

Summary and Background

Recent inflationary pressures and the uncertainty which the war in Ukraine has brought to bear on the operation of supply chains is impacting on the delivery of public works projects.

The Short Public Works Contract (PW-CF6) does not contain a price variation clause, nor does it contain an entitlement to an extension of time for delay to the Works caused by supply chain disruption.

On 7 January 2022, the Office of Government Procurement (OGP) published amendments to the suite of public works contracts to address the material price inflation pressures that had been evident since Q2 of 2021.

Whilst there were no amendments made to the conditions of PW-CF6, however the associated Instructions to Tenderers (ITTW4 & ITTW5) and Form of Tender and Schedule (FTS9) were amended to permit indexation of the materials element of the tendered Price immediately prior to the award of the contract. The movement in the 'All Materials' index¹ between a date that is 10 days before the tender is submitted (Designated Date) and the date the contract is awarded is used to determine any uplift in the tendered Price of the successful tender and the point the contract is awarded.

Having regard to the burden that may be placed on contractors as a result of the increased inflationary pressures and uncertainty with respect to the delivery of goods and materials for the Works, the OGP proposes the use, by those parties to a PW-CF6, of an Inflation/Supply Chain Delay Co-operation Framework Agreement ('the Agreement').

Under the Agreement,

- in respect of supply chain disruption, the parties engage with one another on an on-going and 'without prejudice' basis to determine the extent to which the Works, or elements of the Works, are impacted by delay in the supply of goods and materials and to seek to agree an appropriate way forward;
- in respect of price inflation, formulae, based on price indices published by the CSO ("Relevant Index"), are provided to calculate an amount for inflation in the price of materials, fuel and electricity.

The Agreement operates without prejudice to each party's rights under PW-CF6 and is predicated on a cost burden share basis, whereby the Employer makes an ex gratia contribution to the inflation amount calculated (*Ex Gratia Payment*) and waives the application of liquidated damages arising from a delay in meeting the Time for Completion caused by supply chain delay that occurred after 01 January 2022 (*Ex Gratia Extension of Time*).

There are two approaches set out to calculating the amount of an Ex Gratia Payment under the Agreement, their application depends on the date on the Form of Tender and Schedule (FTS6)² used

¹ 'All Materials' is a category in Table 3 Detailed Wholesale Price Indices (excluding VAT) for Building and Construction Materials published by the Central Statistics Office

² Note this is the date on the inside cover sheet and footer of the standard-form FTS6, it does not refer to the tender submission date

in the tender; Category 1 applies to an FTS6 with a version date of 7 January 2022 and Category 2 applies where the FTS6 is that dated *prior* to 7 January 2022.

The measures available on an *ex gratia* basis in both categories are outlined below.

FTS6 is dated	7th January 2022 ("Category 1 projects")	<i>prior to 7th January 2022</i> ("Category 2 projects")
Ex Gratia Measure		
Supply Chain Delay	√	√
Material Price Inflation	√ ¹	√
Fuel Price Inflation	√	√ ²
Energy Price Inflation	√	√

Table 1: Ex Gratia Measures Available under Agreement by Project Category

Key differences between Category 1 and 2

In the majority of cases, the reference Relevant index (i.e. that value of the Relevant Index against which any subsequent fluctuations are measured) is the month of the Designated Date. There are two exceptions set out below:

Note 1: For Category 1 projects, the reference Relevant Index for materials is the month of the Contract Date. This is the date that the Employer issues the counter-signed Tender Accepted to the successful tenderer.

Note 2: For Category 2 projects, the value of the reference Relevant Index for fuel is a fixed at 106.0

The use of the proposed Agreement is voluntary, and parties are advised to have regard to their particular circumstances and those of the project in deciding whether to engage under it on a without prejudice basis. However, where both parties consider that it is appropriate to utilise the Agreement, the OGP strongly encourages Employers and Contractors, to the greatest extent possible, to engage in a collaborative and proactive manner under the Agreement.

Employers may send any queries they may have in relation to this Note to construction@per.gov.ie.

Part A: Standard-form Public Works Contracts

A1 Background

At the date of this Guidance Note, material price inflation will already have been felt on the majority of projects. Increases in excess of typical movements in the price of construction materials has been recorded by the Detailed Wholesale Price Indices (excluding VAT) for Building and Construction Materials³ since March 2021. More recently, energy prices have increased. Fluctuating energy prices also impact the cost of producing and transporting construction materials, as well as on site operations. The trajectory of materials and energy prices inflation is determined by events outside the control of either party.

In addition, shipping and logistics costs, whilst currently showing signs of reducing, may yet see further rises due to energy price increases and the war in Ukraine.

The operation of supply chains to supply materials or goods for the Works are also impacted by the war in Ukraine and the ongoing direct and indirect impacts of the pandemic.

It is apparent therefore, that significant challenges face the parties to a PW-C6, currently and for the foreseeable future. The proposed Agreement affords parties the opportunity to engage with one another for the purpose of mitigating the impacts of inflation and supply chain delay on Contractors undertaking public work contracts.

It is very important that parties take note that no additional Exchequer funding is being made available to Employers for the purpose of engaging under the Agreement. Any Ex Gratia Payments made under the Agreement on public investment projects must be met by the Departments or Agencies from within the existing capital ceilings in 2022 and beyond. Because of the considerable demands placed on the Exchequer at this time, cost increases that arise on completing projects may have an impact on investment decisions on pipeline projects that are yet to go to tender. It is, therefore, incumbent on both parties to an existing PW-CF6 to work together and complete the project to the greatest extent possible within the programme and, particularly, budget parameters.

A1.1 Purpose of this Note

The OGP considers that PW-CF6 does not provide an entitlement to a Contractor for an extension of time to the Time for Completion of the Works in respect of delay caused by supply chain disruption.

In addition, there is no capacity to recover the costs associated with the exceptional rates of inflation of energy, fuel and materials prices currently being experienced.

The OGP therefore considers it appropriate to propose the use of the Agreement in order to facilitate parties to a PW-CF6 to:

- Adopt a pragmatic and proportionate approach to mitigate

³ See Table 3 of the Detailed Wholesale Price Indices (excluding VAT) for Building and Construction Materials, published by the CSO

(i) the risk of delay to the Works arising from supply chain disruption; and

(ii) cost increases arising from price inflation;

both of which being impacts of these external factors;

- adopt a burden share approach to addressing the impact of price inflation; and
- mitigate the risk of a substantial increase in the number of disputes escalated to formal dispute resolution procedures and the associated costs as a result and potential delays to the delivery of public works infrastructure.

This Guidance Note describes the provisions of the Agreement as summarised in Section A3, to facilitate engagement between the parties to a PW-CF6 in order to:

1. address delay to the Time for Completion of the Works that has occurred since 01 January 2022 where the delay is caused by supply chain disruption;
2. address inflation in the prices of fuel and energy that has arisen since the Designated Date and inflation in the price of materials from the Contract Date for contracts using those FTS6 with a version date of 7th January 2022 (i.e. Category 1 projects);
3. address inflation in materials, fuel and energy prices that has arisen from 01 January 2022 onwards for contracts using those FTS6 with a version date prior to 7th January 2022 (i.e. Category 2 projects);
4. proactively, and collaboratively, manage the on-going impact of these external factors insofar as is possible within the project's original delivery parameters.

A1.2 Availability of the Inflation/Supply Chain Delay Co-operation Framework Agreement

Availability of the Agreement for live contracts

Where, prior to 10th May 2022, the Contractor *has notified* the Employer's Representative that the Works are substantially complete (under sub-clause 2.4) the Agreement may not be used by the parties.

Where, prior to 10th May 2022, the Contractor *has not notified* the Employer's Representative that the Works are substantially complete (under sub-clause 2.4.) the Agreement may be used by the parties.

Availability of the Agreement for tender procedures currently underway

For live tender competitions (i.e. tenders have not been received), contracting authorities may elect to propose the use of the Agreement with PW-CF6.

It is recommended that Contracting Authorities clarify to tenderers in live tender competitions whether the use of the Agreement is proposed with the PW-CF6, and that where appropriate, tender deadlines be extended.

For contracts that are not yet awarded but tenders have been received, contracting authorities should consider the implications of proposing the use of the Agreement with PW-CF6 and seek expert procurement advice before determining the next appropriate step.

Availability where the tender procedure has not yet commenced

Where a tender procedure has not yet commenced, the Agreement is available for use by the parties. Until such time as amendments are made to the PW-CF6 to address the issues outlined in Section A1 of this Guidance Note, it is recommended that contracting authorities propose the use of the Agreement with the PW-CF6.

A1.3 Adopting a Proactive and Collaborative Approach

The OGP recommends that parties to a PWC undertake a proactive and collaborative approach, within existing budget constraints, to address issues as they arise in relation to mitigating the ongoing impacts of these external factors to help ease the financial burden on contractors.

The engagement set out at Section A3 of this Note, if committed to by both parties, will enable dialogue and robust discussion on a 'without prejudice' basis.

There is no requirement for the parties to enter into the Agreement described in this Guidance Note and the PW-CF6 provides a process for claims to be submitted, determined, and for the determination to be disputed. However, where the parties elect to enter into the Agreement it offers an opportunity to address, in a proactive and collaborative manner, those matters within those burden-sharing principles that are set out in Section A4.

Parties are requested to proactively engage in order to manage the issues to deliver the best result for the project, the parties and the taxpayer.

A2 Ex Gratia Relief available under the Inflation/Supply Chain Delay Co-operation Framework Agreement

The OGP has prepared guidance for Employers to address the key challenges presented by these external factors. These are set out below under the appropriate headings.

A2.1 Ex Gratia Extension of Time

The Agreement provides that parties may consider the impact of delays caused by the war in Ukraine and/or continuing Covid-19 related supply chain disruption in delivering materials or elements of the project that lie on the critical path.

That consideration is subject to meeting the requirements for a Supply Chain Delay (as defined in the Agreement).

Subject to meeting the requirements of the Agreement in respect of the definition of a Supply Chain Delay, where a delay in the supply of goods or materials for the Works which arises on or after 1 January 2022, the Employer may grant an Ex Gratia Extension of Time for which period, the Employer will waive the application of liquidated damages where the Works are certified as being substantially complete after the Time for Completion.

The Contractor must demonstrate that there were no measures they could have taken prior to submitting their tender to address the potential for delays.

Where a disruption in the supply has arisen, the circumstances must be clearly shown to be outside control of the Contractor or the Contractor's Personnel. A failure to demonstrate:

- that an order was placed in reasonable time,
- confirmation of delivery dates, or
- regular updates from the supplier on progress, or
- compliance with the supplier's payment terms

may be taken into account by the Employer when considering whether an Ex Gratia Extension of Time (as defined in the Agreement) is appropriate.

A2.2 Ex Gratia Payment

A2.2.1 Calculating the Amount of an Ex Gratia Payment

The Agreement provides formulae (contained in appendices to the Agreement) to calculate the amount of an Ex Gratia Payment.

Note:

- Appendix Two in the Agreement contains the formulae for the calculation of Ex Gratia amounts for Category 1 projects.
- Appendix Three in the Agreement contains the formulae for the calculation of Ex Gratia amounts for Category 2 projects.

Irrespective of the project category, the amount of an Ex Gratia Payment is arrived at by calculating the Total Inflation Amount, which is then apportioned between the Employer and Contractor by applying the Employer's Share Percentage as follows.

<i>Ex Gratia Payment Amount (EGP):</i>	$EGP = ES\% \times TI$	Category 1 and Category 2 projects
--	--	------------------------------------

Where

ES % is the Employers Share Percentage, which is that proportion, up a maximum of 70%, of the Total inflation Amount that the Employer will pay to the Contractor on an ex gratia basis. The Employer's Share percentage is stated in the Agreement.

TI is the Total inflation Amount, the formulae used to determine inflation are the same for both categories, however the reference indices differ between the two categories.

Total Inflation Amount

The Total Inflation Amount is the aggregate of the amounts calculated for Material Price Inflation (MPI), Fuel Price Inflation (FPI) and Energy Price Inflation (EPI).

<i>Total Inflation Amount :</i>	$TI = MPI + FPI + EPI$
---------------------------------	--

A2.2.2 Formulae used for calculating Inflation Amounts

Formulae are provided to calculate the amount of material, fuel and energy price inflation making up the Total Inflation Amount. The formulae calculate the amount of inflation by measuring movements in a specified price index (the Relevant Index) and applying it to a stated proportion ("the Percentage") of the Effective Value of an Interim or Final Certificate ("a Certificate") issued by the Employer's Representative under clause 4 of the contract. The Effective Value of a Certificate is the amount certified as being the amount due to be paid to the Contractor under clause 4 of the contract, and adjusted in accordance with the requirements of the Agreement.

A2.4 Material Price Inflation

The Relevant Index for the calculation of the Material Price Inflation amount is the “All Materials” index in Table 3 Detailed Wholesale Price Indices (excluding VAT) for Building and Construction Materials. A threshold figure is deducted from the change in the Relevant Index. The percentage of the Effective Value to be adjusted by fluctuations in the Relevant Index to arrive at the amount for Base Amount for Material Inflation in respect of a Certificate is 34%.

For Category 1 projects, fluctuations in the Relevant Index are calculated relative to the Contract Date.

For Category 2 projects, fluctuations in the Relevant Index are calculated relative to the Designated Date.

A2.5 Fuel Price Inflation

The Relevant Index for the calculation of Fuel Price Inflation is the category “Gas Oil (other than Autodiesel)” in Table 5 Wholesale Price Indices (excluding VAT) for Energy Products (i.e. Fuels purchased by Manufacturing Industry) published by the CSO.

For Category 1 projects, fluctuations in the Relevant Index are calculated relative to the Designated Date.

For Category 2 projects, the fluctuations in the Relevant Index are calculated relative to a pre-established figure of 106.0.

Irrespective of the project category, the Percentage of the Effective Value to be adjusted by the fluctuations in the Relevant Index is as stated below.

Where PW-CF6 is used for a:	The Fuel Percentage, Y is
Building project	1%
Civil Engineering project	4%

A2.6 Energy Price Inflation

The Relevant Index for calculation for the Energy Price Inflation amount is the category “Electricity” in Table 7 COICOP Division 04 Housing, Water, Electricity, Gas and Other Fuels of the Consumer Price Index, published by the CSO. The Percentage of the Effective Value to be adjusted by the fluctuations in the Relevant Index to arrive at the Energy Inflation Amount is 0.25%.

A2.7 Entitlement to an Ex Gratia Payment

The Contractor shall not be entitled to any Ex Gratia Payment in respect of inflation on costs incurred during any period in respect of which the Contractor is not entitled to an extension of time under the Contract or to an Ex Gratia Extension of Time under the Agreement.

A2.8 Template Workbooks

The OGP has prepared four template Excel workbooks which contracting authorities may use to assess, in a transparent and consistent manner, the amount of the Ex Gratia Payment in respect of a Certificate for payments made under the Contract from 01 January 2022 onwards. The workbooks contain the formulae that are contained in Appendix Two and Appendix Three of the Agreement.

Four template workbooks are available to download here as follows as appropriate to the project:

Type of project: Project Category	Building	Civil Engineering
1	Workbook 5	Workbook 6
2	Workbook 7	Workbook 8

A3 Inflation/Supply Chain Delay Co-operation Framework Agreement

The objective of the engagement to be undertaken in accordance with this Section A3 is to complete the project to the standard required with the least possible increase in time and costs.

The measures described below refer to the provisions in PW-CF6. Separate guidance has been published to address PW-CF1 – PW-CF5.

General

The process outlined below is intended to identify any Ex Gratia Extension of Time and any Ex Gratia Payments in accordance with the elements set out in Section A2, and thereafter, to apply the burden sharing principles set out in Section A4 for purpose of arriving at the amount of the Ex Gratia Payment.

Employers' Representatives, advised by the various members of the design team, will be expected to adopt a robust position and to rigorously interrogate the details provided by the Contractor particularly with respect to proposals put forward by the Contractor to mitigate any on-going effects of supply chain delay.

Accurate records are essential in ensuring both parties have confidence in the process.

Commencing the engagement under the Agreement — Exploratory Co-operation Meetings

As soon as practicable, in order to commence the engagement under the Agreement, the ER should, with the consent of the Employer invite the Contractor to an exploratory meeting for the purpose of reviewing the impact of the external factors described in Section A1 of this Guidance Note.

Matters related to inflation should be considered by the parties in the first instance as a matter of priority. The provisions set out in section A2.2 Ex Gratia Payment should be applied as appropriate depending on whether the project falls under Category 1 or 2 for payments made since 1 January 2022. The workbooks referenced in section A2.8 will assist the Employer in determining the inflation amounts.

The Contractor may have already identified issues in relation to supply chain delay that has occurred after 1 January 2022.

Having concluded exploratory meetings, and where the use of the Agreement is deemed appropriate by the parties, the Employer may then, by letter, invite the Contractor to participate in the Agreement.

An On-going Review and Plan Process

Under the Agreement, the parties should engage in a regular 'Review and Plan' process. It is recommended that this process is undertaken on a periodic basis, in order to plan both the work to be undertaken and the implications for those works as well as measures to mitigate any negative impacts. Under the Agreement, the parties may agree the frequency of the

periodic meetings, which may be at monthly frequency for many projects, or at quarterly frequency for projects of longer duration, as appropriate.

Where parties agree an Ex Gratia Payment amount (as apportioned in line with the burden sharing principles in Section A4) and any Supply Chain Delay, the ER shall issue an Inflation/Supply Chain Delay Notice ('Notice') under the Agreement for the relevant period. The Notice shall set out the scope of the Ex Gratia Relief, which may be the grant of either or both

- (i) a payment of costs by the Employer (Ex Gratia Payment);
- (ii) a period of time for which the Employer waives the application of liquidated damages for the period specified in the Notice (Ex Gratia Extension of Time)

The input of the ER and the design team is essential to the successful implementation of this approach — refer to Part B of this note for further details.

Treatment of any Contractor Claims under sub-clause 4.8 of the Contract

Where the Contractor has submitted claims in accordance with sub-clause 4.8 of the contract that relate to material, fuel, or energy price inflation, and/or supply chain delay, the ER and the Contractor shall engage to formally agree to pause the determination process on such on-going claims, subject to the outcome of the process outlined in this Section A3, as follows:

- The ER shall request the Contractor to confirm that the Contractor agrees to defer the determination process, including the ER's right to seek further information until the conclusion of the exploratory co-operation meetings.
- Following the Contractor's agreement to the request to defer the determination process, the ER shall reply within 10 working days, to confirm that both the ER and the Employer agree to defer the determination process and that, subject to the claim not being withdrawn, the ER will treat the claim as extant and as having been submitted on the next working day falling after the date of the last of the exploratory co-operation meetings.
- Where the Contractor accepts the invitation to participate in the Agreement, using the process outlined, the determination of any such Contractor claims will be further deferred until the earlier of
 - (a) the conclusion of the Agreement, or
 - (b) the notice to terminate by either party from the Agreement.
- Where either party provides a notice to terminate the Agreement, such claims are treated as extant and as having been submitted on the next working date falling after the notice to terminate was received;

Any measure extended by the Employer to a Contractor under the Agreement is on an *ex gratia* basis, and in the event that the Contractor is successful in a claim under the contract or otherwise that is in connection with material, fuel or energy price inflation, and/or the extension of time due to the Contractor as a consequence of such inflation and/or a Supply Chain Delay claim shall be reduced by the amount of the aggregate of the Ex Gratia Payments and the Ex Gratia Extension of Times respectively.

In the event the aggregate of the Ex Gratia Payments exceeds the amount determined as due to the Contractor in connection with such inflation and/or a Supply Chain Delay claim, the Contractor shall pay to the Employer the amount of such excess within ten days of such amount being demanded. In the event the aggregate of the Ex Gratia Extensions of Time exceeds the extension determined as due to the Contractor in connection with such inflation and/or a Supply Chain Delay claim, the Employer shall be entitled to withdraw the excess period of the Ex Gratia Extension of Time upon notice to the Contractor.

Duration of the Agreement

Once the parties have concluded the exploratory meetings, and the Contractor has accepted the Employer's invitation to participate in the Agreement, the Agreement may be terminated by either party giving 2 weeks written notice (in accordance with sub-clause 5.3 of the Contract) to the other party.

A4 Inflation/Supply Chain Delay Co-operation Framework Agreement – Burden Sharing Principles

It is acknowledged that material, fuel or energy price inflation, and delay arising from supply chain disruption, will impact projects individually. The principles set out hereunder are intended to guide the parties in establishing the optimum balance between the parties.

1. The Agreement as outlined at Section A3 is subject to the conditions set out at Section A1.2.
2. Only those amounts for material, fuel or energy price inflation calculated in accordance with the relevant Appendix to the Agreement, and delay as a result of supply chain disruption that meets the requirements of the Agreement are open for consideration for the grant of Ex Gratia Relief under the Agreement.
3. The following items of time and cost are excluded from consideration in the process:
 - a. Any delay (or costs) associated with supply chain disruption that has already been dealt with under any Covid Co-operation Framework;
 - b. Any additional costs that may already have been determined under the contract or by agreement with the Employer; or in any recommendation of a Conciliator under clause 15.2 or in any Adjudication undertaken under the Construction Contracts Act;
4. The Contractor must take all reasonable efforts to avoid and minimise delay and additional costs associated with materials, fuel or energy price increases (as applicable to the relevant category the project falls under), and delay arising from supply chain disruption.
5. For the purpose of determining material price inflation, the rates in the Pricing Document where there is one, are not negotiable.
6. Where the amount of an adjustment to the Price for a Compensation Event is the amount of an agreed or accepted quotation under sub-clause 4.7, the amount is not subject to indexation (i.e. it is an Excluded Amount).
7. Those total inflation amount (the aggregate of material, fuel and energy price inflation costs, as applicable to the project category) that are agreed between the parties and subject to the foregoing, will be shared between the parties. The Employer will bear the percentage that is stated in the Agreement of the total inflation amount, which will not exceed 70% of the total inflation costs. Depending on funds available to the Employer, the Employers share may be less than 70%.
8. Where the payment of retrospective Inflation costs are concerned, (i.e. for payments made on or after 01 January 2022 up to the date of the Agreement), one half (50%) of the retrospective amount of the Ex Gratia Payment will be paid upon entering the Agreement, and the remainder apportioned and paid in installments with subsequent Ex Gratia Payments.

Part B: Consultants' and Employers' Roles

B1 Employer's Representative

The ER will be the lead individual on the Employer's side in managing the engagement with the Contractor as Works progress. The ER will request input from members of the project team (who are not Contractor's Personnel) as necessary to assist in that engagement.

B2 Project Team

It is recognised that there will be additional time associated with the engagement set out at Section A3 of this note for project team members (who are not Contractor's Personnel).

For two members of the project team, the ER and the Quantity Surveyor ('QS'), the additional time necessary will be difficult to separate from the time associated with their duties under the contract.

For other members, their input, subject to the prior agreement of the Client, should be formally requested (by the ER) and a separate log of the time associated with the engagement under the Agreement shall be kept and paid in accordance with the conditions of engagement.

With respect to the ER and the QS, both should seek an engagement with the Client under Clause 8 of COE1 where both parties to the Services contract may engage on a 'without prejudice' basis to establish the optimum arrangements.

B3 Employer

Prompt delivery of the project is a key imperative for the Employer. As a party to the contract, the Employer is advised to have close regard to the implementation of the Agreement, as set out in Section A3.