

Capital Works Management Framework

Guidance Note

Procurement and Contract Strategy for Public Works Contracts

GN 1.4

Procurement and Contract Strategy for Public Works Contracts
Document Reference GN 1.4. V.1.2

04 September 2018

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Published by:

Office of Government Procurement
Department of Public Expenditure & Reform
Government Buildings
Upper Merrion Street
Dublin 2.

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Foreword

Purpose of this document

This document is one of a number of guidance notes aimed at facilitating the implementation of the Government's public sector construction procurement reform objectives. It is a key part of the Capital Works Management Framework (CWMF), which is an integrated set of contract forms, guidance notes and standard templates that are the necessary toolkit for the satisfactory delivery of a works project.

The purpose of this document is to assist Contracting Authorities in the application of the Public Works Contracts when selecting procurement and contract strategies to achieve their project objectives. This covers the alternative strategies and the considerations that contracting authorities need to take into account in deciding which of the public works contracts to use on a particular project. .

The guidance in this document applies to the standard forms of Public Works Contracts. It is for the Contracting Authority to choose which public works contract best meets its needs for particular projects.

The choice of procurement strategy should strike a balance between project objectives, funding, risk allocation and constraints to identify the best way of achieving the required result.

Terminology in this guidance note

The title **Sponsoring Agency** changes to **Contracting Authority** once a contract for technical services for a works project is awarded and **Contracting Authority** changes to **Employer** when a Works Contract is signed. The term **Client** is used throughout this guidance note as a generic term to cover the Sponsoring Agency / Contracting Authority / Employer.

Audience

This document is intended primarily for the guidance of Sponsoring Agencies embarking on traditional and design-and-build projects. However, the role of the Sanctioning Authorities and any external consultants appointed in relation to the capital works projects is also considered.

Capital Works Management Framework

The Capital Works Management Framework (CWMF) is a structure that has been developed to deliver the Government's objectives in relation to public sector construction procurement reform. It consists of a suite of best practice guidance, standard contracts and generic template documents. For more information on the CWMF refer to Guidance Note GN 1.0.

1. Overview

1.1 Introduction

The primary consideration in procurement of construction projects is the need to match the correct *procurement strategy* with the right contract type so that best value for money is obtained regarding the infrastructure being provided. Best value for money for a project should be considered not only in the context of the capital cost but in the whole life cost of the facility delivering the public service which a Sponsoring Agency can afford. Furthermore, the objective should be to ensure the design and operation of a facility maximises the delivery of effective public services.

The aim of a *procurement strategy* is to achieve the optimum balance of risk and control for a particular project. Issues to be considered in order to achieve the objectives of the project include:

- How is risk is to be dealt with
- How are constraints to be addressed,
- Can the Sponsoring Agency define clearly what it wants;
- When is the infrastructure required,
- What are the funding requirements,
- Are the resources available in-house or do they have to be outsourced,
- What type of market (i.e. contractors) is being targeted, what is the expected level of competition, etc.?

The *contract strategy* determines the level of integration of design and construction for a given project and should support the main project objectives in terms of risk allocation, delivery, cost and so on.

1.2 The decision

The standard suite of contracts in the Capital Works Management Framework consists of eleven generic forms (Contract Conditions) that can be used in different situations. Before embarking on a public works project, the Contracting Authority / Employer needs to identify the contract type that is most suitable. It is at this stage, before significant design decisions are taken, that the type of contract should be selected. This will determine what Client activities will take place in the Planning Stage.

The following table summarises the circumstances in which each of the forms of contract is appropriate See also the flow chart on page 8 to help determine which contract form of contract to use.

Continued on next page

1. Overview, *Continued*

1.2 *The decision, continued*

Nature of Works	Contract Type	Code	Form of Contract
Building Works	Traditional	PW-CF1	Public Works Contract for Building Works designed by the Employer
	Design-and-Build	PW-CF2	Public Works Contract for Building Works designed by the Contractor
Civil Engineering Works	Traditional	PW-CF3	Public Works Contract for Civil Engineering Works designed by the Employer
	Design-and-Build	PW-CF4	Public Works Contract for Civil Engineering Works designed by the Contractor
Minor Works, Building and Civil Engineering	Traditional	PW-CF5	Public Works Contract for Minor Building and Civil Engineering works designed by the Employer
Short Form, Building and Civil Engineering	Traditional	PW-CF6	Public Works Short Form of Contract for Public Building and Civil Engineering Works
Investigation , Building and Civil Engineering	Traditional	PW-CF7	Public Works Investigation Contract
	Traditional	PW-CF8	Public Works Investigation Short Form of Contract

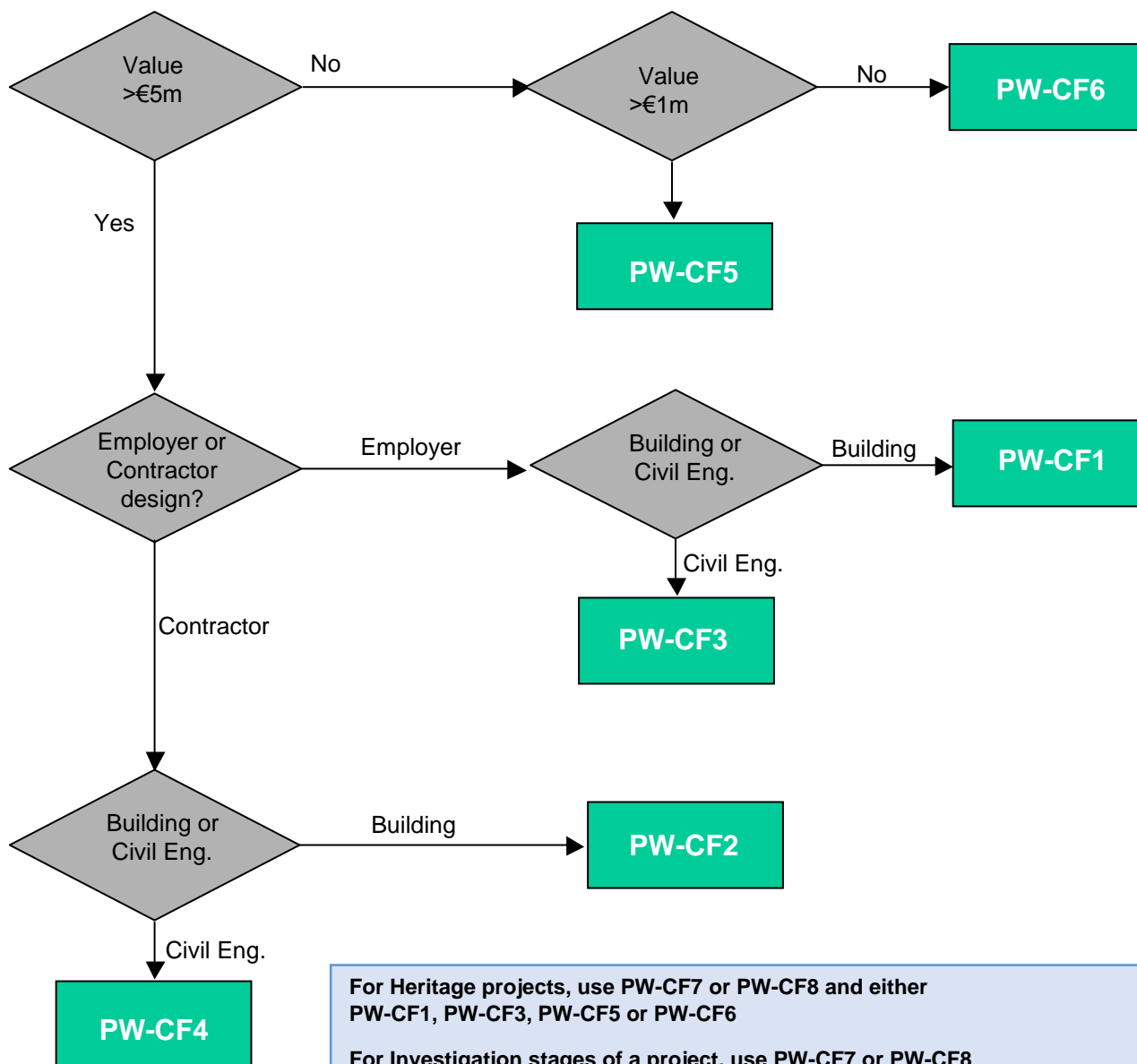
Nature of Works	Code	Form of Contract
Framework Agreement	PW-CF9	Public Works Framework Agreement
Large projects (e.g. over €100 million), or technically complex projects on which Contractor input is required at an early stage	PW-CF10	Public Works Contract for EARLY COLLABORATION
Urgent maintenance requirements or where certain types of planned maintenance and refurbishment are envisaged	PW-CF11	Public Works Term Maintenance and Refurbishment Works Contract

Continued on next page

1. Overview, Continued

1.2 The decision, continued

Use the following diagram to help you decide which main form of contract to use.



For Heritage projects, use PW-CF7 or PW-CF8 and either PW-CF1, PW-CF3, PW-CF5 or PW-CF6

For Investigation stages of a project, use PW-CF7 or PW-CF8

For Framework Agreements, use PW-CF9

For large projects with a value in excess of €100m or technically complex projects, use PW-CF10. [Please note permission must be sought from the GCCC in advance].

For urgent or certain types planned maintenance or refurbishment projects, use PW-CF11

Continued on next page

1. Overview, *Continued*

1.3 Building works or civil engineering works?

In most cases it will be obvious from the Definitive Project Brief whether the works relate to a building or a civil engineering project. However there will be circumstances when this distinction is not that clear. In such cases a Contracting Authority should carefully consider all relevant facts about the project before making a decision as to which category it falls into. It is important to pick the right category as building contractors and civil engineering contractors have different sets of skills and are used to particular contract types. In normal circumstances the choice will be aided by the following broad parameters:

If the project is for...	and if the Contracting Authority's requirements...
General construction works	... are to be satisfied by a building – that is, a structure with walls and a roof – one or other of the <i>building works</i> contracts (PW-CF1 or PW-CF2), the minor works contract (PW-CF5) or the short form of contract (PW-CF6) is the appropriate choice.
Heavy construction works	... relate to something other than a building – for example, a road, a bridge, or water treatment facilities – one or other of the <i>civil engineering works</i> contracts (PW-CF3 or PW-CF4), the minor works contract (PW-CF5) or the short form of contract (PW-CF6) is the appropriate choice.

1.4 Traditional or design-and-build

The Contracting Authority then needs to decide whether to go the traditional or the design-and-build route. Factors that need to be taken into account in deciding which route to take include the following:

- The optimal level of risk that a Contracting Authority wishes to transfer;
- What total risk is tolerable for contractors;
- What needs to be done to achieve optimal risk transfer;
- Where is the necessary design expertise located;
- How important is the performance of the completed works;
- Anticipated market response; and
- Delivery time of end product.

The result of these considerations will guide the Contracting Authority in choosing a particular contract type.

Continued on next page

1. Overview, *Continued*

1.5 Other Contract Types

There are alternatives available to the broad categories of *Traditional* or *Design and Build*. A Contracting Authority may wish to consider the following options also:

Frameworks:

A Contracting Authority with a steady stream or pipeline of similar projects may wish to consider establishing a Framework. A basic standard form, (PW-CF9), is available for works, which gives details of *participants, call-off rules* and *performance measurement* matrices. It is advised that all Contracting Authorities seek expertise advice when looking to establish a Framework to ensure that the outcome meets their needs.

Collaboration:

For large scale projects with a value in excess of €100m or indeed very technically complex projects that require the expertise of the Contractor as early as possible, there is a standard form available for use. PW-CF10, Public Works Contract for Early Collaboration, allows for tendering for *Early Services, Specific Tasks and Target Price*. The Contract may only be used with advance permission of the GCCC

Maintenance and Refurbishment:

The Term Maintenance and Refurbishment Works Contract (TMRC) may be used to address urgent maintenance requirements or where certain types of planned maintenance and refurbishment are envisaged, in a way that is cost effective, provides value for money and does not involve a new procurement process each time unscheduled or certain types of planned maintenance and refurbishment works have to be carried out. The type of planned maintenance and refurbishment work that this contract may be used for are those where the work cannot be accurately defined in advance and for which one of the other fixed price lump sum contracts.

Continued on next page

1. Overview, *Continued*

1.6 If you are unsure ...

If having carefully considered the description of the project as set out in the Definitive Project Brief, you are still unsure as to the type of the project it should be and which form of contract is most appropriate, you should seek expert advice. For most types of project, expertise is available within the public sector – either in the Contracting Authority, the Sanctioning Authority, the parent department, elsewhere in the public sector, or at the Construction Procurement Policy Unit of the Office of Government Procurement via their email address construction@per.gov.ie.

Where the resource is not available, the Contracting Authority should employ outside consultants to advise on the differences between the various approaches and the risks involved and on the most suitable approach to take.

The next step in the planning stage is to appoint design and other experts including the Project Supervisor for the Design Process (if not already appointed) to provide technical services during the Design Stage.

See *Procurement Process for Consultancy Services (Technical)* (GN 1.6).

2. Employer-Designed (Traditional) Projects

2.1 Definition: Employer-Designed

An Employer-designed (traditional) project is one where the design is carried out directly by the Sponsoring Agency or by specialist consultants engaged directly by the Sponsoring Agency, and that design forms the basis for the tender for construction.

The works contractor is responsible for the management and delivery of the facility and for the quality of workmanship and materials used – which are checked by the Sponsoring Agency's Employer's Representative.

Its main disadvantage (from an implementation point of view) is that the technical and management experts involved with the project are not part of a single integrated team with a single point responsibility for both design and construction. Instead the design team is separate from the construction team and each work independently of each other. In such an arrangement there are no contractual ties between the parties and the only common feature is that both parties have been engaged by the Sponsoring Agency.

2.2 Why choose Employer-Designed?

Employer-design contracts are most appropriate in the following circumstances:

- Refurbishment or alteration of existing buildings or facilities;
 - Works on historic buildings or on heritage sites;
 - Works that a contractor might be unable to scope accurately, or where there are significant unknowns leading to significant risks;
 - If the Contracting Authority cannot commit to proceeding to the construction stage until the design has been fully developed;
 - Where a design competition is held;
 - Where the Contracting Authority has in-house design capacity, or wishes to use design capacity from elsewhere in the public sector, or if the Contracting Authority wishes to build to a pre-existing standard design;
 - If the Contracting Authority needs to retain a high level of control over the quality aspects of the design; and
 - If the Contracting Authority wishes to retain control over the design process, or to choose between alternative proposed solutions
-

2.3 Why not choose Employer-Designed?

By retaining control over the design, the Contracting Authority reduces the scope of the Contractor to offer innovative solutions that may offer better value for money, either in construction (i.e. buildability) or in terms of whole-life costs. As the designer and the construction Contractor are contracted separately, there is the potential for conflict between them, and this could give rise to cost and time overruns. The resolution of such conflicts, if they arise, requires additional administrative effort and possibly costs on the part of the Contracting Authority.

Continued on next page

2. Employer-Designed (Traditional) Projects, *Continued*

2.4 Which Employer-Designed contract to use

Where a traditional contract is being used, the Employer includes detailed designs in the tender documentation, and prospective contractors bid for the build element of the project.

In deciding which traditional contract to use, the Employer should consider the nature, the complexity and value of the project. The project budget should be well established at Definitive Project Brief stage – including the value of the main construction contract. The following table summarises the choices that the Sponsoring Agency takes in deciding which contract to use.

If the project is ...	and the works are ...	Then use ...
Worth less than €5 million and more than €1 million (including VAT)	Civil Engineering – or – Building Works	PW-CF5
Worth less than €1 million (including VAT)	Civil Engineering – or – Building Works	PW-CF6
Worth less than €1 million (including VAT) and there are exceptional circumstances	Building Works	PW-CF5
	Civil Engineering	PW-CF5
Worth less than €5 million and more than €1 million (including VAT) and there are exceptional circumstances <i>(see note on Exceptional Circumstances below)</i>	Building Works	PW-CF1 or PW-CF5
	Civil Engineering	PW-CF3 or PW-CF5
Worth €5 million (including VAT) or more	Building Works	PW-CF1
	Civil Engineering	PW-CF3

Investigation Contracts

The Public Works Investigation Contract (PW-CF7) must be used for building or civil engineering investigation works above and/or below ground with a value of €50,000 (including VAT) or more.

The Public Works (Short) Investigation Contract (PW-CF8)-should be used for small building or civil engineering investigation works above and/or below ground with a value of €50,000(including VAT) or less.

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2. Employer-Designed (Traditional) Projects, *Continued*

2.5 Exceptional Circumstances

On projects valued above €1 million and below €5 million, it is more usual to use the Minor Works Contract (PW-CF5). However, *in certain exceptional circumstances* the Employer may deem the project sufficiently complex to warrant the use of one of the major works contracts (PW-CF1 or PW-CF3) – see Appendix A of *Public Works Contracts* (GN 1.5) for a comparison of the Minor Works contract with the major works contracts.

Similarly for projects valued below €1 million, it is more usual to use the Public Works Short Form of Contract (PW-CF6). However *in certain circumstances*, where the Employer deems that the works are of a particular nature, a Minor Works Contract (PW-CF5) or a Major Works Contract (PW-CF1 or PW-CF3) may be used instead. The Short Form of Works Contract (PW-CF6) should not be used for projects with a value in excess of €1 million (including VAT).

2.6 Allocation of risk

In a traditional contract the Employer retains the design risk and normally also retains a greater degree of risk overall.

- The contract specifies the circumstances in which compensation events will be allowed. Compensation events are events for which the Employer retains the risk and
- The Contractor may seek compensation from the Employer in the event of of the fixed compensation events or one of the optional risks *included in the Contract* that the Employer is carrying being realised (there is no option to transfer risk in PW-CF6, PW-CF7 or PW-CF8). It should be noted that the choice of optional risks are reduced in the case of contract PW-CF5 and a greater level of risk is retained by the Sponsoring Agency.

The use of the term ‘compensation events’ only arises in contracts PW-CF1 to PW-CF6. Contracts PW-CF7 and PW-CF8 cater for ‘instructions’ from the Employer on foot of which the Contractor may be entitled to an additional payment.

3. Contractor-Designed (Design-and-Build) Projects

3.1 What is Contractor-design?

A Contractor-designed (design-and-build) project is one where the Contractor takes responsibility for both design and construction of the facility in accordance with the Contracting Authority's specifications.

For a Contractor-designed project to be successful, there must be a complete and comprehensive output specification developed as part of the Definitive Project Brief. This helps facilitate tender assessment of a design, and will help ensure that quality and performance are not compromised during implementation.

3.2 Why choose Contractor-Design?

Contractor-designed contracts are most appropriate in the following circumstances:

- For new buildings or facilities; and
- For extensions to existing buildings or facilities

In Contractor-designed projects, design constraints on the contractor are at a minimum, and the contractor may respond to output requirements in innovative ways, and thus present greater opportunities for delivering better value for money.

The main advantage of taking the Contractor-designed route is that all technical and management experts work in a single integrated team with single-point responsibility for both design and construction. This means that the project team has the potential to deliver better performance benefits to the Contracting Authority on certain project types through better buildability, inventiveness, standardisation and integration in the supply chain.

The early involvement and commitment of the construction contractor ensures that the practical aspects of constructing the design are taken account of as the design develops so that it is actually possible to construct the design in the most economic way; the potential for conflict between the designer and the construction contractor (which implicates the Contracting Authority) is eliminated. Risk in the execution of the design is effectively transferred to the contractor who is best able to manage and control it.

Continued on next page

3. Contractor-Designed (Design-and-Build) Projects, *Continued*

3.3 Why not choose Contractor-Design?

Contractor-Designed contracts would not be appropriate, for example, if the site is sensitive, with the likelihood of a complex planning result. Nor are they appropriate if there is any other impediment or constraint to the contractor’s freedom to innovate.

Contractor-Designed contracts should be awarded only after a restricted procurement procedure, in which the quality of the contractor’s design team has been verified before the contractor is asked to tender for the project. This helps contain the number of tenders submitted (with designs) to a reasonable level.

The Works Requirements developed from the Definitive Project Brief (including output specifications) must be very clear and specific on the requirements and in particular on the quality requirements. An incomplete brief can lead subsequently to costly alterations, to satisfy the Sponsoring Agency’s requirements.

If there is any uncertainty in these areas, the Contractor-Designed contracts would not be appropriate.

There is no minimum financial threshold set for the use of either of these two contracts (PW-CF2 and PW-CF4). However, for Contractor-Design the project should be of sufficient size to be cost effective and that it would attract appropriate interest from the market.

3.4 Which Contractor Design Contract to use

Where design and build is being used the prospective contractor bids for the design as well as the build elements of the project. The type of design and build contract that must be used is one of the following:

If the work type is.....	Then use ...
Civil Engineering	PW-CF4 Public Works Contract for Civil Engineering Works designed by the Contractor
Building Works	PW-CF2 Public Works Contract for Building Works designed by the Contractor

4. Minor Works Form of Contract

4.1 Definition: minor works

Minor works are Employer-designed projects covered by a Minor Works Contract. The value of the construction contract must be less than €5 million including VAT. All projects with a value of €5 million or more must use either the PW-CF1 or PW-CF3 form of contract. In certain circumstances PW-CF1 or PW-CF3 can be used for projects worth less than €5 million.

4.2 Why choose the Minor Works Contract

The Minor Works Contract is the appropriate choice in the following circumstances:

- The value of the construction contract (including VAT) is less than €5 million.
- The project is relatively straightforward
- The project can be executed by a smaller contractor, without significant input from specialist subcontractors

Under the Minor Works Contract (PW-CF5), the Contracting Authority retains more risk than under the other two contracts PW-CF1 and PW-CF3.

Note: The minor works contract is never appropriate for a Contractor-designed project.

4.3 Why *not* choose the Minor Works Contract

If the value of the construction contract (including VAT) is more than €5 million, the Minor Works Contract should not be used.

In addition, contracting authorities may choose, in particular circumstances, to use PW-CF1 or PW-CF3 on projects where the value of the construction contract is below €5 million. This could arise, for example, if the project (even though low in value) was complex, or required significant input from specialist subcontractors.

5. Public Works Short Form of Contract

5.1 Definition: small projects (Traditional Design)

The Public Works Short Form of Contract (PW-CF6) is appropriate for Employer-designed projects whose value is less than €1 million (including VAT).

However, the use of the Public Works Short Form of Contract is not mandatory for projects with a value below €1 million: forms PW-CF1; PW-CF3; or PW-CF5 may be used if it is more appropriate, depending on the nature of the project.

5.2 Why choose the Short Form of Contract

The Public Works Short Form of Contract is the appropriate choice in the following circumstances:

- The value of the construction contract (including VAT) is less than €1 million, and
- The project is straightforward – for example, replacing a pump, replacing a valve, replacing radiators, installing a boiler, replacing windows, repairing a roof, painting and decorating.

Under the Public Works Short Form of Contract, PW-CF6, the Contracting Authority retains more risk than under PW-CF1 and PW-CF3.

Note: The Public Works Short Form of Contract is never appropriate on its own for a Contractor-designed project. If contemplating using the Short Public Works Contract for specialist work under €1 million with a design input considerations should be given to requiring the Contractor to execute the PW-CF6 and the COE 1 standard Forms. However it should be noted that Clause 2.4 of COE 1 states that *“No contents of the Contract (whether within 1.5, 6, 7.) amount to a guarantee by the Consultant of suitability for purpose of the design or other Services”*.

5.3 Why not choose the Short Form of Contract

If the value of the construction contract (including VAT) is €1 million or more, the Public Works Short Form of Contract should not be used.

In addition, contracting authorities may not choose to use it on projects where the value of the construction contract is below €1 million because of particular circumstances. This would arise for example, if there was a greater level of risk being transferred to the contractor or there were particular specialists involved.

6. Investigation Forms of Contract

6.1 Definition: Investigation studies

Investigation studies are works that are carried out in advance of permanent works to identify and quantify potential risks that are concealed.

The contracts used have been specially developed to suit all types of investigation work that might be carried out for public projects. There are two Public Works Investigation Contracts one (PW-CF8) is for small studies with a value of less than €50,000 (including VAT) and the other (PW-CF7) is for medium to large studies with a value of €50,000 (including VAT) or more.

Contract		When to use
PW-CF7	Public Works Investigation Contract	For medium to large studies with a value of €50,000 (including VAT) or more.
PW-CF8	Public Works Investigation Contract, Short Form	For small studies with a value of less than €50,000 (including VAT)

6.2 Why choose an Investigation Contract

Under the Public Works Contracts there is a requirement that all design work should be comprehensively defined as input specifications and designs (i.e. the traditional approach) or output specifications (i.e. design and build) before a project is put out to tender. This means that all unknown risks in so far as possible in relation to design are identified and resolved before the tender competition. An investigation study should be conducted in the following circumstances:

Below Ground	Where excavations are required, the site should be subjected to a site investigation so that any subsequent design of the facility to be provided can be comprehensively defined and detailed based on factual ground information.
Above Ground	Where refurbishment/alteration work to an existing structure is required all areas that are concealed should be opened up and investigated so that any subsequent design can be comprehensively defined and detailed based on factual information before tenders are sought for the main works.

7. Early Collaboration Contract

7.1 Definition: Early Collaboration Contract

This form of contract is intended for use on large projects (e.g. over €100 million), or technically complex projects on which Contractor input is required at an early stage. In any event a Contracting Authority must get prior approval from the Government Contracts Committee for Construction for its use. The Contract requires the Contractor to be appointed for a Project's Early Services, who may also be appointed for one or more Tasks. In a simple case, the Early Services is design development and obtaining planning consents, and the Task is the physical works. If there is more than one Task, they would normally be different phases of physical works.

7.2 Why choose the Early Collaboration

The Early Collaboration Contract allows the Sponsoring Agency to engage the expert services of the Contractor as early as possible in order to assist in design development and planning works. The Early Services will normally consist of design development and planning work. The Contractor is paid a tendered Early Services Fee for completing the Early Services. The Early Services will include taking the design development to a stage at which the Contractor can offer the Employer a Guaranteed Price for each Task. If the Guaranteed Price is accepted, the contract moves on to the Task(s). The Early Services may also include some Advance Works, such as relocation of utilities. Advance Works would normally be provided for in the Employer's Brief.

Apart from tendering an Early Service Fee and a Percentage Fee for each Task a Contractor is also required to tender a Target Price for each Task. To assist a Contractor in this regard there can be pre-tender dialogue with potential bidders using the competitive dialogue procedure to enable them more accurately gauge the scope of the project.

The Employer's requirements for the Project as set out in the Employer's Brief which is a contract document. It is important that the Employer's Brief comprehensively describes the Employer's Requirements. It is envisaged that because a this type of contract would be used when the definition of a Project is at an early stage (i.e. in generic terms) it would be a matter for the Contractor in the Early Services stage to develop the brief to a point at which a Guaranteed Maximum Price could be agreed.

As noted above, the Guaranteed Price for each Task (which is agreed at the end of Early Services) must be lower than the Target Price originally tendered for the Task. The contract may provide for the Contractor to be paid a percentage of the difference between the agreed Guaranteed Price and the tendered Target Price for a Task. This is called an Initial Saving Share. The Initial Saving Share would be paid out on completion of specific stages of the Task, as set out in the contract. The Contractor may be also be entitled to a share of any difference between the Guaranteed Price and the total out-turn cost for a Task. For this purpose, the out-turn cost means the total Defined Cost plus Fee Percentage.

8. Term Maintenance & Refurbishment Contract

8.1 Why choose the Term Maintenance & Refurbishment contract

The Term Maintenance and Refurbishment Works Contract (TMRC) may be used to address urgent maintenance requirements or where certain types of planned maintenance and refurbishment are envisaged, in a way that is cost effective, provides value for money and does not involve a new procurement process each time unscheduled or certain types of planned maintenance and refurbishment works have to be carried out.

The type of planned maintenance and refurbishment work that this contract may be used for are those where the work cannot be accurately defined in advance and for which one of the other fixed price lump sum contracts (i.e. PW-CF1 to PW-CF6) is not suitable. Where the nature of the works can be clearly defined then PW-CF1 to PWCF6 should always be used in preference to the TMRC since this represents better value for money.

8.2 The Contract Principles

The TMRC may be awarded as a standalone contract or in conjunction with a Framework Agreement. A standalone contract is awarded to a single contractor whereas the Framework Agreement may be used for single or multi-operator frameworks.

Under the TMC as a standalone contract or when used with the framework agreement no contractual obligation arises until the Employer issues a Task Order, and no obligation for payment arises until that task is completed to the satisfaction of the Employer.

The limits that apply to the use of this contract are:

- (i) The Maximum Sum included in the contract shall not exceed €2.0m and;
- (ii) The maximum duration shall not exceed 2 years in the case of multi participant frameworks and shall not exceed 4 years in the case of a single participant framework or standalone contract.

Both these limits must be stipulated in the appropriate section of the Schedule to the

Form of Tender and Schedule (FTS12). In the case of the contract duration this runs from the date that the tender accepted section of the FTS12 is sent in accordance with clause 1.7 of the TMRC

9. Public Works Contracts and Heritage Strategy

9.1 Introduction

The Public Works Contracts (Employer Design) can be used to great effect for construction works on heritage projects. Such projects relate to works to protected structures, existing structures within the curtilage of a protected structure or the attendant ground, or structures to which the National Monuments Acts apply.

Two-contract strategy

Public expenditure on construction works for heritage projects is subject to the same constraints as expenditure for works on a green field site. The constraints are: value for money, greater cost certainty at tender stage and more efficient delivery of projects. To ensure that greater cost certainty at tender stage is achieved on heritage projects, which by their nature involve working with existing structures where the type and quantum of work is difficult to define in advance, a heritage contract strategy has been developed. The strategy involves the use of two public works contracts and the need for the procurer to have a competent knowledge of the procurement rules.

The two public works contracts in question are; the Employer Design fixed price lump sum contract (i.e. PW-CF1, PW-CF3, PW-CF5, or PW-CF6), and an Investigation contract (i.e. PW-CF7 and PW-CF8) specially developed for this type of investigation work.

The appropriate use of the two contracts (i.e. the Employer Design fixed price lump sum contract and the Investigation contract) should achieve the objective set at the outset i.e. greater cost certainty at tender stage.

9.2 Investigation contracts

In any one heritage project, the investigation contracts need to be balanced with the main contract so that the greater portion of the construction work is done under the main contract.

Ultimately the purpose of investigation contracts is to obtain sufficient information to allow comprehensive designs and specifications to be developed and competitively priced so as to ensure greater cost certainty for the main works at contract award stage.

The investigation contract is a standalone contract which includes the facility for the Employers Representative to instruct the contractor to change the 'scope' (clause 7.5 of PW-CF7 and PW-CF8) of the work as may be deemed appropriate. Under 'Scope' the investigation contracts allow for opening up inaccessible areas for examination, and permanently or temporarily making good any elements which have been disturbed.

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9. Public Works Contracts and Heritage Strategy, *Continued*

9.3 Heritage specialists

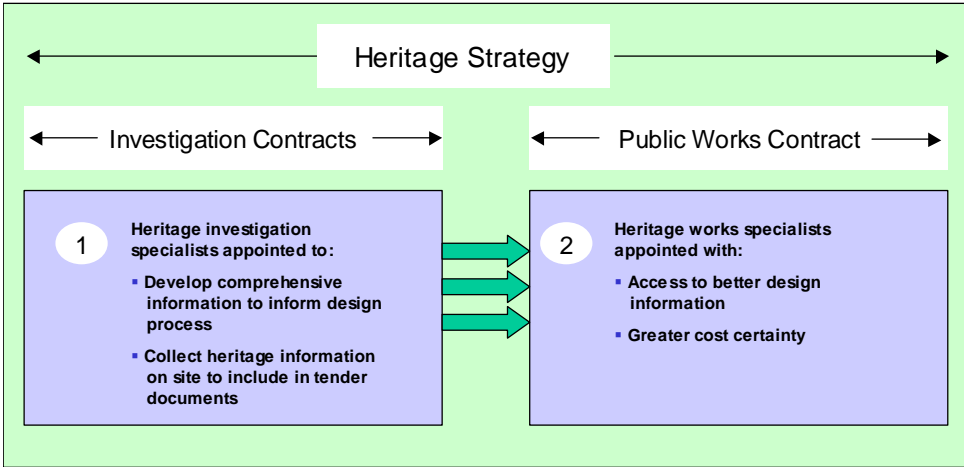
Specialist works form a significant part of heritage contracts. To ensure the integrity of work to protected structures, it is important that control is exercised over the specialists selected to undertake this work. There are two equally important roles that specialists fulfil on heritage projects, each of which is described in more detail below.

1. **Heritage investigation specialists** are appointed by the Contracting Authority under an investigation contract (PW-CF7 or PW-CF8). They carry out investigation studies and tests so that the Design Team can determine in as thorough a manner as possible the likely scope and quantum of the works that will subsequently be undertaken by a main contractor under a separate Public Works Contract.
2. **Heritage works specialists** are employed by the Works Contractor to carry out the detailed specialist work specified and illustrated in the Works Requirements. They are named in the tender documents (i.e. Works Requirements) in panels for the specialist areas of work identified in the Works Requirements.

In limited situations heritage investigation specialists may be engaged for both parts of the heritage project i.e. both the investigation and execution work. In particular, there are two situations in which this can arise:

- **Where no works contractor is involved:** in this case the heritage investigation specialist appointed by the Contracting Authority carries out all the work, investigation and execution under the Investigation Contract (PW-CF7 or PW-CF8).
- **Where the heritage investigation specialist’s contract is novated to the Works Contractor:** in this case the heritage investigation specialist appointed by the Contracting Authority carries out the initial investigation work under the Investigation Contract (PW-CF7 or PW-CF8), and later that contract is then novated to the Works Contractor for the execution of the detailed specialist works specified in the Works Requirements.

The diagram below illustrates the heritage strategy and the relationship between the Investigation Contract (heritage investigation specialists) and the Public Works Contract, Employer Design (incorporating the heritage works specialists).



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9. Public Works Contracts and Heritage Strategy, *Continued*

9.4 Heritage investigation specialists and the Investigation Contract

The heritage investigation specialist appointed under the Investigation Contract is responsible for carrying out tests, opening up structures, gathering and collating all the necessary heritage-related information, which can subsequently be drawn on and can assist in the development of designs and specifications that are to be included in the tender documents for the main contract. This approach brings a number of key advantages:

- Comprehensive design information is developed earlier in the cycle, and before the Contractor for the construction is appointed;
 - Authoritative heritage information is included in the tender documents; and
 - Greater cost certainty is achieved because the full heritage implications of the project are known in advance of the appointment of the main Contractor.
-

9.5 Heritage works specialists and the Public Works Contract

Following a tender competition for the main contract for a heritage project, the Main Contractor is appointed under the *Public Works Contract for Building Work Designed by the Employer* (PW-CF1, PW-CF3, PW-CF5 and PW-CF6). The design information in the main contract tender documentation will have been influenced by the outputs from the preceding Investigation contract. The tender competition for the main works should be between competent contractors experienced in heritage work who have won a place on a short list in a separate qualitative assessment competition.

The heritage works specialist is employed by the Contractor, and can be:

- Pre-qualified with Works Contractors who identify their specialists in the Works Contractors' suitability assessment material submitted; or
- Included on a panel in main contract tender documents drawn up by the Employer; and can then be selected by Works Contractors and named in their main contract tenders; or
- Alternatives proposed by Works Contractors in their tenders to those on a panel in main contract tender documents. Note that if the panel arrangement is used, then this must be made clear by the Employer in the tender documents.

Note: If there is a panel of specialists included in the tender documents, the Contractor must be allowed to propose alternatives of his choice. This must be made clear by the Employer in the tender documents.

Pricing of specialists' work

At tender evaluation stage the Pricing Document of the preferred tenderer should be examined to see that a reasonable allocation of money has been identified for each area of specialist work. If it is felt that the price is too low and the Employer is otherwise satisfied with the rest of the main contract tender price a more realistic price should be arrived at for the specialist area of work through the re-balancing of rates and included (in consultation with the tenderer – prior to issue of notice to unsuccessful tenderers) without affecting the overall tendered fixed price for the main works (in accordance with section 8.2 of the *Invitation to Tender Document* (ITTW 1, ITTW1a, ITTW 2).

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9. Public Works Contracts and Heritage Strategy, *Continued*

9.6 Combining specialist roles

In limited situations heritage investigation specialists may be engaged for both parts of the heritage project i.e. both investigation and execution work. In particular, there are two situations in where this can arise:

- **Where no works contractor is involved:** in this case the heritage investigation specialist appointed by the Contracting Authority carries out all the work, investigation and execution under the Investigation Contract (PW-CF7 or PW-CF8) .
- **Where the heritage investigation specialist's contract is novated to the Works Contractor:** in this case the heritage investigation specialist appointed by the Contracting Authority carries out the investigation work under the Investigation Contract (PW-CF7 or PW-CF8), and when complete the Investigation contract is then novated to the Works Contractor so that the specialist can assist with the execution of the detailed specialist works specified in the Works Requirements

Note: in both situations the scoping and specifying of the specialist work in the main contract tender documents is done by the Contracting Authority's Design Team.

9.7 Insurance

The PW-CF7 and PW-CF8 Investigation contracts allow for alternative insurance arrangements to be used. These can either rely on the provisions in Clause 12 of the Conditions as the default or on an alternative set out in the Scope of the Contract.

10. Framework Agreement

10.1 Definition: Framework Agreement

In effect, a framework agreement is an agreement between a Sponsoring Agent and one or more works contractors which sets out terms and conditions under which specific purchases can be made during the term of the agreement. Article 33(1) of Directive 2014/24/EU defines a framework agreement as:

‘... an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.’

Article 33 of Directive 2014/24/EU sets out the conditions and procedures under which agreements must be set up and contracts based on the agreements awarded¹.

10.2 Collusion

Contracting Authorities need to exercise care when setting up Framework Agreements to ensure that they do not inadvertently create an environment that allows competitors on Framework Agreements to collude with each other so as to fix prices. Furthermore, Contracting Authorities should continuously monitor the operation of their Framework Agreements to search for any suspicious signs of collusion. If there is any suspicion whatsoever the contracting authority should suspend all procurement activity under the relevant Framework Agreement until such time as the suspicions have been fully investigated and the contracting authority is satisfied that there is nothing to be concerned about.

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¹ Regulations 33 of SI No.284 of 2016 implement Article 33 of Directive 2014/24/EU.

10. Framework Agreement, *Continued*

10.3 Using a Framework Agreement

Framework arrangements are covered by Directive 2014/24/EU as implemented by SI 284 of 2016. The rules in the Directive are designed to ensure that contracts and panel placement under framework agreements are awarded in an open, transparent and competitive manner. The Framework Agreement form of contract (PW-CF9) should be executed separately by each party to the Framework Agreement to contractually bind them to the framework agreements for public works projects.

Strategic purchasing policy in relation to construction works is a matter for each Contracting Authority to decide on. Some of the areas where such a policy might apply are:

- The establishment of panels of specialists for public works contracts;
- Multiple works projects for which there is a generic design;
- Multiple low-value works projects;
- Strategic centralised purchasing; and
- Purchasing by a Central purchasing body.

In normal circumstances framework agreements should last for a fixed period (maximum of 4 years) set at the outset and should provide an economic and efficient means of procuring works projects. Only those who are admitted at the outset can participate in the framework – it is not open to Sponsoring Agencies to admit new entrants during the course of the agreement.

As the requirement for each project arises under a Framework Agreement, the Contracting Authority invites those participants listed on the Framework Agreement who are in a position to perform the contract to tender for the work in a mini-competition. The successful tenderer subsequently enters into a contract with the Contracting Authority (as Employer).

Main advantages of using a Framework Agreement

The main advantage of establishing a Framework Agreement is that the Contracting Authority only needs to advertise (in the OJEU and on the eTenders website) just once – announcing the intention to set up the framework. Individual projects can be awarded following a call off mini-competition under the framework which does not involve advertising.

Note: Procuring works projects outside a framework is allowable where, for instance, a Contracting Authority believes that the terms of a framework do not fit a particular requirement or that more advantageous terms can be obtained outside the framework, or there is a suspicion of collusion.

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10. Framework Agreement, *Continued*

10.4 Managing a Framework Agreement

The Contracting Authority needs to manage framework agreements very carefully, particularly for specialist, technical or complex works; and before deciding on a framework, the Contracting Authority should assess whether or not it is suitable in a particular situation. For example, a framework arrangement might not be suitable for long-term works contracts that could run longer than the duration of the framework agreement

Under Directive 2014/24/EU and SI No 284 of 2016, the duration of framework agreements is limited to a maximum of 4 years. However, there is provision to allow for longer periods in exceptional circumstances where it can be justified by the nature of the work that is subject to the framework agreement. An example might be where in order to execute a works contract a contractor has to incur a certain level of expenditure; and if the recovery of that expenditure cannot be achieved within a normal maximum 4-year period, a longer term framework may be justified.

10.5 How does a Framework Agreement work

A framework agreement is established using many of the features involved in a standard tendering procedure. Normally the total value of contracts to be awarded under framework agreements would exceed the relevant EU threshold and therefore the rules set out in the EU Directives must be followed. Such rules cover procurement in relation to open and restricted procedures; and in exceptional circumstances in relation to competitive dialogue and negotiated procedures. In practice, therefore most frameworks would be established using the open or restricted procedure.

It is also possible, however, that the total value of the contracts awarded under some frameworks will not exceed the threshold (€5,548,000² excluding VAT) and in such cases the flexible procedures set out in national guidelines for awarding below threshold contracts can be followed for both the award of an initial contract (if applicable) and for places on the framework agreement.

Continued on next page

² EU Threshold with effect from January 2018 to 31 December 2019. Thresholds are revised every two years. Full and up to date thresholds can be checked on the EU public procurement website <http://simap.europa.eu/>.

10. Framework Agreement, *Continued*

10.6 Setting up a Framework agreement

The Contracting Authority must advertise its intention to establish a framework agreement in the *OJEU* and on the eTenders website and where appropriate in the *OJEU*.

Content of the eTenders and OJEU notice

The Notice should indicate the following:

- That it is the Contracting Authority's intention to establish a framework agreement;
- That the framework agreement is for a single or a stated number of contractors/specialists;
- The duration of the framework agreement;
- The estimated total value of all contracts to be procured under the proposed framework agreement; and
- Whether an open or restricted procedure is being used to appoint suitable candidates to the framework agreement.

Open tendering process to determine participation in a framework

A standard open tendering procedure may be used to establish a single or multi-participant framework. A single participant framework involves the award of the complete framework contract to one contractor who is also awarded the follow-on contracts under the framework without further competition on a draw-down basis. This type of framework requires that all award criteria for the agreement and follow-on contracts as well as all the suitability criteria are established at the outset. Bona fide tenders are evaluated using the award criteria to determine which one of them is the most economically advantageous tender and is therefore the most eligible to be awarded the framework contract.

In the case of a multi-participant framework tenderers are invited to compete for a place on the framework. There may, or may not be an award of an initial contract when the framework is being set up. The criteria used to establish a framework are suitability and award criteria, and in order to satisfy the transparency principle they should be published in the contract notice. This enables the contracting authority establish eligibility, of interested parties, for a place on the framework, and if an initial contract is to be awarded to determine which is the most economically advantageous tender. All applicants that meet the minimum suitability and award standards (criteria) should be included in the framework agreement.

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10. Framework Agreement, *Continued*

10.6 Setting up a Framework agreement (Continued)

Open tendering process to determine participation in a framework

A standard open tendering procedure may be used to establish a single or multi-participant framework. In this case tenders are invited for inclusion in the framework. These are then evaluated and admission to the framework is awarded to the best bidder or bidders in accordance with the published award criteria.

Restricted tendering process to determine participation in a framework

Alternatively, under a restricted procedure, candidates may be shortlisted under suitability assessment criteria and appropriate award criteria. Those who are shortlisted are placed on a panel on the Framework Agreement and may subsequently be invited to tender in mini-competitions for individual draw-downs of the framework agreement as they arise.

Following award of framework agreement

Following the award of the framework agreement, each participant should:

- Sign a Framework Agreement form (PW-CF9);
- Participate in mini-competitions when invited during the life of the framework agreement; and
- If awarded a contract from a mini-competition, execute one of the Public Works Contracts (PW-CF1 to PW-CF8).

10.7 Award Criteria

The published notice (in the *OJEU* or the eTenders website) or the information supplied to candidates must include details of:

- The basis for admission to the framework agreement; and
- Indicative ranges for the criteria for the award of contracts that will arise within the ambit of the agreement.

No substantive changes or modifications in award criteria are permitted during the operation of the framework. For that reason, the Contracting Authority should (when advertising the establishment of the framework agreement) set out indicative ranges (rather than precise values) for the weighting of criteria for subsequent contract awards. Mini competitions for the award of contracts can operate within those indicative ranges and at criteria weightings that are appropriate for the particular contract award.

10.8 Small and medium-sized enterprises

As part of the decision to establish a framework agreement, consideration should be given to how the proposed arrangements will impact on small and medium size enterprises. In selecting participants for a framework, contracting authorities should ensure that where smaller enterprises can meet the requirements for the terms of the framework, their inclusion should be facilitated.

End