

Note: Guidance on public works tenders with respect to recent material price inflation

Guidance for Contracting Authorities whose public works tenders have been impacted by the recent price inflation in certain construction materials.

Please note that the following constitutes general advice only and, in all cases, Contracting Authorities must take the particular circumstances of the project into account prior to arriving at a decision as to the most appropriate course of action. Where appropriate, expert procurement advice should be obtained.

Background and purpose of this note

Significant increases in construction material prices have arisen suddenly since the beginning of this year (2021). There are two main reasons:

1. Material shortages due to the disruption to supply chains; to manufacturing and logistics that has arisen since the onset of the pandemic;
2. Stimulus packages announced globally have increased demand.

Not all construction materials are experiencing the same level of price inflation. Indeed many are within the range of what might ordinarily be expected, however steel and timber products in particular have seen substantial, sustained increases since the middle of last year joined by other materials such as insulation and plastics since early in 2021.

The current period of volatility is expected to continue until supply chains settle down. Nonetheless global demand for construction materials is expected to remain for the foreseeable future meaning that prices are unlikely to reduce significantly in the short term.

This guidance is aimed at Contracting Authorities who have invited or received tenders or are planning to issue invitations to tender and covers the following situations:

- 1) Where tenders have been received but a contract is yet to be awarded (see Section 1 below);
- 2) Those live tenders where the deadline for receipt of tenders has not passed (see Section 2 below); and
- 3) Tenders that are yet to commence (see Section 3 below).

Prior to considering the guidance set out below Contracting Authorities are advised to review projects currently in the tender phase or those that are scheduled to go out to tender to determine whether they are impacted by the categories of materials¹ that have shown significant price increases.

¹ Please refer to the Wholesale Price Index for Building and Construction Materials published by the Central Statistics Office in the first instance.

1. Tenders received prior to the date of this note and the contract is not yet awarded

Because the extent of increases (where they arise) varies significantly Contracting Authorities are advised to review those projects at tender stage to determine which have the greatest exposure to material price inflation. Once those projects have been identified the date when the tender was submitted should also be considered. Typically tenders with a Designated Date² prior to March 2021 have the greatest exposure since not all tenderers would have been aware of the extent of price increases which began to be applied by suppliers from March 2021.

Following this assessment a revised cost estimate should be prepared for those projects that are identified as high risk to determine the likely cost increase to the project.

Contracting Authorities may have to consider the impact of any increase on the project's budget. If changes to the scope, design or specification are necessary to bring the project back within budget, Contracting Authorities must consider their impact and how such changes are to be addressed within the context of public procurement provisions. Expert advice may be necessary to determine the next steps.

Whilst the review may conclude that no significant change to the project as originally tendered is required, nonetheless the extent of price movements witnessed so far and their continuing dynamic nature means that there may be risks associated with the award of a contract that must be identified and addressed. Contracting Authorities are advised to weigh up the risks associated with each circumstance as it pertains to their project and seek specialist procurement advice where necessary.

In the present circumstances, where tender offers remain open and a contract has not been awarded, there are a range of issues that need to be considered when determining how to proceed.

There are essentially two scenarios that contracting authorities should consider.

- 1) Where Tenderers have **not** been advised (by any means) of the outcome of the evaluation or are otherwise unaware (i.e. notification letters have not issued and the apparently successful Tenderer has not already been contacted to clarify aspects of their tender (e.g. aspects of their Pricing Document)) then, depending on the circumstances of the particular tender evaluation process, it may be open to the Contracting Authority to:

Seek a clarification from all those who submitted tenders confirming that they are aware of the implications of the recent material price increases on their tender and the provisions of the public works contract with respect to price inflation and request written confirmation that they are willing to stand over their tendered sum.

- a) Where all Tenderers are willing to do so then Contracting Authorities may proceed to conclude the evaluation process in line with the provisions set out in the applicable Instructions to Tenderers . The written confirmation referred to in the preceding paragraph is appended to the Letter of Acceptance (or Tender Accepted) to the successful Tenderer as a tender clarification.
- b) If one or more of the Tenderers indicates that they cannot stand over their tender sum, it may be possible to invite Tenderers to resubmit their tenders to take account of

² Sub-clause 1.1 of the public works defines it as the date 10 days prior to the submission of the tender

material price increases that have arisen since the Designated Date of the original tender, however it is recommended that expert procurement advice be taken having regard to the individual circumstances of the tender.

- 2) Where Tenderers **have** been notified of the outcome of the tender or one of the Tenderers is aware that they are the apparently successful Tenderer:

Where Tenderers have been notified (by any means) or are otherwise aware of the outcome of the evaluation it is suggested that only the successful Tenderer be asked to clarify that they are aware of the implications of the recent material price increases on their tender and the provisions of the public works contract with respect to price inflation and request written confirmation that they are willing to stand over their tendered sum.

- a) Where that confirmation is given the Contracting Authority may proceed and award the Contract and the confirmation should be listed in the Letter of Acceptance (or Tender Accepted) and included in the Contract as a post-tender clarification.
- b) Where such confirmation cannot be given it is recommended that the Contracting Authority seek expert procurement advice before determining the next appropriate step.

Where it is decided that the appropriate course of action is to re-tender the project, the tender procedure must be cancelled and all Tenderers notified of the reason(s). Contracting Authorities should consider whether the urgency provisions set out in SI 284 of 2016 may be availed of to undertake the new tender.

2. Deadline for Receipt of Tenders Not Passed

Where the tender has commenced but tenders have not yet been received.

The review advised in the introduction to this note will give contracting authorities an indication of the exposure to material price increases the project is likely to face. It must be determined whether this is acceptable in the context of the budget and the programme.

Whilst tenderers will be aware of the material price increases that have been applied to date, the uncertainty with respect to future prices is a key concern for tenderers. Projects that have a construction period of 12 months or less present a lower risk to material price volatility.

Contracting Authorities are advised to consider the provisions of Section 3 and the potential impact this may have on projects in this situation and seek expert advice if necessary.

3. Future Tenders

Where the tender has yet to commence.

Contracting Authorities should consider the potential impact that the material price increases may have on their budget and business case. Those materials with increased delivery periods may also have programme implications.

In recognition of the projected period of price volatility the OGP is introducing a series of interim amendments to the price variation provisions in the suite of public works contracts and associated Instructions to Tenderers. These will be published by the middle of December 2021 and are summarised below:

- 1) The introduction of an indexed price adjustment mechanism in the Instructions to Tenderers for certain forms of public works contracts which will apply to the materials element of the tendered sum prior to the award of contract.
- 2) A reduction of the fixed price period defined as the Base Date in forms PW-CF1 – PW-CF5 inclusive. The Base Date for PV1 and PV2 will be both be reduced to 24 months from the date of the award of the contract³.
- 3) The sub-clauses dealing with exceptional material price increases – first bullet under PV1.1.3 and Appendix 1 to Clause PV2 – definition (j) – will be amended to adjust the threshold to 15%⁴ which will be referenced back to the Contract Date in both cases.

Broader amendments to the price variation provisions will be introduced following a period of consultation on the proposed changes which will be published in Q1 of 2022.

³ The Base Date for PV2 was linked to the Designated Date in the forms of contract published prior to the date of this note.

⁴ In the current conditions PV1 determines that where the price of any material at the purchase date has increased by more than 50 percent of the price at the first business day of the month in which the purchase occurred or the price at the Designated Date (whichever is highest) then that excess percentage over 50 percent is applied to its price at the Designated Date.