

Note: Guidance on Protocol Measures in Live and Future Tenders

Guidance for Contracting Authorities whose works and works-related tenders have been impacted by the public health measures introduced to restrict the spread of Covid-19.

Introduction and Background

Covid-19 has caused disruption on many levels and to all economic sectors. The Office of Government Procurement has, because of the uncertainty with respect to conditions of contract and procurement brought about by this disruption, issued guidance in a series of Notes in order to assist Contracting Authorities charged with delivering key state assets.

On 9 May 2020, the Return to Work Safely Protocol (the 'Protocol') was published jointly by the Department of Business, Enterprise and Innovation and the Department of Health in consultation with the Labour Employer Economic Forum. It provides the operative guidance for the introduction of necessary measures in the workplace to reduce the risk of Covid-19 spreading ('Protocol Measures').

The publication of the Protocol is significant in that it sets out measures to be applied to address the potential spread of the virus in the workplace. It does not set out to address the detail as to how this is achieved and that is a matter for employers in individual workplaces to determine.

Compliance with the Protocol may result in upfront costs in the form of the provision of enhanced welfare facilities, dedicated access and egress points to some sites, as well as ongoing costs such as the provision of Covid-19 specific supervisors, PPE and cleaning regimes. Certain tasks may also take longer due to social distancing requirements which may change over time.

Where works-related services are concerned the impacts of the Protocol Measures are anticipated to be less severe; nonetheless, remote working and social distancing may impact on service delivery for some businesses. However the impact of the Protocol Measures on construction operations and wider public health measures may, in certain circumstances, result in longer performance periods.

As many of the Protocol Measures will not have been expressed in tender documentation issued in live tenders, this Note sets out options for Contracting Authorities to consider in the context of their particular circumstances.

This guidance covers the following situations:

- 1) Where tenders have been received but a Contract is yet to be awarded (see Section 1 below);
- 2) Those live tenders where the deadline for receipt of tenders has not passed (see Section 2 below); and
- 3) Tenders that are yet to commence (see Section 3 below).

Please note that the following constitutes general advice only and, in all cases, Contracting Authorities must take the particular circumstances of the project into account prior to arriving at a decision as to the most appropriate course of action. Where appropriate, expert procurement advice should be obtained.

1. Tenders Received and Contract Not Yet Awarded

Where tenders have been received prior to the publication of the Return to Work Safely Protocol, no provision has been made in the tender to comply with the Protocol and the Contract is yet to be awarded.

1.1 Introduction

There are a range of issues that may have to be considered in advance of a decision to award a Contract where the requirements of the Protocol Measures may have an impact on the performance of the Contract. These are summarised briefly in Appendix I to this Note and Contracting Authorities should be aware of the potential time and cost implications prior to deciding to proceed with an award.

The options that may be open to Contracting Authorities in this position will vary and, because of the changed circumstances and their dynamic nature, there may be risks associated with the award of a Contract that must be identified and addressed. Contracting Authorities are advised to weigh up the risks associated with each circumstance as it pertains to their project and seek specialist procurement advice where necessary.

The circumstances brought about by the advent of Covid-19 were unforeseeable by Contracting Authorities and Tenderers when the contract notice was published and, given the pace that the virus spread, its significance may not have registered at the point that tenders were submitted.

In the present circumstances, where tender offers remain open and a Contract has not been awarded, there are a range of issues that need to be considered when determining how to proceed.

The more significant issue to be determined initially is whether a substantial change to the project that was originally tendered arises in the circumstance where the implementation of the Protocol Measures:

- 1) Impacts on the construction of the Works to the extent that it represents a substantial change to the project that was originally tendered.
- 2) Has implications for the design of the project to the extent that it imposes a substantial change to the project that was originally tendered (this applies in the main to consultancy tenders but may apply to a limited number of works tenders).

For the purposes of this Note, those circumstances identified in Regulation 72 (4)-(7) inclusive of SI 284 of 2016 should inform Contracting Authorities to determine whether the change to the project is substantial.

Even where it is decided that the change is not substantial it is likely that, for many projects, more time may be required and additional costs may arise as a result of compliance with the Protocol Measures. Given that this is now a known requirement, it is therefore prudent to address it pre-award, where circumstances permit, in order to mitigate against the risk that performance issues may arise under the ensuing Contract.

1.2 Change is Substantial

Where it is determined that compliance with the Protocol Measures constitutes a substantial change to the project originally tendered then it may be necessary to consider re-tendering. However, it is recommended that prior to taking that decision expert procurement advice be engaged.

1.3 Change is Not Substantial

Where it is determined that compliance with the Protocol Measures does not constitute a substantial change and:

- 1) Where Tenderers have **not** been advised (by any means) of the outcome of the evaluation or are otherwise unaware (i.e. notification letters have not issued and the apparently successful Tenderer has not already been contacted to clarify aspects of their tender (e.g. aspects of their Pricing Document)) then, depending on the circumstances of the particular tender evaluation process, it may be open to the Contracting Authority to:

Seek a clarification from all those who submitted tenders confirming that they are aware of the implications of the Protocol Measures¹ on their tender and request written confirmation that they are willing to stand over their tendered sum.

- a) Where all Tenderers are willing to do so then Contracting Authorities may proceed to conclude the evaluation process in line with the provisions set out in the applicable ITT. The written confirmation referred to in the preceding paragraph is appended to the Letter of Acceptance (or Tender Accepted) to the successful Tenderer as a tender clarification.
 - b) If one or more of the Tenderers indicates that they cannot stand over their tender sum, it may be possible to invite Tenderers to submit a price to meet the requirements of the Protocol Measures, however it is recommended that expert procurement advice be taken having regard to the individual circumstances of the tender.
- 2) Where Tenderers **have** been notified of the outcome of the tender or one of the Tenderers is aware that they are the apparently successful Tenderer:

Where Tenderers have been notified (by any means) or are otherwise aware of the outcome of the evaluation it is suggested that only the successful Tenderer be asked to clarify that they are aware of the implications of the Protocol Measures¹ on their tender and request written confirmation that they are willing to stand over their tendered sum.

- a) Where that confirmation is given the Contracting Authority may proceed and award the Contract and the confirmation should be listed in the Letter of Acceptance (or Tender Accepted) and included in the Contract as a post-tender clarification.
- b) Where such confirmation cannot be given it is recommended that the Contracting Authority seek expert procurement advice before determining the next appropriate step.

¹ The provisions of Appendix 1 herein that are applicable to this Section 1 should be referenced in the clarification letter sent out.

Where it is decided that the appropriate course of action is to re-tender the project, the tender procedure must be cancelled and all Tenderers notified of the reason(s). Contracting Authorities should consider whether the urgency provisions set out in SI 284 of 2016 may be availed of to undertake the new tender. The guidance set out in section 3 and Appendix I of this Note should be followed with respect to updating the tender documentation.

2. Deadline for Receipt of Tenders Not Passed

Where the tender commenced in advance of the publication of the Return to Work Safely Protocol but tenders have not yet been received.

2.1 Introduction

As per the preceding section, the more significant issue to be determined initially is whether a substantial change arises where the implementation of the Protocol Measures:

- 1) Impacts on the construction of the Works to the extent that it represents a substantial change to the project originally tendered.
- 2) Has implications for the design of the project to the extent that it imposes a substantial change to the project originally tendered (this applies in the main to consultancy tenders but may apply to a limited number of works tenders)

For the purposes of this Note, those circumstances identified in Regulation 72 (4)-(7) inclusive of SI 284 of 2016 should inform Contracting Authorities when determining whether the change is substantial.

2.2 Change is Substantial

Where it is determined that compliance with the Protocol Measures will constitute a substantial change to the project originally tendered then it may be necessary to consider re-tendering the project. However, it is recommended that prior to taking that decision expert procurement advice be engaged.

2.3 Change is Not Substantial

2.3.1 Works

The design team and the PSDP should review the contract period stipulated and determine whether it is necessary to extend the contract period to facilitate the requirements of the Protocol. See Appendix I, Notes 1 – 3.

Where, in the opinion of the design team and/or PSDP, the contract period should be extended, the date/period should be amended in the Form of Tender and Schedule and the Preliminary Safety and Health Plan should also be updated. This should be notified to Tenderers as part of the clarification process.

A clarification to the tender shall be issued notifying all Tenderers that their tender sum must include the following aspects:

- 1) Site infrastructure and welfare facilities such as toilets; canteens; isolation spaces; access, egress and circulation routes must meet the standards set out in the Protocol.
- 2) Cleaning to the standard required in the Protocol.
- 3) Covid-19 supervisor role(s) as necessary to meet the requirements of the Protocol.
- 4) Covid-19 PPE where necessary to meet the requirements of the Protocol.
- 5) Social distancing to meet the requirements of the Protocol – including an extension of the Contract preliminaries to reflect the extended programme (where applicable).

Further details are provided in Appendix I.

The date for receipt of tenders should be extended by a period of not less than 2 weeks to permit Tenderers to respond to the changes.

If however, the project completion date cannot be amended and the design team and PSDP believe that a longer contract period may be necessary, Tenderers should be alerted to the risk posed by the Contract programme and compliance with the Protocol. See Appendix I, Notes 1-3.

2.3.2 Works-related Services

There are likely to be fewer issues but nonetheless the impact of remote working, possible interruptions to planning periods and longer construction periods should be considered.

If amendments to the scope of services and the performance periods for the stages and total performance period need to be changed this should be brought to the attention of Tenderers through the clarification process and an extension provided to the tender return date.

3. Future Tenders

Where the tender has yet to commence.

3.1 Works

The design team and the PSDP should review the contract period and determine whether it is necessary to extend the period to facilitate the requirements of the Protocol (see Appendix I, Notes 1-3).

If a longer Contract duration is deemed to be required and the project completion date cannot be amended, the design team should review the Works Requirements to determine whether any aspect of the detail design and/or specification can be adjusted to reduce the time necessary for construction. Where this is possible, the Preliminary Safety and Health Plan, Works Requirements and Pricing Document should be updated to reflect any design adjustments.

If no significant time savings can be identified as a result of that exercise, prospective Tenderers should be alerted to the risk posed by the Contract programme and compliance with the Protocol.

The Works Requirements and, where necessary, the Pricing Document should, at a minimum, address the following measures that are requirements of the Protocol:

- 1) Site infrastructure and welfare facilities such as toilets; canteens; isolation spaces; access, egress and circulation routes must meet the standards set out in the Protocol.
- 2) Cleaning to the standard required in the Protocol.
- 3) Covid-19 supervisor role(s) as necessary to meet the requirements of the Protocol.
- 4) Covid-19 PPE where necessary.
- 5) Social distancing – including an extension of the Contract preliminaries to reflect the extended programme (where applicable).

Further details are provided in Appendix I.

It is important to consider the appropriate duration for tender periods in the context of remote working for office based personnel.

3.2 Works-related Services

It is important to consider the longer service delivery periods to take account of remote working, virtual design team and client meetings, possible interruptions to planning periods and longer construction periods.

If amendments to the scope of services and the performance periods for the stages and total performance period need to be changed this should be incorporated into the tender documents.

It is important to consider the appropriate duration for tender periods in the context of remote working.

Appendix I

For the purposes of Sections 1-3 of this Note, compliance with the Protocol where public works contracts are concerned may be summarised as follows:

- 1) Site infrastructure and welfare facilities such as toilets; canteens; isolation spaces; access, egress and circulation routes must meet the standards set out in the Protocol.
- 2) Cleaning to the standard required in the Protocol.
- 3) Covid-19 supervisor role(s) as necessary to meet the requirements of the Protocol.
- 4) Covid-19 PPE where necessary to meet the requirements of the Protocol.
- 5) Social distancing to meet the requirements of the Protocol.

With respect to Sections 2 and 3 of this Note, where additional costs are to be provided, for items 1-5 above, the preliminaries section of the Bill of Quantities or Pricing Document shall be amended so that these items are included as priced lump-sum items. Each of the 5 headings should be priced individually. The successful Tenderer may be required to provide additional background information to the Contracting Authority during the course of the project.

Should there be a reason to impose greater restrictions on movement to combat any significant increases in the spread of the virus to the extent that construction activities cease in the manner imposed between 28 March 2020 and 18 May 2020, the contractor is entitled to an extension of time in accordance with the form of tender and schedule, part 1K (15)² but no financial recompense. The ex gratia payments introduced to cover the period from 12 April 2020 to 18 May 2020 will not be made available again.

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| Notes: |
| <ol style="list-style-type: none">1) The extent of the impacts associated with compliance with the Protocol is becoming clearer. Compliance with the Protocol will not affect all projects equally and will vary depending on the scale, nature and complexity of the project, as well as its location and its stage of development.2) For some projects, compliance with the Protocol may represent a change to the circumstances within which some tasks are ordinarily performed. It may also limit the number of workers permitted on site at one time.3) Through forward planning and scheduling, many of the potential impacts of compliance with the Protocol may be mitigated. |

² Where the operative contract is PW-CF1-PW-CF5 inclusive. Where PW-CF6 is concerned sub-clause 2.7.