

## Summary and Background

The Office of Government Procurement ('OGP') has published a series of notes providing guidance to those Contracting Authorities using standard form public works contracts or professional services engagements under the Capital Works Management Framework ('CWMF') in relation to the implementation of the public health measures aimed at helping prevent the spread of Covid-19. These notes are as follows:

- *19 March 2020: Note on Procurement and Contractual Matters Associated with the Covid-19 Response Measures*  
This guidance was subsequently replaced by the publication of 'Update 1' on 14 April 2020 (see below).
- *14 April 2020: Update 1 to Note on Procurement and Contractual Matters Associated with the Covid-19 Response Measures*  
This guidance was subsequently replaced by the publication of 'Update 2' on 8 May 2020 (see below).
- *8 May 2020: Update 2 to Note on Procurement and Contractual Matters Associated with the Covid-19 Response Measures*  
The guidance in Update 2 — **with the exception of Sections 2.1 and 3.1.2 of Update 2** — is replaced by this Note. **Sections 2.1 and 3.1.2 of the Note of 8 May 2020 are still current.** The circumstances that gave rise to the guidance set out in Section 2.2 of the Note of 8 May 2020 no longer apply. However, further guidance on tendering and award of contracts that are addressed in Section 2.2 of the Note of 8 May 2020 will be published shortly by the OGP.
- *14 May 2020: Note and Template Checklist for the Re-opening of Sites Closed due to the Covid-19 Response Measures*  
The note of 14 May 2020 is a standalone note and applies only to the pre-start phase for those sites permitted to re-open from 18 May 2020 onwards.

Following the public health measures published on 28 March 2020, work on non-essential projects ceased and Contractors closed their sites. In its Note of 14 April 2020, in respect of non-essential construction works, the OGP considered that, while the standard form public works contracts provide an entitlement to delay under Delay Event 1K15 (arising from the closure of the sites), there is no contractual entitlement to costs associated with the closure of non-essential sites. Having regard to the exceptional circumstances faced by Contractors on publicly funded projects, the OGP provided a template for a supplemental letter agreement between the parties under which an *ex gratia* payment could be extended by the Employer to the Contractor in respect of certain stipulated costs therein.

Under the 'Roadmap for the Reopening of Society and Business' (the 'Roadmap') published by Government on 1 May 2020, work on those previously non-essential construction sites was permitted to re-commence from 18 May 2020. The Return to Work Safely Protocol (the 'Protocol'), published on 9 May 2020, has been developed by the Department of Business, Enterprise and Innovation and the Department of Health in consultation with the Labour Employer Economic Forum. The Protocol provides the operative guidance for the introduction of measures necessary in the workplace, including construction sites, to reduce the risk of spreading Covid-19 ('Protocol Measures').

The purpose of this Note is to provide guidance to those Employers that are currently a party to a standard form Public Works Contract (PWC) in relation to the implementation, by Contractors, of Protocol Measures on construction sites.

The OGP considers that the standard public works contracts do not give rise to an entitlement for Contractors to an extension of time or to recover costs incurred as a result of the implementation of the Protocol Measures. Having regard to the burden that may be placed on Contractors as a result of the implementation of the Protocol Measures, in this Note the OGP proposes a template for a Covid Co-operation Framework Agreement ('the Covid Co-operation Framework'). Under the Covid Co-operation Framework, 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 and to seek to agree an appropriate way forward. The Framework is predicated on a burden share basis, whereby the Employer makes a contribution to any unavoidable cost and delay impacts on the completion of the Works. Under the Covid Co-operation Framework, any measure of relief extended to the Contractor (by way of a contribution to additional costs or giving an extension of time) will be on an *ex gratia* basis and without prejudice to each party's rights under the Contract. The OGP will publish the template for the Covid Co-operation Framework on [constructionprocurement.gov.ie](https://www.constructionprocurement.gov.ie) the week beginning 29 June 2020.

The use of the proposed Covid Co-operation Framework is not mandatory and parties are advised to have regard to their particular circumstances and those of the project in deciding whether to engage on a without prejudice basis. However, where both parties consider that it may be appropriate to use the Framework proposed in this Note, the OGP strongly encourages Employers and Contractors, to the greatest extent possible, to engage in a collaborative and proactive manner with the Covid Co-operation Framework outlined in Section A3 of this Note.

Employers may send any queries they may have in relation to this Note to [construction@per.gov.ie](mailto:construction@per.gov.ie).

## Part A: Standard Form Public Works Contracts

### A1 Introduction

Whilst the extent of the impact of the Protocol Measures may not yet be fully apparent on the operation of construction sites, for some projects, their implementation may represent a change to the circumstances originally envisaged in which to carry out elements of the Works, and this may give rise to challenges in completing the project. In other projects, the Protocol Measures may be readily integrated without giving rise to significant challenges in completing the project.

#### A1.1 Purpose of this Note

The OGP considers that the standard forms of Public Works Contracts (PWC) do not provide an entitlement to Contractors to an extension of time or to recover any costs that may arise as a result of the introduction of the Protocol and/or the implementation of the Protocol Measures.

The OGP therefore considers it appropriate to publish guidance to encourage parties to a standard form Public Works Contract to:

- arrive at pragmatic and proportionate options to mitigate the risk of delays and cost increases arising from compliance with Protocol Measures;
- adopt a burden share approach to managing the impact of Protocol Measures on site operations;
- avoid the risk of a substantial increase in the number of disputes escalated to formal dispute resolution procedures and the associated costs as a result of the implementation of the Protocol Measures and potential delays to the delivery of public works infrastructure.

This Note therefore proposes a template for a Covid Co-operation Framework, described in Section A3, to facilitate engagement between Employers and Contractors in order to:

1. address any issues that may arise where work has re-commenced on projects since 18 May 2020, and
2. proactively and collaboratively manage the ongoing impact of the Protocol Measures (which may be subject to adjustment in accordance with the public health guidance) insofar as is possible within the project's original delivery parameters.

#### A1.2 Availability of the Covid Co-operation Framework

The Covid Co-operation Framework is applicable to those Public Works Contracts:

- a) awarded on or before 14 April 2020; and
- b) where the sites were shut from 28 March 2020 and permitted to be re-opened from 18 May 2020<sup>1</sup>; and
- c) where elements of the Works are likely to be affected by the implementation of the Protocol Measures.

It is very important to note that no additional Exchequer funding is being made available to Employers for the purpose of engaging in the Covid Co-operation Framework. Any additional costs on public investment projects must be met by the Departments or Agencies from within the existing capital ceilings in 2020 and beyond. Because of the considerable demands placed on the Exchequer

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<sup>1</sup> i.e. sites that were previously classified as non-essential under the public health measures of 28 March 2020.

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 PWC to work together and complete the project to the greatest extent possible within the programme<sup>2</sup> and, particularly, budget parameters.

### **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 the implementation of the Protocol Measures to help ease the financial burden on contractors.

The Covid Co-operation Framework 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 engage in the manner set out in Section A3 and the PWC provides a process for claims to be submitted, determined, and for the determination to be disputed. However, where the parties commit to the process outlined in Section A3, this offers an opportunity to address, in a proactive and collaborative manner, those matters within those burden sharing principles set out in Section A4.

Extraordinary times call for extraordinary measures and 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 Re-commencing Work and Management to Completion**

Unless the Employer’s Representative (‘ER’) has directed a suspension under sub-clause 9.2, it is the Contractor who must determine when the site may reopen, having regard to its obligations under the Contract.

#### **A2.1 Assessing the Impact of the Protocol Measures**

In its Note issued on 14 May 2020, the OGP provided a recommended pre-start checklist for the ER to engage with Contractors by holding an initial pre-start meeting. That meeting should determine, in broad terms, issues that the Contractor can foresee arising from the implementation of the Protocol Measures and should commence the process of engagement under the contract.

#### **A2.2 Health and Welfare: Facilities and Oversight**

Where necessary, site welfare facilities should be brought up to the standard required in the Protocol at the earliest possible juncture.

In accordance with the Protocol Measures, the Contractor must appoint an appropriate number of worker representatives charged with ensuring that Covid-19 measures are strictly adhered to in their place of work.

#### **A2.3 Continued Availability of Products and Materials**

Contractors are required to confirm within 20 working days of a date to be determined by the ER — which should be as early as possible after both parties have agreed to participate in the Covid Co-operation Framework (outlined in Section A3) — that all the products they have chosen to meet the Works Requirements remain available.

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<sup>2</sup> In its Note of 14 April 2020, the OGP provide guidance in relation to the treatment of delay under the contract as a result of the public health measures of 28 March 2020.

#### **A2.4 Cashflow at Commencement**

As a result of the measures introduced to contain the spread of Covid-19 it is possible that credit terms have tightened considerably. Depending on the Contractor's particular circumstances, there is a risk that this may impact the progression of the project.

Should an issue be identified, by way of co-operation with the Contractor, the ER may give consideration to reducing the payment intervals from monthly to every two or three weeks. It is acknowledged that this places a greater burden on those preparing and processing the payment certificates and for this reason the practice should be discontinued no later than 6 months after the reduced payment periods commence.

Prior to the ER agreeing to this measure, a list of the suppliers and subcontractors engaged directly by the Contractor should be sought and assurances should be received from those suppliers and subcontractors that payments are being passed on in accordance with their payment terms.

### **A3 Covid Co-operation Framework**

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 whilst maintaining a safe workplace. The process outlined in this Section may, in many circumstances, last until the Date for Substantial Completion is achieved or the public health measures are dispensed with — whichever arises first. Employers should note that the Covid Co-operation Framework will be published separately to this advisory Note in the week beginning 29 June 2020.

#### *General*

It is recognised that there may be delays to completion and potentially increased costs caused by the implementation of the Protocol Measures, but it is stressed these should not be assumed at the outset, and instead, parties should engage in the below process for the purpose of meeting the objective in the paragraph above.

The process outlined herein is intended to identify the additional time and costs associated with compliance with the Protocol Measures and apply the burden sharing principles set out in Section A4.

ERs, advised by the various members of the design team, will be expected to adopt a robust position and to rigorously interrogate proposals put forward by the Contractor to undertake the Works to completion.

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

The measures described below refer to the provisions in PWC forms PW-CF1–PW-CF5 inclusive. This is not intended to exclude other forms within the suite of the standard forms of public works contract and the principles set out below and in Section A4 may be applied to those other forms where necessary and by agreement between the parties.

#### *Commencing the engagement under the Covid Co-operation Framework — Exploratory Co-operation Meetings*

As soon as practicable after the pre-start engagement referred to in Section A2.1, in order to commence the engagement under the Covid Framework, the ER should, with the consent of the Employer, under sub-clause 4.1 ('Co-operation'), invite the Contractor to an exploratory meeting for the purpose of reviewing the impact of the Protocol Measures on the Works.

If no issues are identified the engagement may end. Where the Contractor identifies issues or where a notification under sub-clause 9.3 *Delay* and/or a claim under sub-clause 10.3 *Contractor Claims* has already been issued, the Contractor should be requested to prepare a revised draft programme for issue which complies with sub-clause 4.9 of the contract. That programme should identify Covid-related delays.

Following receipt of the revised draft programme, the ER should convene a further exploratory co-operation meeting to discuss the implications for the project and agree a way forward.

In the event that, following these exploratory meetings, the Contractor has identified impacts on the Works, the ER and the Contractor may engage in further communications under sub-clause 4.1, which may include meetings, for the purpose of assessing the impacts and exploring the potential for the application of the Framework.

Having concluded exploratory meetings, in the event that its use is deemed appropriate, the Employer may then, by letter, invite the Contractor to participate in the Covid Co-operation Framework.

*Duration of the Framework*

Once the parties have concluded the exploratory meetings and the Contractor has accepted the invitation to participate, the duration of the Framework may be agreed between the parties, having regard to the particular circumstances of the project. It may be extended by agreement between the parties on a monthly basis. It may be terminated by either party giving 2 weeks written notice to the other party.

*Treatment of any Contractor Claims under the Contract*

In the event that, the Contractor **has** submitted claims in accordance with sub-clause 10.3 ('Contractor Claims') that relate to the implementation of Protocol Measures, the ER and the Contractor shall engage to formally agree to pause the contract 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 under sub-clause 10.5.1 (1) of the contract until the conclusion of the exploratory co-operation meetings.
- Following the Contractor's agreement to so defer, the ER will reply within 10 working days, that both the ER and the Employer agree to defer the determination process and confirming 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.
- In the event that the Contractor accepts the invitation to participate in the Covid Co-operation Framework, using the process outlined, the determination of any such Contractor claims will be further deferred until the earlier of
  - (a) the conclusion of the Covid Co-operation Framework, or
  - (b) the notice to withdraw by either party from the Covid Co-operation Framework.
- In the event that either party provides a notice to withdraw from the Covid Co-operation Framework, such claims are treated as extant and as having been submitted on the next working date falling after the notice to withdraw was received;

Any measure extended under the Covid Co-operation Framework to a Contractor is on an *ex gratia* basis, and in the event that the Contractor is successful in a claim under the contract or otherwise against the Employer in connection with the Protocol Measures, the amount payable to the Contractor as a consequence of such a claim shall be reduced by the aggregate of the *ex gratia* payments made under the Covid Co-operation Framework, and in the event the aggregate of any *ex gratia* payments made under the Covid Co-operation Framework exceeds the amount determined as due to the Contractor in connection with such claim, the Contractor shall pay to the Employer the amount of such excess within 10 days of such amount being demanded.

### *An On-going Review and Plan Process*

The Covid Co-operation Framework will require that the parties engage in a regular 'Review and Plan' process. It is recommended that this process is undertaken on a regular, 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 Covid Co-operation Framework, 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 any unavoidably incurred and reasonable cost and time implications (apportioned in line with the burden sharing principles in Section A4) to represent the minimum measures necessary to safely undertake the Works, or element of the Works, the ER shall issue a Notice under the Covid Framework ('Covid Notice'). The Covid Notice shall set out, subject to the Framework terms and conditions, the scope of agreed measures, which may be additional costs to be paid by the Employer and/or whether an adjustment to the Date of Substantial Completion shall be made in respect of the scope covered by the Notice.

In all cases, insofar as the Employer agrees to bear any of the applicable costs, those will be shared between the parties in accordance with the provisions of Section A4.

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.

### **A4 Covid Co-operation Framework – Burden Sharing Principles**

It is acknowledged that compliance with the Protocol Measures will impact differently on all projects. The principles set out hereunder are intended to guide the parties in establishing the optimum balance between the parties.

1. The Covid Co-operation Framework outlined at Section A3 is subject to the conditions set out at Section A1.2.
2. Only delay and additional costs arising strictly as a result of compliance with necessary Protocol Measures for the purpose of completing the Works, or elements of the Works (as may be amended from time to time under the Protocol), are open for consideration under the Framework. Other measures, as may be introduced by Government from time to time to control the spread of Covid-19, may also be considered but only by agreement between the parties. Such Protocol Measures include (but are not necessarily limited to) measures associated with additional and/or upgraded site welfare facilities; additional cleaning measures; Covid-19-related supervision; Covid-19 PPE; and social distancing.
3. The following items of time and cost are excluded from consideration in the process:
  - a. The time and cost of compliance with a higher standard than required under the Protocol unless agreed with the Employer;
  - b. Delay and associated costs as a result of the unavailability of materials unless otherwise agreed with the Employer under Section A2.3 of this note;
  - c. Delay associated with the provision of access, egress, and movement within the site in compliance with the Protocol;
  - d. Any costs and delay associated with a closure notice served by the HSA for non-compliance with the Protocol;
4. The Contractor must take all reasonable efforts to avoid and minimise the additional time and costs associated with compliance with the Protocol.



5. Only the additional time and reasonable, unavoidably incurred and vouched direct costs that have been agreed with the Employer's Personnel under the process outlined in Section A3 will be considered.
6. In respect of determining additional costs, the rates in the Pricing Document are not negotiable. Where additional costs are identified and agreed — strictly in respect of those specific cost and delay headings identified in item (2) of this Section A4 — the determination of such costs shall be in accordance with sub-clause 10.6 ('Adjustments to the Contract Sum').
7. Once the extent of any unavoidable delay to the Works has been agreed between the parties and subject to the foregoing, the Date for Substantial Completion will be adjusted accordingly.
8. Those additional costs that are agreed between the parties and subject to the foregoing, will be shared between the parties. The Employer will bear up to a maximum of 50% of those agreed additional costs. Depending on funds available to the Employer, the percentage contribution may be less than that.
9. While the impact of social distancing is open for consideration, the appropriate burden share will be arrived at by way of reference to the particular circumstances of the project and availability of funds to the Employer.

## **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.

The Note and pre-start template checklist published by the OGP on 14 May 2020 set out a framework for engagement with the Contractor in advance of the reopening of sites in accordance with the Roadmap for Reopening Society and Business.

Section A3 extends that framework for engagement between the parties to manage the commencement and operational challenges associated with remobilisation and ongoing compliance with the Protocol.

### **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 this engagement 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 in a manner that has regard to the safety and welfare of those engaged on the works 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 Covid Co-operation Framework set out in Section A3, being mindful of the impact the implementation of the Protocol Measures has on safety, quality, cost, and timelines.