance notice of a forthcoming amendment to the Public Works Contract.

In recognition of the enduring nature of the Covid-19 pandemic, and in particular:

- that the implementation of future public health measures (if any) related to the Covid-19 pandemic may require Contractors to close construction sites for prolonged periods; and,
- the challenge for Contracting Authorities and Tenderers in allowing for the likelihood of closures on public health measures on a consistent basis; and

⁴ For instance (but not limited to) any specific provisions that may have been inserted in the Works Requirements or in the Pricing Document for the project.

⁵ i.e. where the affected pwc construction site is permitted to re-open **before** 5 March 2021.

- while, as outlined previously, the Public Works Contracts entitle the Contractor to an extension of time for such closures, they do not entitle the Contractor to receive payment of costs associated with the period of closure;

it is considered appropriate to prepare an amendment to the Public Works Contracts.

The objective of the amendment will be to provide a mechanism whereby, in the event of a site closure for public health grounds, certain costs will be shared between the Employer and the Contractor.

The OGP will provide updates as to the intended⁶ publication date of the amended forms of Public Works Contract and details relating to their implementation.

END NOTE

⁶ Currently, publication is anticipated to be c. early Q2 2021.