



28 July 2021

## Resources for construction projects

### Purpose

1. This Construction Policy Note (CPN) sets out measures for contracting authorities to manage and mitigate market pressures affecting the availability and affordability of construction sector resources.

### Key message

2. If a contractor seeks relief from or waiver of their contractual obligations, the contracting authority should refer to the relevant terms and conditions and seek legal advice as need be to inform their decision. Contracting authorities should also re-examine their models for the design, procurement and delivery of their forward construction portfolio programme.

### Coverage

3. This note is intended for all those contracting authority staff involved in the planning and delivery of public works projects. It is applicable guidance under the [Scottish Public Finance Manual](#).
4. This policy note **should not be regarded** as instructing or advocating that contracting authorities should impose or waive, as a matter of national construction procurement policy, provisions in live construction contracts or planned projects concerning matters of resources' availability and affordability.

### Projects currently on or about to proceed to site

5. It is recommended that contracting authorities which have projects on or proceeding to site where contractors are reporting unprecedented difficulties with availability and affordability of materials, plant and potentially labour undertake the following actions in relation to the construction contract:
  - examine the terms and conditions which apply if the contractor fails to deliver on time and to specified requirements.
  - elicit clear evidence from the contractor of the reasons for delay and disruption to the project.
  - evaluate requests for relief or waiver of time and/or financial consequences in relation to the standard of evidence and details of the cause of any issues as required by the contract.
  - take legal advice as need be.

6. As well as considering matters of obligation and entitlement, contracting authorities should work closely with contractors to identify how risks to the delivery of projects adversely affected by resource constraints might be mitigated. Such discussions should be honest and open, with the following among the information needed from contractors to help contracting authorities understand and evaluate the situation:
  - materials' source and stocks and how requisitions and deliveries are prioritised.
  - supply chain integrity and reliability including labour, plant and consumables.
  - tender allowances for time and cost compared to current prime costs and lead times.
  - tendered overhead costs and profit.
7. Discussions with contractors should take account of what is fair and reasonable in particular circumstances. Matters including but not limited to the following are for each contracting authority to consider on a project by project basis:
  - application of the terms of the construction contract.
  - relevance and reliability of information provided by the contractor.
  - events which impact against the contractor's ability to perform the contract but not considered or covered by the contract.
8. In order to reach mutually-satisfactory outcomes, either or both parties may wish to propose that engagement is built around a conflict avoidance philosophy. [CPN 2/2021](#) has more details.

### **Projects in development (including those where tenders are not yet concluded)**

9. Contracting authorities should take immediate steps to assure themselves that projects in their pipeline remain deliverable as originally envisaged in terms of programme, cost and specification parameters taking note of the current unprecedented difficulties with affordability and availability of materials, plant or labour (particularly specialist skills/trades). The feasibility and commercial viability of the following project characteristics should be reviewed:
  - design, technology, materials/components source and availability.
  - procurement/contract/risk transfer strategy.
  - contractor payment model.
10. Whole life implications should be included in these reviews to ensure decisions made on capital spend are economically and technically sustainable and robust in terms of the key parameters of affordability and availability, in so far as is reasonably foreseeable in current circumstances.
11. Where contracting authorities consider it may not be economically viable to commence pipeline projects, they may wish to reassess which of these proceed to market and which do not. Abortive tendering should be avoided wherever possible.
12. Contracting authorities may wish to consider writing formal price fluctuation clauses into tender documents. This should reassure bidders that they will not be exposed to large and unpredictable movements in the prime cost of materials during the course of

the contract. It should reduce the pricing cover included in bids for unquantifiable inflation risk thereby bringing them in scope of a well-estimated client budget. It will also return prime cost decreases to the client, should such occur during the project.

13. While price fluctuation clauses require a forensic approach to conducting interim valuations, they provide for a systematic and transparent process. Properly implemented and managed, they are a fair option in circumstances where contractors cannot reasonably predict input prices over the duration of a project and where any attempt to do so would incur a high risk of unsustainable commercial loss or even potential insolvency, with associated time, cost and potential reputational consequences for employers.
14. Projects' materials inventory can be reviewed by conducting an in-depth analysis specific to a particular detailed design, or implied by an overall design philosophy which has yet to be fully committed to plan. This should help inform prioritisation exercises suggested above. It should also take account of whole life implications regarding ongoing market access and affordability of built materials and components for upkeep purposes, maintenance scheduling and in relation to revenue budgets.
15. Discussion with the supply chain pre-tender or with the contractor post contract award may aid identification of potential constraints and thereby facilitate timeous solutions.
16. Contracting authorities should be aware that during a period of rapid price increase there may be bids which appear very low by comparison to the competitors. Scottish Government's Abnormally Low Tender guidance<sup>1</sup> in The Client Guide to Construction Projects can be used to help identify if a bid is potentially abnormally low and sets out procedures to follow thereafter.
17. Current market conditions affecting prices and availability of materials, plant and labour may mean that a contracting authority might feel it needs greater assurances on their prospective contractor's exposure to and performance for other public sector employers. Those in scope of the Scottish Public Finance Manual can ask The Crown Representative<sup>2</sup> in confidence. Moreover, if any contracting authority, in or out of SPFM scope, suspects particular bids or consider patterns of bidding to be unusual, particularly with respect to potential cartel activity, they can relay concerns to the Competition and Markets Authority.<sup>3</sup>

## **Dissemination and Contact**

18. Please bring this CPN to the attention of all those staff involved in the procurement of relevant construction projects. If you have any questions about this CPN please contact:

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<sup>1</sup> [Construction Procurement Handbook - gov.scot \(www.gov.scot\)](http://www.gov.scot)

<sup>2</sup> [Crown Representatives and strategic suppliers - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

<sup>3</sup> [Competition and Markets Authority - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

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