

COMPENSATION SCHEME POLICY

Regulatory Mechanism vis-à-vis Claims related to Market Price Increases of Commodity Items utilised in Public Works (Construction) Contracts

Regulation 3 of Subsidiary Legislation 601.13¹ (published on the Government Gazette on 15 July 2022, through Legal Notice 203 of 2022) states that *‘(1) Requests for compensation shall be made to the relative contracting authority, and may be entertained by the Director of Contracts on condition that the public contract which refers to the request:*

- (a) shall have been signed on or before the 24 February, 2022;*
- (b) was still in force on the date referred to in paragraph (a); and*
- (c) refers to specific items listed in any policy document referred to in sub-regulation (2).*

(2) The Director of Contracts may issue such policy documents as may be required from time to time, in order to facilitate and better regulate the compensation scheme referred to in these regulations’.

Accordingly, in line with the above, the Compensation Scheme Policy applies to Public Contracts originally signed (signature by the last party²) on or before 24 February 2022 and that were still in force on such dates. In addition, this policy mechanism shall be valid and applicable for a set of pre-identified Construction (Works) Categories including any relevant repetition³ works (modifications) that were executed as of 15 March 2022 and no later than 15 January 2023. Therefore, for avoidance of doubt, it is reiterated that any works undertaken or rendered prior to 15 March 2022 shall not be eligible for redress allowance under this Compensation Scheme Policy, and accordingly shall not be entertained.

Furthermore, Contracting Authorities / Entities shall submit the relevant Compensation Requests to the Department of Contracts by no later than 15 March 2023, thus, allowing a two-month period for claims received (in relation to works carried out up to 15 January 2023) to be validated and approved by the relevant Contracting Authorities / Entities.

Accordingly, the Contracting Authorities / Entities shall stipulate a realistic time frame by which Contractors shall submit their claims to them allowing them enough time to carry out

¹ S.L. 601.13 is titled ‘Temporary Suspension of Certain Provisions relating to Public Procurement Regulations’.

² A contract shall take effect on the date on which it is signed by the last party.

³ Compensation Requests for Additional items [new rates] are not eligible under the Compensation Scheme Policy.

the necessary verifications. In the eventuality that a Contractor fails to submit a claim within the stipulated time frame, it shall be understood that the said Contractor has no claims to present and is automatically forfeiting one's right to claim for any applicable / potentially applicable compensation under this Compensation Scheme Policy.

Contracting Authorities / Entities are hereby being notified that pursuant to Regulation 5(b) of S.L. 601.13, the '*payment of such compensation shall be effected, and shall be borne solely, by the contracting authority*'.

Methodology: Categories and Percentage Increase

The Department of Contracts has conducted a Financial Analysis to evaluate the impact on Public Works (Construction) Contracts vis-à-vis the abnormal Market Price Increases being experienced. The said exercise assessed the cost implications of materials since the onset of the Conflict between Russia and Ukraine in February 2022, in comparison to the Pre-Conflict scenario.

The methodology approach adopted took into consideration the major *Construction Works Categories* wherein each category was defined by listing a set of components that were deemed as salient elements within the specific Construction Works Category being considered for compensation. Accordingly, the below table provides a Summary of the Percentage Increase in Materials deemed to be fair and reasonable per Construction Works Category.

Construction Works Category	Percentage Increase
Construction	10%
Road Pavement and Pipe Works	19%
Structural Steelwork	17%
Finishes (Internal and External)	11%
Glazed External Apertures	21%
Electrical and Plumbing	13%
HVAC	10%
Lifts	9%

The components of each Construction Works Category may be viewed in the enclosed Compensation Request Template.

Therefore, the Monetary Compensations to be granted to Contractors to mitigate the financial losses being incurred in Public Works (Construction) Contracts shall be affected according to the above pre-set percentages, as per applicable category. Such percentages shall be applied

on the Total Category Value (ie Original Value + Modifications Value [if applicable]) as per Contract Agreement.

Compensation Request Template

To assist Contractors and Contracting Authorities / Entities as well as to standardise procurement documentation, the Department of Contracts has formulated a Compensation Request Template to be utilised for Claims in relation to Market Price Increases of Commodity Items utilised in Public Works (Construction) Contracts. It is expected that any Compensation Request (irrespective if the Works Public Contract is a Unit-Price or a Lump-Sum) shall be formulated and presented in line with the official requirements of the said template.

Contractors shall back up their claims with all applicable Supporting Documentation, such as (but not limited to) a Detailed Bill of Quantities for each Construction Works Category. Furthermore, Contracting Authorities / Entities shall also submit a Signed and Endorsed Declaration by the Project Supervisor / Manager attesting the validity, accuracy and justification of the claims presented by the Contractors.

The Department of Contracts and / or the Contracting Authorities / Entities reserve the right to request that *inter alia* the Contractors submit additional Supporting Documentation for the correct implementation of the Regulatory Mechanism of the Compensation Scheme.

Applicability of the Compensation Scheme Policy

The Compensation Scheme shall be applicable to all Procurement Procedures pursued by all the Contracting Authorities / Entities⁴ within the Public Administration in relation to Public Works (Construction) Contracts within the scope of the Public Procurement Regulations S.L. 601.03 and the Utilities Procurement Regulations S.L. 601.05⁵, specifically wherein the Contract Value exceeds Euro10,000 excluding VAT.

⁴ The Compensation Scheme Policy applies to all Contracting Authorities listed in Schedule 1,2,3 and 16 of S.L. 601.03. In addition, the said policy applies also to all Contracting Entities pursuing activities in line with S.L. 601.05.

⁵ Utilities Procurement refers to Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulation: S.L. 601.05.

Contracting entities in S.L. 60.05 are entities which: (a) are contracting authorities or public undertakings and which pursue one of the activities referred to in regulations 8 to 14; (b) when they are not contracting authorities or public undertakings, have as one of their activities any of the activities referred to in regulations 7 to 13, or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority.

Regulations 7 to 14 relate to various activities as follows: Reg 7 – Gas and Heat. Reg 8 – Electricity. Reg 9 – Water. Reg 10 – Transport Services. Reg 11 – Ports and Airports. Reg 12 – Postal Services. Reg 13 – Extraction of Oil and Gas Exploration or Extraction of Coal or other Solid Fuels. Reg 14 – Tenders Comprising Products Originating in Third Countries

Modus Operandi: Submission of a Compensation Request

Contractors shall present their claims in relation to the aforementioned Market Price Increases of materials utilised in Public Works (Construction) Contracts to the concerned Contracting Authority / Entity, being the final beneficiary of the Procurement Contract. Thereafter, in line with Regulation 4 of S.L. 601.13, the *'relative contracting authority shall transmit the request to the Director of Contracts only if it deems the request to be applicable, fair and reasonable in accordance with the provisions of these regulations, and the decision of the Director of Contracts shall be final'*.

To this end, the Department of Contracts is providing an overview of the Modus Operandi (including any applicable Terms and Conditions) to be adhered to when submitting the Compensation Request for the Director of Contracts' consideration. Specifically, a dedicated email address to centralise the submission of such documentation for review has been set up. Thus, Contracting Authorities / Entities shall direct any communication in relation to this matter on compensations.contracts@gov.mt.

Step 1: Contracting Authorities / Entities shall vet, review and assess the Compensation Request and ascertain that it is fair and reasonable in accordance with the provisions of S.L. 601.13. The endorsement and validation by Contracting Authorities / Entities shall be substantiated by the Competent Body / Authority, namely the Project Supervisor / Manager.

The Project Supervisor / Manager shall:

- Duly certify that the relevant Public Works have been carried out within the applicable timeframe; and
- Ascertain that the Components listed under each pre-identified Construction Works Category and their corresponding Percentage Increase are a reflection of the above table and in line with the requirements of the Compensation Request Template

Step 2: Contracting Authorities / Entities shall submit the Compensation Request (including all the Supporting Documentation) via email to the Department of Contracts through compensations.contracts@gov.mt.

The subject of the email shall read: Compensation Request. In addition, the salient parts of the Contract Title as well as the name of the Contracting Authority / Entity shall also be included.

The said Compensation Request must be channelled through any customary Quality Assurance processes (including the Head of the Contracting Authority / Entity and the respective Permanent Secretary) prior to its submission to the Department of Contracts.

Step 3: Any approved Compensation Request shall be formalised through an Addendum to the Contract Agreement.