

Coronavirus and the Capital Works Management Framework - Updated Guidance



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On Tuesday, the Department of Public Expenditure and Reform issued updated guidance on procurement and contractual matters associated with the Covid-19 Response Measures.¹ The purpose of the much-awaited guidance is to assist:

- Contracting authorities that are required to procure essential professional services or works specifically related to Covid-19 response measures;
- Contracting authorities that are currently engaged in a procurement process for works or services; and
- Employers/Clients that are currently a party to a Public Works Contract (“PWC”) or Standard Conditions of Engagement.

Many contracting authorities were unsure whether to proceed with tenders or whether to enter into contracts with successful tenderers. In short, the guidance points out that contract opportunities are important in maintaining market confidence, but that this should be balanced with the sector’s capacity to respond. If contracting authorities proceed with planned tenders it should consider longer tender deadlines, and selection criteria should be reviewed to ensure that it does not create a disproportionate barrier in these challenging times. With respect to live tenders the advice is to extend the deadline by at least six weeks, which is to be reviewed two weeks prior to the deferred deadline (unless public health measures have eased in the meantime). For tenders that have passed the deadline, the Office of Government Procurement is recommending that they should not be concluded until there is greater certainty unless there is a compelling reason to do so.

Many contracting authorities were also unsure as to how delay should be dealt with under the PWC for those projects deemed ‘non-essential’. The note deals with this in detail. I have summarised some key points below:

- Employers should ensure that interim payments reflect progress up to the date that the site closed;
- Delay is to be dealt with under Item 15 Schedule, Part 1k (PW CF 1-5);
- The Contractor is to notify in accordance with 9.3 (PW CF 1-5);

- Delay should be treated as having commenced on the date of site closure following the publication of Public Health Measures on 28 March 2020;
- PWC does not provide entitlement to cover costs associated with delay for site closure;
- In order to relieve financial pressure on Contractors, and as the Public Health Measures have been extended from (and including) 12 April 2020 to midnight on 4 May 2020 (“Applicable Period”), the Employer will make an ex gratia payment to the Contractor for the period that the site was closed during the Applicable Period (or portion thereof);
- The ex gratia payment will be in respect of a portion of certain permissible items of the Contractor’s Preliminaries, unavoidably incurred and reasonable and vouched;
- Prior to any such ex gratia payment being made, the Employer and the Contractor will record the amount of the ex gratia payment. This will be recorded in a supplemental agreement in accordance with the note;
- The ex gratia payment should be included with the next scheduled interim payment following the recording of the agreement of the costs; and
- Shorter interim payment periods may be considered where necessary.

There is also a section on how the ‘ex gratia payment’ should be calculated, which is based on the Contractor’s preliminaries. Notably, Contractors will get half of the calculated “supervision” element from the preliminaries. This is not good news for contractors who did not price their preliminaries realistically. No doubt there will also be some disagreements in relation to works which have been instructed to close and otherwise would have fallen under Item 3 Schedule, Part 1k.

If you have any questions on the above or any other related issue, feel free to contact me at Claire.Graydon@QuiggGolden.com.

¹ The full publication from the Department of Public Expenditure and Reform can be found here: <https://constructionprocurement.gov.ie/wp-content/uploads/CW/MF-Update-1-to-Note-on-Covid-19-14-04-2020.pdf>