

Standard Form Contract Amendment for Covid-19 Related Delay (hub D&B Projects)

Version 1: 14 May 2020

**SCOTTISH
FUTURES
TRUST**



CONTRACT VARIATION TO THE DESIGN AND BUILD DEVELOPMENT AGREEMENT

between

[AUTHORITY]

and

[HUBCO]

[Project]

[Date]

hub TEMPLATE CONTRACT VARIATION TO PROJECT AGREEMENT – D&B PROJECTS

VERSION 1

IMPORTANT NOTICE

This is the Template Contract Variation to the Project Agreement for D&B Projects, which amends the template Design and Build Development Agreement set out in Section 2 (*Design and Build Development Agreement*) of Schedule Part 7 (*Template Project Agreements*) of the Territory Partnering Agreement ("TPA") to address the impact of Covid-19 on hub projects currently in their construction phase.

Users should be aware of the following points:-

1. Changes to this Template Contract Variation Agreement, other than project specific and minor drafting (such as completion of time periods) require prior approval of the SFT. Normally approval will only be given to changes required to reflect changing guidance or demonstrable changing market circumstances.
2. This Template Project Agreement is not a replacement for independent, specialist advice and parties must ensure that they have taken appropriate legal, financial and technical advice before using this document.
3. This Template Project Agreement should be used in conjunction with the Guidance issued/adopted by the Scottish Government and/or SFT from time to time, in particular the Guidance issued by SFT in respect of Covid 19 related delays, which can be accessed here:
<https://www.scottishfuturetrust.org.uk/storage/uploads/sftcovid19impactonhubcontractsfinal.pdf>.
4. This notice and the footnotes should be removed as appropriate before finalisation of the document for issue for a specific project.
5. Should you have any questions on the standard form please contact the SFT hub team (<http://www.scottishfuturetrust.org.uk>).

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THIS CONTRACT VARIATION IS MADE ON [●] BETWEEN

- (1) [●] (the "Authority"); and
- (2) [●] LIMITED (registered under number [●]) whose registered office is [●] ("hubco")

WHEREAS

- (A) The Authority and hubco entered into a design and build development agreement dated [●] to design and build [●] (the "DBDA");
- (B) the DBDA was entered into as part of the Scottish Futures Trust's hub programme;
- (C) in consideration of the COVID-19 pandemic and the guidance issued by the Scottish Government under: Coronavirus (COVID-10): Business and Social Distancing Guidance dated 25 March 2020, CPN 1/2020 (Coronavirus (COVID-19): impact on construction contracts) published on 9 April 2020; SPPN 4/2020 (Coronavirus (COVID-19): procurement regulations for public bodies) published on 20 March 2020; and SPPN 5/2020 (Coronavirus (COVID-19): supplier relief) published on 26 March 2020¹, the Authority and hubco have agreed to vary the DBDA to permit applications for extensions of time as a result of delay caused by the COVID-19 pandemic and for the Authority to consider claims for certain additional COVID-19 related costs which may be made by hubco;
- (D) the Authority and hubco have entered into this Contract Variation to document the terms on which the applications for extensions of time and claims for certain additional COVID-19 related costs will be considered;
- (E) the Parties agree that the rights and entitlements granted to hubco by this Contract Variation will be fully passed down to hubco's Contractor, subcontractors and, where relevant, to such subcontractor's obligations under the sub-contract.

IT IS AGREED as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

1.1.1 Unless otherwise stated, words and expressions used in this Contract Variation shall have the meaning given to them in the DBDA.

1.1.2 In this Contract Variation the words and expressions below shall have the following meanings:

1.1.2.1 "**Allowable Costs**" means the costs and expenses incurred by hubco as a direct result of the closure and subsequent re-mobilisation of the Site during the 2020 COVID-19 pandemic, which fall within the categories of costs and expenses set out in

¹ Authorities should update the references to guidance to include any updated guidance issued prior to the date of the Contract Variation

Annex 1 to this Agreement and provided that Allowable Costs shall not include any profit margin applied to such costs by hubco, the Contractor and/or any subcontractor of hubco;

1.1.2.2 “**Contract Variation**” means the terms set out in this agreement;

1.1.2.3 “**COVID-19 Hardship Claim**” has the meaning given in Clause 2.2.1;

1.1.2.4 “**COVID-19 Related Costs**” has the meaning given in Clause 2.2.1;

1.1.2.5 “**COVID-19 Related Delay**” means any delay in the completion of the Works caused as a direct result of: (i) the closure and subsequent remobilisation of the Site in compliance with Coronavirus (COVID-10): Business and Social Distancing Guidance dated 25 March 2020 and any relevant Scottish Procurement Policy Notes (SPPNs) or Construction Policy Notes (CPNs) (the “**Policy Notes**”) published by the Scottish Government during the 2020 COVID-19 pandemic ; [and (ii) delay in the delivery of materials to the Site as a direct result of the COVID-19 pandemic, where the Authority agrees that such additional delay should be taken into account in determining the COVID-19 Related Delay]²;

“**Relief Expiry Date**” means the date that the parties agree (acting reasonably) that hubco is able to re-commence the Works on the Site in accordance with any updates made to the Policy Notes and such further guidance that may be issued by the Scottish Government after the date of this Contract Variation (including any guidance which may be issued by the Scottish Government relating to the safe operation of construction sites in compliance with social distancing measures or any other Scottish and/or UK Government advice and/or direction on the prevention of the spread of coronavirus (COVID-19))³ as such guidance may be updated from time to time (the “**Construction Guidance**”), after a reasonable period for remobilisation (such period to be agreed between the parties acting reasonably)⁴;

1.1.2.6 “**Variation Date**” means either (i) the agreed date specified in Clause 9.2.2 of this Contract Variation where this Contract

² Authorities to consider if this additional limb (b) is required, depending on the impact of the COVID-19 pandemic on the Contractor's supply chain.

³ Authorities to update the drafting to include reference to any such applicable guidance that may have been issued prior to the date of the Contract Variation.

⁴ This is drafted on the assumption that at the time of entering into this Contract Variation there have been no updates to the original CPN 1/2020 issued by the Scottish Government on 9 April 2020 or further guidance issued permitting construction operations to continue on non-essential construction sites.

Variation is executed on separate counterparts in accordance with Clause 9 of this Contract Variation; or (ii) the date the second party signs this Contract Variation where the parties agree that this Contract Variation shall not be executed on separate counterparts;

1.2 Interpretation

- 1.2.1 The provisions of Section 2 (Interpretation) of Schedule Part 1 (Definitions and Interpretation) of the DBDA shall apply *mutatis mutandis* to this Contract Variation.

2. VARIATION OF THE DBDA

Notwithstanding any other term of the DBDA, the parties agree to vary the DBDA by incorporating the following terms into the DBDA:

2.1 Extension of the Completion Date due to a COVID-19 Related Delay

- 2.1.1 If due to the occurrence of a COVID-19 Related Delay, hubco is unable or is likely to be unable to achieve the Actual Completion Date by the Completion Date the Authority's Representative shall, subject to hubco complying with its obligations under this Clause 2.1, grant hubco such extension of time to the Completion Date as is reasonable for such COVID-19 Related Delay and the Completion Date shall be revised accordingly.

- 2.1.2 The Parties agree that on [●] (being the date that the Contractor ceased operations and the carrying out of the Works on the Site due to a COVID-19 Related Delay⁵) the actual progress of the Works had fallen behind the Programme by [●]⁶ weeks (the "**Non-COVID-19 Related Delay**") and that the Non-COVID-19 Related Delay shall be excluded from any extension of time granted by the Authority under Clause 2.1.1.

- 2.1.3 Where hubco is adversely affected by a COVID-19 Related Delay:

2.1.3.1 it shall (and shall procure that its Contractor and subcontractor's shall) take and continue to take all reasonable steps to eliminate or mitigate the consequences of the COVID-19 Related Delay upon the performance of its obligations under the DBDA and use all reasonable endeavours to re-commence the operations and the Works at the Site as soon as reasonably practicable following the COVID-19 Related Delay; and

2.1.3.2 it shall neither be relieved from liability under the DBDA nor entitled to any extension of time for the purpose of this Clause 2.1 to the

⁵ Where the Authority and hubco have not already agreed the extent of any period to which the operations and Works at the Site were behind the Programme prior to the COVID-19 Related Delay, they should do so prior to signing this Contract Variation. See Clause 14.9 of the DBDA.

⁶ Insert the exact date the Site ceased operating within the w/c 23 March 2020

extent that it is delayed or impeded due to its failure (if any) to comply with its obligations under Clause 2.1.3.1 above.

2.1.4 Hubco shall within [●] Business Days of the Relief Expiry Date [(or such later date agreed between the parties (acting reasonably) where there has been any delay in the completion of the Works falling within limb (ii) of the definition of COVID-19 Related Delay)⁷] provide the Authority's Representative with:

2.1.4.1 a revised Programme setting out the revised Completion Date and reflecting all steps being taken by hubco to eliminate or reduce the COVID-19 Related Delay from the Programme ; and

2.1.4.2 any other changes reasonably required to be made to the DBDA as a direct result of the COVID-19 Related Delay including, but not limited to, hubco's submission of method statements detailing how hubco shall re-mobilise the operations onto the Site and operate the Site in compliance with:

(a) any social distancing requirements and any operating restrictions which may still be place at the Relief Expiry Date; and

(b) any relevant guidance published on or before the Relief Expiry Date including, but not limited to the Construction Guidance.

2.1.5 If hubco does not agree that any extension of time to the Completion Date granted by the Authority above is reasonable, hubco shall be entitled to refer the matter for determination in accordance with Schedule Part 15 (Dispute Resolution Procedure).

2.2 **Application for COVID-19 Related Costs**

2.2.1 If due to the occurrence of a COVID-19 Related Delay hubco incurs or is likely to incur additional Allowable Costs then hubco may make an application claiming payment of such Allowable Costs by the Authority (the "**COVID-19 Related Costs**") in accordance with the provisions of this Clause 2.2 (a "**COVID Hardship Claim**").

2.2.2 Hubco shall apply for any claim for payment of COVID-19 Related Costs as soon as reasonably practicable and in any event within [●] Business Days of the Relief Expiry Date [(or such later date agreed between the parties (acting reasonably) where there has been any delay in the completion of the Works falling within limb (ii) of the definition of COVID-19 Related Delay)⁸] by:

⁷ Drafting should be deleted where limb (ii) of the definition of COVID-19 Related Delays is not applicable to the Contract Variation.

⁸ Drafting should be deleted where limb (ii) of the definition of COVID-19 Related Delays is not applicable to the Contract Variation.

2.2.2.1 providing the Authority with full details of hubco's claim for COVID-19 Related Costs including the justification for inclusion and quantum of each head of claim for such COVID-19 Related Costs;

2.2.2.2 demonstrating to the Authority:

(a) that the COVID-19 Related Costs occurred as a direct result of a COVID-19 Related Delay;

(b) that hubco has used all reasonable endeavours (including (where practicable) the use of competitive quotes) to oblige the Contractor, and any other sub-contractors to minimise any increase, and maximise any reduction, in COVID-19 Related Costs;

(c) that the COVID-19 Related Costs claimed could not reasonably be expected to be mitigated or recovered by hubco, the Contractor or any sub-contractor acting in accordance with Good Industry Practice;

(d) whether any proceeds of any insurance policy are recoverable (or would have been recoverable if hubco and/or the Contractor had complied with the requirements of the DBDA and/or Construction Contract or any policy of insurance required under the DBDA and/or Construction Contract); and

(e) that hubco, the Contractor and any subcontractor whose costs are included in the claim for COVID-19 Related Costs have made all applications it is permitted to make to Her Majesty's Government, the Scottish Government and/or relevant economic development agencies for any COVID-19 related relief, grants, schemes, interventions or other measures including the furloughing of employees and no element of the COVID-19 Related Costs includes any element of cost which has been funded or reimbursed by such relief, grants, schemes, interventions or other measures or is included in an application pending for such relief, loan, grant, scheme, intervention or other measure.

2.2.3 As soon as practicable after receipt of COVID-19 Hardship Claim by the Authority the parties shall meet to discuss the claim in good faith, following which the Authority may (in its sole discretion) agree to the payment of any COVID-19 Related Costs (being such amount as was included in the COVID -19 Hardship Claim, or such other amount as the Authority determines (in its sole discretion), the determination of which shall include the Authority's view in relation to:

- 2.2.3.1 any amount which hubco and/or the Contractor has recovered, will recover or should reasonably be able to recover under any insurance policy (or would have recovered if hubco and/or the Contractor had complied with the requirements of the DBDA and/or the Construction Contract or any policy of insurance required under the DBDA and/or the Construction Contract); and
- 2.2.3.2 any application made (or which ought to have been made) to Her Majesty's Government, the Scottish Government and/or relevant economic development agencies for any COVID-19 related relief, grants, schemes, interventions or other measures including the furloughing of employees;
- 2.2.4 the Authority may (at its sole option) agree:
 - 2.2.4.1 a payment schedule in respect of the payment of each sum of the COVID-19 Related Costs reflecting the amount and timing of the costs that have or will be incurred by hubco; and
 - 2.2.4.2 an objective means for hubco to provide evidence confirming that the sums of the COVID-19 Related Costs corresponding to each occasion when payment is due under the payment schedule appears to have been duly incurred,
- 2.2.5 Any amount which the Authority has agreed to pay pursuant to Clause 2.2.3 may be included in any Application for Payment made by hubco to the Authority's Representative in accordance with Clause 27 of the DBDA.
- 2.2.6 Where the Authority makes payment to hubco of any amount which the Authority has agreed to pay pursuant to Clause 2.2.3 of this Contract Variation, hubco shall pay such sums attributed to Allowable Costs incurred by the Contractor, or any other sub-contractor to the relevant party within [●] Business Days of hubco's receipt of such payment.
- 2.2.7 Hubco shall make available to the Authority upon request any information and/or evidence which the Authority may reasonably require in order to verify and assure that hubco has paid any monies intended for payment of the Contractor and/or sub-contractors properly and promptly.

3. RECORDS

- 3.1 Hubco shall:
 - 3.1.1 maintain full records and a written audit trail relating to any COVID-19 Related Delay or claim for any COVID-19 Related Costs;
 - 3.1.2 provide promptly to the Authority on reasonable request copies of the documentation required to be maintained under Clause 3.1.1 above; and
 - 3.1.3 retain, maintain and keep all such records and documents in accordance with Schedule Part 14 (Record Provisions).

4. AMENDMENT TO SUB-CONTRACTS

4.1 Hubco shall amend the Construction Contract and any Sub-Contract entered into by hubco and shall procure that the Contractor and any other Sub-Contractor amends any Sub-Contract to which they are a party to fully pass down the benefit of the terms of this Contract Variation and any entitlement to additional time and/or costs determined pursuant to this Contract Variation to the extent that such terms are relevant to the performance of the Contractor under the Construction Contract and any Sub-Contractor under the relevant Sub-Contract.

5. RECOVERY OF COVID RELATED COSTS/ SOLE REMEDY IN RESPECT OF COVID-19

5.1 If, in the reasonable opinion of the Authority, hubco fails to:

5.1.1 make the payments required in accordance with Clause 2.2.6 above;

5.1.2 provide the evidence required under Clause 2.2 above;

5.1.3 takes undue advantage of any relief available in accordance with this Contract Variation; or

5.1.4 fails to act transparently and with integrity,

the Authority may take all action necessary to recover any payment of COVID-19 Related Costs it makes to hubco, including without limitation, the right to set-off payment of any amount it owes to hubco at any time under the DBDA.

5.2 Hubco shall not be entitled to any payment or other compensation or relief from any performance of its obligations under the DBDA in respect of any COVID-19 Related Delay or COVID-19 Related Costs other than as set out in this Contract Variation.

5.3 The parties acknowledge and agree that notwithstanding the terms of this Contract Variation the Policy Notes do not comprise a Change in Law under the DBDA.

6. VARIATION PROCEDURE

6.1 This Contract Variation shall constitute a Variation to the DBDA to which the provisions of Clause 26 (Variation Procedure) and Schedule Part 13 (Variation Procedure) shall not apply.

7. GENERAL

7.1 Except where expressly provided by this Contract Variation, this Contract Variation constitutes the entire agreement between the parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Contract Variation.

7.2 Except as amended by this Contract Variation, the DBDA shall continue in full force and effect and this Contract Variation shall not release or lessen any accrued rights, obligations or liability of the parties under the DBDA.

7.3 Unless expressly stated in this Contract Variation no provision of this Contract Variation is intended to or does confer upon any third party any benefit or right enforceable at the option of that third party or any liability whatsoever to any third party (whether under the Contract (Third Party Rights) (Scotland) Act 2017 or otherwise) .

8. **AMENDMENTS**

8.1 This Contract Variation may not be amended except in writing and any such amendment must be signed by duly authorised representatives of the parties.

9. **COUNTERPARTS AND DELIVERY**

9.1 This Contract Variation may be executed in any number of counterparts and by each of the parties on separate counterparts.

9.2 Where executed in counterparts:

9.2.1 this Contract Variation will not take effect until each of the counterparts has been delivered; and

9.2.2 where any counterpart is being held as undelivered, delivery will take place on the date of delivery agreed [among]/[between] the parties (the “**agreed date**”). The agreed date will be inserted in the [in the testing clause] of this Contract Variation; and

9.2.3 [section 2(3) of the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 is hereby excluded and shall not apply to the execution arrangements in respect of this Contract Variation].

10. **GOVERNING LAW AND JURISDICTION**

10.1 This Agreement shall be considered as a contract made in Scotland and shall be subject to the Laws of Scotland.

10.2 Subject to the provisions of Clause 42 (Dispute Resolution Procedure) of the DBDA, both parties agree that the courts of Scotland shall have exclusive jurisdiction to hear and settle any action, suit, proceeding or dispute in connection with this Contract Variation and irrevocably submit to the jurisdiction of those courts.

IN WITNESS WHEREOF these presents consisting of this and the preceding [●] pages are executed in counterpart as follows and DELIVERED on [●] 2020:

Annex 1 Allowable Costs

[To be completed in line with SFT guidance:

<https://www.scottishfuturestrust.org.uk/storage/uploads/sftcovid19impactonhubcontractsfinal.pdf>]