



empai frameworks 2014 – 2018

Guidance on the expiry of the frameworks
October 2017



Introduction

The empa frameworks are in the last 12 months of their operation. The minor works framework agreement expires on 5th March 2018, the intermediate framework expires on 30th January 2018 and the provincial framework agreement expires on 12th January 2018.

It should be noted that there is no change to framework operations in the interim and call offs can continue until the framework expiry dates. A Delivery Agreement must be signed by both the client and delivery partner for any primary construction work(s) by the expiry date of the framework.

The purpose of this guidance note is to confirm the implications for projects currently underway and the considerations for new projects.

Projects currently underway

In order to constitute a compliant call off for construction under the terms of the framework, a Delivery Agreement for the primary construction works, using the template within Schedule 4 of the agreement, must be executed by no later than the dates listed above.

Please note that Delivery Agreements for other services under the framework agreement, such as design or enabling works, will not constitute a call off to enable primary construction works to be subsequently undertaken. The framework agreement permits services to continue to be delivered under the terms of a construction Delivery Agreement, for up to four years after the framework expiry date. Scape anticipates that a number of projects will inevitably continue through the construction stage for some time after the empa frameworks have expired.

In the event that an enabling works and/or a design services Delivery Agreement has been executed, but a construction Delivery Agreement has not been executed by the framework expiry date, the works and/or services defined by these agreements may be completed but no further construction works will constitute a compliant call off under the respective framework agreement.

Considerations for new projects

The inception, feasibility and pre-construction stages of an empa project will vary in duration, depending on matters such as draw down of funding, design development, sign off by stakeholders and planning approval processes. The progress of the pre-construction stage can also be influenced by the strategies adopted for design and for mitigating risk.

Inevitably, due to the value and complexity of projects that the framework is used for, the period of time required to reach the point at which the construction Delivery Agreement can be executed can be several months. In view of the impending framework expiry dates, in commissioning any new project under the empa frameworks, clients should work closely with delivery partners and Scape and consider the activities to be undertaken in order to satisfactorily progress pre-construction activity and satisfy themselves that a construction Delivery Agreement can be entered by the expiry date of the relevant framework.

Scape and the respective delivery partners will maintain and monitor a list of projects from 90 days from the expiry of the framework in order to provide visible, clear and tracked project information. This information will be shared with clients and will enable action to be taken should projects experience issues affecting the progress of the projects and thus the signing of the Delivery Agreement.

Options to secure a Delivery Agreement before framework expiry

Based on information currently available and the preferred strategies for the delivery of a project, clients and the delivery partners may identify that a construction Delivery Agreement is not programmed to be executed by the due expiry date. Where the parties wish to secure a project under the framework agreement before it expires, the following are examples of actions that can be taken to enable the construction Delivery Agreement to be executed:

1. Accelerate pre-construction activities

This could include the activities of the delivery partner, the activities of their or the client's designers and consultants. In most instances, this option, which would result in the Works Information being developed to the original level of detail required by the client to enter into the Delivery Agreement, would attract additional costs.

2. Delivery Agreement based on less advanced Works Information

Many Delivery Agreements are based on Works Information developed to RIBA Stage 3 (Developed Design) or Stage 4 (Technical Design). However, as identified in the RIBA's Plan of Works, the parties may agree to enter into a Delivery Agreement based on Stage 2 (Concept Design) information. A mutually agreed risk profile/allowance would need to reflect the level of design and project risk at that stage.

3. Include an extended pre-construction stage within the construction Delivery Agreement

If the project team is able to develop the Works Information sufficiently, to be able to establish an overall Project Programme and Activity Schedule, the parties may agree to include an extended pre-construction period within a construction Delivery Agreement.

For the avoidance of doubt, a construction Delivery Agreement, inclusive of Starting, Access and Completion Dates and a Tendered Total of Prices, must still be executed. Where the parties agree that the Works Information is not sufficiently developed to allow the construction works to be diligently progressed, the Works Information could be finalised under the term of the construction Delivery Agreement, prior to the commencement of the construction works themselves. The parties would enter into such a Delivery Agreement in the knowledge of the Employer's rights to terminate the agreement if required, (for example, if the Works Information has not been developed to the Employer's satisfaction), as provided for by the NEC Engineering and Construction Contract / NEC Engineering and Construction Short Contract on which the construction Delivery Agreement is based.

This option does not place any additional risk on either the client or contractor, compared to entering a Delivery Agreement following the full development of the Works Information. If the client is not satisfied with the further developed Works Information at the end of this extended pre-construction period, as permitted by Core Clause 90 of the NEC contract, the Project Manager can terminate the Delivery Agreement, paying for costs incurred up to that point only.

If the client is content with the finalised Works Information, the client would then instruct the construction stage to commence. If for any reason the Works Information has changed during this extended pre-construction stage, then as would occur under any Delivery Agreement, the Project Manager would issue a Compensation Event Notice to formally confirm all mutually agreed changes from the original Delivery Agreement. As normal practice, it is important that the

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Activity Schedule clearly shows the costs payable throughout this extended pre-construction period, to avoid any doubt whatsoever as to what costs are payable at any given stage.

To further protect all parties, the client may wish to incorporate the following 'Z' clauses within the Delivery Agreement:

NEC3 – Full Contract

- 20.8 *The Contractor and the Employer* acknowledge that the Works Information provided by the *Employer* and/or the *Contractor* may not be sufficiently detailed to allow the *Contractor* to diligently progress and complete the Works on site and, if required, the *Employer* may wish to vary, omit or add to the Works Information and the Parties acknowledge that they have agreed that they may need to work together over the review period (*Review Period*), being the period specified in the Programme for design development and mobilisation using reasonable endeavours and in good faith and in accordance with the principles of the Delivery Agreement, to resolve all outstanding issues in relation to the Works Information prior to any written instruction from the *Employer* to commence the Works on site and will utilise the *Review Period* to finalise the Works Information, the Accepted Programme and/or the total of the Prices to suit their commercial needs within the parameters of the overall budget and Completion Date(s) specified by the *Employer*.
- 20.9 During the *Review Period*, the liability of the *Employer* shall be limited to the sum of [.....] exclusive of VAT to be paid in accordance with the timetable and schedule forming part of the Works Information.
- 20.10 Where a *Review Period* is included in the Programme, and in the event the parties reach agreement upon the Works Information, the Accepted Programme and the total of the Prices in order to commence construction, the *Employer* may issue a written instruction to the *Project Manager* and the *Contractor* to commence the Works in accordance therewith. Following receipt of such an instruction, the *Contractor* shall promptly commence and progress the Works accordingly.
Should the *Contractor* not consider the Works Information to yet be sufficiently developed to commence the Works, it shall promptly inform the *Project Manager* in writing, stating its reasons.
- 20.11 For the avoidance of doubt, and notwithstanding the existence of an Access Date and Starting Date, the *Employer* is under no obligation either during or at the end of the *Review Period*, to issue an instruction to commence the Works on site and shall further be entitled to terminate this Delivery Agreement in accordance with the termination provisions within the Delivery Agreement at any time during the *Review Period* on written notice to the *Contractor* and its liability shall be limited as set out in clause 20.9 to the sums incurred by the *Contractor* and services instructed prior to the written notice of termination, and such failure to instruct shall not be regarded as a Compensation Event.
- 90.2 Insert the following within the Termination table:-

Terminating Party	Reason	Procedure	Amount due
The Employer	R22	P1 and P4	A1 and A2

- 91.8 The *Employer* may terminate in the event the *Employer* and the *Contractor* fail to finalise or reach agreement upon the Works Information, the Accepted Programme and/or the total of the Prices (R22).

NEC3 – Short Contract

- 20.14 *The Contractor and the Employer* acknowledge that the Works Information provided by the *Employer* and/or the *Contractor* may not be sufficiently detailed to allow the *Contractor* to diligently progress and complete the Works on site and, if required, the *Employer* may wish to vary, omit or add to the Works Information and the Parties acknowledge that they have agreed that they may need to work together over the review period (*Review Period*), being the period specified in the Programme for design development and mobilisation using reasonable endeavours and in good faith and in accordance with the principles of the Delivery Agreement, to resolve all outstanding issues in relation to the Works Information prior to any written instruction from the *Employer* to commence the Works on site and will utilise the *Review Period* to finalise the Works Information, the Accepted Programme and/or the total of the Prices to suit their commercial needs within the parameters of the overall budget and Completion Date(s) specified by the *Employer*.
- 20.15 During the *Review Period*, the liability of the *Employer* shall be limited to the sum of [.....] exclusive of VAT to be paid in accordance with the timetable and schedule forming part of the Works Information.
- 20.16 Where a *Review Period* is included in the Programme, and in the event the parties reach agreement upon the Works Information, the Accepted Programme and the total of the Prices in order to commence construction, the *Employer* may issue a written instruction to the *Project Manager* and the *Contractor* to commence the Works in accordance therewith. Following receipt of such an instruction, the *Contractor* shall promptly commence and progress the Works accordingly.
Should the *Contractor* not consider the Works Information to yet be sufficiently developed to commence the Works, it shall promptly inform the *Project Manager* in writing, stating its reasons.
- 20.17 For the avoidance of doubt, and notwithstanding the existence of an Access Date and Starting Date, the *Employer* is under no obligation either during or at the end of the *Review Period*, to issue an instruction to commence the Works on site and shall further be entitled to terminate this Delivery Agreement in accordance with the termination provisions within the Delivery Agreement at any time during the *Review Period* on written notice to the *Contractor* and its liability shall be limited as set out in clause 20.9 to the sums incurred by the *Contractor* and services instructed prior to the written notice of termination, and such failure to instruct shall not be regarded as a Compensation Event.
- 90.6 The *Employer* may terminate in the event the *Employer* and the *Contractor* fail to finalise or reach agreement upon the Works Information, the Accepted Programme and/or the total of the Prices (Reason 9).

empa frameworks – expiry dates for each framework, partner and region

Lot	Partner	Region	Expiry Date
Minor Works Lower SR1 - SR7 £50k - £350k	G F Tomlinson	Derbyshire, Derby City & Staffs	5th March 2018
	Robert Woodhead Ltd	Nottinghamshire, Nottingham City	5th March 2018
	Robert Woodhead Ltd	North Lincs & North East Lincs	5th March 2018
	Lindum	South Lincs	5th March 2018
	Interserve	Leicestershire, Leicester City	5th March 2018
	Jeakins Weir	Northants, Peterborough, Rutland	5th March 2018
	Ashe Construction Ltd	Warwickshire, Coventry, Solihull	5th March 2018
Minor Works Upper SR1 - SR7 £350k - £2m	Ashe Construction Ltd	Derbyshire, Derby City & Staffs	5th March 2018
	Ashe Construction Ltd	Nottinghamshire, Nottingham City	5th March 2018
	Robert Woodhead Ltd	North Lincs & North East Lincs	5th March 2018
	Robert Woodhead Ltd	South Lincs	5th March 2018
	G F Tomlinson Ltd	Leicestershire, Leicester City	5th March 2018
	Clegg Construction Ltd	Northants, Peterborough, Rutland	5th March 2018
	Ashe Construction Ltd	Warwickshire, Coventry, Solihull	5th March 2018
Intermediate North Lower SR1 - SR4 £50k - £2m	G F Tomlinson	Derbyshire, Derby City & Staffs	30th January 2018
		Nottinghamshire, Nottingham City	30th January 2018
		North Lincs & North East Lincs	30th January 2018
		South Lincs	30th January 2018
Intermediate South Lower SR5 - SR7 £50k - £2m	Jeakins Weir	Leicestershire, Leicester City	30th January 2018
		Northants, Peterborough, Rutland	30th January 2018
		Warwickshire, Coventry, Solihull	30th January 2018
Intermediate North Upper SR1 - SR4 £2m - £7.5m	Wates Construction	Derbyshire, Derby City & Staffs	30th January 2018
		Nottinghamshire, Nottingham City	30th January 2018
		North Lincs & North East Lincs	30th January 2018
		South Lincs	30th January 2018
Intermediate South Upper SR5 - SR7 £2m - £7.5m	Morgan Sindall	Leicestershire, Leicester City	30th January 2018
		Northants, Peterborough, Rutland	30th January 2018
		Warwickshire, Coventry, Solihull	30th January 2018
Provincial SR1 - SR7 £500k - £7.5m	Wates Construction	Entire Region	12 th January 2018

Frequently asked questions

Q. *Are there any limitations on Compensation Events under a construction Delivery Agreement?*

A. There is no time limit, either connected to the date on which the Delivery Agreement is executed or from the expiry of the framework itself, within which Compensation Events are required to be notified or processed. As stated previously, in giving an instruction to change the Works Information during or at the end of the *Review Period* referred to above, the Project Manager should simultaneously notify the delivery partner of the Compensation Event. Where the delivery partner believes an event, such as the development of the Works Information during the *Review Period*, is a Compensation Event and the Project Manager has not notified the event to the delivery partner, they must notify the Project Manager accordingly within eight weeks of becoming aware of the event, in order to be entitled to a change in the Prices, the Completion Date or a Key Date.

The parties generally, and the client in particular, should be aware of the requirements of regulation 72 (Modification of contracts during their term) of the Public Contracts Regulations 2015 and ensure their associated obligations in regard to Compensation Events are satisfied.

Q. *When does the Scape fee become due, if construction works are not envisaged to commence following on from the execution of the Delivery Agreement?*

A. As per the framework agreement, the Scape fee becomes due from the delivery partner upon the execution of the construction Delivery Agreement. However, if a project does not proceed beyond the *Review Period* to construction, the Scape fee will only be charged on works undertaken.

Q. *What options are available to a client where a construction Delivery Agreement is not executed by the relevant expiry date?*

A. As previously stated, if a construction Delivery Agreement has not been executed by the expiry date of the relevant framework, the associated construction works will not be deemed to be a call off under the empa framework agreements. As stated in the framework agreements, the delivery partner grant a client a royalty-free licence to Intellectual Property (as defined by the framework agreement) which they have provided for the project. A client may therefore utilise this Intellectual Property via any procurement method they subsequently choose to deliver the project.

Re-procurement status

Scape submitted a Contract Notice in April 2017 to the Official Journal of the European Union with the intent to procure the Scape Regional Construction framework, to succeed the current empa frameworks. The Regional Construction framework will offer the services currently available from the empa frameworks and will be available for projects of the same nature and value up to £5m.

The proposed framework structure and procurement timeline are published on the Scape website, please visit <http://www.scapegroup.co.uk/services/procure/live-procurement/regional-construction> for further details and status updates.

The procurement timeline is based on there being a period of overlap between the current and the new framework. Should clients consider that it will ultimately not be possible to have sufficiently progressed a new project by the appropriate expiry date, if compatible with their programme requirements, they may opt to await the new Regional Construction framework being available for use, this is currently anticipated to be in December 2017, depending on the exact date of award and associated standstill period.

Further information and queries

If you have questions or require further information in regards to the guidance issued, please contact your Scape Regional Business Manager or the Regional Frameworks Manager. Contact details have been listed below.

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