

Guidance Notes for Construction Contracts - Procurement Policy Note 02/20

Before reviewing the guidance notes for construction contracts, please read:

- Procurement Policy Note 01/20 – Responding to COVID-19
- Procurement Policy Note 02/20 – Supplier relief due to COVID-19
- Procurement Policy Note 02/20 – Frequently Asked Questions (FAQs) for construction contracts
- Current versions of industry guidance issued by the Construction Leadership Council including “Site Operating Procedures” and “Advice on temporary suspension of sites”.

Purpose of the guidance notes for construction contracts

The purpose of these guidance notes is to support contracting authorities in how they implement PPN 02/20 under existing works contracts to provide contractual relief to at risk suppliers (and their supply chain) who have been affected by COVID-19. This includes preventing a supplier from claiming separate relief from another source of Government financial support on COVID-19, to the effect that the supplier gains an undue advantage by claiming relief twice for the same hardship.

The model deeds of variation provide a set of terms that contracting authorities can use for NEC3 and JCT standard forms of contracts. Authorities should seek legal advice to ensure that the model deeds are consistent with the contract which they seek to vary.

Who should use the guidance notes for construction contracts?

All contracting authorities to which PPN 02/20 applies should use the guidance notes.

The guidance notes are designed for existing public contracts for the delivery of works. The principles in the guidance notes can be applied across all forms of construction contracts. Authorities should seek legal advice to ensure that the amendments to existing contracts are consistent with the contract they seek to vary.

The guidance notes set out the various forms of relief an authority may agree with a supplier in order to deal with business disruption caused by COVID-19 as set out in PPN 02/20. Other forms of contractual relief and remedies, which are not the subject of the guidance notes or PPN 02/20, may be available to the authority.

Guidance

The table appended to this note outlines each form of relief and the effect on the supplier together with points for consideration by the authority and practical notes on the implementation of each relief.

The model deeds of variation allow a supplier, which the authority has identified as at risk because of COVID-19, to obtain relief in the manner agreed.

It should include:

- what relief it considers appropriate in the circumstances and for what purposes;
- what steps it is taking to mitigate the impact of COVID-19.

The authority should consider the supplier's request for relief as well as the various forms of relief available under PPN02/20 (whether or not these have been requested by the supplier) and what is the most appropriate relief to the relevant supplier, to enable the works to continue both during (if appropriate) and after the current COVID-19 outbreak.

Not all relief options will be necessary or appropriate for each supplier under each contract. The authority should consider the circumstances applicable to the supplier and the contract in question and agree to the relief that it considers will be the most effective. The authority and the supplier will need to engage in discussions on a case-by-case basis to determine the most effective relief or combination of relief(s) and how these should be applied in the individual circumstances.

Any relief granted will need to be accompanied by provisions around open book transparency and the provision by the supplier of supporting information to allow the authority to check that the commercial principles are complied with when relief is given, which may include an ability to audit where savings are being applied during the period of relief.

Implementation of any relief given to the supplier:

- will require the supplier to continue to pay employees as well as its supply chain and to do so promptly within any specified time scale;
- will potentially require the supplier to warrant that it will not be in breach of any financial covenants by accepting the relief and ensure that the supplier does not enforce any security against a third party after receiving relief;
- is subject to the authority being able to take all action necessary to recover any relief payments made if the supplier fails to apply the relief for the purposes agreed by the authority, fails to act transparently and with integrity, or takes an undue advantage of the relief; and
- is provided on the basis that a supplier is prevented from claiming contractual relief from an authority as well as claiming separate relief from the Government to the effect that the supplier gains an undue advantage by claiming relief twice for the same hardship (save where separate relief from the Government is in relation to recovery of costs (e.g. furloughed staff costs under the Coronavirus Job Retention Scheme) which are distinct from any other relief available under the PPN and have been properly incurred by the Contractor).

Frequently Asked Questions (FAQs)

Q1 - Which works and construction contracts are in scope of PPN 02/20?

A - PPN 02/20 applies to all contracts let under the Public Contracts Regulations 2015 (PCR), Defence and Security Public Contracts Regulations 2011, the Utilities Contracts Regulations 2016 and the Concession Contracts Regulations 2016. This includes engineering, building and construction works contracts which are normally, but not exclusively, procured using one of the standard forms of construction contract (e.g. JCT or NEC).

Q2 - Are the Construction Guidance Documents applicable to devolved administrations?

A - No.

Q3 - If a contracting authority has a construction project which is paused due to the impact of COVID-19, should it continue to pay its suppliers?

A - The contracting authority should continue to pay suppliers at risk due to COVID-19 on a continuity and retention basis until at least the end of June 2020, to:

- ensure supplier cash flow;
- maintain cash flow into the supply chain;
- protect jobs;
- ensure suppliers are better able to cope with the current crisis and to fulfil contractual obligations once the COVID-19 crisis over;
- ensure continuity of suppliers' businesses during and after the crisis; and
- ensure suppliers are able to resume delivery of public services once the outbreak is over.

This could include, for example, in situations where:

- works are required to be ceased or scaled back at short notice due to the impact of COVID-19 and non-payment could result in supply chains collapsing and/or significant financial implications for the supplier and consequential job losses at the supplier and supply chain level; and
- it would be value for money and important to business continuity to continue to pay suppliers in the short term (regardless of whether contracting authorities are able to reconcile at a later stage) to ensure that the supplier can complete the works in due course.

The contracting authority should identify their suppliers at risk and this should be taken on a case by case basis. We anticipate the majority of suppliers will be at risk during this period and authorities do not need to undertake a detailed assessment of suppliers' financial viability to determine whether they are at risk, but clearly suppliers that are not impacted by COVID-19 should not benefit from relief.

Payment under construction contracts can operate in a number of different ways and there are a range of ways to provide payment relief to suppliers during this period. For example, contracting authorities can continue to pay at usual contractual rates, or consider other options such as payment against revised/extended milestones or timescales, interim payments, forward ordering, payment on order or payment in advance/prepayment. Risks associated with advance or pre-payment should be carefully considered and documented and legal advice sought.

If the supplier is able to continue delivering their contract as normal, then the contracting authority should pay it as normal under the agreed payment regime.

Q4 - Should contracting authorities amend contract terms to reflect the fact that the supplier has been given relief?

A. Yes, contracting authorities should obtain legal advice regarding how the relief agreed affects the parties' respective obligations under the contract. Cabinet Office will shortly be publishing Model Terms which will set out some examples of how JCT and NEC contracts may be varied to provide relief to suppliers.

Q5 - How should contracting authorities ensure that a supplier receiving relief under PPN 02/20 does not also receive equivalent relief from the Coronavirus Job Retention Scheme (CJRS) or other COVID-19 support schemes from the Government?

A - Suppliers cannot be paid under delivery of the contract and claim for some or all of the same employees working on the contract under the Coronavirus Job Retention Scheme (CJRS). Payments under CJRS are for staff who are furloughed and not working.

Relief provided by contracting authorities should therefore be contingent on suppliers ensuring that during the relief period, all of the parts of the workforce identified to deliver the contract are not furloughed under CJRS.

Any supplier found to have acted fraudulently by claiming under the CJRS (or other COVID-19 support schemes) for workers that are being paid under a public sector contract, may be excluded from future public contracts on grave professional misconduct grounds under regulation 57(8)(c) of the PCRs.

Q6 - Should I consider early release of retentions?

A - Contracting authorities should carefully consider whether retentions can be released early on a case-by-case basis. The premature release of retentions by an authority may result in the authority taking on significant risks which are not in its control and which are inappropriate for it to bear (for example, serious defects which may only come to light once the authority has the time and resources to satisfy itself that the works have been completed to the required standard, or latent defects).

The contracting authority may consider the release of a retention where the works have been completed in substance and only minor defects (or snagging items) remain which do not prevent use but cannot be rectified immediately due to COVID-19. An appropriate amount should be withheld in respect of those minor defects and a sum might also be withheld to guard against undiscovered defects.

Authorities may also consider releasing a percentage of the retention sum if the authority is advised that certain milestones have been met.

Q7 - Are there other ways we can ensure payments reach the whole of the supply chain quickly?

A - In order to accelerate payment down the supply chain, contracting authorities may want to consider operating project bank accounts (PBAs). PBAs are ring-fenced bank accounts with trust status from which payments are made directly and simultaneously to members of the supply chain under the terms of the PBA.

A PBA can be an effective mitigation to the risk of payment delay and cost associated with it, thus reducing the risk of supply chain failure by improvement of cash flow to the supply chain. Also in the case of insolvency, the trust status of the PBA means that monies in the account due for payment to the supply chain are secure and can only be paid to it.

Central Government departments have committed to use PBAs in all new construction projects unless there are compelling reasons not to do so, for further information contact - governmentconstructionteam@ipa.gov.uk.

Options for Relief in Construction Contracts

These options for supplier relief should be considered alongside the model deeds of variation. The model deeds provide a set of terms that contracting authorities can use for NEC3 and JCT standard forms of contracts. Authorities should seek legal advice to ensure that the model deeds are consistent with the contract which they seek to vary.

	Relief	Application to supplier	Consideration	Implementation
1	Accelerated payment of invoices.	Enhances cash flow for the supplier and its supply chain.	<p>In PPN 02/20 payment of invoices submitted by suppliers should be accelerated and therefore this relief should be considered for all at risk suppliers.</p> <p>If there are currently disputed invoices, the authority may consider paying them now and reconciling them later.</p> <p>Reconciliation of issues within invoices may be needed following the end of the relief period.</p>	<p>Contractual changes likely to be required to provide reconciliation provisions</p> <p>Authorities should ensure that payment systems are set up to allow for accelerated payments.</p> <p>Payment of disputed invoices should be properly documented by the parties.</p> <p>Where accelerated payment of invoices has been made during relief period, express right for authorities to review such invoices and where appropriate, set off against/reconcile with future invoices, as appropriate.</p>
2	Certification of interim valuations where work has not been undertaken, based on previous valuations	Maintains cash flow for the supplier as they will continue to be paid notwithstanding the non-performance of its contractual obligations.	<p>The proposal is to certify interim valuations based on previous months' progress of the works, not actual progress given that progress of the works may be effected by COVID-19. As a guide for what relief the authority should offer to suppliers, calculate the average of the previous three months' valuations (less supplier profit). The amount the authority continues to pay suppliers should be no more than this average.</p> <p>For projects that have recently commenced, consideration will need to be given to the value of</p>	<p>This form of relief would require an amendment to the contract terms to allow for the authority to make payments in excess of the value of the works performed to date at its discretion.</p> <p>Contract terms would need to be amended to prevent contractual claims for costs due to COVID-19 being claimed in addition to this relief.</p>

			<p>works already provided and any payments made by the supplier to its employees and supply chain i.e. staff costs and any long-lead items along with the projected cashflow for the project.</p> <p>This option is similar to an advance payment (see below).</p> <p>If the previous months' invoicing contains any disproportionately high values, for project-specific reasons or otherwise, these should be discounted in assessing the value of the interim payments to be made during the relief period.</p> <p>Consideration should also be given as to the stage of the contract works, whether the value remaining in the works is greater than the proposed interim payments to be made and the possibility that any overpayments made are unlikely to be recovered if there is an insolvency event.</p> <p>If this relief is given, the supplier will not be able to make contractual claims for costs incurred as a result of the COVID-19 outbreak.</p>	<p>Contractual changes likely to be required to provide reconciliation provisions.</p>
3	<p>Amendment to existing payment mechanism to make more regular payments or re-order existing payment schedule</p>	<p>Improve supplier cash flow.</p>	<p>Consider current milestone / activity schedule as to whether it can be re-ordered or whether milestone / activities could be split to bring them forward.</p> <p>Consider ability to process more regular payments.</p> <p>The authority should consider current progress on site and whether it is in accordance with the existing milestone schedule / activity schedule.</p>	<p>The contract terms would need to be amended to provide for revised milestone / activity schedules.</p> <p>Depending on how parties agree to re-order existing payment schedule, reconciliation provisions may apply.</p>
4	<p>The provision of advance payment(s) to the supplier.</p>	<p>Improved cash flow for the supplier and its supply chain and continuity of payments.</p>	<p>The authority will need to consider whether there is a value for money case by virtue of securing continuity of supply of critical</p>	<p>Some contracts already provide for advance payments (for example the JCT 2016 DB Contract, clause 4.20 and</p>

			<p>works in the medium and long term.</p> <p>The authority will need to consider the amount of advance payments being made to the same supplier across numerous contracts (if applicable).</p> <p>Consideration should be given as to how and when any advance payment(s) will be repaid by the supplier to the authority.</p> <p>The purpose of the advance payment(s) should be clear. For example, if it is being used for the ordering of materials, it might be appropriate to ensure that appropriate vesting certificates are provided to the authority or advance payment bonds.</p>	<p>NEC3 ECC, Option X14), albeit such payments are generally identified at contract signature and outlined in the contract particulars. Therefore an amendment to the contract to introduce any new and/or additional advance payments may be required.</p> <p>Depending on what additional advance payment(s) the parties agree to, reconciliation provisions may apply.</p>
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**MODEL DEED OF VARIATION FOR NEC3 ENGINEERING AND CONSTRUCTION
CONTRACT (APRIL 2013 EDITION)**

DATED

2020

(1) [AUTHORITY]

- and -

(2) [CONTRACTOR]

DEED OF VARIATION¹

relating to

an NEC3 Engineering and Construction
Contract (April 2013
edition) for [INSERT PROJECT DETAILS]

¹ Note: if signing as a deed is unlikely to be achievable, speak to your legal team. If not signed as a deed there must be consideration.

[User notes:

- Authorities will consider any interim proposals for COVID Related Hardship from contractors engaged by them and the agreed outcome of this dialogue will be documented using this Deed of Variation as a basis.
- As part of this dialogue, Authorities should consider the relief options outlined in the PPN 02/20 Guidance note for Construction Contracts and the corresponding drafting options set out in this Deed of Variation. It is envisaged that these relief options can be used in isolation or in conjunction with one another in order to provide suitable relief from COVID-19 to contractors. This should be considered on a case-by-case basis.
- Authorities should also consider any bespoke amendments already made to the underlying contract and how, if at all, these affect the terms of this Deed of Variation and/or warrant additional amendments to be made to it. Authorities should seek legal advice in relation to this.]

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THIS CONTRACT is made as a Deed on
BETWEEN

2020

- (1) [AUTHORITY] of [ADDRESS] (the "*Employer*"); and
- (2) [CONTRACTOR] (company number []) whose registered office is at [ADDRESS] (the "*Contractor*")

each a "Party" and together the "Parties"

WHEREAS

- A The *Contractor* entered into an agreement with the *Employer* dated [INSERT DATE] pursuant to which the *Contractor* agreed to provide the [insert description of works under the contract] works (the "**Construction Contract**").
- B The Parties have agreed to enter into this Deed to vary the Construction Contract to give relief to the *Contractor* due to the adverse impacts of COVID-19. The Parties acknowledge that the relief is given in accordance with the policy set out in Procurement Policy Note 02/20 as updated or amended from time to time ("**PPN 02/20**") and that both Parties shall act in good faith and work together towards the aims and principles set out in PPN 02/20.

NOW IT IS HEREBY AGREED AS FOLLOWS:

1. DEFINITIONS AND INTERPRETATION

- 1.1 Unless a contrary indication appears, terms defined in the Construction Contract (as amended pursuant to this Deed) shall have the same meanings when used in this Deed (unless they are otherwise defined in this Deed).
- 1.2 In this Deed any reference to a "**clause**" is, unless the context otherwise requires, a reference to a clause of this Deed.

2. VARIATION

- 2.1 The Parties acknowledge and agree that the Construction Contract shall be amended and restated so that it shall be read and construed as set out at clauses 2.2 to 2.10 of this Deed:
- 2.2 Insert the following new definitions at clause 11.2 of the Construction Contract and re-number the defined terms in alphabetical order accordingly:

2.2.1 Average Amount

is:

(i) the average of the total of the previous three payment certificates issued by the *Project Manager* and/or if applicable, pay less notices issued by the *Project Manager* or the *Contractor* or where fewer than three payment certificates and/or pay less notices have been issued, all payment certificates and/or pay less notices issued to date; less

(ii) the *Contractor's* profit included within such payment certificates and/or pay less notices provided that:

(a) if the *Project Manager* considers one or more payment certificate and/or pay less notice used to calculate (i) above has or have been disproportionately high, such payment certificate(s)

and/or pay less notice (s) shall be disregarded in the calculation; and

(b) if no payment certificates and/or pay less notices have been issued to date, the amount reasonably forecast by the *Contractor* in accordance with the [Shorter Schedule of Cost Components]¹ / [Schedule of Cost Components]² (less the Contractor's profit) shall be used.

- 2.2.2 COVID-19** [is the coronavirus disease 2019, an infectious disease caused by severe acute respiratory syndrome coronavirus 2].
- 2.2.3 COVID Related Hardship** is the *Contractor's* inability to meet its contractual obligations pursuant to this contract, having been adversely affected as a result of COVID-19.
- 2.2.4 COVID Relief** is any relief contained in this contract being referred to as a COVID Relief.
- 2.2.5 COVID Relief Payment** is a sum that the Parties agree is required in order to allow the continuity of the *works* and the retention of the *key persons* and Subcontractors during and after the COVID Relief Period provided that such sum shall:
- (1) not include an element of profit margin for the Contractor and Subcontractors;
 - (2) be accompanied by a transparent and open-book break-down of the sum and its application (including but not limited to its application to *key persons* and Subcontractors) together with any other relevant supporting information;
 - (3) be consistent with the Average Amount and the progress of the *works*;
 - (4) not be subject to retention;
 - (5) be considered a COVID Relief; and
 - (6) be in lieu of any other cost relief available to the *Contractor* under or arising in connection with this contract as a result of COVID-19 (including arising out of an instruction issued under clause 19.1 or a compensation event under this contract occurring during the COVID Relief Period).
- 2.2.6 COVID Relief Period** is the period from [the date of this Deed] / [insert date] until 30 June 2020, or such other date as may be notified by the *Employer* to the *Contractor* prior to or on 30 June 2020.

¹ Applicable only to NEC3 ECC Option A

² Applicable only to NEC3 ECC Option C

- 2.2.7 **Open Book Interim Data** is the complete and accurate financial and non-financial information which is required by the *Employer* to enable the *Employer* to understand all COVID-19 related relief, grants, interventions or other measures received by the *Contractor* and/or the *key persons* and/or Subcontractors from the Government and to verify the payments made by the *Employer* to the *Contractor* and by the *Contractor* to the *key persons* and/or Subcontractors during the COVID Relief Period (including any COVID Relief) and including:
- (1) *the Contractor's actual cost breakdown based on the items listed on the Activity Schedule, including the Contractor's overheads;*
 - (2) *all interest, expenses and other third party financing costs incurred in relation to Providing the works; and*
 - (3) *full details of the payment of the key persons and/or Subcontractors and any other third parties in relation to Providing the works.*
- 2.2.8 **Reconciled Value** is the whole or any part of any payments made to the *Contractor* as COVID Relief the value of which is determined by the *Project Manager* and notified to the *Contractor*.
- 2.3 **[OPTION 2: CERTIFICATION OF PAYMENT FOR UNDELIVERED WORK DUE TO COVID-19]³ / [NOT USED]**
- 2.3.1 In clause 50.2, at the end of the second bullet point insert: "which shall include any COVID Relief Payment made in accordance with clause 50.4A."
- 2.3.2 Insert a new clause 50.4A as follows: "If the *Contractor* is suffering a COVID Related Hardship during the COVID Relief Period the *Contractor* shall be entitled to include within the application for payment a COVID Relief Payment."
- 2.4 **[OPTION 3: AMENDMENT TO EXISTING PAYMENT SCHEDULE]⁴ / [NOT USED]**
- 2.4.1 In the first sentence of clause 51.1, delete "one week" and insert "[agreed number of days for payment to be certified from the assessment date, which must be shorter than the period for payment in clause 2.4.2 below and should be the same as the period in clause 2.4.3]".
- 2.4.2 In the first sentence of clause 51.2, delete "within three weeks" and insert "[agreed number of days for a certified payment to be made]".
- 2.4.3 In Option Y2.2, delete "seven days" and replace with "[agreed number of days after the assessment date on which payment becomes due, which should be the same period as in clause 2.4.1 above]".

³ See Option 2 of the table included in PPN 02/20 Guidance note for Construction Contracts

⁴ See Option 3 of the table included in PPN 02/20 Guidance note for Construction Contracts.

- 2.4.4 In entry "5 Payment" of Part one of the Contract Data on page 66 of the NEC3 Engineering and Construction Contract (April 2013), after "The assessment interval is" insert "[agreed number of days / weeks]".
- 2.4.5 In the Optional statements section of Part one of the Contract Data on page 68 of the NEC3 Engineering and Construction Contract (April 2013), at entry Option Y2.2, delete the period inserted after "The period of payment is", and replace with "[agreed number of days after which payment becomes due for the final date for payment, which should be the same as stated in clause 2.4.2]".
- 2.5 [OPTION 4: ADVANCE PAYMENT⁵⁶ / [NOT USED]
- 2.5.1 In entry Option X14 of Part one of the Contract Data on page 72 of the NEC3 Engineering and Construction Contract (April 2013):
- 2.5.1.1 after "The amount of the advanced payment is" insert "[£agreed sum]" / "[agreed percentage of The Price for Work Done to Date⁷] provided as a COVID Relief";
- 2.5.1.2 after "The Contractor repays the instalments in assessments starting not less than" insert "[agreed number of weeks for reimbursement of advance payment to the Employer]";
- 2.5.1.3 after "The instalments are" insert "[£amount(s)]/[percentage of payment due%]" and
- 2.5.1.4 delete ["is"] ["is not required"] after the wording "An advanced payment bond".
- 2.5.2 Clause X14.2 is deleted and replaced by "The advanced payment is made on the [[first assessment date following the [insert description of the amendment agreement if payment to be immediately after the amendment is agreed]] or [insert such other assessment date as is agreed]]".
- 2.6 Insert a new fourth bullet point in clause 19.1: "is not a COVID Related Hardship or any event occurring as a result of or caused by a COVID Related Hardship or COVID-19"
- 2.7 Insert new clause 60.4: "A COVID Related Hardship or any event occurring as a result of or caused by a COVID Related Hardship or COVID-19 shall not be considered to be a compensation event for the purposes of this contract."
- 2.8 Insert a new clause 91A as follows: "Notwithstanding clauses 90 and 91, the Contractor shall not be entitled to terminate this Contract neither:
- 2.8.1 during the COVID Relief Period; nor
- 2.8.2 for any period thereafter as a result of COVID-19 or a COVID Related Hardship, where COVID Relief Payments are being made or reviewed (and where appropriate, such payments are set-off or deducted from further payments) in accordance with Clause Z2.5."

⁵ See Option 4 of the table included in PPN 02/20 Guidance note for Construction Contracts

⁶ This clause has been drafted on the basis that the existing construction contract does not make provision for any advance payment(s). To the extent that advance payments were already provided for, the required amendments will need to be tailored accordingly.

⁷ The maximum amount of any advance payment cannot exceed 25% of the value of the contract, unless HM Treasury approval has been obtained.

- 2.9 In clause X2.1, at the end of the first sentence insert: "except if the change in the law is due to COVID-19".
- 2.10 In clause Y2.4, at the end of the clause insert: "except if such suspension is as a result of or caused by a COVID Related Hardship or COVID-19".
- 2.11 Insert a new clause Z2 as follows:

"COVID-19 Relief

Open Book Reporting

Z2.1 During the COVID Relief Period and for any period thereafter where COVID Relief Payments are being made or reviewed (and where appropriate, such payments are set-off or deducted from further payments) in accordance with Clause Z2.5, the *Contractor* shall:

Z2.1.1 at the *Employer's* request, promptly provide a full cost breakdown which sets out the Contractor's actual costs, expenses, cash flow and profits contained in the [Shorter Schedule of Cost Components]⁸ / [Schedule of Cost Components]⁹ for the previous three months;

Z2.1.2 ensure that the payments made by the *Employer* as a COVID Relief are promptly and solely applied to the purposes for which they are made including payments to *key persons* and/or Subcontractors;

Z2.1.3 make available to the *Employer* upon request any information and/or evidence (including Open Book Interim Data) which the *Employer* may reasonably require in order to:

- (a) verify and assure that the *Contractor* has applied any monies received as a COVID Relief for the intended purpose (or as agreed with the *Employer*), including copies of accounts, ledgers, cash-flow forecasts, balance sheets, profit and loss accounts and any other documentary evidence; and
- (b) verify and assure that monies intended for *key persons* and/or Subcontractors have been properly and promptly paid;

Z2.1.4 ensure that all invoices clearly set out which elements of the invoice are attributable to COVID Relief;

Z2.1.5 maintain full and accurate records and a written audit trail of COVID Relief received, which the *Contractor* will provide to the *Employer* on request; and

Z2.1.6 act transparently and with integrity and at all times in good faith and using best endeavours in relation to any COVID Relief."

Payment during COVID Relief Period

Z2.2 During the COVID Relief Period, the *Contractor* shall not be entitled to combine and shall procure that the *key persons* shall not combine any COVID Relief provided pursuant to this Deed or otherwise with any Government COVID-19 related relief, grant, intervention or other measure which results in the *Contractor* and/or *key persons* and/or Subcontractors receiving relief more than once for the same underlying cashflow issue which in the reasonable opinion

⁸ Applicable only to NEC3 ECC Option A

⁹ Applicable only to NEC3 ECC Option C

of the Employer would amount to the *Contractor* and/or *key persons* and/or Subcontractors taking undue advantage of any COVID Relief.

Recovery of payments by Employer

Z2.3 If the *Contractor*:

Z2.3.1 fails to comply with the provisions of any of this clause Z.2; and/or

Z2.3.2 *key persons* and/or Subcontractors in the *Employer's* opinion takes undue advantage of any COVID Relief; and/or

Z2.3.3 has failed to expend any COVID Relief for the intended purpose (or as agreed by the *Employer*)

the *Employer* shall be entitled to, without limitation, retain or set-off the Reconciled Value from any amount due and/or outstanding to the *Contractor* under this Deed or any other contract and/or recover the Reconciled Value from the *Contractor* as a debt due and payable by the *Contractor* to the *Employer* and the Reconciled Value shall be deducted from the Prices.

Warranties

Z2.4 The *Contractor* warrants to the *Employer* that during the COVID Relief Period:

Z2.4.1 the receipt of any COVID Relief will not place the *Contractor* in breach of any financial or non-financial covenants pursuant to the terms of any finance agreement or other agreement which the *Contractor* has entered into in relation to Providing the *works* or otherwise; and

Z2.4.2 it will not seek to enforce any security against any Subcontractors or other third party engaged in relation to the *works*.

Payments

Z2.5 The *Contractor* agrees and acknowledges that any payment paid to the *Contractor* by the *Employer* during the COVID Relief Period are not acceptance by the *Employer* as to the validity of the application for payment, payment certificate, and/or pay less notice and that the *Employer* shall be entitled to subsequently review any application for payment, payment certificate, and/or pay less notice and set-off or deduct from further payments due to the *Contractor* under this Deed any sums that it considers should not have been included within such application for payment, payment certificate, and/or pay less notice.

3. CONSTRUCTION CONTRACT REMAINS EFFECTIVE

3.1 This Deed is supplemental to the Construction Contract. It is agreed and declared that, except to the extent that they are varied by this Deed, the terms and conditions set out in the Construction Contract shall remain in full force and effect.

3.2 Except to the extent set out in this Deed, this Deed shall not constitute a waiver of any right or remedy of the *Employer* or the *Contractor*, arising before, during or after this Deed.

4. EXCLUSION OF RIGHTS UNDER THE CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

A person who is not party to this Deed shall have no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Deed. This clause does not affect any right or remedy of any person which exists or is available otherwise than pursuant to that Act.

5. JURISDICTION AND LAW

This Deed and any dispute or claim arising out of or in connection with it or its subject matter or formation (including any non-contractual dispute or claim) shall be governed by and

construed in accordance with the law of England and Wales and subject to the jurisdiction of the courts of England and Wales.

THIS DEED is executed and delivered as a deed on the date stated at the beginning hereof.

[INSERT EXECUTION BLOCKS]

MODEL DEED OF VARIATION FOR JCT DESIGN AND BUILD CONTRACT (2016 EDITION)

(1) **[AUTHORITY]**

- and -

(2) **[CONTRACTOR]**

DEED OF VARIATION¹⁰

relating to

a JCT Design and Build Contract (2016 edition) for **[INSERT PROJECT DETAILS]**

¹⁰ Note: if signing as a deed is unlikely to be achievable, speak to your legal team.

[User notes:

- Authorities will consider any interim proposals for COVID Related Hardship from contractors engaged by them and the agreed outcome of this dialogue will be documented using this Deed of Variation as a basis.
- As part of this dialogue, Authorities should consider the relief options outlined in the PPN 02/20 Guidance Notes for Construction Contracts and the corresponding drafting options set out in this Deed of Variation. It is envisaged that these relief options can be used in isolation or in conjunction with one another in order to provide suitable relief from COVID-19 to contractors. This should be considered on a case-by-case basis.
- Authorities should also consider any bespoke amendments already made to the underlying contract and how, if at all, these affect the terms of this Deed of Variation and/or warrant additional amendments to be made to it. Authorities should seek legal advice in relation to this.]

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BETWEEN

- (1) **[AUTHORITY]** of **[ADDRESS]** (the "**Employer**"); and
- (2) **[CONTRACTOR]** (company number []) whose registered office is at **[ADDRESS]** (the "**Contractor**").

WHEREAS

- A The Contractor entered into an agreement with the Employer dated **[INSERT DATE]** pursuant to which the Contractor agreed to provide the works (the "**Building Contract**").
- B The Parties have agreed to enter into this Deed to vary the Building Contract to give relief to the Contractor due to the adverse impacts of COVID-19. The Parties acknowledge that the relief is given in accordance with the policy set out in Procurement Policy Note 02/20 as updated or amended from time to time ("**PPN 02/20**") and that both Parties shall act in good faith and work together towards the aims and principles set out in PPN 02/20.

NOW IT IS HEREBY AGREED AS FOLLOWS:

1. DEFINITIONS AND INTERPRETATION

- 1.1 Unless a contrary indication appears, terms defined in the Building Contract (as amended pursuant to this Deed) shall have the same meanings when used in this Deed (unless they are otherwise defined in this Deed).
- 1.2 In this Deed any reference to a "**clause**" or "**appendix**" is, unless the context otherwise requires, a reference to a clause or appendix of this Deed.

2. VARIATION

- 2.1 The Parties acknowledge and agree that the Building Contract shall be amended and restated so that it shall be read and construed as set out at clauses 2.2 to 2.9 of this Deed:
- 2.2 Insert the following new definitions at clause 1.1 of the Building Contract in alphabetical order:
 - 2.2.1 Average Amount: (i) the average of the total of the previous three Payment Notices and/or if applicable, Pay Less Notices issued by the Employer or where fewer than three Payment Notices and/or Pay Less Notices have been issued, all Payment Notices and/or Pay Less Notices issued to date; less

(ii) the Contractor's profit included within such Payment Notices and/or Pay Less Notices

provided that:

(a) if the Employer considers one or more Payment Notice and/or Pay Less Notice used to calculate (i) above has or have been disproportionately high, such Payment Notice(s) and/or Pay Less Notice (s) shall be disregarded in the calculation; and

(b) if no Payment Notices and/or Pay Less Notices have been issued to date, the amount reasonably forecast by the Contractor (less the Contractor's profit) shall be used.

- 2.2.2 COVID-19: [is the coronavirus disease 2019, an infectious disease caused by severe acute respiratory syndrome coronavirus 2].
- 2.2.3 COVID Relief: any relief contained in this Contract being referred to as a COVID Relief.
- 2.2.4 COVID Relief Payment: a sum that the Parties agree is required in order to allow the continuity of the Works and the retention of the Contractor's Persons during and after the COVID Relief Period provided that such sum shall:
- (1) not include an element of profit margin for the Contractor and the Contractor's Persons;
 - (2) be accompanied by a transparent and open-book break-down of the sum and its application (including but not limited to its application to Contractor's Persons) together with any other relevant supporting information;
 - (3) be consistent with the Average Amount and the progress of the Works;
 - (4) shall not be subject to Retention; and
 - (5) be considered a COVID Relief.
- 2.2.5 COVID Related Hardship: the Contractor's ability to meet its contractual obligations pursuant to this Contract has been adversely affected as a result of the COVID-19.
- 2.2.6 COVID Relief Period: the period from [the date of this Deed][insert date] until 30 June 2020, or such other date as may be notified by the Employer to the Contractor on or before 30 June 2020.
- 2.2.7 Open Book Interim Data: the complete and accurate financial and non-financial information which is required by the

Employer to enable the Employer to understand all COVID-19 related relief, grants, interventions or other measures received by the Contractor and/or the Contractor's Persons from the Government and to verify the payments made by the Employer to the Contractor and from the Contractor to the Contractor's Persons during the COVID Relief Period (including any COVID Relief) and including:

- (1) the Contractor's actual cost breakdown based on the items listed on the Contract Sum Analysis, including the Contractor's overheads;
- (2) all interest, expenses and other third party financing costs incurred in relation to the carrying out of the Works; and
- (3) full details of the payment of the Contractor's Persons and any other third parties in relation to the carrying out of the Works.

2.2.8 Reconciled Value: the whole or any part of any payments made to the Contractor as a COVID Relief the value of which is determined by the Employer and notified to the Contractor.

2.3 [11OPTION 2: CERTIFICATION OF PAYMENT FOR UNDELIVERED WORK DUE TO COVID-1912] [NOT USED]

2.3.1 At the end of 4.13.3.2 delete the full stop and insert a new paragraph as follows:

2.3.1.1 "provided that during the COVID Relief Period, if the Contractor is suffering a COVID Related Hardship the Contractor shall be entitled to include within the Gross Valuation a COVID Relief Payment, which shall be treated as an addition to the Contract Sum."

2.4 [OPTION 3A: REVISED STAGE PAYMENTS IF ALTERNATIVE A (STAGE PAYMENTS) APPLIES]13[NOT USED]

2.4.1 In the entry "4.7.1 Method of payment – alternatives, Alternative A: Stage Payments" of the Contract Particulars on page 11 in the JCT Design and Build Contract 2016 booklet14

2.4.1.1 [after "The stages are set out in the following document" delete the current entries and replace with "[[insert name of new

¹¹ To be used when Alternative B applies.

¹² See Option 2 of the table included in PPN 02/20 Guidance Notes for Construction Contracts

¹³ See Option 3 of the table included in PPN 02/20 Guidance Notes for Construction Contracts.

¹⁴ Delete as applicable depending upon how the Contract Particulars have been populated.

document which sets out revised stage payments as] appended to Annex A (Revised Stage Payments)^{15]}

[or]

[after “The stages are as follows” delete the current entries and replace with the following:

Stages (insert brief description)	Cumulative value	COVID Relief
[insert]	[insert]	[Yes/No]

2.5 OPTION 3B: MORE REGULAR PAYMENTS APPLICABLE TO BOTH ALTERNATIVE A (STAGE PAYMENTS) AND ALTERNATIVE B (PERIODIC PAYMENTS)¹⁶¹⁷ [NOT USED]

2.5.1 In the entry “4.7.2 Interim Payments – Interim Valuation Dates” of the Contract Particulars on page 11 in the JCT Design and Build Contract 2016 booklet insert after “in that month” the words “or during the COVID Relief Period, as a COVID Relief [insert agreed timeframe e.g. weekly/fortnightly].”

2.6 [OPTION 4: ADVANCE PAYMENT¹⁸¹⁹] [NOT USED]

2.6.1 In the entry “4.6 Advance payment” of the Contract Particulars on page 10 in the JCT Design and Build Contract 2016 booklet:

2.6.1.1 delete “does not apply;

2.6.1.2 insert after “If applicable: the advance payment will be” the words “£[insert sum]”/ “[percentage of the Contract Sum²⁰]” provided as a COVID Relief;

2.6.1.3 insert after “and will be paid to the Contractor on” the words “[insert date]”; and

2.6.1.4 insert after “it will be reimbursed to the Employer in the following amount(s) and at the following time(s)” the words:

¹⁵ The table should clearly identify and mark any revised stage payments that are due to COVID-19 as a “COVID Relief”.

¹⁶ See Option 3 of the table included in PPN 02/20 Guidance Notes for Construction Contracts

¹⁷ The JCT standard payment cycle is 21 days. In the interests of complying with the principles outlined in PPN 02/20, authorities may consider it prudent to reduce this timeframe.

¹⁸ See Option 4 of the table included in PPN 02/20 Guidance Notes for Construction Contracts

¹⁹ This clause has been drafted on the basis that the existing construction contract does not make provision for any advance payment(s). To the extent that advance payments were already provided for, the required amendments will need to be tailored accordingly.

²⁰ For central government organisations, the maximum amount of any advance payment cannot exceed 25% of the Contract Sum, unless HM Treasury approval has been obtained.

“[insert the amount(s) and date(s) for reimbursement of advance payment to the Employer].”

2.6.2 In the entry “4.6 Advance Payment Bond” of the Contract Particulars on page 11 in the JCT Design and Build Contract 2016 booklet delete **“is”** **“is not required”**

2.7 Insert a new clause 8.10A:

“8.10A Termination by Contractor during COVID Relief Period

8.10A Notwithstanding the provisions of clause 8.9, 8.10 and 8.11, the Contractor shall not be entitled to terminate this Contract neither:

8.10A.1 during the COVID Relief Period; nor

8.10A.2 for any period thereafter as a result of COVID-19 or a COVID Related Hardship where COVID Relief Payments are being made or reviewed (and where appropriate such payments are set-off or deducted from further payments) in accordance with clause 10.5 .”

2.8 In clause 8.11.2, after the words “8.11.1” in the first line insert the words “during the COVID Relief Period or”

2.9 Insert a new section 10 as follows:

“Section 10 COVID-19 Relief

Open Book Reporting

10.1. During the COVID Relief Period and for any period thereafter where COVID Relief Payments are being made or reviewed (and where appropriate such payments are set-off or deducted from further payments) in accordance with clause 10.5, the Contractor shall:

10.1.1 at the Employer’s request, promptly provide a full cost breakdown which sets out the Contractor’s actual costs, expenses, cash flow and profits contained in the Gross Valuations for the previous three months;

10.1.2 ensure that the payments made by the Employer as a COVID Relief are promptly and solely applied to the purposes for which they are made including payments to the Contractor’s Persons;

10.1.3 make available to the Employer upon request any information and/or evidence (including Open Book Interim Data) which the Employer may reasonably require in order to:

(a) verify and assure that the Contractor has applied any monies received as a COVID Relief for the intended purpose (or as agreed with the Employer), including copies of accounts, ledgers, cash-flow forecasts, balance sheets, profit and loss accounts and any other documentary evidence; and

- (b) verify and assure that monies intended for the Contractor's Persons have been properly and promptly paid;
- 10.1.4 ensure that all invoices clearly set out which elements of the invoice are attributable to COVID Relief;
- 10.1.5 maintain full and accurate records and a written audit trail of COVID Relief received, which the Contractor will provide to the Employer on request; and
- 10.1.6 act transparently and with integrity and at all times in good faith and using best endeavours in relation to any COVID Relief.

Payments during COVID Relief Period

10.2 During the COVID Relief Period, the Contractor shall not be entitled to combine and shall procure that the Contractor's Persons shall not combine any COVID Relief provided pursuant to this Contract or otherwise with any Government COVID-19 related relief, grant, intervention or other measure which results in the Contractor and/or the Contractor's Persons receiving relief twice for the same underlying cashflow issue which in the reasonable opinion of the Employer would amount to the Contractor and/or Contractor's Persons taking undue advantage of a COVID Relief

Recovery of payments by Employer

- 10.3 If the Contractor:
- 10.3.1 fails to comply with any of the provisions of this Section 10; and/or
 - 10.3.3 in the Employer's opinion takes or a Contractor's Person takes undue advantage of any COVID Relief; and/o
 - 10.3.4 has failed to expend any COVID Relief for the intended purpose (or as agreed by the Employer)

the Employer shall be entitled to, without limitation, retain or set-off the Reconciled Value from any amount due and/or outstanding to the Contractor under this Contract or any other contract and/or recover the Reconciled Value from the Contractor as a debt due and payable by the Contractor to the Employer and the Reconciled Value shall be deducted from the Contract Sum.

Warranties

10.4 The Contractor warrants to the Employer that during the COVID Relief Period:

10.4.1 the receipt of any COVID Relief will not place the Contractor in breach of any financial or non-financial covenants pursuant to the terms of any finance agreement or other agreement which the Contractor has entered into in relation to the Works or otherwise; and

10.4.2 it will not seek to enforce any security against any Contractor's Person or other third party engaged in relation to the Works.

Payments

10.5 The Contractor agrees and acknowledges that any Interim Payments paid to the Contractor by the Employer during the COVID Relief Period are not acceptance by the Employer as to the validity of the Interim Payment, Payment Notice and/or Pay Less Notice and that the Employer shall be entitled to subsequently review any Interim Payment, Payment Notice and/or Payless Notice and set-off or deduct from further payments due to the Contractor under this Contract any sums that it considers should not have been included within such Interim Payments, Payment Notice and/or Payless Notice.

3. BUILDING CONTRACT REMAINS EFFECTIVE

3.1 This Deed is supplemental to the Building Contract. It is agreed and declared that, except to the extent that they are varied by this Deed, the terms and conditions set out in the Building Contract shall remain in full force and effect.

3.2 Except to the extent set out in this Deed, this Deed shall not constitute a waiver of any right or remedy of the Employer or the Contractor, arising before, during or after this Deed.

4. EXCLUSION OF RIGHTS UNDER THE CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

A person who is not party to this Deed shall have no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Deed. This clause does not affect any right or remedy of any person which exists or is available otherwise than pursuant to that Act.

5. JURISDICTION AND LAW

This Deed and any dispute or claim arising out of or in connection with it or its subject matter or formation (including any non-contractual dispute or claim) shall be governed by and construed in accordance with the law of England and Wales and subject to the jurisdiction of the courts of England and Wales.

THIS DEED is executed and delivered as a deed on the date stated at the beginning hereof.

[INSERT EXECUTION BLOCKS]

[ANNEX A (REVISED STAGE PAYMENTS)]

[Drafting note: Where Option 3A is selected, the Authority is to insert the document which includes the revised stage payments here.]