

GUIDANCE NOTE GN 1.5.2

Cost Control: Price Variation Clause in Public Works Contracts

(PW-CF1 to PW-CF6 only)

Cost Control: Price Variation Clauses

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Section 1: Introduction

1.1 Purpose of this Guidance Note

The forms of public works contracts PW-CF1 to PW-CF5, published on 17 July 2023 and PW-CF6, published on 19th July 2023 (and their corresponding Forms of Tender and Schedule) contain a new price variation clause entitled Price Variation (“the PV Clause”), incorporated as

- Clause 15 in PW-CF1 to PW-CF5
- Clause 18 in PW-CF6

This Guidance Note describes the operation of the Price Variation Clauses.

Terms used in this Guidance Note have the same meaning as in the Public Works Contract, unless otherwise stated.

Note

For forms of public works contracts PW-CF1 to PW-CF5, where the publication date pre-dates 17th July 2023, please refer to the previous versions of this Guidance Note in the CWMF Archive.

Prior to the version published on 19th July 2023, the form of public works contract for PW-CF6 did not contain a price variation clause.

Terms used in this Guidance Note have the same meaning as in the Public Works Contracts PW-CF1 to PW-CF6, unless otherwise stated.

Section 2: The PV Clause

2.1 The PV Clause

The PV Clause provides that the Contract Sum/Price¹ may be adjusted for fluctuations in the price of materials and fuel, as provided in the relevant clause. For PW-CF1 to PW-CF5 only, the Contract Sum may be adjusted for price fluctuations in labour, as provided in the clause. Formulae are included in the PV Clause, which are used to calculate the amount of any adjustment permitted under clause.

Material and Fuel

For material and fuel, fluctuations in price indices published by the CSO (“CSO price index”) for the material and fuel categories listed in the Schedule are used to determine adjustments to the Contract Sum/Price (in respect of those categories applied in the contract). Each fuel and material category listed in the Schedule represents a CSO price index, the fluctuations in which are used to determine whether adjustments are permitted in respect of a particular material or fuel category, and, if so, the resulting amount of the adjustment.

Labour – PW-CF1 to PW-CF5 only

For labour, changes in sectoral employment orders applicable to the labour categories in the Schedule that come into effect after the Base Date, are used to determine adjustments to the Contract Sum, where applicable. Each labour category listed in the Schedule is associated with a sectoral employment order for a relevant sector of workers.

Data to be provided by the Employer

In the Schedule, the Employer must assign the following:

- 1) proportions of the Contract Sum/Price eligible for adjustment for price fluctuations in materials, fuel and labour.
- 2) weightings to the categories of materials, fuel and labour² to apply in the contract;
- 3) a value for the Permitted Increase Threshold (which must be between 3% and 10%) for material and fuel categories.

In order for an adjustment to be permitted, movements in the relevant CSO indices for a material category and fuel category must either: (i) increase by more than the applicable Permitted Increase Threshold; or (ii) decrease by more than ten percent.

¹ The term “Contract Sum” is used in PW-CF1 to PW-CF5. The term “Price” is used in PW-CF6.

² Note labour is not subject to adjustment under PW-CF6

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2.2 Proportions

For the purpose of calculating adjustments in accordance with the PV Clause, in the Schedule, the Employer assigns nominal proportion (expressed as percentages) of the Contract Sum/Price to the following elements of the Works:

- Labour
- Material
- Fuel
- Non-adjustable overheads
- Plant

Notes:

- 1) The aggregate total of the nominal proportions assigned must equal 100%.
 - 2) For PW-CF1 to PW-CF5, the nominal proportions of the Contract Sum assigned to material, fuel and labour are subject to adjustment for price fluctuations under the contract. The remaining proportions (Non-adjustable Overheads and Plant) are not subject to adjustment for price fluctuations at any time.
 - 3) For PW-CF6, only the nominal proportions of the Contract Sum assigned materials and fuel are subject to adjustment. The remaining proportions (Labour, Non-adjustable overheads and Plant) are not subject to adjustment for price fluctuations at any time.
 - 4) Note that the nominal proportions used are irrespective of actual proportions of the elements in the Contract Sum and are used solely for the purpose of calculating adjustments to the Contract Sum/Price for price fluctuations in material, fuel and labour (where applicable).
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2.3 Weightings for Material Categories and Fuel Categories

The Schedule also lists material categories and fuel categories. Each material and fuel category represents a specific price index maintained by the CSO. The Employer selects material and fuel categories to apply in the contract by applying a weighting to appropriate categories. Note that depending on the project characteristics, not all of the material or fuel categories (or any sub-categories therein) may be appropriate to use. Where a project requires only selected material and fuel categories, this is acceptable, and achieved by allocating weightings only to those categories deemed appropriate, and ensuring that all categories add up to one (1.0).

Material Categories

The material categories provided relate to price indices in Table 3 Wholesale Price Indices for Building and Construction Materials (ex VAT) (“Table 3 WPI”). The CSO provides a description of the material types that fall into each material category in Table 3 WPI on their website³. The Table 3 WPI provides 12 main categories (and sub-categories), including the “All Materials” category which is a composite price index.

Material Categories in PW-CF1 – PW-CF4

For PW-CF1 to PW-CF4 only, eleven of the categories in the Table 3 WPI, and sub-categories (where applicable), are provided in the Schedule. The “All Materials” category is not included in the material categories provided in PW-CF1 to PW-CF4.

Options for Material Categories in PW-CF5

For PW-CF5 only, one of the following options may be applied in the contract:

- (i) the eleven main categories, (and any sub-categories therein) (i.e. as per PW-CF1 – PW-CF4); or
- (ii) the “All Materials” category only.

Employers may consider using option

- (i) for higher value and/or complex projects; or
- (ii) for simpler and lower value contracts.

In addition, for medium value and less complex projects, Employers may also consider using only the 11 main categories in Table 3 WPI (i.e. not using the sub-categories therein).

Options for Material Categories in PW-CF6 only

For PW-CF6 only, one of the following options may be applied in the contract:

- (i) the eleven main categories only (i.e. any sub-categories therein are not provided); or
- (ii) the “All Materials” category only.

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Employers may consider using option (i) for more complex projects, or projects where there is a Pricing Document in the contract; or option (ii) for simpler and lower value projects, where a Pricing Document is not included in the contract.

Fuel Categories PW-CF1 to PW-CF6

Three fuel categories are provided, which with the exception of the electricity category, relate to sub-indices in Table 5 Wholesale Price Indices for Energy Products (“Table 5 Energy WPI”). The fuel category for electricity is a sub-index of the Consumer Price Index.

Labour Categories PW-CF1 to PW-CF5 ONLY

For PW-CF1 to PW-CF5 only, three categories of labour are provided in the Schedule. Each category represents a sectoral employment order for a particular sector of workers (as defined in a relevant sectoral employment order).

Applying Weightings

The Employer selects the categories to apply in the contract by allocating nominal weightings to broadly reflect the composition of material, fuel, and in the case of PW-CF1 to PW-CF5 only, labour that may be used in the Works.

The total of the nominal weightings used for materials and fuel categories must equal one (1.0) in both cases (i.e. to reflect the full allocation of the material and fuel proportions to material and fuel categories).

³ <https://www.cso.ie/en/methods/prices/wholesalepriceindex/descriptionofproductsforbuildingandconstruction/>

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2.4 Material and Fuel Prices Indices, Absence of an Index Figure, Changes to an Index Figure

The CSO publish updated index figures in their relevant monthly Statistical Release (e.g. Wholesale Prices Index or Consumer Price Index) which record changes in prices. Note that the price indices sets are published monthly in arrears, that is to say, the indices are published in any one month relate to data from the preceding month. This means, for instance, that the price indices pertaining to March are published in April (generally towards the latter part of the month).

In the PV Clause, the relevant price index for a material or fuel category in the Schedule is referred to as the “Index Figure”.

The relevant Index Figure is used to establish a baseline value for a material or fuel category at the Designated Date (or the Recovery Date, where there is a Recovery Date), and is used to measure any subsequent fluctuations to assess whether an adjustment is permitted to the Contract Sum.

The PV Clause provides that where, prior to the issue of the final payment certificate, any index figure used to calculate an adjustment is subsequently revised by the CSO, then any such adjustment is recalculated using the revised index figure and the appropriate adjustment is made on the next certificate.

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2.5 Permitted Increase Threshold

The Permitted Increase Threshold applies to each material category and fuel category assigned a weighting in the contract.

The value of the Permitted Increase Threshold determines

- (i) whether a Permitted Increase applies; and
- (ii) where a Permitted Increase applies, the magnitude of the Permitted Increase.

Where a percentage increase in a relevant Index Figure exceeds the value of the Permitted Increase Threshold, an adjustment is made the Contract Sum/Price for the particular material or fuel category. The adjustment is calculated in respect of that portion in excess of the Permitted Increase Threshold.

For example:

The Employer has applied a Permitted Increase Threshold of 5%.

In a particular month, the change in the Index Figure for a particular material or fuel category is 7%. The excess portion of the increase is therefore 2% (i.e. $7\% - 5\% = 2\%$) which figure is used to calculate the amount of the Permitted Increase, using the formula provided for Permitted Increases in the relevant Appendix to the PV clause.

Considerations in selecting an Permitted Increase Threshold

In the drop-down menu provided in the Schedule, a value between 3% and 10% must be selected to apply in the contract.

The Employer selects the value considered most appropriate to the particular characteristics and circumstances of the project. Factors that may be taken into consideration in assessing an appropriate value to apply in the contract include:

- the projected start date of the Works, relative to the Designated Date;
- the inflationary climate for construction materials and fuels;
- the estimated value of the Works;
- the nature and complexity of the Works;
- the expected duration of the Works;
- the projected payment profile in line with the project work schedule;
- the composition of the materials and the volatility of the price indices applied (for instance does the project require significant quantities of a potentially price volatile material category);
- the Employer's budget;
- overall risk appetite of the Contracting Authority.

It is recommended that Employers conduct risk assessments particular to inflation in order to inform the selection of an appropriate value to apply. Expert cost advice may be sought for this exercise, where appropriate. For example, for lower value project of short duration, with reasonably traditional material components, a risk assessment may consider it appropriate to use a value in the upper range.

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2.6 Effective Value and Excluded Amounts

The Effective Value (EV) is the net amount due in any interim or final Certificate (before retention) and excludes any price adjustments made under the PV Clause and Excluded Amounts. Excluded Amounts are those amounts that are not subject to adjustment for price fluctuation, and are deducted from the total amount payable in any interim or final Certificate, to calculate at the Effective Value (EV) (in addition to any price adjustments made). Amounts excluded from the amount payable in an interim or final certificate are defined in the PV Clause in the relevant contract.

2.7 Permitted Increases for Material and Fuel Categories

The Contract Sum/Price is permitted to be increased where, for an applicable material category or fuel category, the increase between an Adjustment Index Figure and the Index Figure at the Designated Date (or where a Recovery Date has been agreed or determined, the Recovery Date) exceeds the Permitted Increase Threshold.

The formula to calculate the amount of a Permitted Increase is contained in the relevant Appendix in the PV Clause.

2.8 Permitted Decreases for Material and Fuel Categories

The Contract Sum/Price is permitted to be decreased where, for an applicable material category or fuel category, the decrease between an Adjustment Index Figure and the Index Figure at the Designated Date (or where a Recovery Date has been agreed or determined, the Recovery Date) exceeds ten per cent.

The formula to calculate the amount of a Permitted Increase is contained in the relevant Appendix in the PV Clause.

2.9 Adjustments for Labour, PW-CF1 to PW-CF5 only

This sections refers to PW-CF1 to PW-CF5 only. After the Base Date, (or where a Recovery Date has been agreed or determined, after the Base Date (Adjusted)), the Contract Sum may be adjusted in respect of any changes in a sectoral employment order applicable to workers in a labour category.

A formula is contained in the relevant Appendix to calculate the amount of any adjustment in respect of any of the labour categories applicable to the contract.

Note: the workers in respect of whom an increase is being claimed must have received in Ireland for the relevant work at least the increased standard rates of remuneration in accordance with the relevant sectoral employment order.

2.10 Failure to commence on time

The PV Clause provides that where, the Contractor fails to commence on time, (and a Recovery Date has been agreed or determined, as defined in the contract) adjustments in respect of an Adjustment Period are calculated using either

- (i) the Index Figure for the Designated Date; or

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(ii) the Recovery Date,
whichever adjustment results in the most favourable adjustment to the Employer.

2.11 Failure to complete on time

The PV Clause also provides that adjustments after the Date for Substantial Completion has occurred, adjustments in respect of an Adjustment Period are calculated using either

- (i) the Index Figure for the Adjustment Period in which the Date for Substantial Completion occurs (or at the approved extension to that date); or
- (ii) the Index Figure for the current Adjustment Period (i.e. that occurs after the Date for Substantial Completion),

whichever adjustment results in the most favourable adjustment to the Employer (i.e. whichever adjustment results in the lesser increase or greater decrease to the Contract Sum).

2.12 Efficiency

In addition, the PV Clause provides that the Contract Sum/Price will only increase where increased costs incurred by the Contractor occur despite its efficient progress and procurement and reasonable efforts to minimise increases.

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2.13 Providing the Data for the PV Clause

In a traditional (i.e. design) contract, the Form of Tender and Schedule issued as part of the tender documents must include the two appendices to PV Clause appropriately filled in.

During the tender period, the Employer may invite Tenderers to comment on the Employer's nominal percentages and weightings, in accordance with the Instructions to Tenderers. Any revisions to the nominal percentages and weightings that the Employer wishes to make should be circulated not later than the time stated in the Particulars under the relevant section of the Instructions to Tenderers.

For Contractor design and build contracts (i.e. PW-CF2 or PW-CF4), Employers may consider whether

- (i) to specify the nominal percentages and weightings for all Tenderers to use; or
- (ii) to permit Tenderers to specify in their tender nominal proportions and weightings related to their design.

For instance, where a reference design is provided, the Employer may consider proposing the nominal proportions and weightings and may provide an opportunity for Tenderers to comment on the nominal proportions and weightings. Any revisions to the nominal percentages and weightings should be issued to all Tenderers in advance of the submission date for the tender.

Alternatively, the Employer may consider whether to permit Tenderers to propose individual nominal proportions and weightings in their Tenders. In addition, the Employer may consider providing ranges for the nominal percentages and/or weightings, within which the values proposed by Tenderers must fall. The MEAT evaluation may be designed to incorporate evaluation of the proposed nominal percentages and weighted material categories, or a selection of the highest-ranking material categories, by providing notional index values to apply for evaluation purposes only.

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