[Note to Employer: delete this text and replace with letterhead/print onto letterheaded paper]

[Note to Employer: delete this text and replace with letterhead/print onto letterheaded paper]

[Insert name and address of Contractor]

[Insert name of Contract]

[Insert date of Letter Agreement]

**PUBLIC WORKS CONTRACTS - COVID-19 SITE CLOSURE**

**SUPPLEMENTAL AGREEMENT FOR CONTRACTS MADE ON OR AFTER 14 APRIL 2020**

Dear [ ],

I refer to the contract dated [ • ] [2020] between the [ • ] (we or us) and [ • ] (you) (the “**Contract**”).

1. Background
   1. On 6 January 2021, the Government announced public health measures aimed at limiting the spread of the Covid-19 pandemic.
   2. In connection with the circumstances contemplated by the public health measures, the Health Act 1947 ((Section 31a – Temporary Restrictions) (Covid-19) Regulations 2021) (the “Regulations”) came into force with effect from 8 January 2021 (“closure order”). As a result of the closure order, the Site must remain closed until further notice.
   3. The Employer considers that the Contract does not provide an entitlement to the Contractor to recover costs associated with the closure of the Site in the circumstances contemplated by the closure order.
   4. A scheme has been published by the Office of Government Procurement (“**OGP**”) for those standard form Public Works Contracts made on or after 14 April 2020, for which contracting authorities are recommended to consider and make ex gratia payments in regards to the sites affected by the closure order.
   5. The Parties wish now to engage to agree an ex gratia payment in respect of certain permissible costs arising from the closure order. The Office of Government Procurement has issued guidance as to the calculation of permissible costs (“**OGP Guidance**”).
2. Ex Gratia Closure Payment
   1. In this Covid-19 Site Closure Supplemental Agreement, ‘**Ex Gratia Closure Payment**’ means the ex gratia payment by the Employer of an amount in respect of a contribution by the Employer to the permissible costs (calculated in accordance with the OGP Guidance) incurred during the Relevant Closure Period, (as hereinafter defined), due to the Site closure as a result of the closure order.
   2. The Parties will approach the calculation of the Ex Gratia Closure Payment as follows:

Subject always to any specific provisions specially agreed in the Contract in relation to site closures by Government order, the period in respect of which the calculation of the Ex Gratia Closure Payment is to be made shall be in accordance with OGP guidance as may be issued from time to time.

The period between commencement and cessation of the period of Site closure covered by the Ex Gratia Closure Payment shall be the referred to in this Covid-19 Site Closure Supplemental Agreement as the “**Relevant Closure Period**”.

* 1. By our signature, and by your countersignature, of this Covid-19 Site Closure Supplemental Agreement (and the return to me of the signed counterpart), now it is hereby agreed as follows in consideration of the mutual agreements set out below (and for other good and valuable consideration the receipt and sufficiency of which is acknowledged by each of the Parties):

1. Interpretation and definitions
   1. In this Covid-19 Site Closure Supplemental Agreement (including the recitals) unless the context otherwise requires (and unless otherwise defined in this Covid-19 Site Closure Supplemental Agreement), terms and expressions used herein shall have the same meaning as in the Contract.
2. Representations and Warranties
   1. Each of the Parties represent and warrant to the other Party that:
      1. it has obtained all authorisations, consents, approvals, resolutions, licences, exemptions, filings, notarisations or registrations required to enable it to lawfully enter into and implement this Covid-19 Site Closure Supplemental Agreement and that all such authorisations are effective and in full force and effect at the date of this Covid-19 Site Closure Supplemental Agreement; and
      2. it has the requisite power to enter into and perform and deliver its obligations and covenants contained within this Covid-19 Site Closure Supplemental Agreement.
   2. The Contractor represents and warrants to the Employer as follows:
      1. insofar as requested by the Employer (and/or by the party nominated by the Employer to act on its behalf for the purposes of arriving at the Ex Gratia Closure Payment) to do so, will in respect of the Relevant Closure Period:
         1. provide a complete and full break-down, on a transparent and ‘open book’ basis, of both (a) the Contract preliminaries and/or rates in the Pricing Document and (b) the Contractor’s unavoidably incurred and vouched costs incurred during the Relevant Closure Period;
         2. make all its records, supporting and vouching material available; and
         3. provide such other information as the Employer’s Representative requests,

in either case, to the Employer or to the party nominated by the Employer;

* + 1. it has not claimed, as part of the make-up of the Ex Gratia Closure Payment, any cost in respect of which it has received assistance through the Employment Wage Subsidy Scheme provided for in the Financial Provisions (Covid-19) (2) Act 2020 (Act No. 8 of 2020) operated by the Office of the Revenue Commissioners; or any cost in respect of individuals who have left employment in connection with the Works or have been laid off since the commencement of the Relevant Closure Period;
    2. the Surety providing the Performance Bond, where a Performance Bond is required by the Contract, and/or the guarantor providing a guarantee, where a guarantee is required by the Contract, has consented to this Covid-19 Site Closure Supplemental Agreement and the Contractor has furnished evidence in a form reasonably satisfactory to the Employer of such consent;
    3. the Contractor remains compliant with its obligations in connection with the payment of taxes;
    4. the Contractor remains compliant with its obligations under the Contract.
  1. Where the Contractor has, prior to the date of this Covid-19 Site Closure Supplemental Agreement, submitted or, where subsequent to the date of this Covid-19 Site Closure Supplemental Agreement, the Contractor submits, a claim in accordance with sub-clause 4.8 of the Contract that relates to costs incurred due to the closure order ("**Site Closure Claim**"), the Employer's Representative shall pause the determination process under the Contract on the Site Closure Claim, subject to the outcome of the process in this Covid-19 Site Closure Supplemental Agreement such that, from the date of execution by both the Employer and the Contractor of this Covid-19 Site Closure Supplemental Agreement, the determination of any such Site Closure Claim by the Employer's Representative under the Contract will be deferred until the notice to withdraw by either party from this Covid-19 Site Closure Supplemental Agreement insofar as it relates to the Site Closure Claim.
  2. Unless the Site Closure Claim has been, subsequent to the date of this Covid-19 Site Closure Supplemental Agreement, withdrawn and waived by the Contractor in writing, then in the event that either party provides a notice to withdraw from this Covid-19 Site Closure Supplemental Agreement, such Site Closure Claim shall be treated, for the purpose of compliance with notice requirements under sub-clause 4.8 of the Contract, as having been submitted on the next working day falling after the date notice to withdraw was issued.
  3. If the Parties agree the amount of the Employer's ex gratia contribution to the permissible costs incurred by the Contractor due to the closure order, as envisaged in the OGP Guidance, the Employer's Representative shall issue a notice (the “**Covid Closure Costs Notice**”) to both the Employer and the Contractor in the form of the Model Form attached in Appendix One hereto. The Covid Closure Costs Notice shall set out, subject to the terms and conditions of this Covid-19 Site Closure Supplemental Agreement, the extent of the Ex Gratia Closure Payment for the period identified in the Covid Closure Notice.
  4. Provided both the Employer and the Contractor shall each have signed the Covid Closure Costs Notice to signify their agreement with its contents, and the Contractor shall have returned a signed counterpart to the Employer, the Ex Gratia Closure Payment shall be paid by the Employer with the next scheduled interim payment due under the Contract following the date of the receipt by the Employer of the signed counterpart of the Covid Closure Costs Notice save where the Employer is entitled under the Contract to withhold any payment otherwise due in whole or in part to the Contractor, in which case the Ex Gratia Closure Payment shall not be payable to the extent of the amount of the withholding. The Ex Gratia Closure Payment shall not be included in a certificate of the Employer's Representative and shall not be subject to retention. The Contractor waives any claim and/or entitlement to interest for late payment of the Ex Gratia Closure Payment.
  5. The decisions of the Employer relating to Ex Gratia Closure Payment, including the amount and make up of it, are final and binding on the Parties. It is acknowledged by the Contractor that, in the event that the Contractor is in breach of any of its commitments made in this Covid-19 Site Closure Supplemental Agreement and/or if any of the warranties and/or representations given by the Contractor in this Covid-19 Site Closure Supplemental Agreement are incorrect or untrue, the Employer has the right to a refund of the Ex Gratia Closure Payment already agreed.

1. (Sub-clause not used).
2. The execution of this Covid-19 Site Closure Supplemental Agreement:
   * 1. by the Employer, is without its admitting or otherwise accepting that it has any responsibility under or in connection with the Contract for any costs associated with implementing the Site closure, pursuant to the closure order, and
     2. does not alter either Party’s rights, duties or obligations under the Contract and shall not be used as a precedent.
3. If the Contractor makes any Site Closure Claim under the Contract or otherwise against the Employer in connection with the closure order, and is successful in such claim, the amount payable to the Contractor as a consequence of such Site Closure Claim shall be reduced by the amount of the Ex Gratia Closure Payment. In the event the Ex Gratia Closure Payment exceeds the amount determined as due to the Contractor in connection with such Site Closure Claim, the Contractor shall pay to the Employer the amount of such excess within ten days of such amount being demanded.
4. This Covid-19 Site Closure Supplemental Agreement may be executed in any number of counterparts, each of which when executed will constitute an original but all of which together shall constitute the same instrument.
5. The Contract, this Covid-19 Site Closure Supplemental Agreement, any Covid Notices and any Covid Closure Costs Notices as signed by both Parties, shall together constitute the entire agreement between the Parties with respect to the closure order and each of the Parties acknowledge to the other Party that they have not been induced to enter into this Covid-19 Site Closure Supplemental Agreement by any statement or promise except to the extent expressly set out in this Covid-19 Site Closure Supplemental Agreement.
6. No provision in this Covid-19 Site Closure Supplemental Agreement shall be deemed waived, amended or modified by a Party, unless such waiver, amendment or modification is made in writing and signed by the Parties hereto.
7. Save to the extent that it is supplemented by this Covid-19 Site Closure Supplemental Agreement, the Parties agree that the Contract shall continue in full force and effect.
8. This Covid-19 Site Closure Supplemental Agreement shall be governed by and construed in accordance with the laws of Ireland and the Parties hereto submit to the exclusive jurisdiction of the Irish courts for the resolution of disputes hereunder.

Please sign where indicated below to acknowledge your acceptance of, and agreement to, the foregoing.

Yours sincerely

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

for and on behalf of [insert name of Employer]**.**

[insert name]

[insert role]

By signing below, we acknowledge and agree to the terms of this Covid-19 Site Closure Supplemental Agreement.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

for and on behalf of [note to Employer: insert name of Contractor]**.**

**NAME:**

**TITLE:**

**APPENDIX ONE: COVID CLOSURE COSTS NOTICE**

**[On the headed notepaper of the Employer's Representative]**

**To each of:**

the **Employer:** [Insert name and address of Employer**]**; and

the **Contractor:** [Insert name and address of Contractor]

**Project:** [Insert project description]

**Contrac**t: [Insert date of Contract]

**Date** of this Covid Closure Costs Notice: [Insert date]

This is a **COVID CLOSURE COSTS NOTICE** issued in accordance with, and subject to, the Covid-19 Site Closure Supplemental Agreement for Contracts Made On or After 14 April 2020 [Insert date of Supplemental Agreement] in respect of the period stated below (falling within the Relevant Closure Period).

[Insert date of first day of period covered by the Notice] and [insert date of last day of period covered by the Notice]

[OR (Note to ER: delete preceding or following date range as appropriate)]

[Insert date at start of subsequent period covered (Note to ER: the start date of a subsequent period will be the day after the last date of the prior Covid Closure Costs Notice)] and [Insert date at end of subsequent period covered] (‘this Period’).

The reasonable, unavoidably incurred and vouched costs due to the closure of the Site in this Period has been calculated at €[*Insert figure (if none agreed, insert 'Nil'*)] and the amount of the **Ex Gratia Closure Payment** agreed to be paid by the Employer is €[*Insert figure (if none agreed, insert 'Nil')*].

The Parties acknowledge that they have not been induced to signify their agreement to this Covid Closure Costs Notice by any statement or promise except to the extent expressly set out in this Covid Closure Costs Notice.

**Signed:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**EMPLOYER’S REPRESENTATIVE**

**By signing below, you acknowledge and agree to the terms of this Covid Closure Costs Notice**.

*Employer*

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

for and on behalf of [Note to ER: insert name of Employer]

**NAME:**

**TITLE:**

**DATE:**

*Contractor*

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

for and on behalf of [Note to ER: insert name of Contractor]

**NAME:**

**TITLE:**

**DATE:**