

Proposals to amend the dispute resolution mechanisms in the public works contracts and promote the greater use of dispute avoidance

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Executive Summary

Ideally disputes should not arise on construction projects, however, it would save a great deal of time and money if the parties to a contract could successfully address disagreements that do inevitably arise given the complexity of the descriptive documents making up a tender and the commercial realities that materialise once a project is under construction.

The current suite of contracts published under the Capital Works Management Framework (CWMF) contain a mix of tried and tested Alternative Dispute Resolution (ADR) procedures; conciliation and arbitration, along with more recent forms that were introduced in 2016 to foster a greater level of dispute avoidance i.e. project boards, standing conciliator. Adjudication, which was introduced by the Construction Contracts Act, is also facilitated but this is available under statute without any requirement for its provision in a contract.

This paper makes proposals for amending the existing dispute resolution mechanisms in the public works contract in order to address issues more efficiently from a time and cost perspective. It also proposes an adjustment to the role of the **Standing Conciliator** to create a stronger forum for dispute avoidance once an issue is raised by either party that may delay Substantial Completion, increase the Contract Sum or impact on the performance of the completed asset. A greater emphasis will be placed on the dispute avoidance aspect of **conciliation** with **arbitration** as the ultimate procedure to resolve disputes.

Further dispute avoidance measures will be considered in the collaborative engagement model being developed by the CWMF, Advisory, Procurement and Skills unit (CAPS) of the Department of Public Expenditure, Infrastructure, Public Service Reform and Digitalisation.

Adjudication is available for all payment disputes that arise under a construction contract. No change is proposed to the manner in which adjudication is addressed in the CWMF.

It is proposed to revitalise **Arbitration** in the CWMF by introducing institutional arbitration. This amendment is designed to improve efficiency and address the high cost of arbitration which is often linked to prolongation of the process. It is proposed to adopt the International Chamber of Commerce (ICC) Arbitration Rules into those public works contracts where arbitration is currently provided for. Costs will be apportioned by the arbitrator, rather than borne by each party, as is currently the case.

The Standard Conditions of Engagement recognises conciliation, adjudication and arbitration as the preferred means of resolving disputes. It is also open to the parties to address issues as they arise and it is understood that these informal avenues are used more often in preference to formal dispute resolution procedures helping to maintain working relationships while in contract. Whilst the proposals contained in this paper are focussed on the public works contracts comments are also welcome on ways to improve the formal dispute resolution mechanisms in the Conditions of Engagement.

Observations are invited in relation to the proposals set out in this position paper by email to gccc@per.gov.ie by 5 PM (local time) on 22 August 2025. Please note that any submissions received may be published on the [CWMF website](#)

Proposals to amend the dispute resolution mechanisms in the public works contracts and promote the greater use of dispute avoidance

Current Position

The construction process, due to the multiple inputs required from different entities and the risk attendant can be prone to disputes. It is imperative to have mechanisms in place to address issues and disagreements at the earliest point and, should disputes arise to have an efficient and cost-effective means to resolve them.

Disputes can arise for a variety of reasons. While the circumstances may be project specific, general themes are clear:

- Gaps between the information provided in the tender documentation and the realities on site can give rise to uncertainty to both parties with respect to who is to carry out the work and payment for same.
- Contract documents may not accurately define the project.
- Contractors may not adequately resource the project.
- The allocation of project risks may be disproportionately skewed to the contractor, making it difficult to work in a collaborative environment, leading to claims.
- Contractors may underbid to win the work and submit claims to reduce their losses.

Ultimately it is to the benefit of the project, when disputes do occur, that they are resolved as efficiently as possible.

Traditionally the court system has been too slow to resolve construction disputes in an efficient manner. It is common for cases to wait years before being heard by a judge, all the while accruing costs and the financial uncertainty for both parties as they await a decision. The purpose of ADR is to resolve disagreements within a contract, in a timely and cost-effective manner, while maintaining the relationship between the parties to the contract where possible.

Since the introduction of the CWMF in 2007, the ADR mechanisms originally provided and those introduced in 2016 have been used effectively to resolve the majority of disputes where they have arisen.

Conciliation:

Conciliation is a voluntary process in which a professional facilitator assists individuals or parties to commercial contracts to resolve disputes when their own unassisted efforts have not succeeded. Conciliation is the most common form of ADR in Ireland, both in the public and private sector.

Currently all CWMF contracts make provision for conciliation with arbitration being the ultimate ADR mechanism on public works contracts with a value in excess of €1m and on the forms used to engage consultants.

Conciliation under the CWMF is a process that is designed to facilitate a resolution between the parties. Both parties consent to resolving the dispute with the mediation of a third party - the conciliator.

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Having assessed the dispute, where the parties are unable to come to an assisted settlement, under the CWMF provisions the conciliator makes a recommendation. If this recommendation cannot be accepted by either party, then the dispute may be referred to arbitration.

The Standing Conciliator & the Project Board:

The Standing Conciliator and Project Board were introduced into certain forms of public works contracts in 2016. The main objective being to resolve disputes without entering into formal ADR processes or, in the case of the Standing Conciliator, avoiding disputes from arising in the first place.

The Project Board should have representatives with the capacity and authority to negotiate agreements that will be binding on the Party that they represent. It is advisable that the members of the PB should come from senior management level in each organisation, with an understanding of the project and the disagreement, but removed from the day-to-day operations of the site, to avoid entrenched viewpoints.

The role of the Standing Conciliator is to:

- encourage proper engagement between the Parties,
- assist the Parties in the avoidance of disputes,
- assist the Parties in the avoidance of costly and lengthy dispute resolution procedures, and
- assist the Parties to establish agreement on the issues before they crystallise into a dispute.

Adjudication:

Adjudication is available for all payment disputes that arise under a construction contract, regardless of whether the contract makes provision for adjudication. As defined by the Construction Contracts Act 2013, construction professionals, when engaged in relation to a construction project, are covered by the Act. No change is proposed to the adjudication process under the CWMF.

Arbitration:

Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. Where a dispute under a Public Works Contract proceeds to Arbitration the CWMF Arbitration Rules for Use with Public Works and Construction Services Contracts (ARB-1) should be used. The Arbitration Rules do not specify who should be appointed as Arbitrator, only that they be appointed by agreement and if no agreement is reached, then they be appointed by a named nominating body. Arbitration is not available under PW-CF6, 8 or 11.

Arbitration has a number of advantages over court proceedings. The selected arbitrator can be a subject-matter expert, meaning that less time is needed on explaining technical matters and there is a reduced need for expert reports. This can lead to reductions in the time and cost of resolving the dispute.

The process is confidential. The arbitrator has a duty of confidentiality, the media is excluded from hearings and the parties are bound to privacy by way of the arbitration rules.

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However in recent years arbitration has fallen out of favour, this is mainly due to its high costs and the very lengthy time that cases take, factors that are often attributed to poor case management.

Objective

The aim of the revision to the ADR mechanisms is to reduce delays and improve satisfaction, if not with the outcomes then with the process. It is acknowledged that there are efficiencies that can be found in the ADR provisions in the CWMF, in particular to resolve disagreements, to improve contract management and maintain relationships.

The Government Contracts Committee for Construction (GCCC), together with the CAPS Unit, elected to carry out a review of the roles of Standing Conciliator and Project Board, with the objective of establishing the approach being taken to these new roles; how they were being operated in practice; and their success in resolving disputes or, in the case of the Standing Conciliator, preventing disputes from arising in the first place.

The review was undertaken by Indecon Economic Consultants and their report was issued in March 2022¹. It is being published alongside this position paper.

The overall conclusion of the report into the roles of Standing Conciliator and Project Board under the Public Works Contract's Dispute Management Procedures showed that, while individual perceptions can be greatly coloured by the experience on different projects, overall, the roles have generally been well-received. This included significant levels of agreement among practitioners and contract parties that Standing Conciliators had assisted in resolving actual disputes and helped in avoiding potential disputes, while the research also found a broad consensus among contract parties and Standing Conciliators that Project Boards had helped to resolve disputes that might otherwise have extended into longer and/or more costly outcomes.

The Report offered a number of recommendations to enhance the functioning of the Dispute Management Procedures in the PWC. An excerpt can be seen in the table below and full recommendations can be found in the full report available to download on the [CWMF website](#).

¹ The publication of the report was delayed by Tendering issues and the onset of the COVID-19 crisis.

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Recommendations on Potential Enhancements to Functioning of Dispute Management Procedures under the PWC

Cross-cutting Recommendations (PB & SC)

Consideration should be given to appropriate application of aspects of Collaborative Contracting, including Early Contractor Involvement, use of Contractual Targets and Incentives, and Quality Management processes. These approaches would serve to enhance the Dispute Management Procedures through improving collaboration at the early stages of a contract, potentially avoiding disputes later in the project; incentivising the contractor to complete their works in a timely manner and within budget; and maintaining a positive, collaborative relationship between contract parties.

As part of the function of the roles of Standing Conciliator and Project Board, the development and application of early warning systems be advanced to incentivise early collaboration by Contract Parties on the identification and management of specified risks, including potential project delays.

The potential to utilise aspects of the International Chamber of Commerce's ADR services should be explored. The ICC offers standard form contracts, as well as a comprehensive variety of dispute resolution services.

Recommendations re Role of Standing Conciliator

Public Works Contract clauses should ensure that the intended role and scope of the Standing Conciliator in respect of dispute avoidance are more clearly emphasised and supported by the Contract Parties. This could include potentially adjusting Clause 13 of the Public Works Contract to formally incorporate a dispute avoidance role for the Standing Conciliator.

Recommendations re Role of Project Board

To place greater emphasis on the avoidance of disputes, consider strengthening the role and remit of the Project Board to include the ability to regularly review a project and discuss potential disputes in advance of an Employer's Representative Determination, and to mitigate potential risks and subsequent claims. This should include consideration of the merits of introducing a contractual requirement to proactively mitigate dispute risks and attempt to achieve dispute resolution.

To ensure consistency in relation to their effective and efficient operation, enhanced guidance is needed in relation to the operating procedure by which the Project Board hears, discusses and resolves referred disputes. The guidance should, among other aspects, emphasize the need for the Project Board members to constructively engage in finding agreement/resolution (including possible negotiation outside contract parameters), to cooperate with the Standing Conciliator, and require boards to reach decisions on referred disputes within pre-defined timescales. The guidance should also be supported by the provision to Project Board members of appropriate training in contract dispute management and resolution, and Project Board operation.

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Guidance on establishing and constituting the Project Board should emphasise the importance of appointing representatives of Contract Parties who have the required knowledge and expertise in the construction industry, in commercial decision making and negotiation, and in dispute resolution methods; are fully familiar with the role and objectives of the Project Board and of the Standing Conciliator; and are ideally decision-makers in their company/organisation and have the authority to engage in meaningful discussions with the other party and the Standing Conciliator at Project Board meetings. In addition, ideally at least one member of the Project Board should be independent of the Contract Parties (this may or may not be the Standing Conciliator).

Consider the merits of giving the Standing Conciliator a more formal, but impartial, role in Project Board meetings. This could include requiring that the Standing Conciliator always chairs the Project Board, or alternatively, permitting the Standing Conciliator to attend Project Board meetings in an observer-only capacity, to build knowledge of issues on-site and/or between the Contract Parties' site teams.

Table 1: excerpt from 2022 report on the function of the Project Board & Standing Conciliator

Amendments Proposed Options

In this section the options that were considered to address the objective of the intervention are discussed.

Do nothing

Maintain all current ADR procedures within the CWMF, without amendment.

With respect to the innovations introduced in 2016; the Project Board and the Standing Conciliator the recommendations set out in the Indecon report suggest a greater focus on dispute avoidance. Whilst establishing the role of Standing Conciliator was an important first step in this and likewise the role of the Project Board in addressing disputes that have crystallised prior to formal ADR there is room for improvement. Likewise, the fact that arbitration is not being used where there are inevitably disputes that are best resolved in this forum is of concern.

There are three proposals upon which comments are invited, they are:

Proposal 1 – Strengthening dispute avoidance

Building on the general success of conciliation as a process for resolving disputes in the PWC, it is proposed to strengthen the dispute avoidance aspect of conciliation. It is proposed to apply conciliation earlier in the dispute lifecycle by inserting the Standing Conciliator more formally into a dispute avoidance role by having them chair the meetings which are triggered once an issue is raised by either party which might delay Substantial Completion, increase the Contract Sum or impact on the performance of the completed asset. If an issue or disagreement can be addressed at this point before a claim is submitted it can be of considerable benefit to the project. While issues are actively and collaboratively being discussed, it is proposed that escalation measures are paused.

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Where agreement cannot be achieved the standard provisions in the contract will take over and, should a dispute crystallise, it can be addressed more efficiently in the formal conciliation process because of the prior involvement of the Standing Conciliator.

It is proposed that issues be notified firstly under *Cl 9.3 Delay and Extension of Time*, (redrafted to provide for a broader remit) and be referred to *Cl 4.1 Co-operation* where the issue can be addressed using the provisions already set out therein.

1. Sub-clause 9.3 to be re-drafted to permit issues which could delay Substantial Completion, increase the Contract Sum or impact the performance of the completed asset with an obligation on Contractor, ER and Employer to raise issues.
2. Contractor may still opt to simultaneously raise a claim under 10.3 (or Employer under 10.9) but if the Contractor opts to raise an issue under 9.3 the Contractor's time bar (10.3.1) will not be applied until engagement under sub-clause 4.1 is exhausted with no agreement.
3. ER and Contractor's Representative engage in meetings under 4.1 to discuss the issue raised.
4. Standing Conciliator chairs meetings under 4.1.
5. A solution is agreed by ER & CR – ER requests a proposed instruction under sub-clause 10.4.
 - a. ER determines the Contractor's response to the proposed instruction.
 - i. Contractor & Employer accept the determination and Contractor progresses solution.
 - ii. Contractor/Employer rejects the determination and it progresses to the Project Board
6. There is no agreement/issue does not materialise, the Contractor does not submit a claim, no further action.
7. There is no agreement, Contractor submits a claim under 10.3.
 - a. ER Determines the claim.
 - i. Contractor & Employer accept the determination and Contractor progresses accordingly
 - ii. Contractor/Employer rejects the determination and dispute progresses to the Project Board
8. There is no agreement, Employer submits a claim under 10.9.
 - a. ER Determines the claim.
 - i. Employer & Contractor accepts the determination
 - ii. Employer/Contractor rejects the determination and it progresses to the Project Board

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9. Where disputes cannot be addressed at the Project Board they are referred onwards to conciliation

The CWMF will be revised as follows:

- publish guidance on the operation of the new dispute avoidance proposals.
- Amend sub-clause 9.3 to:
 - broaden its scope to consider issues which could delay Substantial Completion, increase the Contract Sum or impact the performance of the completed asset.
 - ‘stop the clock’ in sub-clause 10.3.1 on the submission of a claim *within 20 working days after it became aware, or should have become aware, of something that could result in such an entitlement*, until the meetings under sub-clause 4.1 have concluded.
- Amend sub-clause 4.1 to include a specific reference to meetings to consider the issues raised under a revised sub-clause 9.3 which are to be chaired by the Standing Conciliator.

Proposal 2 - Standing Conciliator to Chair the Project Board

- It is proposed that the Standing Conciliator (SC) Chair the Project Board as default in forms PW-CF1 to PW-CF4 inclusive (where a SC is appointed). This will enhance their role in dispute avoidance as well as resolution. The SC will have a better understanding of the circumstances which led to the dispute crystallising.

The CWMF will be revised as follows:

- Amend the Form of Tender and Schedule Part 3C to change the role of the SC to read “Standing Conciliator and Project Board Chair”, unless otherwise agreed by the Parties.
- Amend clause 13.1.2 (6) of the PWC, so that the SC chairs the PB as default.
- Enhance guidance to promote the SC as Chair of the PB.

Proposal 3 - Implementing Institutional Arbitration

The case management aspect of institutional arbitration results in the procedure being carried out in a timely fashion as well as overseeing the integrity of the process – where arbitrations are successfully challenged, it tends to be on a procedural error rather than on the award itself.

It is therefore proposed that the International Chamber of Commerce (ICC) Arbitration Rules would replace the current *Arbitration Rules for Use with Public Works Contracts and Standard Conditions of Engagement*. Such a change would see the ICC oversee any dispute that is referred to arbitration under the relevant public works contract. The existing rules would continue to be used on arbitrations that arise under the Standard Conditions of Engagement.

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Parties to the contract may agree on the appointment of an arbitrator as is the case currently. The ICC case manage the process for which they charge an administration fee, the ICC also levy the fee charged by the arbitrator. Costs for engaging the ICC to oversee an arbitration are determined on the basis of published percentages of the disputed amount. The percentage charged decreases inversely in proportion to the disputed amount. Rulings must be returned within a specified timeframe. The arbitrator fixes the costs of the arbitration in the final award. The costs of the arbitration include the fees and expenses of the arbitrator and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitrator and the reasonable legal and other costs incurred by the parties for the arbitration. This differs to the current situation under the CWMF where each party bears their own costs.

The CWMF will be revised as follows:

- Introduce the ICC's Arbitration Rules into clause 13.4.
- Amend the Forms of Tender (FTS 1 – FTS 5 inclusive) to remove the pre-agreement for both parties to bear their own costs in arbitration.
- Retain the existing CWMF Arbitration Rules as the default Arbitration Procedure in the Standard Conditions of Engagement (referenced in FTS 9 & FTS 10).

Next Steps

Market Consultation

- Deadline for responses will be **5 PM (local time) on 22 August 2025**.
- Follow up Bilateral meetings may be organised to clarify points raised in response to the position paper.

Finalisation

- Summary of market consultation and proposed amendments will be presented to GCCC members at its meeting in October.
- Submission to the Minister made by end October.
- Amendments to the effected CWMF Contracts by end 2025.

Observations are invited in relation to the proposals set out in this position paper by email to gccc@per.gov.ie by 5 PM (local time) on 22 August 2025.