

## 1. Introduction and Background

This note ('Supplementary Note') provides supplementary guidance to **Section 4** of the OGP note 'Note on Public Works Contracts and January 2021 Public Health Measures' published on 12 February 2021 ('Note').

Section 4 of the Note recommends that, for those Public Works Contracts made on or after 14 April 2020 where the works were ongoing in January 2021, in consideration of the financial burden that the extension of the closure order [defined in the Note] from 31 January 2021 to 5 March 2021 will place on Contractors, Employers consider making *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 an *ex gratia* payment. 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). Examples of such permissible preliminary costs include costs associated with insurance premiums and maintaining the security of the closed site and the performance of any on-going health and safety obligations in relation to the closed site.

The following formula has been developed to provide a calculation to determine the value of the *ex gratia* payment.

$$S = \left\{ \frac{P - (I + C + Su)}{D} \right\} \times d$$

Where:

- S* The value of *ex gratia* payment for the period of relevant site closure.
- P* The aggregate values of the Preliminaries (as stated in the Pricing Document).
- I* Initial set-up costs (including but not limited to items such as site set up, bonds, conciliator fees, hard standing, etcetera – see below for further detail).
- C* Consumables (including but not limited to items such as waste disposal, non-essential power, fuel and small plant, etcetera – see below for further detail).
- Su* 50% of the aggregate cost of permissible supervision items (see below for further detail).
- D* Contract duration in weeks (as stated in the Contract).
- d* The relevant closure period (in weeks or parts thereof), for which *ex gratia* payments may be made (see Section 3 for further detail).

**‘I’ – Initial Set-up costs:**

The permissible costs under this item are those costs associated with the establishment of the site and include all site set-up costs stated in the Contract Preliminaries (as per the Pricing Document) including, but not limited to, site accommodation and storage, hoarding, site services, roadways and hard standings, etcetera. These initial costs are generally agreed at the commencement of the works and the agreed costs should be used as the base data for the purposes of the calculation of the ex gratia payment. Where these costs have not been agreed, the Employer (or the party nominated by the Employer to act on its behalf for the purposes of determining the amount of the ex gratia payment) shall determine the Initial Set-up costs.

In the case of scaffolding, where on the day prior to the commencement date of the relevant closure period:

- (a) Scaffolding was erected on the site (and remains erected on the closed site), 65% of the total scaffold amount (erection and hire) stated in the Contract Preliminaries is to be included in the Initial set-up costs; (i.e. 35% of the total scaffold amount is taken into account in the calculation of the ex gratia payment);  
or
- (b) Scaffolding was not yet erected, or had been dismantled, 100% of the scaffold of the total scaffold amount (erection and hire) is to be included in the initial set up costs.

**‘C’ – Consumables:**

The permissible costs under this item includes all items deemed as consumables or not required during the period of site closure including, but not limited to, personal protective equipment (PPE), fuel, small plant and tools, waste disposal, cleaning (periodic and final), any demobilisation costs included in the preliminaries, etcetera. During the period of site closure such consumable costs are excluded from the ex gratia payment.

The amount included in the total preliminaries figure in respect of large items of plant and machinery (cranes, excavators, dumpers, vehicles for the purposes of site inspection only) that properly remain on the site for the duration of the relevant site closure shall **not** be included in the calculation of amount C – i.e. their cost as per the Pricing Document shall contribute to the amount of the ex gratia payment.

**‘S’ – Supervision:**

The permissible supervision costs under this item are 50% of the aggregate of the Contract Preliminaries supervision item(s) 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 site closure) 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.

**Exclusions**

For the avoidance of doubt, the following costs are not permitted to be included in the *ex gratia* calculation:

- Any costs arising from the period of site closure falling between 6 January 2021 and 31 January 2021
- 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 Contract Preliminary Costs.

**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, the Relevant Site Closure shall:

- (a) commence on the day falling after the later of:
  - i) 31 January 2021; or
  - ii) the date on which the Site closed (if after 31 January 2021); or
  - iii) the expiry of any stated period of site closure by closure order for public health reasons in the Public Works Contract<sup>1</sup> for which the Contractor is not entitled to recover costs (where the expiry of such period falls after i) or ii) above); and
- (b) cease to apply from the earlier of:
  - i) midnight on 5 March 2021; or
  - ii) the permitted date of re-opening of the site<sup>2</sup>;

**END NOTE**

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<sup>1</sup> For instance (but not limited to) any specific provisions that may have been inserted in the Works Requirements or in the Pricing Document for the project.

<sup>2</sup> i.e. where the affected pwc construction site is permitted to re-open **before** 5 March 2021.