

## **Addressing the Impact of COVID-19 on Existing hub Contracts**

### **Introduction**

The Covid-19 crisis has created an unprecedented environment which is impacting all projects within the hub programme as well as many other construction projects - SFT has been working with Scottish Government and the construction industry to develop an appropriate response. Scottish Government has issued several pieces of guidance which relate to managing construction projects through the COVID-19 crisis. A note of these is included in Annex A for reference.

The Scottish Government's Construction Policy Note (CPN) 1/2020 specifically addresses existing contracts and it is this guidance to which this paper refers. A copy can be found [here](#). One of the objectives of this guidance is to "help ensure the construction sector retains the capability and capacity necessary to effectively recommence work and deliver current and future construction project pipeline."

SFT seeks in this paper to provide a view on how authorities may interpret the provisions of CPN 1/2020 for the existing projects in the hub programme which are in construction. This is provided as guidance only and goes further than contractual entitlement. This paper does not cover the funding implications associated with the additional costs incurred under the current Covid-19 situation.

We hope that in presenting this view that there may be a common approach adopted with appropriate levels of collaboration between authorities and contracting parties. The aim is to mitigate the impact of this crisis on all parties with a pragmatic approach being recommended.

It is vital, as stated in CPN 1/2020 that engagement should progress honestly, openly and constructively, recognising the mutual need of clients and contractors to pragmatically address issues relating to COVID-19. COVID-19 should not be used as an opportunity to gain from the loss of another party.

The objective of any measures taken should be to help ensure that Scotland, both locally and nationally, retains a viable construction sector through these unprecedented times and that businesses emerge ready to resume work on existing projects and new opportunities.

### **Programme**

The impact of the various Scottish Government announcements and guidance has resulted in construction sites being closed across the hub programme from week commencing 23<sup>rd</sup> March 2020. Two DBDA sites and two DBFM sites have been classified as essential and work will continue on these sites with appropriate social distancing measures in place to ensure safety and welfare of operatives and suppliers.

It is essential that a clear process is established to understand and detail what progress has been made on site by the date of cessation of the works and to record and agree jointly how this compares with the original programme. This should include areas such as:

- Progress to date on site relative to programme
  - Value of work executed on site
-

- Impact of supply chain disruption and supporting payments
- Applications made to Her Majesty's Government and/or Scottish Government for emergency loans, grants and the like, for supporting supply chains
- Any other matters of importance and relevance in light of COVID-19.

There should be a clear understanding of the delay attributable to COVID-19 and how this will be monitored given the ongoing uncertainty.

### **Costs**

The recommended approach allows for the recovery of costs which have been incurred due to the COVID-19 situation. This would be agreed between the parties to the contract, bearing in mind the circumstances of the project and on a fair and equitable basis.

There should be a duty to mitigate costs through for example accessing wider government financial support, insurance proceeds etc and all parties should work on an open book accounting basis. There should be no recovery of profit on these costs.

The types of costs that will arise during the period of closure include:

- Work involved in closing the site
  - These are in some cases likely to be minimal but could include decommissioning installations where appropriate, and additional protective measures.
- Work involved in re-opening the site
  - Likewise, these are likely to be minimal but will involve those activities in recommissioning.
- Site establishment costs - that are time related
  - The items here include security, care and maintenance, plant and equipment still on site, and general running costs.

Annex B includes a more detailed breakdown of the potential additional costs and activities at each of these stages.

We recommend that the parties urgently access the wording to the contracts works insurance and obtain appropriate advice to establish what can be supported.

### **Making Payments**

Cash flow is vitally important, and we encourage all parties to make sure the valuation of all works is current and that all payments are made timeously. We are aware that some parties (public bodies and contractors) are speeding up payment procedures. There should be a duty to ensure payments are made to sub-contractors and the wider supplier base.

### **Looking After Closed Sites**

Sites should be kept secure and safe. We also recommend that an approach is agreed for care and

---

maintenance. Some projects are at quite an advanced stage of construction and there will be lots of systems and possibly equipment that need to be looked after.

We are aware that some projects are using digital technology tools to record site status and to monitor CCTV systems and the like.

### **Back Up and Running**

The impact on projects when they are back up and running will depend a lot on when they recommence. If construction is unlocked when elements of the COVID-19 restrictions are still in force, then sites will need to operate using safe working practices. Construction Scotland has prepared Standard Operating Procedures for working under the COVID-19 restrictions – a copy can be found [here](#). A public sector/construction industry joint working group is gathering evidence from work on Essential Sites and elsewhere that will help provide evidence of how this works in practice.

The situation at recommencement will also be influenced by the readiness and capacity of the contracting parties and the supply chains. There is a key role for the public bodies and hubCos to work together on maintaining readiness and capacity for restart.

### **Contract**

In terms of the hub DBDA contract, having considered the various contractual options available, and taken further external legal advice, the suggested approach is to enter into a negotiation to cater for a variation to the contract.

This will allow for relief to be granted providing an extension of time which will protect the contractor from the application of L&A damages. This will also provide for the recovery of additional costs incurred relating to COVID-19 with a duty to mitigate costs and be able to demonstrate these on an open book basis.

SFT will provide suggested drafting for this which can be tailored, as required, for project specifics. SFT can also provide support on the wider agreements as to the impact of COVID-19.

Similar principles should apply to the DBFM projects in construction and SFT will work with authorities to agree the most appropriate contractual approach to do this.

20 April 2020

---

### **Annex A: Scottish Government Guidance**

As a result of the spread of the novel Coronavirus (Covid-19), the Scottish Government has issued guidance. The key components of guidance in relation to hub DBDA construction sites are as follows:

- Scottish Government Coronavirus (COVID-19): Business and Social Distancing Guidance dated 25 March 2020 which requires all non-essential businesses and premises to close ([Covid 19 Business and Social Distancing Guidance](#)).
  - On 4<sup>th</sup> April 2020, Scottish Government issued [updated guidance to business](#) saying that “all non-essential business premises, sites and attractions should close unless and until we can all be clear how operations can be undertaken safely and in a way that is fully compliant with social distancing”
  - Scottish Government guidance issued on 6<sup>th</sup> April 2020 regarding the definition of essential and non-essential sites available [here](#).
  - Scottish Procurement Construction Policy Note CPN 1/2020 outlining how the Coronavirus (COVID-19) impacts on construction contracts and available [here](#).
  - Construction Scotland: [Site Operating Guidance Issue 01 dated 06-04-20](#)
-

## **Annex B: Potential Additional Costs Associated with Pausing Non-essential Sites**

Note: where the public sector funds the additional costs this is on the basis of (i) contractor mitigation of costs through for example, insurances, obtaining support through wider business support measures such as furloughing staff etc.. ; (ii) open book accounting; and (iii) there is a pass down in support/relief to suppliers and sub-contractors.

No profit will be paid on these costs at any level in the supply chain. Potential additional costs to complete following re-start are not considered at this stage.

Close Down Activities/Costs	Hibernation: ongoing costs	Site Restart Activities/Costs
<ul style="list-style-type: none"> <li>Decommission installations (Water/Air Handling etc)</li> </ul>	<b>Site Activity:</b> <ul style="list-style-type: none"> <li>Essential care and maintenance to prevent deterioration and maintain public safety</li> </ul>	<ul style="list-style-type: none"> <li>Condition survey to ascertain deterioration over downtime</li> </ul>
<ul style="list-style-type: none"> <li>Provide temporary protection (Board windows etc)</li> </ul>	<ul style="list-style-type: none"> <li>Maintain required level of security</li> </ul>	<ul style="list-style-type: none"> <li>Reinstatement of work impacted by delay - e.g. ground works</li> </ul>
<ul style="list-style-type: none"> <li>Extend/activate security systems - Fire alarm etc including extend security cover</li> </ul>	<b>Site Prelims</b> <ul style="list-style-type: none"> <li>Cost of plant etc (scaffolding, storage, crange etc) for duration of downtime</li> </ul>	<ul style="list-style-type: none"> <li>Recommission installations (Air conditioning/water etc)</li> </ul>
<ul style="list-style-type: none"> <li>Secure site perimeter and building entrances</li> </ul>	<ul style="list-style-type: none"> <li>Cost of site accommodation for duration of downtime</li> </ul>	<ul style="list-style-type: none"> <li>Contractor (inc hubCo) costs associated with restart process</li> </ul>
<ul style="list-style-type: none"> <li>In consultation with insurance advisers, amend cover provision as required</li> </ul>	<ul style="list-style-type: none"> <li>Rates, utilities etc</li> </ul>	
<ul style="list-style-type: none"> <li>Decommission/return items of plant where possible</li> </ul>	<ul style="list-style-type: none"> <li>Required insurances</li> </ul>	
<ul style="list-style-type: none"> <li>Secure retained scaffolding</li> </ul>	<b>Overhead</b> <ul style="list-style-type: none"> <li>Main Contractor % overhead on costs paid by the Authority</li> </ul>	
<ul style="list-style-type: none"> <li>Temporary power supply to maintain live systems</li> </ul>	<b>Supply Chain</b> <ul style="list-style-type: none"> <li>Sub-contractor site prelims as above for sub-contractors on site at the time of shut-down</li> </ul>	

Close Down Activities/Costs	Hibernation: ongoing costs	Site Restart Activities/Costs
<ul style="list-style-type: none"> <li>Contractor staff costs associated with closedown works (inc hubCo costs associated with close down work)</li> </ul>	<ul style="list-style-type: none"> <li>Sub-Contractors' % overhead on costs paid by the Authority</li> </ul>	
<ul style="list-style-type: none"> <li>Condition survey costs to ascertain position at closedown</li> </ul>	<p><b>Other</b></p> <ul style="list-style-type: none"> <li>Storage and insurance of materials off site</li> </ul>	
<ul style="list-style-type: none"> <li>Consideration to be given to accelerated payment for materials / work off-site where status can be verified and title transferred.</li> </ul>	<ul style="list-style-type: none"> <li>Valuation of, and payment for any ongoing design costs which can be progressed during site close-down should be considered on a case by case basis</li> </ul>	