

## Covid-19 Update

OGP Publishes Covid Co-Operation Framework Agreement on Implementation of Return to Work Protocols

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On 9 July 2020, the Office of Government Procurement (“OGP”) published its ‘Covid Co-operation Framework Agreement’ (“Framework Agreement”).

The purpose of the optional Framework Agreement is to manage the cost and time impacts of the implementation of measures on construction sites required under the Return to Work Safely Protocol (“Protocol”). 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.

Issuing of the Framework Agreement followed a guidance note from the OGP on the same topic dated 24 June 2020, and the Framework Agreement now includes template documentation as well as further guidance. As clarity has been sought for some time from those involved in public works contracts on the implications of introducing the measures included in the Protocol, the publishing of the Framework Agreement is to be welcomed. That said, the position adopted by the OGP may not necessarily avoid contentious issues arising, either now, or at final account stage.

### Framework Agreement

There has been particular uncertainty for public works contracts stakeholders’ in relation to entitlements to extensions of time and/or the recovery of costs, arising from implementing the measures included in the Protocol. The OGP’s position is clear: standard public works contracts do not give rise to an entitlement for Contractors

to an extension of time or costs incurred as a result of implementing the measures included in the Protocol.

Notwithstanding the OGP’s stated position, the Framework it has proposed encourages Employers and Contractors to engage with one another on an ongoing and ‘without prejudice’ basis to determine the extent to which the Works are impacted as a result of compliance with the Protocol and seek to agree an appropriate way forward. The Framework Agreement identifies that ‘an appropriate way forward’ includes the Employer making a contribution to any “unavoidable cost” impacts on the completion of the Works. The OGP’s intent is that this approach will avoid an increase in the number of disputes escalated to formal dispute resolution procedures and associated costs and delays.

Much is made by the OGP of a ‘burden sharing’ approach to cost and delays between Employer and Contractor, however, it is specifically stated that the Employer will bear **no more than 50%** of agreed additional costs, dependent on funds available. This position, apart from providing no real comfort to Contractors that they would receive even 50% of additional costs, will present a significant issue for Contractors who believe they are entitled to all of their costs and full extensions of time for the implementation of the measures to comply with the Protocol. Particularly, pursuant to various events included in Part 1K of the Tender & Schedule, for example, event 1, 3 and 7, amongst others.

## Eligibility for Framework Agreement

The Framework Agreement is not mandatory, but it is restricted in its use to those operating under public works contracts:

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

## Structure of the Framework Agreement

The Framework Agreement is comprised of two documents: a 'Letter Agreement' and a 'Covid Notice', which are to be read in conjunction with the OGP's guidance note of 24 June 2020. The Letter Agreement sets out the terms upon which the Employer and Contractor agree to proceed under the Framework and in what circumstances a Covid Notice is issued. The Covid Notice identifies the amount of unavoidable costs incurred and the amount of ex-gratia payment to be made to the Contractor as a result, as well as the ex-gratia extension of time to be awarded.

A summary of the steps involved in the Framework Agreement is as follows:

### 1. Commencing the process:

- **Pre-start engagement** - The Employer's Representative ('ER') should engage with Contractors by holding an initial pre-start meeting to determine issues that the Contractor can foresee arising from the implementation of the Protocol;
- **Exploratory meeting** - 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 on the Works;

- **Revised draft programme** - 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 is requested to prepare a revised draft programme for issue which complies with sub-clause 4.9 of the contract and identifies Covid related delays;
- **Further exploratory meeting** - 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;
- **Further communications** - In the event 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 discussing the application of the Framework Agreement;
- **Letter to Participate** - 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 Framework Agreement.

### 2. Treatment of Contractor claims under the Framework Agreement

- The duration of the Framework Agreement may be agreed between the parties. It may be extended by agreement on a monthly basis and may be terminated by either party giving 2 weeks written notice to the other party.
- In the event the Contractor submitted claims in accordance with clause 10.3 that relate to the implementation of the Protocol, the ER and the Contractor shall formally agree to pause the contract determination process on such on-going claims, subject to the outcome of the above "*Exploratory Cooperation meetings*";

- Following the Contractor's agreement to defer, the ER will reply within 10 working days confirming that 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;
- If the Contractor accepts the invitation to participate in the Framework Agreement, the determination of any such Contractor claims will be further deferred until the earlier of (a) the conclusion of the engagement under the Framework Agreement, or (b) the notice to withdraw by either party from the Framework Agreement;
- Under the Framework Agreement, the parties will engage in a regular 'Review and Plan' process;
- Where parties agree any unavoidably incurred costs and time due to measures necessary to safely undertake the Works, the ER shall issue a 'Covid Notice' which shall set out the additional costs to be paid by the Employer and/or an adjustment to the Date of Substantial Completion;
- In the event the Covid Notice is agreed and signed by both the Employer and Contractor, an ex-gratia payment will be made to the Contractor in the next scheduled, interim payment.

#### 3. Burden Sharing & Costs

- Only delay and additional costs arising strictly as a result of compliance with the Protocol for the purpose of completing the Works, are open for consideration under the Framework Agreement, such as: additional and/or upgraded site welfare facilities; additional cleaning measures; Covid-19-related supervision; Covid-19 PPE; and social distancing
- The Framework Agreement excludes the following claims for time and costs related to: (a) compliance with a higher standard than required under the Protocol (unless otherwise agreed with

the Employer); (b) the unavailability of materials (unless otherwise agreed with the Employer); (c) 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.

- Additional costs agreed between the parties will be shared between the parties. As mentioned, the Employer will bear up to a **maximum of 50%** of those agreed additional costs.

#### Other Key Clarifications

*Resumption of Works* – Clarity had been sought by industry on where responsibility rests for the resumption of works. The OGP's guidance note clarifies that, unless the ER directed a suspension under sub-clause 9.2, it is the Contractor who must determine when the site may reopen.

*Health & Safety Protocol Measures* - The guidance note reiterates that pre-start checklists and pre-start meetings take place, whereby the ER engages the Contractor and that this should determine issues the Contractor can foresee arising from the protocol measures. It is also outlined that the Contractor must appoint an appropriate number of worker reps to ensure compliance with Covid-19 measures.

*Continued availability of products and materials* - If parties agree to take part in the Framework Agreement, Contractors are required to confirm within 20 working days of a date to be determined by the ER, that all the products they have chosen to meet the Works Requirements remain available.

*Cash flow at Commencement* - Should an issue arise with regard to cash flow, the ER may give consideration to reducing the payment intervals from monthly to every two or three weeks. Prior to the ER agreeing to this measure, a list of the suppliers and subcontractors engaged directly by the Contractor will be sought and assurances that payments are being passed on.

*Project Team* – The guidance note acknowledges extra time will be required from the ER and the Quantity Surveyor towards the Framework negotiations. Both should seek an engagement with the Client under Clause 8 of COE1 to engage on a ‘without prejudice’ basis to establish the optimum arrangements. For other members of the Project Team, their input should be formally requested by the ER and a separate log of the time associated with their engagement be kept and paid.

### Reaction to the Framework Agreement

The Framework Agreement is to be welcomed for providing clarity on the OGP’s position on the added costs associated with implementing the Protocol. It is also sensible in that it calls for parties to engage in a collaborative manner, on a without prejudice basis, and for providing a structure for recouping time and costs associated with the introduction of measures in the Protocol.

However, the Framework Agreement seeks to impose some onerous obligations on Contractors and, coupled with the cap of 50% on the Employer’s contribution towards costs as well as the denial of any entitlement for

Contractors under the strict provisions of the contract, may not result in the desired outcome of avoiding escalation of disputes. On the contrary, it could have the opposite effect and result in Contractors progressing with disputes since they feel a 50% (or less) deal on costs is simply the Public Sector trying to save itself money and avoid paying full entitlement in accordance with the contract. Also, contractors and the Project Team would seem to be treated differently under the Framework Agreement, which may not sit well with Contractors.

The basic question is whether the incentive of receiving up to 50% of costs for compliance with the Protocol will be enough to stave off claims from Contractors. The jury is out on that for the moment and the answer will differ on a project-by-project basis, but initial reaction from the industry would suggest that it may be not.

If you or your organisation are affected by any of the issues discussed in this note and require specialist advice in that regard, please contact Killian Dorney or Cian O’Gorman whose details are below.

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