

## **Background**

On 27<sup>th</sup> March 2020, the Government announced public health measures [“Public Health Measures”] that were to apply from 28<sup>th</sup> March until April 12<sup>th</sup> 2020 to reduce the spread of the Covid-19 virus. The Public Health Measures [[available here](#)] were subsequently published on 28<sup>th</sup> March 2020.

Regulations have come into force with effect from 8 April 2020 (i.e. Health Act 1947 (Section 31a - Temporary Restrictions) (Covid-19) Regulations 2020<sup>1</sup>) (the “Regulations”). The Regulations largely mirror the Public Health Measures as published on 28<sup>th</sup> March 2020.

On the 10<sup>th</sup> April, the Government extended the Public Health Measures (and the Regulations) for a duration of 3 weeks to apply until midnight of the 4<sup>th</sup> May 2020.

The Public Health Measures provide that people must stay at home unless engaged in providing [essential services](#). Essential construction services are set out at section 5 of the “List of essential service providers under new public health guidelines”<sup>2</sup>.

On foot of the [continuation] of the Public Health Measures, the Office of Government Procurement (‘OGP’) has issued this revised note (‘Note’). The Note replaces the one previously published on 19<sup>th</sup> March 2020 by the OGP in response to the then public health measures [as were announced by the Government on 12<sup>th</sup> March 2020].

As the Public Health Measures are further updated by Government this Note will be amended, as necessary.

## **Terms used in this Note**

*The terms Contracting Authority/Client/Employer used in this Note are the same terms used in the Capital Works Management Framework (CWMF) variously at procurement and contract stages. The term Contracting Authority is the term used to refer to a public body during the procurement stage of a project. On award of a contract, the term Contracting Authority become either the Client (where the contract awarded is a standard form of the Conditions of Engagement) and/or the Employer (where the contract awarded is a standard form Public Works Contract).*

## **1. Purpose of this Note**

The purpose of this Note is to provide guidance to;

- Contracting Authorities that are required to procure essential professional services or works specifically related to Covid-19 response measures (section 2.1 of this Note); or
- Contracting Authorities that are currently engaged in a procurement process to engage a works contractor or works-related service providers using one of the CWMF standard form Public Works Contract or standard Conditions of Engagement respectively (section 2.2 of this Note); or

---

<sup>1</sup> SI 121/2020

<sup>2</sup> See also Regulation 3 of SI 121/2020

- Employers/Clients that are currently a party to a CWMF standard form Public Works Contract or standard Conditions of Engagement, or both, in respect of either essential construction services or non-essential construction services (section 3 of this Note).

Such Contracting Authorities, Employers and/or Clients (as appropriate) may send any queries they may have in relation this Note to [construction@per.gov.ie](mailto:construction@per.gov.ie).

This Note does not apply to those Contracting Authorities not using the standard Public Works Contracts or the standard Conditions of Engagement under the Capital Works Management Framework.

## **2. Procurement of Essential and Non-Essential Construction Services**

### **2.1. Procurement of Essential Construction Services specifically related to Covid-19 response measures**

The Office of Government Procurement has issued '[Information Note – Covid-19 \(Coronavirus\) and Public Procurement](#)' which is being updated as the situation develops. Accordingly, it should be noted that Contracting Authorities **are not** required to comply with the provisions of the CWMF or use the CWMF standard forms of the Conditions of Engagement and/or the Public Works Contracts for the engagement of contractors or consultants to provide construction services specifically required for *essential health and related projects relevant to the Covid-19 crisis, and supplies necessary for such projects*<sup>3</sup>. Nonetheless, the procurement of any such essential construction services / supplies should be undertaken in a manner that delivers value for money.

Contracting Authorities should ensure that prudent budgetary oversight measures are in place to manage the arrangements and that there is a contract in place, regardless of whether services, works or supplies are involved, to ensure both parties to any contract are clear on their obligations and entitlements. Cost reimbursable arrangements for works contractors and time based engagements for consultants are the most suitable given the urgency of the situation.

### **2.2. Procurement of Non-essential Construction Services**

Progressing a steady flow of contract opportunities and a clear pipeline of those to come is one way that Contracting Authorities can contribute to maintaining market confidence in these challenging times. It must be balanced with the sector's capacity to respond to tenders with all the other pressures on businesses at present. The advice set out herein is at a high level and should be read in the context of specific market conditions for the services and works that are required.

Contracting Authorities with large programmes are best positioned to take a strategic view of the market's capacity and determine which projects should progress to tender. Longer tender deadlines than would otherwise apply should be considered and selection criteria should be reviewed to ensure that the standards chosen do not present unrealistic and disproportionate barriers to entry in the present circumstances.

---

<sup>3</sup> Bullet 1, section 5 of the List of essential service providers

Whilst works-related services can continue to be delivered, albeit with some disruption, it must be acknowledged that works contracts are particularly challenging with respect to the Public Health Measures. Where Contracting Authorities are concerned, a definite date where the Contractor can occupy the site cannot, at present, be committed to. Contractors, in submitting their price have to take this uncertainty on board and the additional challenges associated with pricing the work practices and additional welfare provisions associated with Public Health Measures that remain uncertain in terms of duration and severity.

With respect to 'live' tenders, the Public Health Measures, the uncertainty of their duration and the consequent challenges for businesses, make it prudent to defer decisions about the delivery of non-essential construction services until greater certainty emerges.

It is recommended that Contracting Authorities give consideration to the following actions with respect to tenders where the deadline for submission of offers has either:

a) *Not passed at the date of this Note:*

Contracting Authorities should consider extending the date for receipt of tenders. The OGP is recommending an extension of at least 6 weeks from the date of this Note as appropriate. No later than two weeks prior to the deferred tender date, unless the Public Health Measures have been eased sufficiently in the meantime to allow the deferred date be adhered to, the situation with respect to the Public Health Measures can be reviewed and a further decision to extend taken if necessary. This is necessary to give businesses an opportunity to assess their circumstances and, should ongoing restrictions apply, their impact on the terms a bidder may wish to provide; or

b) *Has passed at the date of this Note*

The risks associated with awarding a contract in these uncertain times and the need to progress important projects should be carefully considered before coming to any decision about an award. The OGP is recommending that procurements should not be concluded until there is greater certainty with respect to enduring Public Health Measures unless the Contracting Authority has a compelling reason to do so. The OGP is available to provide guidance where necessary.

### **3. Contractual Measures**

The Client and/or Employer party to the relevant contract should determine whether the project concerned is essential with respect to the list of essential services described under the section titled 'Background' in this Note.

Irrespective of whether a service falls within the definition of an essential service or not, parties to a Public Works Contract or Conditions of Engagement or both should continue to operate in a collaborative fashion in these challenging times.

This Section 3 sets out measures to:

- 1) Assist parties to CWMF standard Conditions of Engagement and/or Public Works Contracts in taking the appropriate contractual steps associated with the closure of sites;
- 2) ensure a speedy return to work once Government eases the current Public Health Measures to the point where workers may return to work; and
- 3) facilitate worthwhile design stage work continuing on National Development Plan projects up to pre-tender approval for the construction stage where possible.

The necessary contractual measures to be taken under the standard form of Conditions of Engagement (COE1) are set out in section 3.1 below.

The necessary contractual measures to be taken under standard forms of the Public Works Contracts are set out at section 3.2 below.

### **3.1. Consultancy contracts – Standard Conditions of Engagement**

If the project is determined to be essential by the Client then the service may continue and the provisions set out at 3.1.1 apply.

If not then Clients should follow the steps set out at 3.1.2 and 3.1.3.

The Public Health Measures are likely to have an impact on the resources available to Consultants, particularly where the service cannot be delivered through remote working. Where a Consultant's capacity to deliver the services for a commission has been adversely affected by the Public Health Measures or their consequences, the Consultant should notify these matters to the Client. Both parties shall establish the best approach to ensuring the service can be continued, if necessary within redefined delivery parameters. The Client may consult with the Consultant for the purposes of considering whether reducing the periods between payments through the introduction of sub-milestones or intermediate delivery requirements would be beneficial. This applies regardless of whether the project being worked on is deemed 'essential' or 'non-essential'.

#### **3.1.1. Construction stage services – Essential Construction Services:**

Where services are required for the provision of essential construction services, these must be carried out in compliance with Public Health Measures and relevant guidance.

Oversight of the works from a health and safety and Building Regulations (where applicable) perspective is critical and it is imperative these roles be resourced adequately.

Key operational risks include [not exhaustive]:

- whether social distancing requirements are capable of being met;
- if not, what additional measures can be introduced to protect workers and minimise the spread of the virus;
- maintaining proper welfare facilities;
- adequate provision for breaks and meal times;
- whether the Contract Administrator/Contractor/Third parties can maintain proper oversight and/or supervision of the works;
- supply chain issues;

Once an assessment of risks has been carried out, required mitigation measures should be identified, procedures documented and any additional resources necessary to maintain the programme identified.

**3.1.2. Pre-construction stage services – Non-essential Construction Services:**

Where design teams are engaged on project design and/or the production of tender documentation, their service provision should continue up to the point where the Client must give permission to proceed to the next Design Team Service stage in accordance with Clause 4 (1) of COE1 unless the Client invites a suspension under Clause 4 (11).

It is a matter for Clients as to whether permission to proceed to the next Stage of the service in accordance with Clause 4 (1) of COE1 should be granted. However, to the extent it is possible to adequately resource the services, Clients should give careful consideration to the continuing development of projects to ensure that they are ready to go to tender once the Public Health Measures are relaxed or withdrawn.

The continued attendance of the various Design Team members and Client personnel at meetings is to be facilitated by remote means such as video or teleconferencing. Where this is not possible, meetings in person may not take place.

Where key Design Team personnel are unable to continue in their roles, a deputy that is acceptable to the Client may be proposed. Adjustments to the milestone delivery dates may also be necessary to allow the project to continue to progress.

Under no circumstances should the Design Team service continue if the level of resources are such that they impact on key health and safety legal obligations and requirements.

**3.1.3. Construction stage services - Non-essential Construction Services**

Even though a Consultant cannot attend site to oversee construction operations, there may be a range of ongoing duties and tasks to be undertaken. In particular those associated with the measures set out at section 3.2.2 and 4 of this Note. The duration of the restrictions associated with the Public Health Measures remains uncertain. It is recommended that Clients call a meeting under Clause 8 of COE1 where both parties to the Services contract may engage on a 'without prejudice' basis to establish the necessary and appropriate arrangements for the duration that the Public Health Measures continue to adversely affect the delivery process that would otherwise have occurred, together with the consequences for the Service provision and the project.

**3.2. Construction Contracts – Standard Form Public Works Contracts (PWC)**

If the project is determined to be 'essential' by the Employer then work may continue and the provisions set out at 3.2.1 apply.

If not then Employers should follow the steps set out at 3.2.2.

**3.2.1. *Where the works are determined to be ‘essential’***

Both parties shall establish the best approach to ensuring the Works can continue to be executed, if necessary within redefined delivery parameters, whilst complying with Public Health guidelines and health and safety requirements.

Sub-clause 4.1 (*Co-operation*) should be used as the vehicle to assess the likely impact of the Public Health Measures on the progress of the works, the issues currently arising and any potential mitigating measures that can be taken. Where the issues arising are linked to the impact of Public Health Measures, the Employer should adopt a proactive and collaborative approach to address them. The Employer may consider, in consultation with the Contractor, whether adjusting the period between interim payments would be beneficial in assisting cashflow and overcoming any tightening of credit terms that may be arising.

The Public Works Contracts make provision for delay and both parties should work within the terms of the relevant conditions of contract with respect to notification and management of delay. For conditions of contract PW-CF1 – PW-CF5 inclusive, sub-clause 9.3 (*Delay and Extension of Time*) provides the early warning contractual mechanism to highlight the delay and allows the parties to take the necessary steps to eliminate or reduce the delay. PW-CF6 and PW-CF7 have similar provisions under Clauses 4.8 and 4.5 respectively.

The Public Health Measures may impact on the progress of the Works in a number of different ways. For example, social distancing may require works to be undertaken differently, there may be a scarcity of key resources or an interruption to the supply of certain Works Items.

The manner in which each issue is dealt with will vary from project to project and will depend on local conditions and the scale, nature and complexity of the Works.

In these cases it is suggested that the Employer’s Representative (ER) make use of sub-clause 10.4 (*Proposed Instruction*) by asking the Contractor involved for a proposal to address the particular issues as they are identified under sub-clause 9.3.

Please note that the use of sub-clause 10.4 is without prejudice to the Contractor’s other rights under the conditions of Contract.

**3.2.2. *Where the works are determined to be ‘non-essential’***

Following the Public Health Measures as published on 28<sup>th</sup> March 2020 aimed at helping prevent the spread of Covid-19, work on non-essential projects ceased and Contractors closed their sites.

Notwithstanding the challenges Employers should ensure that interim payments reflect progress up to the date that the site closed. Whilst verification by means of a

site visit is not possible, the payment could be an estimate based on previous interim payments verified by alternative means agreed with the Contractor.

Where the conditions of contract in use are a standard form of PW-CF1 – PW-CF5 inclusive, 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 PW-CF6 is being used for a project, 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”*. Where the form of contract is a standard form of PW-CF7, in accordance with 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 standard forms of PW-CF1 to PW-CF7 inclusive (together the *“Public Works Contracts”*) make provision for delay 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. Where, in order to meet its obligations as an employer, the Contractor has closed the site, the Contractor should, in accordance with sub-clause 9.3<sup>4</sup> (*Delay and Extension of Time*) notify the ER as soon as practicable of the delay and its cause. Where PW-CF6 is operative, the notification should be given under sub-clause 4.8. Where PW-CF7 is operative, the notification should be given under sub-clause 4.5. Where PW-CF11 is operative, the notification should be given under sub-clause 4.3. Where PW-CF8 is operative, the Contractor should notify the ER as soon as practicable of the delay and its cause.

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.

Having regard to the exceptional circumstances currently facing Contractors on publicly funded projects, the following measures are proposed in connection with Covid-19 related site closures in the case of Public Works Contracts (as defined above):

#### Delay

1. In relation to delay, and subject to proper notification having been given of site closure, notwithstanding the publication of the Regulations on 8 April 2020, for the purposes of calculating an extension of time, the delay should be treated as having

---

<sup>4</sup> of PW-CF1 to PW-CF5 inclusive

commenced on the date of site closure following the publication of Public Health Measures on 28<sup>th</sup> March 2020.

#### Cost

1. 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.
2. In order to relieve financial pressure on Contractors, and as the Public Health Measures have been extended from [and including] the 12<sup>th</sup> April 2020 to midnight on the 4<sup>th</sup> May 2020 (“Applicable Period”), without admission of any responsibility for such costs under or in connection with the Contract, without altering either party’s rights or duties and without creating a precedent, the Employer, in the case of Public Works Contracts (as defined above) will make an ex gratia payment to the Contractor for the period that the site was closed during the Applicable Period (or portion thereof). Acceptance of such ex gratia payment by the Contractor will be on the basis that it is paid without admission of any responsibility on the part of the Employer for such costs under or in connection with the Contract, and without altering either party’s rights or duties and without creating a precedent, (even where the parties have not expressly stated on a particular project that it has been made, or accepted, on that basis).
3. The ex gratia payment will be in respect of a portion of certain permissible items of the Contractor’s Preliminaries, unavoidably incurred and reasonable and vouched, to be reviewed on a project by project basis with individual Contractors by the Employer, (or any party nominated by the Employer to act on its behalf in relation to the assessment of the ex gratia payment, including the Employers Representative). The ex gratia payment will cover that period that the site is closed as a result of the Public Health Measures during the Applicable Period (or portion thereof). Examples of such permissible preliminary costs include costs associated with insurance premiums and with maintaining the security of the closed site and the performance of any on-going health and safety obligations in relation to the closed site.
4. Further guidance is given in the following section 4.0.
5. It shall be a condition for the making of an ex gratia payment that the Contractor makes their records and all relevant supporting material that may reasonably be required to vouch for such permissible costs available to the Employer or to any party nominated by the Employer to act on its behalf for the purposes of determining the amount of the ex gratia payment in accordance with this Note. Regardless of whether the Employer conducts the assessment or delegates it to another party, for example the ER, the determination of the ex gratia amount shall remain the prerogative of the Employer.
6. Prior to any such ex gratia payment being made, the Employer and the Contractor will record the amount of the ex gratia payment. This will be recorded in a



supplemental agreement<sup>5</sup>, effected by a simple exchange of letters, which will set out:

- a) the parties and the project;
  - b) the amount determined by the Employer to be paid;
  - c) the headings of costs covered by the determined amount;
  - d) that the agreement is supplemental to the Contract for the undertaking of the Works.
7. The ex gratia payment, when the supplemental agreement is exchanged between the Employer and the Contractor, should be included with the next scheduled interim payment following the recording of the agreement of the costs. Shorter interim payment periods may be considered where necessary.

---

<sup>5</sup> Model Form to follow

#### 4. Calculating ex gratia payments

The following formula has been developed to provide a calculation for the ex gratia payments. Ex gratia payments apply to that period that the site was closed during the Applicable Period (or portion thereof).

Applicable Period: the period commencing on the twelfth day of April 2020 and ending [at midnight] on the fourth day of May 2020.

$$S = \left\{ \frac{P - (I + C + Su)}{D} \right\} \times d$$

Where:

- S* Value of ex gratia payment
- P* The aggregate of the Contract Preliminaries values (as stated in the Pricing Document)
- I* Initial set-up costs (including but not limited to items such as site set up, bonds, conciliator fees, hard standing, etc. see below)
- C* Consumables (Including but not limited to items such waste disposal, non-essential power, fuel and small plant, etc.)
- Su* 50% of the aggregate of permissible supervision items, see below
- D* Contract duration in weeks (as stated in the Contract)
- d* The actual period of site closure during the Applicable Period (in weeks or part thereof). Any periods that the site was not closed during the Applicable Period are not taken into account in the ex gratia payment.

The calculation of the ex gratia payment is based upon an assessment of the breakdown of the contract preliminaries as per the Pricing Document in the accepted tender. Where requested, the Contractor is to provide a complete and full break-down of the tendered Contract Preliminaries on a transparent and “open book” basis.

**Initial Set-up costs (I) are those costs associated with the establishment of the site** and include all site set-up costs stated in the Contract Preliminaries (as per Pricing Document) including, but not limited to, site accommodation and storage, hoarding, site services, roadways and hard standings, etc. These initial costs are generally agreed at the commencement of the works and the agreed costs should be used as the base data for the purposes of the calculation of the ex gratia payment. Where these costs have not been agreed the Employer [or the party nominated by the Employer to act on its behalf for the purposes of determining the amount of the ex gratia payment] shall determine the Initial Set-up costs.

In the case of scaffolding where, on the 28<sup>th</sup> March 2020:

- (a) Scaffolding was erected on the site (and remains erected on the closed site), 65% of the total scaffold amount (erection and hire) stated in the Contract Preliminaries is to be

- included in the Initial set-up costs; (i.e. 35% of the total scaffold amount is taken into account in the calculation of the ex gratia payment); or
- (b) Scaffolding was not yet erected, or had been dismantled, 100% of the scaffold of the total scaffold amount (erection and hire) is to be included in the initial set up costs.

**Consumables** includes all items deemed as consumables or not required during the period of site closure including, but not limited to, personal protective equipment (PPE), fuel, small plant and tools, waste disposal, cleaning (periodic and final), any demobilisation costs included in the preliminaries, etc. During the period of site closure such consumable costs are excluded from the ex gratia payment.

The amount included in the total preliminaries figure in respect of large items of plant and machinery (cranes, excavators, dumpers, vehicles for the purposes of site inspection only) that properly remain on the site for the duration of the Applicable Period shall NOT be included in the calculation of amount C – i.e. their cost as per the Pricing Document content shall contribute to the amount of the ex gratia payment.

**Supervision** - The permissible supervision costs under this item are 50% of the aggregate of the Contract Preliminaries supervision item(s) for those members of the Contractors Personnel ordinarily engaged in the supervision of the Works in the week immediately preceding the 28<sup>th</sup> March 2020 (and that remained in the employ of the Contractor during the Applicable Period) except where such permissible supervision costs (or an element therein) are recovered by the Contractor under the Temporary Covid-19 Wage Subsidy Scheme operated by the Revenue Commissioners.

#### **Exclusions**

For the avoidance of doubt, the following items are expressly excluded from the ex gratia calculation:

- Any Bond premium;
- Any sum for Standing Conciliator;
- Any utility connection fees and contributions;
- Any allowance for profit and overheads expressly provided for within the Contract Preliminaries.

*End Note*