

1. Introduction and Background

This note ('Supplementary Note') provides supplementary guidance to **Section 3** of the OGP note 'Note on Public Works Contracts and January 2021 Public Health Measures' published on 12 February 2021 ('Note').

Section 3 of the Note recommends that, for those Public Works Contracts made before 14 April 2020 where the works were ongoing in January 2021, in consideration of the additional financial burden the closure order [defined in the Note] will place upon the Contractors, Employers consider seeking agreement under the Covid-19 Co-operation Framework, ("the Covid-19 Framework") to make *ex gratia* payments in respect of certain permissible costs for the relevant closure period.

Section 2 of this Supplementary Note provides guidance in relation to the permissible costs that may be subject to *ex gratia* payment. This Supplementary Note is published with the model form of a 'Covid-19 Site Closure Supplemental Agreement' ("the Supplemental Agreement") to give effect to the making of *ex gratia* payments under the Covid-19 Framework. This Supplementary Note is to be read with the Supplemental Agreement.

2. Permissible Costs for Ex Gratia Payment

The *ex gratia* payment will be in respect of a portion of certain permissible items of the Contract Preliminary Costs ("Preliminaries"), as per the Pricing Document, that are unavoidably incurred, reasonable and vouched for the relevant closure period, or period thereof, to be reviewed on a project-by-project basis with individual Contractors by the Employer (or any party nominated by the Employer to act on its behalf in relation to the assessment of the *ex gratia* payment, including the Employer's Representative).

Application of Burden Sharing Principles

The principles of burden sharing (as outlined in Section A4 of the Covid Co-operation Framework Note of 23rd July 2020) adopted in the Framework, apply to the *ex gratia* payment of the permissible costs as outlined above. In particular, the permissible costs are to be shared between the parties. The Employer will bear up to a maximum of 50% of the agreed permissible costs. Depending on funds available to the Employer, the percentage contribution may be less than that.

The permitted categories of the Contract Preliminary Costs for the purposes of determining the *ex gratia* payment are:

- Supervision – the permissible supervision costs under this item are the aggregate of supervision items for those members of the Contractor's Personnel ordinarily engaged in the supervision of the Works in the week immediately preceding the commencement of the relevant closure period (and that remained in the employ of the Contractor during the relevant closure period), except where such permissible supervision costs (or an element therein) are recovered by the Contractor under the Employment Wage Subsidy Scheme operated by the Revenue Commissioners.
- Plant - the permissible costs under this item are costs associated with the hoisting, lifting and distribution of materials, where such costs are not included elsewhere within Contract Pricing Document.

- Scaffolding - where the day prior to the commencement date of the relevant closure period, the scaffolding was erected on the site (and remains erected on the site for the duration of the relevant closure period), the hire and inspection of the scaffolding during the relevant closure period.
- Hire of site accommodation and storage
- Insurances, where required by the Contract
- Health and safety obligations in relation to the site
- Site security measures for the relevant closure period

For the avoidance of doubt, the following items are not permitted categories of Preliminary Costs for the purpose of the ex gratia payment:

- Any Bond premium
- Any sum for Standing Conciliator
- Any utility connection fees and contributions
- Any allowance for profit and overheads expressly provided for within the Preliminary Costs

Costs agreed for Protocol Measures under the Covid Co-operation Framework

Where, under Covid-19 Co-operation Framework Supplemental Agreement, the parties have agreed to the ex gratia payment of direct costs relating to Protocol Measures, only those reasonable, vouched direct preliminary costs unavoidably incurred during the period of relevant site closure are permissible costs for the purpose of the ex gratia calculation relating to the closure order.

3. Relevant Closure Period

Subject always to any specific provisions that Employers may have made in the Public Works Contract in relation to site closures by Government order, for the purposes of determining the duration of the Relevant Closure Period in Clause 2.2 of the 'Covid-19 Site Closure Supplemental Agreement', the Relevant Closure Period shall:

- (i) commence on the day falling after the later of:
 - (A) 8 January 2021; or
 - (B) the date on which the Site closed (if after the 8 January 2021); and
- (ii) cease to apply from the earlier of:
 - (A) midnight on 5 March 2021; or
 - (B) the permitted date of re-opening of the Site¹.

END NOTE.

¹ i.e. where the affected pwc construction site is permitted to re-open **before** 5 March 2021.