

GUIDANCE NOTE GN 1.5.4

Covid-19 and the Public Works Contracts

Office of Government Procurement

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Document Reference 1.5.4 v1.0

29 July 2021

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Published by: Office of Government Procurement
Department of Public Expenditure and Reform
Government Buildings
Upper Merrion Street
Dublin 2

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Introduction*Purpose of Guidance Note*

The purpose of this guidance note is to provide Contracting Authorities and Contractors with guidance on the Covid-19 Mandatory Closure clause ('Covid-19 clause') in the Public Works Contracts. This guidance note should be read alongside both the Covid-19 clause and the Site Closure Costs Supplement.

The Covid-19 clauses in the Public Works Contracts are as follows:

Public Works Contract Form	Covid-19 Clause Reference in Contract
PW-CF1-5	Clause 14
PW-CF6 (Short Public Works Contract)	Clause 16
PW-CF7 (Investigation Contract)	Clause 17
PW-CF8 (Short Investigation Contract)	Sub-Clause 7.10
PW-CF11(Term Maintenance Contract)	Sub-clause 4.6

Much of the guidance in this document applies equally to all of the contract clauses above and, unless otherwise specified, any reference to the 'Covid-19 clause' can be taken to apply to every version of the clause. Where guidance applies to particular contract forms only, this will be indicated clearly in the guidance note either via a separate sub-heading for each contract form or, where the differences between clause versions are only slight, a footnote.

Covid-19 Clause

The Covid-19 clause provides clarity to both the Employer and the Contractor regarding the risk share in the event of a Covid-19 Mandatory Closure.

Although the mechanics of the Covid-19 clauses differ slightly between contracts, in each of the above contracts the clause provides the Employer and the Contractor with a clear process to extend time due to, and to calculate payments in respect of certain costs incurred during, a Covid-19 Mandatory Closure.

**Covid-19 and
Covid-19
Mandatory
Closure***Covid-19 Definition*

For the purposes of the Covid-19 clause, the definition of 'Covid-19' is as follows:

Covid-19 means Covid-19 or such variant thereof as each is listed in the schedule to the Infectious Diseases Regulations 1981.

Covid-19 Mandatory Closure Definition

The Covid-19 clause applies only in respect of a 'Covid-19 Mandatory Closure' which is defined as:

The closure of the Site due to Covid-19 that is mandated by Law and/or mandated by order of a 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.¹

For clarity, the Contractor is responsible for health and safety on the Site and for compliance with applicable legal requirements. The Employer is not required under the Contract to interpret the law for the Contractor.

**Entitlements
Under the
Covid-19
Clause**

The Covid-19 clause provides an entitlement to the Contractor to an extension of time for completion and to the payment of certain costs ('Site Closure Costs') incurred during a Covid-19 Mandatory Closure. Where possible, the adjustments for time and payment of Site Closure Costs are made under existing provisions within the Contract, rather than under new mechanisms introduced by the Covid-19 clause itself.

The entitlement to any extension of time and to payment of Site Closure Costs under the Covid-19 clause is subject always to any conditions precedent to the application of the Covid-19 clause or other clauses in the Contract.

¹ This is the definition in Clause 14 of PW-CF1–PW-CF5. In the case of PW-CF6, PW-CF7, PW-CF8, and PW-CF11, the term 'law' is used instead of the terms 'Law' and 'Legal Requirements' in this definition.

Entitlement to Extension of Time

The Covid-19 clause entitles the Contractor to an extension of time in the event of a Covid-19 Mandatory Closure. Due to the different uses and structures of the forms of public works contract, however, this extension of time is accommodated in several different ways according to the form of contract used.

PW-CF1-PW-CF5

In PW-CF1-PW-CF5, a ‘Covid-19 Mandatory Closure’ falls under the definition of a Delay Event given in Item 15 of the Schedule, Part 1K. In the event of a Covid-19 Mandatory Closure, the Contractor should proceed according to the Covid-19 clause and seek an extension to the Date for Substantial Completion under clause 9.3 of the Contract.

The Programme Contingency referred to in sub-clause 9.4 and sub-clause 10.5 of the Contract is **not** available for the purposes of determining the adjustment to the Date of Substantial Completion, as a Covid-19 Mandatory Closure is not a Compensation Event under the Contract.

PW-CF6

Under PW-CF6, a ‘Covid-19 Mandatory Closure’ is included as an event at sub-clause 2.7. Under this sub-clause, the occurrence of any of the listed events, subject always to meeting any conditions precedent, provides an entitlement to the Time for Completion of the Contract.

PW-CF7

Under PW-CF7, a ‘Covid-19 Mandatory Closure’ is included as an event at sub-clause 4.5. Under this sub-clause, the occurrence of any of the listed events, subject always to any conditions precedent, provides an entitlement to an extension to the Performance Period for a Task.

PW-CF8

Under PW-CF8, sub-clause 7.10 provides, subject always to any conditions precedent, an entitlement to an extension to the Performance Period in the event of a Covid-19 Mandatory Closure.

PW-CF11

Under PW-CF11, sub-clause 4.6 provides, subject always to any conditions precedent, an entitlement to an extension to the Time for Completion in the event of a Covid-19 Mandatory Closure.

Entitlement to Site Closure Costs*Site Closure Costs*

The Contractor bears the full cost of the first 7 days of a Covid-19 Mandatory Closure or, where there is more than one Covid-19 Mandatory Closure, the Covid-19 Mandatory Closures. After the first 7 days have elapsed, subject to meeting any conditions precedent, the Covid-19 clause provides an entitlement to the Contractor to the payment of Site Closure Costs.

Site Closure Costs are defined in, and calculated in accordance with, the Site Closure Costs Supplement (MF 1.31) (the ‘Supplement’). The payment of Site Closure Costs is subject always to full compliance with both the provisions of the Covid-19 clause and the Supplement itself; it should be noted that this includes the requirement in the Covid-19 Clause that the Contractor ‘makes all reasonable efforts to avoid and minimise the adverse effects of the Covid-19 Mandatory Closure’.

Calculation of Site Closure Costs*Site Closure Costs Supplement*

The Supplement is to be included in the Works Requirements². Where it is not included, the version of the Supplement (the ‘template Supplement’) published on the CWMF website most recently before the Designated Date³ will apply in respect of the calculation of Site Closure Costs.

The template Supplement lists, as fixed text, 9 Permissible Items for which the Contractor is entitled to claim Permissible Costs. The sum of the Permissible Costs incurred during the Covid-19 Mandatory Closure – less the first 7 days of the closure – are the Site Closure Costs to which the Contractor is entitled.

Continued on next page

² In the case of PW-CF6, the Supplement is provided as part of the documents listed at 1.3 of the Schedule; in the case of PW-CF7 and PW-CF8, the Supplement is provided as part of the documents listed at 1.1 of the Schedule.

³ Or, in the case of PW-CF6, PW-CF7, PW-CF8, and PW-CF11, the version published on the CWMF website 10 days before the deadline for submissions of tenders for the contract.

Calculation of Site Closure Costs (cont.)*Permissible Items*

The description and scope of the standard Permissible Items are provided in the notes to the Supplement's 'Schedule of Permissible Items'.

When preparing the Supplement for issue with the Instructions to Tenderers, the Employer may amend this Schedule to include additional Permissible Items beyond those included in the template Supplement. Where additional Permissible Items are added to the Schedule, the Contracting Authority should ensure that they are accompanied with detailed descriptions and explanatory notes. Unless such an amended Supplement is included in the Works Requirements⁴, the template Supplement will apply – Employers should, therefore, carefully consider which additional costs they may wish to make provision for during a Covid-19 Mandatory Closure when preparing the Supplement.

Where the Contract contains a Pricing Document, an appropriate level of detail of the items that fall under the definitions of the Permissible Items in the Supplement should be provided.

Permissible Costs

Only the costs of Permissible Items which meet the definition of 'Permissible Costs' in the Supplement are included in Site Closure Costs. Employers and Contractors are advised to familiarise themselves with these definitions, including the exclusions listed at the Schedule of Permissible Items of the Supplement. It should also be noted that, amongst the other conditions in the Supplement pertaining to the calculation of a Permissible Cost, the cost must always be 'reasonably incurred' during a Covid-19 Mandatory Closure.

Where the Contract includes a Pricing Document, the Permissible Cost of an item will be calculated using the rates and prices contained within. If there is no rate or price for the Permissible Item, calculation will be made on the basis of any other suitable rates or prices included in the Pricing Document. In either case, the rates or prices included in the Preliminaries shall take precedence over any rates or prices for Permissible Items included elsewhere in the Pricing Document.

If the Contract does not include a Pricing Document, or there is otherwise no suitable rate or price in the Pricing Document, the Permissible Costs will be calculated by assessing the Contractor's reasonable costs.

⁴ See footnote 2, above.

Payment of Site Closure Costs

The method of claiming for Site Closure Costs differs according to the contract form being used. In every case, however, the value of the Site Closure Costs is determined in accordance with, and payment made subject to compliance with, the Site Closure Costs Supplement and the Covid-19 clause. The usual dispute resolution mechanisms available under the Contract apply to the determination by the ER of Site Closure Costs.

PW-CF1-PW-CF5

Under PW-CF1-5, the Contractor should calculate its Site Closure Costs and submit a claim for payment under sub-clause 10.3. The ER determines the Contractor's claim under sub-clause 10.5 in reference to the Covid-19 clause and Site Closure Costs Supplement and notifies the Contractor of the determination.

The payment of Site Closure Costs is not subject to the retention percentage stated in the Schedule (if any).

PW-CF6

Under PW-CF6, the Contractor should calculate its Site Closure Costs and submit a claim for an adjustment to the Price under sub-clause 4.8. The ER will then make a determination on the claim in reference to the Covid-19 clause and Site Closure Costs Supplement and make the necessary adjustment to the Price.

PW-CF7

Under PW-CF7, the Contractor submits its claim for the payment of Site Closure Costs under sub-clause 7.7. The ER determines the claim in reference to the Covid-19 clause and Site Closure Costs Supplement and makes an adjustment to the Price.

PW-CF8 & PW-CF11

Under PW-CF8 and PW-CF11, the Contractor should notify the ER in writing of its claim for the payment of Site Closure Costs. The ER will assess the Contractor's submission for Site Closure Costs in reference to the Covid-19 clause and Site Closure Costs Supplement and make the necessary adjustment to the Price.

END DOCUMENT