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Management Framework

Guidance Note 1.6 & 1.7

Procurement Process for Consultancy Services (Technical)

Suitability Assessment/Tender Process/Contract Management

Procurement Process for Consultancy Services (Technical)
Suitability Assessment/Tender Process/Contract Management
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Appendices

Appendix 1 - Alternative Procurement Option – Design Contests.

Appendix 2 - Sample Services Breakdown Spreadsheet.

Appendix 3 - Sample Form of Tender and Schedule (FTS9) including guidance support.

Important Note It is imperative that Contracting Authorities download and use the latest version of the Instructions to Tenderers Document, Form of Tender and Schedule, Conditions of Engagement Agreement and associated model forms.

Guidance Note – Procurement of Works-Related Consultancy Services

Section 1: Purpose and Scope

This document relates to the procurement of the services necessary to support the development of a public works project and specifically where the Standard Conditions of Engagement for Consultancy Services (Technical) Contract (COE1) must be used. It is of particular interest to government departments, bodies under their aegis, including local, regional or other relevant bodies (including private bodies¹) that are in receipt of public funds for a construction project or for construction related consultancy services and who wish to appoint Consultant Technical Professionals (CTP). If in doubt refer to relevant Capital Works Management Framework (CWMF) circulars to determine whether use of the COE1 contract is required. All relevant circulars are located [here](#).

It is also of relevance to:

- **Public Private Partnership (PPP)** projects where a technical consultant advisor is to be retained by the Client; or
- **Design Contest** (a procedure used to obtain a design concept) – applies to appointment of a consultant following Design Contest. Information relating to Design Contests can be found in Appendix 1.

The terms Sponsoring Agency, Contracting Authority, Client and Employer are all titles used to describe the role of a public body at the different stages in the delivery of a public works project. Sponsoring Agency refers to its role in proposing a project for capital funding. It becomes a Contracting Authority for that project once it engages in procurement for service providers or works contractors; a Client once a COE contract is awarded and an Employer when the public works contract is awarded.

The term Client is used throughout this guidance note as a generic term to cover the Sponsoring Agency / Contracting Authority / Employer.

¹ Where a project is more than 50% publicly funded

Section 2: Considerations before Commencing Works-Related Procurement(s)

2.1 Pre-procurement Considerations

In advance of any procurement using COE1, Clients must satisfy themselves that all pre-procurement actions, particularly those related to the Infrastructure Guidelines as they apply to the particular project from a sectoral (Education/Housing/Transport etc.) perspective have been actioned or adhered to.

Clients must have a clear understanding of the Exchequer funding stream, approving authority and any particular National Development Plan (NDP) programme or specific project approval requirements before and during the project lifecycle. Outputs from works-related service providers throughout the project lifecycle form the basis of business cases required for Infrastructure Guidelines Gate Approvals on public works projects funded/part funded by the Exchequer.

2.2 Works-Related Services - Project Procurement Pipeline

Although they can be combined into a single procurement, the overall CTP services required to deliver a capital project are not usually procured through a single technical consultancy contract. They are usually issued as a pipeline of interdependent contract procurements. An overall works-related technical services procurement strategy and public works contract type i.e. Designed by Employer or Designed by the Contractor should be decided at project level before works-related services are put out to tender for Stages (ii) – (v). Works related services procurements through a project lifecycle can be undertaken through independent procurement competitions, through competitions from suitable framework agreements or through a combination of both.

2.3 Framework Contracts

Before setting up new framework agreements, Clients should ascertain whether their organisation is already included on suitable established frameworks that use the COE1 contract. They should also determine whether these frameworks cover the scope of their particular project.

Where Contracting Authorities need to prepare their own single or multi-party framework, the CMWF provides a simple framework agreement for works contractors which may be used as a reference. Contracting Authorities should also seek advice on developing their own framework agreements to suit their programme or project objectives.

2.3.1 Multi-Party Frameworks

Works-related technical services can be procured using mini-competitions from Multi-party Frameworks for particular works-related service types.

2.3.2 Single Operator Frameworks

A Single Party Framework established for a single project may be useful in situations where the retention of a suitably qualified team through the project lifecycle is of importance for continuity but the services for the full lifecycle cannot be defined in the initial procurement. Single Party Frameworks may also be established for a number of related projects.

Section 3: Government Policy – Works-Related Services Procurement

3.1 Underlying Procurement Principles

Government procurement policy seeks to maintain high standards and to ensure value for money. In meeting these requirements, Clients are required to ensure that:

- The consultants they employ can deliver high standards in the planning, design and supervision of construction projects;
- Consultancy advice is sought from professionals with relevant competency and experience;
- The procedure used for the procurement of such services is conducted in a transparent, fair and equitable manner;
- Competitive tendering is used which allows quality to be assessed in a way that achieves best value for money;
- The construction cost estimates for project designs submitted by consultants or by in-house design teams are subjected to independent scrutiny to confirm that they are reasonably within acceptable margins of accuracy, and to confirm that the proposed designs represent good value for money;
- Green Public Procurement considerations relating to both a CTP's business operation and the technical capability of its staff to contribute during their appointment to the delivery of sustainable built assets/infrastructure from a total cost of ownership perspective through sustainable design and sustainable construction project management; and
- Information Management commensurate with the specific contract and in line with CWMF Building Information Modelling mandate and any Open Data requirements for the project are considered/included.

3.2 Works-Related Service Providers

The Client will need to avail of the full range of expert resources necessary to first prepare the definitive project brief (undertaken within Stage (i)) and then to undertake the design and supervision of the public works project. If these resources are not available in-house they will have to be engaged under service contracts. This guidance focusses on the engagement of works-related services.

The type of expertise that may have to be engaged to ensure a successful outcome, includes the services of planners, architects, quantity surveyors, engineers, designers etc. These are commonly referred to as Category 12 services. The Category 12 Services reference was derived from the 2004 directive but the distinction is no longer made in the current Directive 2014/24/EU² on public procurement (the European Procurement Regulations). However, it is still referred to in 213/2008/EC³ [link](#). Details of individual Common Procurement Value CPV

² References to legislation are current at time of publication. Reader should ensure latest version of relevant legislation is referred to.

³ p. 270 of 213/2008/EC

codes relating to Category 12 services are included in that document also. CPV establishes a single classification system for public procurement aimed at standardising the references used by contracting authorities and entities to describe procurement contracts.

Sponsoring agencies should adopt a broad interpretation of this category. This means that the services of a wide range of consultants come within the scope of this guidance.

Category	Description
12	Architectural services; engineering services and integrated engineering services; urban planning and landscape architectural services; related scientific and technical consulting services; technical testing and analysis services.

Table 1

3.3 Works-Related Services Contracts to Deliver a Capital Project/Capital Study OR Use Cases for COE1

As well as engaging the design team for Stage (ii) services and up to Handover Stage (v), COE1 may be used to engage the necessary expertise to undertake discrete tasks such as a study or report or in a combination to deliver a Public works project. A range of options are listed below (this is not an exhaustive list).

- Pre-Stage (i) Scoping**
 Where construction technical professional input is required to the strategic assessment / preliminary business case, (for example in preparing options) and sufficient expertise is not available in-house – COE1 can be used to engage the necessary expertise. This might also incorporate early Stage (i) services (see below) to draw up a scope of service document or preliminary brief in order to engage consultants for subsequent stages.
- Early Stage (i) Services**
 Where it is considered unlikely that a separate Stage (i) appointment will facilitate the completion of the definitive project brief or the preference is for the same service provider to develop the definitive project brief and remain on throughout the subsequent stage. If the Client does not have the in-house capability then construction technical professional services should be engaged to develop the preliminary project brief and oversee early desktop/site surveys. This will facilitate the preparation of scope of services and appointment of the Design Team on a percentage Fee basis to undertake residual Stage (i) definitive project brief development and undertake the subsequent stages required by the Client's procurement strategy.
- Services Relating to Building/Infrastructure Designed by the Employer**
 A single COE1 contract (on simple/repeat projects) or multiple COE1 contracts for stage appointments (larger/complex projects). A single party framework may be suitable where arriving at detailed scope of services for each stage is dependent on the outcome of the preceding stage or sub stage and retention of Consultant through the project lifecycle is preferable.

- **Services Relating to Building/Infrastructure Designed by the Contractor**
Projects delivering new/upgrade Infrastructure/Buildings Designed and Built by the Contractor. A single appointment for all Stages or individual appointments for Stage (i) and Stage (iia) and possible (iib) and Client Representative for remainder of the project lifecycle.
- **Services Relating to Project Studies/Plans/Models**
Services contracts necessary to inform or rank future capital construction projects but not result in a built asset.
- **Services Relating to Capital Projects during Operation/Maintenance Phase**
Projects where construction technical professional consultancy services are required relating to maintenance/retrofit of existing infrastructure/building.
- **Services Relating to Peer Review**
Projects where peer construction technical reviews may be required relating to design documents, project cost estimates or other requirements.
- **Specialist Services**
Services relating to specialist or niche services required to progress a capital project.
- **Topographical Services**
Services relating to topographical and LiDAR surveys.

3.3.3 CWMF Stage Services

A specific service requirement may be broken down into the CWMF stages and procured using separate contracts should that be appropriate. The scope of service required will vary depending on the project and whether the procurement strategy for the works stage involves a traditional, Employer designed approach or whether it involves the Contractor undertaking the design. In the case of Designed by Employer contract the consultant(s) will provide design stage services as Designer. In the case of a Design Build Contract the consultant may be retained for Client advisory services only through the remainder of the Design Stage as detailed design responsibility sits with the contractor team.

Contracts that are not delivering building/infrastructure can use stage options in keeping with the nature of the service. While splitting of services for a single requirement into individual procurements is allowed, it cannot be used to avoid the obligations imposed by EU or national procurement guidelines (See Section 4.3).

The five CWMF stages are outlined below. In keeping with life cycle costing, lifecycle assessment and the circular economy, new public works projects must be undertaken (where applicable) with reference to renovation/re-use of relevant existing building/infrastructure and/or at minimum be assessed with reference to lifecycle cost estimate and life cycle assessment rather than capital cost alone.

Some sectors have adapted the CWMF project lifecycle with reference to the nature of Building/Infrastructure being delivered and whether Designed by the Employer/Designed and Built by the Contractor. In simple terms Stage (i) processes defines the solution to a problem in the form of a Definitive Project Brief and Stage (ii) and beyond delivers on this brief through design and construction of that built solution. This guidance refers to the CWMF lifecycle as outlined below.

CWMF Project Lifecycle Stages	
i	Feasibility study or Preliminary Report Stage
ii	Design (which can be split)
ii (a)	Outline Sketch Design
ii (b)	Design for Statutory Approval
ii (c)	Detailed Design and Preparation of Tender Documents for Works
iii	Tender Action, Evaluation & Award
iv	Construction
v	Handover & Final Completion

Table 2

Sectors, while following the underlying principles of the CWMF, may adapt the lifecycle to suit sector-specific requirements.

Section 4: Procurement Procedures

4.1 Public Procurement Legislation

There are currently four key pieces of EU legislation governing the conduct of public procurement⁴ – these apply to contracts equal to or above the EU thresholds, National Guidelines apply below the EU thresholds. A link to current thresholds is provided here <[Public Procurement Thresholds - Valid 1st January 2024 to 31st December 2025](#)>

Be aware that EU thresholds are revised every two years. It is the responsibility of the Client to ensure the correct thresholds are being adhered to.

European Procurement Rules/ Regulations

- Directive 2014/23/EU on the award of concession contracts and SI 203/2017 (Award of Concession Contracts)
- Directive 2014/24/EU on Public Procurement and SI 284/2016 (Award of Public Authority Contracts).
- Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and SI 286/2016 (Award of Contracts by Utility Undertakings Regulations)
- Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts and SI 130 of 2010 (European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010)

National Guidelines

These apply to public contracts below the EU threshold values and are set out in the [National Public Procurement Policy Framework](#). The Capital Works Management Framework sets out the policy framework that applies to Works and Works-related services with respect to public works projects. Circular 33/06 states that the Standard Conditions of Engagement must be used to engage construction consultants by government departments, bodies under their aegis, including local authorities or other relevant bodies that provide public services (e.g. schools, voluntary hospitals etc.). However, the use of the Standard Conditions of Engagement for Construction Consultants should be encouraged right across the public sector, including commercial semi-state bodies, as appropriate.

⁴ A different regime applies to defence and security procurement.

It is the responsibility of the Contracting Authority to ensure the correct thresholds are being adhered to. If EU thresholds do not apply based on contract value, national guidelines apply.

For works-related services the following guidelines will assist in determining whether you should advertise a CTP contract on eTenders or on the Official Journal of the EU – please note these are only rough indicators:

- If the capital value of the works contract is estimated to be approaching €500,000 (ex VAT) or more then the works-related service contracts necessary to deliver the project should be advertised on eTenders.
- If you are a central government authority (as defined in Annex I to 2014/24/EU) and the capital value of the works is estimated to be approaching €1.4m or more then the works-related service contracts necessary to deliver the project should be advertised on the Official Journal of the EU.
- If you are not a central government authority and the capital value of the works is estimated to be approaching €2.2m or more then the works-related service contracts necessary to deliver the project should be advertised on the Official Journal of the EU.

4.2 Procurement Procedures for Works-Related Services

There are six types of procurement procedure available in the directives. Regulation 26 of SI 284 of 2016 sets out when the different procedures may be used. The open and restricted procedures are available for any procurement however for their successful deployment, both procedures require a clear definition of the services. Government policy with respect to public works project delivery favours the use of these procedures as they represent the most efficient use of taxpayer's money and scarce consultancy resources for the majority of projects.

However, it is recognised that it is often not possible to fully define the services for some projects and, whilst the use of a percentage fee (discussed at Section 7.1.2) may address that to some extent, it still requires a detailed scope of service and preliminary brief to operate successfully.

For projects whose scope cannot be comprehensively defined or where the Client wishes to explore options to meet their project's objectives the competitive procedures or the innovation partnership may be used where the circumstances laid out in the regulations apply. It should be noted however that these procedures are more complicated to administer and may also involve considerable time and financial investment from prospective tenderers.

The **CWMF only provides procurement templates for the open and restricted procedures** and the core guidance focuses on these. Appendix 1 provides updated guidance in relation to the use of Design Contests. Design contests can be used as a means to promote

exemplary design, engage public interest and debate in a project, and foster innovation and promote new participants in the development of public projects.

The Office of Government Procurement – OGP Public Procurement Guidelines gives a good overview of alternative procurement routes e.g. competitive dialogue, competitive procedure with negotiation, innovative partnership procedure, negotiated procedures etc. Contracting Authorities should also familiarise themselves with the relevant EU and national procurement legislation if considering an alternative procurement and may seek advice from construction@per.gov.ie as well as contract specific procurement and legal advice should that be considered necessary.

4.3 Thresholds - Aggregation of Contract Values for a Single Requirement

For the majority of projects a multi-disciplinary team is required to design and oversee the construction stage. Their combined input is considered a single requirement and, whether the necessary services are tendered separately or as lots, it is the anticipated aggregate value of all the services that must be considered when determining whether either the national or EU thresholds have been breached.

The aggregation rules apply to consultancy contracts for a single requirement whether they are placed on the market and awarded at the same time, or they are placed on the market at different times and awarded at different times.

Each of the principal service providers employed as a member of a design team for a single requirement should be engaged directly by the Client. Where the services of specialist sub-consultants are required, these sub-consultants may be procured directly or via the principal consultants, at the discretion of the Client.

4.3.1 Exception to Aggregation Rule

If, out of a number of contracts which together form a single requirement a particular contract or group of contracts has a value of not more than €80,000 and the aggregated value/combined value of all such contracts does not exceed 20% of the aggregate value of the total single requirement, the EU rules need not be applied to the contract or group of contracts. National rules will apply to such contracts. An example illustrating the exception is provided below.

4.3.2 Example of Exception

A design team of five consultancy firms is required to provide construction related services for a project valued at €2.5 Million (Excluding VAT). The total Fee is €337,500 (excluding VAT) made up as follows:

Services	Value (Ex. VAT)	% of Total
Architectural	€150,000	44%
Quantity Surveying	€75,000	22%
Mechanical and Electrical	€50,000	15%
Civil Engineering	€37,500	11%
Landscape Architectural	€25,000	8%
Total	€337,500	100%

Table 3

The aggregate value of the services exceeds the current OJEU thresholds. Looking at the individual works related services contract values, as the value of the architectural services exceeds €80,000, the tender must always be advertised on the OJEU. Similarly, as the value of the quantity surveying service exceed 20% of the total service requirement it must be advertised in the OJEU.

In relation to the other three remaining service contracts:

- If the mechanical and electrical services are advertised in the OJEU, it is not mandatory to advertise the civil engineering and landscape architectural services in the OJEU (as the value of each contract is less than €80,000 and the aggregate value of the two is less than 20% of the total).
- If any two of the three contracts are advertised in the OJEU, it is not mandatory to advertise the third (as the value of each contract is both less than €80,000 and less than 20% of the total).

4.3.3 Aggregation of Contract Values – Framework Agreements

Technical services for public works project (irrespective of value) under an existing framework agreement are not subject to the aggregation rules a second time round. However, their value is to be taken into account to establish the threshold of a single requirement where other technical services are required that are not covered by a framework agreement.

4.4 Procurement Procedure – Open or Restricted

It is a basic principle of Government policy that a competitive process should always be used to engage works-related services associated with public works projects, unless there are justifiable exceptional reasons for not doing so.

Some points to consider when choosing which procedure might best suit the project's needs are set out below.

Restricted procedure	
Pros	Cons
Contains the cost and administrative burden associated with preparing a tender to a defined field.	Qualitative evaluation in the pre-qualification stage to prepare the shortlist is more complicated and may be open to challenge
Economic Operators perceive their chances of success as being higher in a restricted field as against one where the competition is unlimited	Can exclude Economic Operators who may otherwise be capable of undertaking the work but who cannot achieve the highest ranking in the shortlisting process
May generate a higher quality field of candidates who can devote more time to prepare their tender.	2-stage process leads to longer time period to award
Open procedure	
Pros	Cons
Opens up competition to all those Economic Operators who can meet the minimum prequalification requirements.	'Unlimited' competition puts many Economic Operators off.
May facilitate a greater level of SME participation	Can be a 'drain' on scarce resources across the consultancy sector with all Economic Operators having to respond to both a pre-qualification and a tender
Pass/fail pre-qualification process is more straightforward to administer.	
Shorter time period to award of contract	

Table 4

Please refer to [Circular 05/23](#) (Initiatives to assist SMEs in Public Procurement) to consider the steps that can be taken to encourage greater participation by Small to Medium Enterprises in the procurement of works-related service providers.

Section 5: Contractual Relationship Options – Multidisciplinary Teams

There are essentially three main ways in which design teams are procured –

1. **Single Point Design Team** – A single entity is appointed to provide a range of multi-disciplinary services. These services may be delivered by a multi-disciplinary practice or by sub-consultants to the contracting party. This is more usual on infrastructural projects and should be avoided on building projects for the reasons outlined below.
2. **Integrated Design Team** – An integrated design team procurement leaves it open to entities who wish to maintain their separate identities but join together in order to bid as an integrated team to deliver the services identified. A multi-disciplinary firm may also apply to provide the required services. Each of the principal service providers in the team should be engaged by individual contracts except in the case where a multidisciplinary firm is successful in which case a single contract may be awarded.
3. **Individually Procured Design Team** – A single contract notice may be utilised with each principal service broken into separate lots. The team lead should be identified and their scope of services should identify the additional tasks associated with this key role.

The manner in which design teams are appointed can have a significant bearing on the liability the different members of that team have to bear.

Design Team Procurement Type	Appropriate for use where	Insurance Considerations
Single Point Design Team	<p>Suitable for Low value/simple infrastructure projects</p> <p>Not suitable for building projects, other than for very simple structures.</p>	<p>Single Point Design Team lead may end up paying insurance premium that reflects Fee income of the entire team as opposed to their own income.</p> <p>Insurance cover will not extend to cover non-related disciplines.</p>
Integrated Design Team	Suitable for use on the majority of building and infrastructure projects.	<p>Individual contracts mean that insurance requirements are suitably tailored to individual design team members.</p> <p>On infrastructure projects where a single, multidisciplinary firm is successful in the tender, a single appointment is permitted.</p>
Individually Procured Design Team	This should be considered on large/complex projects where Client requires greater individual scrutiny on the appointment of design team	Individual contracts mean that insurance requirements are suitably tailored to individual design team members.

Table 5

When considering design team appointments Contracting Authorities should be aware that the list of exclusions to Professional Indemnity Insurance (PII) policies has increased. For this reason, it may be necessary for Contracting Authorities to seek to directly appoint certain disciplines.

An example of this is fire safety advice. Previously architects would have offered this service on relatively straightforward structures, however professional indemnity insurance policies no longer provide cover to general architectural practices leaving only specialist fire safety consultants offering this service. They should be identified as a principal service provider for large/complex buildings and a specialist skill requirement for other building projects.

The manner in which the design team is to be appointed has a significant bearing on the liability that they carry. This can also impact the cost of their premiums when it comes to purchasing professional indemnity insurance. Please refer to [Guidance Note 1.1.2](#) for further information to assist in determining an approach that will encourage competition and keep overheads to a minimum – a ‘win-win’ for the taxpayer and consultants alike.

Section 6: Suitability Assessment

6.1 Suitability Assessment Introduction

The purpose of suitability assessment is to identify suitably qualified and competent candidates to invite to tender. In the case of the Restricted Procedure the candidates' suitability is first assessed and only those shortlisted are invited to tender. In the case of the open procedure, the tenderers' suitability is assessed first and only tender submissions of tenderers considered suitably qualified are assessed.

The core documents are listed below

Restricted Procedure	Open Procedure
Contract Notice	Contract Notice
QC1 Part 1	QC2 Part 1
QC Part 2 & Associated Appendices	QC Part 2 & Associated Appendices
	ITTS 2a or ITTS 2b, FTS9 or FTS10 + Any Other Tender Documents e.g. Scope of Service

Table 6

The QC Part 2 part of the questionnaires are the same for both the open and the restricted procedures. The QC Part 1 is different depending on whether the open or restricted procedure is chosen. The forms are intended to be largely self-explanatory, as guidance for the Contracting Authority is included with the form under the relevant criteria.

The main differences in terms of QC1 Part1 and QC2 Part1 are

- **Information for Applicants/Project Particulars** – As the tender documents including ITT and FTS are issued with the suitability questionnaires for the Open Procedure the Information for Applicants section in QC2 Part 1 is shorter as the rules governing the tender are included in the ITT.
- **Pass/Fail/Qualitative** – The Restricted Procedure allows for qualitative assessment of Technical Capability, the Open procedure does not allow for qualitative assessment.
- **Short Listing** – In the open procedure those that pass the health and safety criteria and the suitability assessment have their tenders assessed. In the case of the restricted procedure the pass/fail health and safety and then pass/fail suitability criteria are examined in the first instance. Only those who pass are considered in the qualitative assessment. The restricted procedure will indicate the number of applicants to be shortlisted based on qualitative assessment scoring or on the basis of random selection. Short listed applicants who have provided all required evidence documentation will be invited to submit tenders for the competition.

A project is underway to digitalise the suitability process which will map the current document-based format. The current suitability questionnaire documentation will continue to be used in the interim. Guidance Note 1.6.3 - Minimum Standards for Suitability Criteria gives advice on selecting the appropriate criteria where Contracting Authorities wish to change from the default criteria settings and setting appropriate minimum standards with

respect to selection criteria and Health and Safety competency. The notes for Contracting Authorities in QC1 Part 1/QC2 Part 1 should be read along with GN 1.6.3 before completing the Contracting Authority elements of the Suitability Assessment Questionnaires prior to issue to the market.

6.2 Differentiating Selection and Award Criteria

The criteria used in Suitability Assessment are different from those used in contract award, and European Court of Justice (ECJ) case law has ruled that they are not interchangeable under a restricted or open procedure. Only criteria aimed at assessing suitability of bidders in general should be used at selection stage (a look back), while award criteria ought to be linked to the performance of the contract (looking forward) in order to evaluate the merits of particular bids in response to a particular requirement.

While selection and award stages are distinct and require separate treatment, the make-up of the team or the resources that are to be deployed to deliver the project can be considered in either the selection or award stages but not both. The organisation's capacity could still be considered **at a high level only** in the selection stage leaving the proposed project team to be evaluated in the award stage e.g. by reviewing their organisation chart in the selection stage and then seeking the experience and qualifications of the key individuals who will be involved in the project in the award stage.

It should be noted that once a service provider has been designated as qualified at suitability stage, the same decision based on the same facts, cannot not be re-opened at a later stage, to do so would be in breach of the EU procurement directive. A Contracting Authority may seek confirmation (and supporting evidence) from a service provider at a later stage in a procurement that there is no change in circumstance in relation to the proved minimum standards. This re-checking can be done right up to award of a service contract to ensure that the evidence presented earlier continues to remain valid.

6.3 Selection Criteria

The CWMF suitability assessment process encompasses EU and National Rules relating to procurement suitability criteria including Financial and Economic Standing criteria and Technical Capability Criteria. In parallel it is a statutory requirement that the competence and satisfactory allocation of resources of the Applicant are established in compliance with the Safety, Health and Welfare at Work (Construction) Regulations 2013 (SI No. 291 of 2013). This relates to design services and services that input to design and construction, Project Supervisor Design Process (PSDP) and Project Supervisor Construction Stage (PSCS).

6.3.1 EU and National Procurement Rules and Health and Welfare at Work (Construction) Regulations 2013

Applicants must submit appropriate evidence to demonstrate that they meet the minimum standards set for the suitability criteria including identification of adequate resources. Those who fail to submit such evidence, where required to do so, may be eliminated from the competition. The EU Rules governing selection are set out in the EU Directives. National rules follow the same principles and details as the European Procurement rules.

Health and Safety (H&S) roles require special consideration because of the importance of the Safety, Health and Welfare at Work (Construction) Regulations 2013 – in relation to tender, design, construction and supervision of a project.

The Contracting Authority may appoint a service provider as Designer and or PSDP. Where both roles are undertaken the service provider is assessed separately for each. In COE2 an Archaeologist can be appointed as Archaeologist and PSCS. Similarly, both roles are assessed independently. It is a statutory requirement that the competence and satisfactory allocation of resources of the Applicant are established.

PSDP and PSCS roles can be identified as Principal Service Providers in QC1 Part 1/QC2 Part 1 they must be assessed using separate Suitability Assessment Questionnaires (SAQs). Where a service provider applies for a PSDP or a PSCS service role in addition to one of the other Principal Services required then they need not submit duplicate responses to criteria 3.1, 3.2 and 3.3 (3.3a – 3.3g where applicable) of the PSDP or PSCS SAQ providing they reference the information contained in the SAQ relevant to their other Principal Service application.

Health and Safety competency must always be assessed separately first – using the Pass/Fail only.

The following is an extract from the ***Guidelines on the Procurement, Design and Management Requirements of the Safety Health and Welfare at Work (Construction) Regulations 2013:***

For the purpose of the Regulations, “competence” means a person or organisation is deemed to be competent where, having regard to the task the person or organisation is required to perform and taking account of the size or hazards (or both of them) of the undertaking or establishment in relation to which or in which the person or organisation undertakes work, the person or organisation possesses sufficient training, experience and knowledge appropriate to the nature of the work to be undertaken.

The CWMF Suitability Assessment documents allow assessment with reference to procurement directives and health and safety requirements.

6.3.2 Suitability Assessment – Considerations before Preparing Documents

This section should be read in conjunction with the relevant questionnaires QC1 or QC2 Part 1, QC Part 2 and GN1.6.3. Considerations common to both Open and Restricted procedure are outlined first,

Consultant Team Make Up

The number of questionnaires needed is dependent on the way the procurement is set up in terms of the contractual relationship required (See Section 5). The expected contractual relationship should also be detailed in a bespoke document for the competition.

For example the Contracting Authority can seek:

- **Integrated Design Team** - A number of Principal Service Providers e.g. Architect, Engineer, Quantity Surveyor, etc. A suitability questionnaire must be completed and provided for each principal service provider. Where consortium or joint venture apply the contracting authority will enter into contract with individual service providers, one of the principal service providers is identified as the Team leader (Ref COE1 Clause 7 11, 12, 13, 14)
- **A Single Point Design Team** - In this case a single questionnaire is provided with any additional services provided as specialist skills to the Principal Service Provider. The Contracting Authority will enter contract with the Principal Service Provider and require collateral warranties from each specialist skills sub-consultant.
- **Individually Appointed Design Team Members** – This could take the form of a single contract notice with lots identified for each Principal Service Provider where the design team is to be appointed at the same time. Otherwise it could be assembled from suitable frameworks or individual procurements.

6.3.3 Overview of Contracting Authority Tasks

In order to procure works related service providers, Contracting Authorities must complete a number of different tasks, an overview is given here. The questionnaire provides directions for Contracting Authorities.

1. **Select Procurement Option** – Restricted or Open
2. **Select Correct Questionnaire** – If Restricted use the QC1 Part 1 or for the Open procedure use QC2 Part1. Complete any necessary parts of QC Part 2. Select Appendices as applicable.
3. **Team Makeup** – Suitability Questionnaires to be provided for each Principal Service Provider needed and Specialist Skills associated with individual Principal Service Providers identified and included in the relevant questionnaire e.g. Architect might be Principal Service Provider with a Specialist Skill requirement for conservation. The specialist skill assessment is included in the QC1/QC2 principal service questionnaire.
4. **Set Requirements** –
 - Default settings in the questionnaires have been carefully considered.
 - Determine whether it is appropriate to change them or not.
 - Establish the minimum standards for each criterion. These standards should be set with regard to the nature, complexity and scope of the project, and with regard to the principle of proportionality (see GN 1.6.3). Open procedure criteria are all pass/fail. In the restricted procedure, selection criteria will be pass/fail and certain capability criteria may be pass/fail+ qualitative.
 - Where qualitative criteria are being used for Principal Service Providers and Specialist Skills Providers the marking and weighting is set out for each sub-criterion in the table provided.
5. **Publish the Contract Notice** – on eTenders or OJEU as appropriate. Upload the documents – QC1, part 1 & QC part 2 for the restricted procedure and QC2 part 1 & QC part 2, ITT, FTS and other tender documents for the open procedure.
6. **Evaluate questionnaire submissions** – QC Part 2 and any required evidence
7. **Create Shortlist** – (Restricted procedure only) Seek evidence on any pass/fail criteria where a declaration has been permitted.
8. **Evaluate Tenders** – (Open Procedure)
9. **Confirm** – (Open Procedure) seek evidence from the successful tenderer in support of the criteria where a declaration has been permitted.
10. **Notify unsuccessful candidates/Invite tenders** – (Restricted procedure only) Notify candidates who did not make the shortlist of candidates who are to be invited to tender. Invite shortlisted candidates to submit a tender.
11. **Evaluate Tenders** – (Restricted Procedure)
12. **Notify Tenderers** – (Both procedures) Notify successful and unsuccessful tenderers at the same time and observe any Standstill or pause (in below threshold procurements)
13. **Award Contract**

6.3.4 Selection Criteria and Health and Safety Competence - Setting Minimum Standards

A Contracting Authority should exercise care when setting minimum standards to ensure **that they are related and proportionate to the subject matter of the service contract**. Minimum standards should not be set at a level that discriminates against certain groups of service providers in a particular sector that would otherwise be eligible to provide the technical service. In order to satisfy the principle of transparency the minimum standards should be made known in the Contract Notice advertised on eTenders and/or in the OJEU and also in the suitability questionnaire available to applicants.

Similarly to the selection criteria, from a Health and Safety perspective the minimum standards used and level of proof required to demonstrate health and safety competence must be proportionate to the size, scale and complexity of the service required for the project. **In the case of PSDP, PSCS and Designer/Service provider with input to Design from Health and Safety perspective.**

- **Project Type 1** applies to all projects that are €1,000,000 + VAT or less in value.
- **Project Type 2** applies to all projects that are €1,000,000 to €10,000,000 + VAT in value
- **Project Type 3** applies to all projects that are greater than €10,000,000 + VAT in value

Project categorisation for the purpose of assessment of Principal Service Provider(s) or Specialist Skill Provider(s) from all relevant Health and Safety legislation perspectives are on the basis of the current capital cost estimate of the construction project related to the competition. The specific project health and safety risk profile of some lower value projects may require the project to be assigned to a higher project category. The QC documentation

(Sections 3.4a – g and Sections 3.4.1a – g) provides suggested requirements for category Type 1 projects, Contracting Authorities should use ‘CA Entry Option’ to outline any additional requirements for project category Type 2 and Type 3 projects.

It is important to highlight again that that the questionnaires have been set up with considered default values or choices already made. Contracting authorities should consider carefully when changing from default values/choices in the questionnaire and note their rationale for selection criteria choices on the capital project file. Some choices made at this stage, for example, in relation to the number of Principal Service Providers, insurance requirements among other things have enduring impact on risk share through the lifetime of the resulting contract(s).

6.4 Contract Notice

Consideration can be given as to whether a Prior Information Notice (PIN) would be advantageous to alert the market of the pending competition. A PIN is only obligatory if a Contracting Authority wishes to take advantage of the shorter time limits in the Directives for receipt of tenders or as a means of satisfying the transparency obligation under the Treaty for below threshold contracts. See Article 51(6) of Directive 2014/24 and Regulation 51 (6) of SI 284 of 2016.

The Client initiates the process by publishing a Contract Notice in the OJEU and/or on the eTenders website (as appropriate to the value of the contract). Contracting Authorities can choose to send a notice automatically to the OJEU for publication. The eTenders platform provides advice and support in relation to populating the Contract Notice which is an eform. This Notice will invite interested parties to either:

- (i) **Restricted Procedure** - Submit suitability material in response to a questionnaire (QC1 – Suitability Assessment Questionnaire for Service Providers Restricted Procedure) to determine which of them qualify as candidates to participate in a tender competition for a specific service requirement.
- (ii) **Open Procedure** – Submit tenders with evidence of suitability in response to a questionnaire (QC2 – Suitability Assessment Questionnaire for Service Providers Open Procedure)

All submissions should be kept confidential and should not be opened until after the latest closing date and time for receipt of that material.

6.4.1 Suitability Assessment - Documentation and Process

When assessing suitability of submissions the assessment is undertaken in a particular order to ensure, for example, that a qualitative assessment is not undertaken on an applicant who has failed to pass the minimum requirements relating to Health and Safety. The order of assessment is:

1. **Open/Restricted - Health and Safety** – Assess all relevant elements of the submission against Health and Safety requirements on Pass/Fail basis.
2. **Open/Restricted - Other Criteria - Pass/Fail** – Assess all relevant elements of the submission against all Pass/Fail Criteria.
3. **Restricted Only - Qualitative Assessment/Random Selection** – In the case of the restricted procedure only those applicants who have passed all pass/fail criteria are assessed qualitatively or admitted to the random selection process (where applicable).

Through assessment of applicant submissions, those who do not demonstrate the capacity or capability to deliver the service for a project of a particular scale, nature and complexity are eliminated at Step 1, Step 2 or Step 3 above in keeping with protocols outlined in the Information for Applicants. Some applicants eliminated in Step 3 may have been deemed to be capable of delivering the service but did not score highly enough on qualitative assessment

to be short listed or were not short listed due to the outcome of the random selection procedure (where it is used).

Section 7: Tender Options - COE1 Works-Related Services

Whether using an open or restricted procedure the options available to Clients when tendering works related services must be considered. COE1 has a number of options related to the manner in which the fee is treated.

7.1 Lump sum or percentage Fee

Stage (i) services should always be tendered as a lump sum. Unless the scope of services and preliminary project brief have been prepared then the latter stage of Stage (i) i.e. preparing the definitive project brief may be included as part of the percentage fee if the design team is being appointed for the duration of Stage (ii) or beyond.

For Stage (ii) *Design* to Stage (v) *Handover*, there are three ways in which competitive tenders can be obtained for consultants' fees. These are 1) lump sum, 2) percentage fee and 3) a combination of lump sum and percentage fee.

A single consultant appointment for Stages (i) – (v) inclusive is simply not possible without having prepared a comprehensive scope of services and a preliminary project brief. If the capacity to prepare these are not available in-house then they must be procured as a standalone Stage (i) service.

7.1.1 Service Contract for Well-Defined Services – Lump Sum

A lump sum fee should be chosen in the circumstances where the scope of service is well defined and the definitive project brief is completed to enable those tendering to accurately price each stage of the project lifecycle. The exception to this is where the appointment is for Stage (i) only and the service required is to develop the scope of service and the brief.

The project type will dictate to a significant degree whether the same consultant can be retained for the entire lifecycle. The procurement strategy is considered in more detail at Section 3 of this note. For some projects separate appointments may be inevitable for discrete stages in order to develop the detail necessary to obtain lump sum fees.

Where continuity of service is a priority and a percentage fee is not appropriate this may be addressed through a single operator framework where lump sum fees may be agreed for the subsequent stage based on outputs from the preceding stage using rates provided at tender stage to avoid negotiation.

Stage (i) services on large infrastructure projects may benefit from sub-division into sub stages. Clients should refer to the project lifecycle approach that prevails in the sector appropriate to the project e.g. Transport, Housing, Health, Education, etc.

A scope of service for a lump sum tender should, in the first instance, clearly define the known services, it should also identify those services that are likely to be required but which are

dependent on outcome of investigations that are included in the known services. If there is a high level of uncertainty or the majority of the services fall outside those defined, then consideration should be given to splitting the procurement into stages using the approaches outlined earlier in this section.

Changes⁵ may be required in particular during Stage (i) when the definitive project brief is being developed, changes should be less likely in Stage (ii) design and subsequent stages if Stage (i) services have been comprehensively completed. The statutory approvals process will dictate to a large degree whether further changes to the scope of service or the brief are necessary.

For example, if there is a reasonable likelihood of an oral hearing during the planning process, the services should specify preparation for a hearing and attendance for a reasonable time, setting out a number of days so that the Consultants tendering can price that number. The rate would then be applied to the exact number of days required.

A risk-based approach should be used to ensure potential Client's Changes are anticipated to the extent possible. They should be outlined in the scope of services, accounted for in the budget and unit costs/rates should be sought in the tender to arrive at a modification to the service that delivers value for money and is compliant with procurement legislation - refer to Regulation 72 of SI No. 284 of 2016 which addresses modifications to contracts during their term.

Some changes arise during the course of the contract that are associated with risks that, pre-procurement, were thought to have such a low likelihood of occurring to be included in the scope of services. A robust risk register will show anticipation by the project team of the issue that gave rise to scope change and will support justification of additional expenditure. This approach shows evidence of considered planning of procurement and expenditure control.

Clients should not underestimate the importance of desktop studies and risk analysis to inform scope of services. Time spent planning will almost certainly offset avoidable delay and unplanned expenditure during the appointment. It is important to note that the CWMF lifecycle has been adapted in some sectors to better suit the nature of the building/infrastructure type e.g. Housing, Health, Education, Transport etc.

Clients must make every possible effort to describe the specific time frame and scope of the service in unambiguous, comprehensive and well-defined terms. Use of best available information at time of tender with reference to the specific contract, experience from other projects and including realistic timelines for CWMF Stage/Infrastructure Guidelines Gate Approvals, Statutory Processes, Utility agreements, Environmental Information collection which can be seasonal in nature etc.

A breakdown of the hours associated with the lump sum fee, at a minimum per stage, should be supplied by the tenderers. The overall lump sum tender price should also be disaggregated in the form of time estimates and hourly/daily rates, so that the resourcing aspects of the

⁵ Addressed in clause 11 *Client's Changes* of COE1

tender can be properly assessed (if this is required it can be requested in the Particulars of the chosen Instructions to Tenderers).

However, the Client must ensure that this does not undermine the integrity of the lump sum and leave the way open for a subsequent tender price increase without change in service or circumstances.

7.1.2 Service Contract that Cannot be Clearly Defined – Percentage Fee

In the event that Stage (i) services do not result in a comprehensively defined project brief i.e. the exact scope of the project to be delivered (not to be confused with scope of consultancy services) or where the design team input to finalise the project brief prepared in Stage (i) will deliver optimum outcomes a percentage fee can be tendered for services for Stage (ii) and beyond.

Where a percentage fee is considered the most appropriate option for technical consultancy services on a project using a **Design and Build Works Contract**, the percentage fee can only be sought for those Stage (ii) Design Sub Stages that are to be undertaken to facilitate preparation of the tender documents. The scope of services for the remaining stages of the appointment should be tendered using a lump sum fee. COE1 facilitates the use of lump sum and percentage fee together.

Where the percentage fee option is chosen, the percentage is competitively tendered based on the notional capital value of the project. This notional capital value is stated in the Particulars in the relevant ITT document.

The ITT also allows the Client to indicate to tenderers when (if it is known) it is anticipated the percentage fee will be converted to a lump sum. The scope of services accompanying a percentage fee tender should include a capital budget range for the project to aid tenderers in arriving at an appropriate percentage fee bid.

It is important to note that scope of consultancy services requirements must be prepared in a similar comprehensive manner to lump sum appointments. This will inform the percentage fee tendered by individual members of the design team.

COE1 stipulates in Clause 9.7.8 that the Scheduled percentage Fee (if it hasn't already been applied and converted to a lump sum) must be applied to the estimate (Detailed Design Cost) approved by the Client of the relevant project costs made on completion of the working design prior to commencement of tender drawings and specifications i.e. during Stage (iic) after detailed design is complete and before commencement of tender documents. This resulting amount is final, and each percentage stage fee is applied to it, irrespective of any later estimated, actual variation in those costs unless due to a Client Change instructed after that estimate.

Clause 9.11 indicates that the Client may by notice apply any initially Scheduled percentage Total Fee to convert to a Lump Sum Fee using the current estimate approved by the Client. The lump sum will then be divided between stages per the percentages scheduled in FTS9. The Client can apply the percentage Fee to convert to a lump sum at any time but can only apply the percentage to arrive at percentage Total Fee using the estimate after Detailed Design is complete. If the percentage fee hasn't been converted by that time it has to be capped at a percentage Total Fee.

The conversion to lump sum should be actioned as soon as the scope of the project is certain and can facilitate an appropriate cost estimate or **at latest** on completion of the working design prior to commencement of tender drawings.

In exceptional cases the project, could following Application of the percentage Fee progress on the basis of a percentage Total Fee i.e. not be converted to lump sum e.g. Where detailed site investigation is only possible at construction stage due to specific site/existing building constraints which could give rise to an element requiring redesign with an impact on the construction capital cost. Agencies must demonstrate by means of approved third-party verification that the use of this approach is the only option appropriate for the proposed project, and that the justification is recorded on the project file.

Percentage Fee – Client Changes

As would be expected, where a percentage fee is chosen there is no mechanism in the contract to instruct a Client Change before the percentage fee has been applied to arrive at a percentage total fee or applied to convert to a lump sum fee.

For clarity, a percentage total fee capped which is based on an approved estimate at end of the Design Stage and a percentage total fee converted to a lump sum at the end of the Design Stage is an equal fee if there were no Client Changes subsequent to that point stage/sub stage/milestone payments would be the same.

The difference would arise in terms of the Client Change mechanism available.

If the Client Change is instructed after conversion to a lump sum, Clause 11 Client Changes (Increased, reduced, lump sum fee) applies exactly as it would if the contract had been a lump sum contract from the beginning.

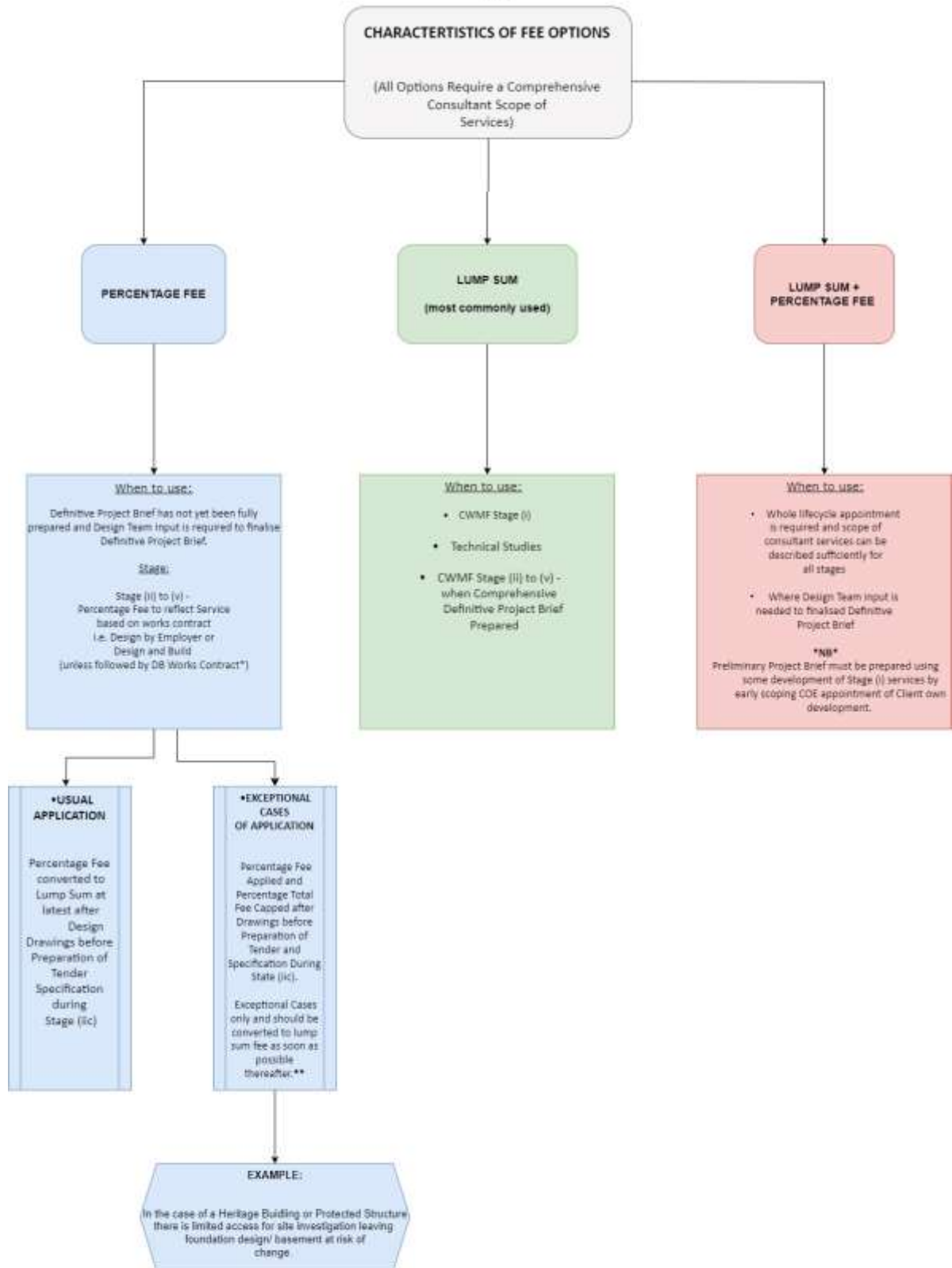
If the percentage fee has been applied to arrive at percentage total fee, Clause 11 Client Changes (Adjustment of percentage Fee) applies:

Adjustment of percentage Fee

- 8 A percentage Total Fee, and consequently each percentage Stage Fee, is adjusted for any increase, decrease, in the estimated Project Costs by a change instructed after the estimate has been applied to calculate the Fee [9.7,8].*
- 9 But a decrease is not made in the estimated Project costs for design excluded from the Project by the change where the Consultant has already undertaken the design services.*

For the absence of doubt a Percentage Total Fee is not eligible for Client's Changes relating to lump sum fee i.e. Time Charges, pro-rata increase. This means that any change that is instructed under a Percentage Total Fee that does not increase the approved project estimate will not result in an increase to the fee.

Fee Tender Choice in Conditions of Engagement 1 Contract



Explanatory Notes:

* Where Percentage Fee is being tendered COE1 related to Design Build Works. COE1 Contract for Stage (i), Stage (iic), Stage(iii), Stage (iv) and (v) must be lump sum.

** Client Changes can only be actioned using Clause 11g.9

Section 8: Tender Process

8.1 Tender Documents

The tender documents issued must include the following information:

Document*	CWMF Template
Instructions to Tenderers – Acts as Invitation to Tender, provides a set of rules to govern the tender and award of the contract and includes Award Criteria.	ITTS 1a, ITTS 1b, ITTS 2a, ITTS 2b (See Descriptions overleaf)
Form of Tender and Schedule for Consultancy Services	FTS9 for Technical Services
Pricing Schedule	Detailed Breakdown of Tender Price (Option to Request in ITT) – See sample template Appendix 2.
Service Requirements	Tenders should be accompanied by a scope of service document specific to the contract. For building/infrastructure projects. Appointments for Stage (ii) and beyond should be accompanied by relevant sections of the Definitive Project Brief for the capital project which is the main output from Stage (i) services.
Note: CWMF contracts and templates are updated from time to time. Please ensure that the most up to date version of documents is downloaded from the CWMF website for each contract to avoid use of superseded contract documentation.	

Table 7

*Where the Open Procedure is being used the tender documents are issued with the suitability questionnaire.

8.2 Considerations and Actions before Tender

In advance of preparing the Instructions to Tenderers the following should have been undertaken/considered,

- **Fee Choice** - Consider whether the contract will be lump sum or percentage fee. Stage (i) services should always be lump sum. Where lump sum and percentage fee are chosen in a single appointment, a preliminary project brief must have been undertaken to inform scope of consultancy services. A single whole lifecycle appointment including Stage (i), based on lump sum is not recommended, rather the lifecycle should be split into a minimum of two contracts.
- **Rates Choice** - Consider whether tendered time charges or calculated hourly rates are going to be sought. Tendered time charges are eligible for inflation adjustment. Calculated hourly rates are not eligible for inflation adjustment because the calculation should be undertaken using the latest salary data at the point the changes are instructed.
- **Definitive Project Brief** – When lump sum fees are sought for Stage (ii) Services and beyond on a capital project, the Definitive Project Brief should be provided. In the event that a percentage fee is sought, the available relevant Stage (i) Project brief output should be provided.
- **Design Team Structure** - Choice of design team procurement approach as set out in section 5 of this guidance.
- **Scope of Services** - The scope of services should have been prepared listing the service requirements for the particular contract.
- **Services Breakdown** - Preparation of service breakdown structure to be populated by tenderers with hours and rates in line with scope of services.
- **FTS Management Services** - Consideration of Management Services requirements to be scheduled in FTS 9 with reference specific to the scope of services being tendered e.g. Fee payment schedule.
- **Insurance** - Consideration of proportionate insurance requirements – see GN 1.1.2 for recommended levels of Professional Indemnity Insurance.
- **Contract Execution Options** - Consideration as to whether the contract will be executed under hand or under seal – see GN 1.1.2.
- **Stage and total performance period** - A preliminary programme relevant to the project and the specific scope of service for the contract should have been prepared to inform best available information on stage durations and inter-stage periods to allow the total performance period to be estimated and indicated to tenderers.
- **Risk Assessment** – Consider risks pertaining to the specific contract and in the context of the project risk register.
- **Selection and Award Criteria** - Consideration of the selection and award criteria for the specific contract.
- **Works Contract Budget** – Ensure the Works Contract Budget is prepared in compliance with Infrastructure Guideline Requirements and using the correct CWMF Cost Planning Template.
- **Market Soundings** - Undertake market soundings to gauge the level of interest in tendering. The type of soundings and the manner in which it is undertaken will vary depending on the scale of the project or programme.

- **COE1 Procurement Pipeline for Overall Project** - Analysis of the routes to procurement should have been undertaken i.e. single contract, use of a single party framework, use of a multi-party framework, other approach. If using frameworks considering whether there are existing frameworks available or the Client will need to set one up.
- **Open/Restricted Procedure choice** - Consider procurement procedure, the Restricted or Open Procedures may be used freely and templates are published under the CWMF for use with either. With respect to the other four procedures Regulation 26 of SI 284 of 2016 provides further details where they may be used. It is important for clients to take advice if they are not familiar with these procedures and where they may be used. Appendix 1 to this note provides guidance on the use of design contests. CWMF, Advisory, Procurement & Skills, construction@per.gov.ie for advice.
- **Form of Tender and Schedule (FTS9)** - Complete the pre-tender elements of the Form of Tender and Schedule.

Section 9: Instructions to Tenderers

The Instructions to Tenderers includes detailed instructions for Contracting Authorities and applicants. It acts as the Invitation to Tender, sets the rules for the conduct of the tender and award, and includes the Award Criteria. Contracting Authorities, construction technical professionals and procurement professionals should familiarise themselves with the document in its entirety before using and seek advice if needed from construction@per.gov.ie.

Below is an overview of some of the key features of the Instructions to Tenderers (ITT) Documents.

The CWMF Consultancy Services ITTs are used for the following contracts:

- **COE1 Standard Conditions of Engagement for Consultancy Services (Technical)**
- **COE2 Standard Conditions of Engagement for Archaeology Services**

Both services contracts use the same Instructions to Tenderers Templates. There are four templates depending on whether the Client chooses:

- Open Procedure or Restricted Procedure
- Tendered Hourly Rates or Calculated Time Charges

The choice between open and restricted procedure should be made with respect to the particular contract services scope in terms of its estimated cost and complexity – Section 4.4 sets out some further considerations. In terms of rates, it should be noted that Calculated Hourly Rates **are not** eligible for adjustment for inflation – because the salary data used to calculate the rates is current at the point the calculation takes place.

The options are thus:

- **ITTS1a** – Instruction to Tenderer for Services (Restricted Procedure) Using Formula to Calculate Hourly Rates.
- **ITTS1b** – Instruction Tenderer for Services (Restricted Procedure) Where Tendered Hourly Rates are to be used
- **ITTS2a** – Instruction to Tenderer for Services (Open Procedure) Using Formula to Calculate Hourly Rates.
- **ITTS2b** – Instruction for Tenderer for Services (Open Procedure) Where Tendered Hourly Rates are to be used.

9.1 Tender Evaluation Criteria

The award criterion for consultancy services (both technical and archaeological) is the Most Economically Advantageous Tender.

The Client is obliged to identify the award criteria including any sub-criteria clearly and in sufficient detail in the Particulars to the Instructions to Tenderers. In most consultancy contracts the quality of the technical services features highly and therefore the Most Economically Advantageous Tender (MEAT) is used.

The criteria should be relevant to the specific contract and appropriate to the nature, type and complexity of the project particularly for the specific technical services for that project, and where no weightings are allocated, they should be stated in descending order of importance. If weightings have been allocated, they should be stated. Refer to Article 67 of Directive 2014/24/EU.

While the quality/price ratio will differ across project types and specific contract scope, the policy approach and core principle is that price must be given significant weighting without undermining quality.

9.2 Typical Price/Quality Ratios

Typical Ratios to be used for Price and Quality are outlined below

Category of Project	Ratio	
	Quality	Price
Feasibility Report and Investigations (Stage i)	80	20
Innovative and imaginative design projects, major conservation and restoration projects	80	20
Most Construction Projects	70	30
Repeat and Straightforward Projects	40	60
Straightforward repairs and maintenance projects	20	80

Table 8

9.3 Quality Criteria Examples

In all cases price must be included as an important criterion. Some examples of quality criteria are outlined in Table 9 below. The ITT templates allow for six award criteria and associated sub-criteria. Contracting Authorities must balance choosing appropriate number and detail of award criteria and sub-criteria against the burden on tenderers in preparing responses, inclusion of Small Medium Enterprises and resources required for Contracting Authorities to assess tenderers.

Criterion	Description
<p>Quality Criteria</p> <p>This is a long non-exhaustive list of award headings. Contracting authorities must consider on a contract by contract basis the criteria and sub-criteria appropriate for the particular contract.</p>	Services breakdown – Grades of staff associated with the project and the time allocated to each grade of staff by stage
	Project Delivery
	Technical ability and project staff allocated to the project (if not already assessed in the suitability assessment)
	Approach to health and safety on the project
	Approach to Risk Management on the project
	Tenderers understanding of Definitive Project Brief (i.e. Appointments from Stage ii and beyond)
	Tenderers consideration of specific contract scope of services
	Methodology for carrying out the service on the project
	Knowledge of the Contracting Authority's approval procedures applicable to the service required
	Approach to Design, Planning, Planning and Control of Costs
	Project Supervision in relation to the service required for the project
	Proficiency in Design and Specification of durable low maintenance, cost efficient, sustainable physical structures in relation to the project
	Ability to work with other technical experts in an integrated team
	Resources to deliver the services
	Share of the service contract that the tenderer intends to subcontract (Regulations 63 and 71 of SI 284 of 2016)
	Tenderer's understanding and knowledge of the service-brief
	Detail as to how the service will be delivered on time
	Communication skills and systems that are to be used to deliver the Service
	Technical assistance with after-sales service (as relevant)
	Opportunities for sustainable project management and design
	Information Management Approach
	Understanding of project appraisal requirements
	Qualitative assessment of services breakdown structure
Price	Tender Price (Calculated as outlined in ITT)

Table 9

9.4 Tender Period

The Client must allow applicants adequate time to submit a tender, and the latest date and time for receipt of same should be stated in the Particulars in the chosen ITT. Contracting Authorities should have regard for the minimum time limits for tender submissions as set out in SI 284 of 2016 (Reference Time Limits) for contracts that are above the EU procurement thresholds. Those projects below the EU thresholds should observe a minimum period of 21 calendar days (excluding public holidays) unless the service requirements are very straightforward.

In considering the minimum time limits – regardless of whether the project is above or below the EU thresholds, contracting authorities must take the complexities of a contract into account and the volume of information that the tenderers are required to submit when setting any time limits.

All tenders should be kept confidential and should not be opened until after the latest closing date and time for receipt of tenders.

It is important when assessing submitted tenders that the principle of proportionality is observed. Clarifications can be raised with tenderers to elicit information that may not have been submitted but only where it can be categorically said to have existed prior to the tender submission – this would usually apply to evidence in support of selection criteria such as insurance or turnover. If pricing information is omitted or material that is prepared to respond to technical merit criteria, that tender should normally⁶ be eliminated from further consideration.

⁶ BAM PPP PGGM Infrastructure Cooperative UA v National Treasury Management Agency (2016), where the High Court found that the NTMA had a power to accept and evaluate tender documents submitted after the tender deadline. The procurement in question involved the electronic submission of the tender and very particular circumstances applied.

9.5 Form of Tender and Schedule

Comprehensive guidance and a sample completed FTS 9 is included in [Appendix 3](#). It is helpful to have a copy of the COE1 contract to hand when completing the FTS 9.

Form of Tender and Schedule – Pre-Tender

Unlike the Instructions to Tenderers which is a tender document only, the Form of Tender and Schedule (FTS) is both a tender document and a contract document. Some entries will have been stipulated in the ITT, during the selection process and the remaining items pre-tender e.g. Management Services, Stage Performance Periods. These contract specific choices have enduring meaning and impact through the management of the contract. With the exception of the Form of Tender element of the FTS all items in the Schedule should be completed by the Client. The Schedules A and B are set out to align to each numbered clause in the Standard Conditions of Engagement (COE1).

Form of Tender and Schedule – During Tender

Tenderers submit their bid for the services within the Form of Tender section. Tenderers also submit responses to selection and qualitative award criteria for open procedure or just qualitative award criteria in the case of the restricted procedure (because the selection stage has already been completed).

9.6 Tender Evaluation

Tender evaluations should be carried out by a team with the requisite competency. A tender evaluation panel should be set up at a very early stage, and certainly no later than the latest date for receipt of tenders. The tender evaluation panel should consist of personnel who are able to establish an informed view on the issues before them. Transparency and objectivity is achieved by the publication of weighted criteria, including price, which allows a comparative assessment of tenders under each criterion.

The evaluation of the qualitative criteria should be undertaken by the evaluation panel without any prior knowledge of the price. Once the marks for the qualitative element are completed then the price may be divulged to the evaluation panel.

Evaluation is based on the proposal for the scope of services relevant to the project, evaluation of the firm should already have been carried out at pre-qualification stage. Time spent on careful evaluation during the award process will pay dividends during delivery of the service. All tenderers should be informed of the result of a tendering process without delay and at the same time using the suite of notification letters published under the Model Forms section of the CWMF - Pillar 2. A Tender Evaluation Report should be the output from the process.

9.7 Abnormally Low Tender

Where an exceptionally low tender price is received, it should be fully investigated and only if it is found to be bona fide and acceptable should it be allowed into the price evaluation part of the procedure. In the case of tenders covered by EU Directives, exceptionally low tenders should be investigated following the procedures set out in those Directives.

9.8 Interviewing Tenderers

In general the tender process should be run without recourse to interviews. Clarifications, where required, should be sought in writing from tenderers. The material in the tender submission should be adequate to assess the tender and confirm that it is from a competent firm with a proven track record.

If it is considered in an exceptional case that there is no alternative but to interview a tenderer. Interviewers should be careful not to invite or accept new information at interview, as consideration of new material would invalidate the whole procedure.

9.9 Notification

Contracting Authorities issue letters to successful and unsuccessful tenderers at the same time. Contracting Authorities are encouraged to give constructive feedback to unsuccessful tenderers. This encourages better tenders in the future and promotes competition in the market. From the point of view of tenderers this provides reassurance about the integrity of the process and helps them to understand and operate the different procedures and practices that apply in the public service. Care should be taken to ensure that confidential information such as the identity of other unsuccessful tenderers, pricing or pricing strategies of other tenderers or information that could compromise the competitive situation or infringe the intellectual property rights of others, is not disclosed.

Template notification letters are available on the CWMF Website < [here](#)>. Simply answer the model form flow chart questionnaire to access the correct letter template. Letter templates are provided for a variety of outcomes including non-compliant tenderers, apparently MEAT tenderer, letter to successful tenderer, letter to unsuccessful tenderers etc. Contracting Authorities must take care that they comply with legislative requirements in relation issue of correspondence, in particular complying with the appropriate Standstill period.

9.10 Pre-Award

Once the successful tenderer has been identified and the Standstill observed (where applicable) the Client should address any post-tender clarifications and confirm any matters that may be outstanding with the successful tenderer such as verifying tax compliance, validate insurances, etc.

The Client completes any outstanding elements of the Form of Tender and Schedule such as populating the Times Charges section in Schedule B (where applicable) with information from the successful tenderer.

9.11 Letter of Acceptance

Once all appropriate notification correspondence has been issued, any required documentation has been submitted by the successful tenderer e.g. insurance, tax clearance, collateral warranties (if applicable) etc. and the Standstill period (if applicable has elapsed), the Letter of Acceptance template can be populated and issued to the Consultant. The letter includes a list of the documents that will be included in the Contract, details of sub-consultants and collateral warranties and relevant post-tender clarifications. The Consultant acknowledges receipt of Letter of Letter of Acceptance by counter signing it and returning a copy to the Client. The Letter of Acceptance, once signed and issued by the Client, forms the contract.

9.12 Contract Execution

Following issue of the Letter of Acceptance the Client will inform the Consultant of the arrangements for the execution of the Conditions of Engagement. The Consultant shall comply with the rules regarding execution in the Particulars of the Instructions to Tenderers. This should be arranged without delay following receipt of signed Letter of Acceptance. The Client will then be in a position to issue the first instruction.

9.12.1 Particulars in ITT that have significance with respect to Execution

A final cross reference of ITT is required to check in relation to for example choice for execution of the agreement signed/under seal etc.

Written Agreements

- **Order Contract Executed** - The Agreement is located at the end of the COE1 document. As a practical matter there is no legal requirement as to who executes first but usually the Client will want to have control of the process and the documents. When the Contract is ready for execution the Client issues it in duplicate to the Consultant who executes and returns it or the Consultant is invited to the Client's offices to execute it.
- **Proper Execution** - The Client must ensure that the Consultant has executed the contract properly. The Client, will, at tender stage, have indicated whether it requires the Consultant to apply their seal or simply sign. The difference, from a practical perspective, is the length of time the Client will have to bring proceedings against the Consultant for breach. It is twelve years from the date of breach if the Contract was executed under seal by the Consultant or six years if executed under hand (signed).

Cross Checks before Countersign

- **Name** - For the Consultant ensure that the name entered is that of the party to whom the contract was awarded, and in the case of a company, not a related company. Always check against the form of tender (which in turn be checked to make sure that it is the same party who qualified or if not that there is a legally and commercially acceptable reason).
- **Seal Check**- When the Consultant has to execute under seal, check that the name of the company embossed on the paper is the same as the name in Schedule A. If in doubt request from the Consultant the Certificate of Incorporation and of the Memorandum and Articles of Association to allow appropriate checks to be undertaken.

- **Signatures** – Signatures should be legible and if not should be accompanied by the name in print underneath.

Section 10: Standard Conditions of Engagement – Contract Management

The preceding section provided an overview the consultancy engagements that may be required to deliver a building or Infrastructure project through the project lifecycle. Depending on the size and complexity of a project there may be distinct and separate consultancy procurements through the project lifecycle whether that be CWMF stage services or specialist services supporting CWMF stage appointments.

It has been outlined that decisions made through the selection and award stage of the procurement process have enduring meaning in the management of COE1 contract and must be considered very carefully.

This section provides general guidance on some of the mechanisms of a COE1 with reference to the version of the contract and its accompanying Form of Tender and Schedule (FTS9) published in September 2024. **Please refer to the current version of the Contract and FTS9 at the time of reading.** Client project managers should be familiar with COE1, FTS9 and other documents that may form part of their individual COE1. Section 11 provides a worked example relating to payment of fee, inflation adjustment etc.

10.1 Client Project Manager – Basic Information Requirements

Client Project Managers and their team should be aware whether the project and, by extension the individual COE1 contract(s), is part of a programme under the National Development Plan (NDP) or is an individual NDP Project or if neither the origin of the funding. This is important from the perspective of the funding source for the project and the reporting requirements for business case/gate approvals with reference to the Infrastructure Guidelines. They must ensure that they are in receipt of or seek all specific requirements of the relevant Approving Authority and any specific NDP programme requirements.

Client Project Managers on individual COE1 contracts should retain a copy of the signed COE1 Agreement which will confirm the version of the COE1 on the particular contract, the completed FTS9, all other contract documents referenced in the FTS9. Project Managers should ensure they are familiar with the contract clauses and particulars of the contract included in the FTS9.

New Action Inflation Adjustment - Client Project Managers must now also keep on the project file, the date the tender for individual COE1 contracts was submitted as this is now a significant date in the COE1 Contract with respect to inflation adjustment.

10.2 Fee Agreement

The Fee Agreement on individual contracts may be based solely on what is populated in the FTS9 Stage Services Tables. In addition to FTS there may also be a fee breakdown that provides more granular detail on individual scope of services items with respect to rates and time allocated by individual team members with reference to Stage, Sub-Stage and Milestone payments.

10.2.1 General points regarding payment of fees

Contracting Authorities should note the following in relation to fee payment.

Prompt Payment

The Prompt Payment of Accounts Act 1997 and the European Communities (Late Payment in Commercial Transactions Regulations 2012, SI 580 of 2012 as amended apply; Contracting Authorities should therefore ensure that all undisputed outstanding fee claims due to consultants are paid promptly.

Withholding Tax and VAT

Fee payments are to be subject to the deduction of withholding tax at the rate current at time of payment.

Construction Contracts Act

The provisions of the Construction Contracts Act (2013) apply to the engagement of works-related service providers. See Section 1 (2) of the Act for confirmation. Whilst a client and the service provider can agree payment terms that meet the minimum requirements in the Act, the schedule to the Act which determines the timing and frequency of payments applies to sub-consultants engaged by the consultant.

Travelling and Other Incidental Expenses

Travelling and other incidental expenses should be included as part of a tender price, whether this is a lump sum or a percentage fee – this should be identified as a separate item supported with appropriate back up detail to cover all expenses that will arise in connection with the service to be provided, insofar as they can be foreseen by the consultant. The actual outgoings on expenses is a consultant's risk.

The Contracting Authority should have identified what, if any, of the fee items to be priced would be considered to be Special disbursements. Specials disbursements covers the expenses incurred by the consultant in engaging specialists to undertake specific tasks in support of the project that are not already engaged as part of the design team. It might be a topographic survey or a desktop archaeological study which will be engaged and directed by the consultant but the cost for which is not included in their fee.

10.2.2 Fee Payment Stages

Payments for services on a traditional, Employer-Design project should be divided so that they correspond to the CWMF project stages, sub-stages that are being procured for the particular COE1 Contract.

As has been indicated most projects require a minimum of two COE1 procurements to move through CWMF Stage (i) to Stage (v). The procurement approach is determined by the ability to define scope of services requirements, the logical split of project stages on different types of capital projects and the variability of positioning of approval in principle i.e. Infrastructure Guidelines Gate 1 where for example on a project that is part of an NDP programme approval in principle might precede CWMF lifecycle, whereas on large or complex projects CWMF project development up to Stage(ii a)/Stage(ii b) might be required to achieve approval in principle.

On Infrastructure Projects the split might be an Early Scoping Contract to facilitate a COE1 for Stage(i) to Stage (ii b) with a separate COE1 for Stage (ii c) to Stage (v). On a building project the benefits of getting design input to definitive project brief may give rise to the Client preparing a preliminary project brief with a single COE1 lump sum for residual actions in CWMF Stage (i) and Percentage Fee for Stage (ii) to (v).

CWMF Lifecycle Stages	
Stage (i)	Feasibility/Preliminary Report Stage with output of Definitive Project Brief. On Infrastructure projects in particular e.g. transportation, CWMF Stage (i) is split into a number of sub-stages called Phases.
Stage (ii)	Design, this can be completed as a single stage or alternatively split into sub-stages
OR	
Stage (ii a)	Outline Design
Stage (ii b)	Statutory Process Design including revisions based on consent conditions.
Stage (ii c)	Detailed Design and Preparation of Tender Documents
Stage (iii)	Tender Action/Evaluation/Award Stage
Stage (iv)	Construction Stage i.e. Implementation Stage
Stage (v)	Handover Stage

Table 10

Contracting Authorities may also introduce Milestone payments with respect to particular deliverables within a stage. The fee profile should always be such that the Client never pays for services that have not as yet been performed or creates a payment profile that disproportionately front loads payment in favour of the Consultant. It is also important that the Client arrives at a fair payment profile for services performed to allow reasonable cash flow during the contract.

10.2.3 Lump Sum Payments

Agreed lump sum payments (which cumulatively equal the tendered fixed price lump sum for the service) are payable on delivery of the approved project stage (corresponding to the five discrete project stages outlined). The Contracting Authority can subdivide the lump sum even further based on milestones within a stage as referred to in the COE1 contract.

Fees for Stage (i) should be on a lump sum basis. On small scale projects that should be paid on delivery of client-approved documentation. On larger or complex projects, milestones should be created within Stage (i) or the generic Stage names open to Contracting Authorities be used to reconcile Stage (i) to a number of phases that more closely reflect the complexities of Stage (i) services at the current time with respect to, for example, non-statutory public consultation, Environmental Impact Assessment and Natura Impact Assessment Screening, landowner liaison etc. Any lifecycle created with reference to the CWMF should always be mapped to CWMF Stages to allow sector users to follow CWMF guidance.

Fees that are tendered on a lump sum basis for Stages (ii) to (v) should be subdivided into milestone payments (particularly those relating to Stage (ii)).

10.2.4 Percentage Fee Payments

A percentage fee can be tendered for Stages (ii) to (v). These should be,

- **Ideally** - converted to a lump sum as soon as the definitive project brief has been completed end of CWMF (ii a).
- **In Some Cases** - where there is significant risk related to potential material change of scope as a result of statutory planning consent or other statutory process conversion to lump sum can be done at end of Stage (ii b) or at latest once working design is complete before preparation of the tender documents i.e. midway in CWMF Stage (ii c).
- **In Exceptional Cases** the percentage fee can be applied (as outlined in the COE1 Clause 9.7,8) and capped to arrive at a Percentage Total Fee once working design is complete before preparation of tender documents, the Percentage Total Fee should be converted to lump sum as soon as project risk profile is such that material change to construction scope has been de-risked.

Where percentage fee conversion occurs later than Stage (ii a) consideration should be given to payment of fee on account by applying the percentage fee to the relevant CWMF International Cost Management Standard's (ICMS) compliant cost estimate **or lower band of capital project budget range**. Conversion to lump sum can only be actioned once. In the exceptional case outlined above where Percentage Fee is 'applied' a lump sum conversion can be actioned subsequent to the application of the percentage fee.

New Action Inflation Adjustment

On percentage fee projects the Percentage Fee conversion date is a key date that is relevant in relation to the Inflation Adjustment Mechanism. The First Adjustment Date for Inflation on Percentage Fee contracts is the later of the Base Date and the Percentage Fee Conversion in Date. In those exceptional cases where percentage fee is applied, it is the later of the Base

Date and the Percentage Fee application [Clause 9.7,8] date regardless of any subsequent lump sum conversion.

10.2.5 Percentage of Total Fee for Stage

In the Form of Tender and Schedule (FTS9) the Fee is broken down into Percentages of Total Fee for each stage. The total of these percentages should be 100%. Guidance on the appropriate breakdown of Percentage of Total Fee is usually given in sectoral guidance as it reflects the balance of services across stages for the project type e.g. housing, roads, active travel, flood management, schools etc.

Example Lump Sum

The winning tenderer bid a lump sum for Stage Services (ii) – (v) of €100,000+VAT. The Client in advance of appointment would then determine the Stage Fee to populate into the table into FTS9 by,

Stages	Percentage of Total Fee (%)	Stage Fee
Stage (ii)	35	Stage (ii) Fee = 35% of €100,000 + VAT = €35,000 + VAT
Stage (iii)	20	Stage (iii) Fee = 20% of €100,000 + VAT = €20,000 + VAT
Stage (iv)	35	Stage (iv) Fee = 35% of €100,000 + VAT = €35,000 + VAT
Stage (v)	10	Stage (v) Fee = 10% of €100,000 + VAT = €10,000 + VAT
Total	100	€100,000 + VAT

Table 11

Example Percentage Fee

The winning tender bid a Percentage Fee of 5% of the Project Construction Cost Estimate (Exclusive of VAT). The FTS9 table cannot be immediately populated post tender as the relevant Project Construction Cost Estimate is not yet known. If project timeline to percentage fee conversion is lengthy, a Client may consider applying the percentage (before contractual scheduled percentage conversion/percentage application). It would be applied to either the best available capital cost estimate or the notional capital cost. This would allow milestone/sub stage payments for cashflow purposes (subject to satisfactory completion of the services deliverables) to be paid on account. The final fee for those elements would then need to be rationalised upwards or downwards based on actual contractual percentage fee conversion/application quantum. Let's assume the Percentage Fee is applied during Stage (ii) to convert to a lump sum. The Project Construction Cost Estimate at the time the conversion was done is €5,000,000 (Ex. VAT). The Lump Sum Fee is 5% of €5,000,000 which is €250,000. The Percentage of Total Fee is then applied to the lump sum in the same way.

Stages	Percentage of Total Fee (%)	Stage Fee
Stage (ii)	35	Stage (ii) Fee = $0.05 \times \text{€}5,000,000 \times 0.35 + \text{VAT} = \text{€}87,500 + \text{VAT}$
Stage (iii)	20	Stage (iii) Fee = $0.05 \times \text{€}5,000,000 \times 0.2 + \text{VAT} = \text{€}50,000 + \text{VAT}$
Stage (iv)	35	Stage (iv) Fee = $0.05 \times \text{€}5,000,000 \times 0.35 + \text{VAT} = \text{€}87,500 + \text{VAT}$
Stage (v)	10	Stage (v) Fee = $0.05 \times \text{€}5,000,000 \times 0.10 + \text{VAT} = \text{€}25,000 + \text{VAT}$
Total	100	€250,000 + VAT

Table 12

10.2.6 Interim Payments

Stage/Sub-Stage Payments are required at a minimum. It is usual for interim payments to be included within stage in the form of Milestones for satisfactory completion of individual deliverables through Stages (ii) and (iii). Stage (iv) payments are sometimes paid on a monthly basis in line with frequency of payments to the Contractor.

All provisional payments made to the Consultant are on account and are for satisfactory delivery of the Service. This means that if payment is made for a Service that subsequently proves to be unsatisfactory then a reduced payment reflecting this can be made to the Consultant for subsequent milestone payments. An added protection to the Client is that they can reduce payments due on other contracts between the Client and the Consultant for unsatisfactory Services provided on the contract, if necessary.

10.3 Client's Changes – Service Adjustments

The Client's Change clause in the COE1 contract deals with service adjustment. It is a change initiated by the Client in the scope of the consultancy services detailed in the COE1 contract, a change may be as a result of a change to the scope of the project that is required after the definitive project brief has been determined at Stage (i) or a change in the level of service required e.g. the original contract scope of services included for five one day workshops and ten were required.

Such changes usually require an adjustment in the fees to be paid to consultants. The sections below outline how such changes are to be handled for both increased and reduced payment of fees. It must be noted that the Client is not liable for any additional fee or other payment for a change that is a consequential on the Consultant's breach of the Contract.

10.3.1 Increased Payments

Where a lump sum or percentage fee has been agreed at appointment and the provision of extra services has been approved, the fee for the additional services should be recalculated in line with the Client's Changes clause of the contract.

Lump Sum

Lump sum as tendered in Schedule B of FTS9 or by conversion to lump sum from percentage fee, the Fee is increased at the Client's choice either in proportion to the increase in those services or by the Scheduled Time Charges (i.e. tendered time charges or calculated hourly rates) applied to the extra estimated time required for increased services in Stage (ii) or the actual extra time spend on the increased Services in any other Stage.

The Client must consider when instructing change on lump sum contracts whether the modifications of the contract are in line with procurement legislation or whether a new procurement may be required (see Regulation 72 of SI 284 of 2016). The scope of service should define known services for pricing and scope items that can be priced that have a high likelihood of occurrence. Client's Changes that could not have been defined at the time of tender should, for the most part, have been anticipated in the scope of services tendered with unit rates sought on variable scope items. Budgeting for COE1 should include confidence levels in relation to outturn cost based on contract risk profile.

Percentage Fee

Client's Changes cannot be instructed in advance of the conversion of a percentage fee to lump sum or the application of the percentage fee to arrive at a Percentage Total Fee. Once a percentage fee is converted to a lump sum, changes are dealt with as above. The exception is where a percentage fee has been applied [Clause 9.7,8], the Percentage Total Fee is capped unless there is a Client instructed change. A Percentage Total Fee and consequently each percentage Stage Fee, is adjusted for any increase in the estimated Project costs by a change instructed after the estimate has been applied to calculate the Fee. It should be noted that this mechanism does not cater for change in scope of service that does not impact the capital cost of the project i.e. it is always the policy to convert to lump sum as soon as early as possible when definitive project brief has been established.

10.3.2 Reduced Payments

Lump Sum

Lump sum as tendered in Schedule B of FTS9 or by conversion to lump sum from percentage fee is reduced in proportion to the reduction in Services by a change.

Percentage Fee

A Percentage Total Fee, and consequently each percentage Stage Fee, is adjusted for any decrease in the estimate Project costs by a change after the estimate has been applied to calculate the Fee [Clause 9.7,8]. A decrease is not made in the estimated Project costs for design excluded from the Project by the change where the Consultant had duly made the design before the change was instructed.

10.4 Inflation Adjustment

Client Project Managers should familiarise themselves with the new sub clause within the Payments Clause (COE1) and the associated Form of Tender and Schedule (FTS9) where new terms are defined. Client Project Managers should read the COE Fee Adjustment Factor Methodology document available on the CWMF website.

Inflation Adjustment was introduced into the COE1 and COE2 contracts on 30 September 2024. Due to the initial fixed period, Quarter 4 2026 is the earliest possible period when inflation adjustment payments will become a contractual entitlement where the new contract was used. **The publication of the COE Fee Adjustment Factor (COE-FAF) will commence in Q4 2026 on the CWMF website and will be updated annually with respect to each Relevant Quarter.** In addition to publication of the COE-FAF, a tool has been created to assist Client Project Managers in determining the appropriate COE-FAF value to use on their individual contracts.

Indexation Years

Client Project Managers should use the tool to ascertain the Base Date which is the First Adjustment Date for those contracts tendered as Lump Sum and in relation to Tendered Time Charges.

The Base Date applies to both lump sum and percentage fees. For fees tendered as lump sum the Base Date is the First Adjustment Date. Where a percentage fee is converted or applied to a lump sum before the Base Date, the Base Date is the First Adjustment Date. Where a percentage fee is converted or applied after the Base Date, the Percentage Fee Conversion/Application date is the First Adjustment Date. The Client must input the contract specific Percentage Fee Conversion Date [9.9,10,11,12] or Percentage Fee Application Date [9.7,8] into the tool. It is the later of the Base Date or the Percentage Fee Conversion/Percentage Fee Application Dates that determines the First Adjustment Date.

The tool will determine the indexation periods from the First Adjustment Date. The Client should supply the indexation periods to the Consultant to facilitate tracking of service completions with reference to Indexation Years.

Stage Instructions

The Client Project Manager gives an instruction to commence a Stage or Sub-Stage in writing and note the date within the tool and the expected completion date per schedule/contract programme.

Programme/ Progress

In accordance with standard practice the Client Project Manager should continue to assess the progress of the service against programme. It would be usual for Consultant Services to include updating the Project Programme, providing monthly progress reports etc. Client to monitor delays to any element of the Service caused by Consultant breach.

Client's Changes

If Client's Changes arise on Lump Sum or by conversion to Lump Sum in case of Percentage Fee and Tendered Time Charges have been chosen at tender, the Fee quantum for Change is worked up based on the Tendered Time Charges. The inflation adjustment is determined in a similar manner to the scheduled/converted lump sum as it applies with respect to when the services arising from the Change instruction are performed.

Assess Draft Invoices

Client Project Manager on COE1 Contract should:

1. Assess whether the service has been performed satisfactorily (if not revert to Consultant).
2. If the Service has been performed satisfactorily, consider whether the performance period indicated by the Consultant is in keeping with reality of project progress (with respect to Programme, Progress Reports etc.).
 - a. If no - revert to Consultant.
 - b. If yes - check if the service was performed during period scheduled by checking Stage/Sub-Stage/ Milestone commencement date and expected completion date. This information can be stored in the tool. If yes go to Step 3.
 - c. If delay is due to a breach by the Consultant, determine whether delay caused the service or part thereof to be performed in a subsequent indexation period. If no - go to Step 3.
 - d. If yes - go to Step 3 but compare COE-FAF when the service was performed versus when it should have been performed and choose the lower.
3. Use the tool to determine whether service was undertaken during the fixed period of the particular contract and not eligible for inflation adjustment or if not the applicable COE-FAF(s).
4. Advise Consultant that they can proceed to submit their invoice and what (if any) COE-FAF applies to the Invoice. The COE-FAF is applied to the fee to arrive at inflation adjusted fee. Invoice information should be as per Management Services requirements i.e. unadjusted fee paid to date and inflation adjustment to date information should be provided with invoice information.

10.5 Deviation from Pre-tender Budget

The Budgetary Control mechanism [Clause 12] refers to the importance and value in the public interest of accurate estimating of the project construction cost. 'Excess Percentage' means the percentage [if any] in excess of the percentage (inserted in Schedule A in FTS9 pre-tender based on the table below) of the tendered amount accepted by the Client for the Project construction by which that amount is above or below the last estimate approved by the Client before giving permission to start Stage (iii). The approved project pre-tender estimate should be current i.e. calculated or refreshed not later than a month prior to tenders being sought. The pre-tender estimate should be based on pricing the final tender documents before issue to tenderers i.e. at the end of Stage (iic). Where there are Bills of Quantities these should be priced by the Consultant.

For example, if the consultant's estimate of the project construction work was €5m and the tender accepted by the Client was €6m. This is a 12% increase. For a project of this value the allowed deviation is 10% so the Excess percentage would be 2%.

For projects with budgeted construction costs of	The deviation beyond which reduced fee apply is *
Up to €50m	10% (fixed)
€50m to €150m	10% to 7.5% (on a sliding scale)
€150m to €450m	7.5% to 2.5% (on a sliding scale)
€450m to €600m	2.5% to 1% (on a sliding scale)
Above €600m	1% (fixed)

Table 13

* Intermediate values can be determined by interpolating e.g. €525m would be 1.75%.

10.5.1 Fee – Adjustments where to apply

The fee adjustment mechanism should be applied only to the consultant(s) at fault in relation to fees earned up to end of the Design Stage i.e. end of CWMF Stage (ii c). This adjustment is only used at Tender Action Stage i.e. CWMF Stage (iii).

Adherence to best practice will minimise the likelihood of this provision having to be applied. Consultant Technical Professionals have a duty of care to their Clients and the project they are engaged upon. Up to date market knowledge and careful co-ordination of tender documents is vital to ensure that robust estimates are prepared in advance of the tender.

The greatest risk arises where proper co-ordination of tender documents is not undertaken prior to tender. A comprehensive review is worthwhile to ensure that the Pricing Document

accurately reflects the Works Requirements since the Pricing Document will be the basis of the pre-tender estimate.

10.6 Termination/Suspension/Prolongation

In relation to Termination, Suspension or Prolongation [Clause 14], the following key provisions are included in the Standard Conditions of Engagement (COE1) between Client and Consultant.

Termination at will

This provision allows for termination at will of a contract prior to completion of the service. Termination takes effect 14 to 28 days after the notice to terminate is served. Compensation is payable only in the event of a project proceeding without the Consultant. Where a project does not proceed, the Consultant is paid for services completed up to the date of termination at will, with a reasonable apportionment for any incomplete, unsatisfactory performance. Where termination at will arises during a stage and the project proceeds, the compensation shall be the Scheduled percentage applied to the fees for the stage in which the termination occurs. This is in addition to the Fee for services completed up to the date of termination, with a reasonable apportionment for any incomplete, unsatisfactory, performance.

Termination with cause

This provision allows either party to terminate a contract for substantial breach of contract by the other and provides compensation to the party terminating the contract. A minimum of 14 days and a maximum of 28 days must elapse after the warning notice is served before the termination may be served. This is to allow time for the breach to be remedied to prevent termination.

Suspension

This is located in Clause 4. Progress, Periods. This provision allows the Client to formally suspend the Consultant's performance of services, but only during a stage. The compensation payable for suspension is a percentage of the fees payable for the stage in which the suspension starts. (The percentage that applies to each stage is specified in Schedule B of the Form of Tender and Schedule (FTS9)). Half of the payment is due at the time of suspension and half at the end of the suspension. Emergency services and requested services related to the suspension can be directed by the Client with payment using Scheduled time charges i.e. tendered time charges or calculated hourly rates.

Prolongation

The prolongation clause was radically changed with the introduction of inflation adjustment in COE contracts in September 2024. Neither the consultant or the client is liable to the other for delay due Special circumstances (war, hostilities, civil commotion, industrial disputes) not due to its own breach of the Contract. Client liability in relation to prolongation is with reference to the suspension clause and inflation adjustment as part of the payments clause only. Except for those the Client has no liability to the Consultant [whether for breach of contract, duty of care or otherwise] for the Consultant's costs or losses for any delay to the Services.

Section 11: Worked Example of Model Fee Payment Mechanism

11.1 Introduction

A worked example is provided below relating to a building project that was tendered as a percentage fee and a civil engineering project that was tendered as a lump sum fee. It would be helpful to have the current COE1 contract, FTS9 and COE Fee Adjustment Factor (COE-FAF) Methodology to hand when looking at this example.

The examples provided are structured with an emphasis on providing the reader with a good understanding of the intention of the fee payment mechanism in the COE1 Contract. It is acknowledged that fee payment structures vary across the government sectors and can be complex. The outlined approach can be adapted to suit the fee payment protocol in place in individual sectors on individual contracts.

The earliest that Inflation payments will become actionable in COE1/COE2 contracts are those with a tender submission date in Quarter 4 of 2024 which will give rise to earliest eligible inflation payments in **Quarter 4 of 2026**.

To facilitate the provision of worked examples, historical calculations of the COE-FAF will be used in this example. **The COE-FAF values used in the examples have no relevance to current or future contracts.**

COE-FAF values will be published on the CWMF Website in commencing in October 2026 with reference to Relevant Quarter 4 and contracts with a First Adjustment Date falling between 01 October 2026 and 31 December 2026. It is these values and continued published values that will be contractually relevant.

11.2 Building Project – Percentage Fee (only)

11.2.1 Project Description

This is a construction project to deliver a large secondary school. The Department of Education has prepared the Developed Project Brief for the school project in-house. Due to particular site constraints, design, and statutory planning risks it has been decided that Design Team input would be necessary to arrive at the definitive project brief.

While the scope of services requirements for secondary school projects are known, the scope of the construction project is not fully known. The Client has access to a multi-party framework for integrated design team using the COE1 contract. There are five design teams on the framework. The framework requires the Client to enter into individual contracts with each member of the integrated design team. Each team is made up of an Architect (as team lead), a Civil and Structural Engineer, a Mechanical and Electrical Engineer, a Quantity Surveyor and a PSDP.

The framework uses a mini competition to appoint a design team, a process that is similar to the second stage of the Restricted Procedure. Instructions to Tenderers ITTS 1b is chosen which relates to works related services with tendered time charges. The appointment is for Stages (ii) to (v) and given that the Definitive Project Brief has not been arrived at it is considered prudent to Tender as a percentage fee. The intention is to convert to lump sum at the end of Stage (ii a). This example will track fee payments to 'Murphy Architects' the Design Lead. Murphy Architects bid a Percentage Fee of 4.5%. The same principles would be applied to the individual COE1 contracts for each of the Design Team members.

The Tender Submission Date = 20 February 2014

The tender submission date can be used to determine the Base Date. Tender Submission to Base Date is the minimum fixed period with respect to inflation adjustment in a COE1 contract tendered as percentage fee. The [COE-FAF tool](#) will automatically calculate the Base Date once the Tender Submission Date is inputted.

The Base Date = 01 March 2016

Base Date means the date that is the first day of the 25th month falling after the date that is 10 days before the last date of receipt of the Consultant's tender for the Services, or, if there was none, 10 days before the Client received the Consultant's tender for the Services.

On a percentage fee contract all that can be known at the outset is the minimum period that will be fixed in relation to inflation adjustment. So we can say this contract will be fixed at a minimum until 01 March 2016.

The tender assessment was undertaken and the Contract was executed with the winning design team during June 2014.

Contract Execution Date = 15 June 2014

Instruction to commence Stage (ii a) = 01 July 2014

The Instruction to Tenderers and Management Services in Schedule B of FTS9 indicated that conversion to lump sum would occur at end of Stage (ii a).

The relevant ICMS template and relevant elements (as listed below in Table 13) was used to report the cost estimate at the end of Stage (ii a)

Building Capital Cost Estimate at end of Stage (ii a) = €20 Million + VAT

As scheduled the percentage was applied to the estimate and converted to a lump sum.

Lump Sum Fee = €20,000,000 x 0.045 = €900,000

2	Construction Costs (CC)
2.01	Demolition, site preparation and formation
2.02	Substructure
2.03	Structure
2.04	Architectural works Non-structural works
2.05	Services and equipment
2.06	Surface and underground drainage
2.07	External and ancillary Works
2.08	Preliminaries Constructors' site overheads general requirements

Table 14

Stages fees before the fee adjustment factor has been applied are as Table 15 below:

Stage Name	Stage Duration	Fee Apportionment		Worked Example – Fee
		Stage (%)	Cumulative (%)	
Sub Stage (ii a) Design – Outline Sketch Scheme	6 Months (Scheduled) 7 Months (Actual)	16%	16% (€144,000 + VAT)	Payment on completion Sub-Stage (ii a) €900,000 x 0.16 = €144,000 + VAT Note: Percentage Fee applied to the estimate at end of Stage (ii a)
Sub-Stage (ii b) Design for Statutory Approval	12 Months (Scheduled) 15 Months (Actual)	15%	31% (€279,000 + VAT)	3 x Milestone payments of €35,000, €35,000, €65,000 (all + VAT) €900,000 x 0.15 = €135,000 + VAT
Sub-Stage (ii c) Detailed Design and Tender Document Preparation	9 Months (Scheduled) 9 Months (Actual)	20%	51% (€459,000 + VAT)	3x Milestone payments of €50,000, €50,000, €80,000 (all + VAT) €900,000 x 0.20 = €180,000 + VAT
Stage (iii) Tender Action, Evaluation and Award	9 Months (Scheduled) 11 Months (Actual)	5%	56% (€504,000 + VAT)	Stage Payment €900,000 x 0.05 = €45,000 + VAT
Stage (iv) Construction Stage	24 Months (Scheduled) 26 Months (Actual)	40%	96% (€864,000 + VAT)	24 x €15,000 payments (all + VAT) €900,000 x 0.40 = €360,000 + VAT
Stage (v) Handover Stage	12 Months	4%	100% (€900,000 + VAT)	Stage Payment €900,000 x 0.04 = €36,000 + VAT

Table 15

Stage/Sub-Stage commencement Instruction Dates and actual completion dates for this example project are provided in the table below.

Stage/Sub Stage	Stage Start Date (Client Instruction)	Stage Finished Date	Delay
(ii a) (1 Invoice)	1 st July 2014	1st February 2015*	1 month delay not due to consultant.
(ii b) (3 Invoices)	1 st March 2015	1 st June 2016	3 months delay not due to consultant
(ii c) (3 Invoices)	1 st July 2016	1 st April 2017	As scheduled
(iii) (1 Invoice)	1 st June 2017	1 st May 2018	2 month delay due to consultant
(iv) (24 Invoices)	1 st January 2019	1 st March 2021	2 month delay not due to consultant
(v) (1 Invoice)	1 st March 2021	1 st March 2022	As scheduled

Table 16

* 01 February 2015 is the Percentage Fee Conversion Date – This is a significant date for inflation adjustment.

On contracts tendered as a percentage fee the First Adjustment Date with respect to inflation is the later of the Base Date and the Percentage Fee Conversion Date. This is outlined in FTS9. The Base Date can be determined at the beginning of the contract using the tender submission date, the Percentage Fee Conversion Date is contract specific. The tool will compare the dates to arrive at the First Adjustment Date.

Base Date = 01 March 2016

Percentage Fee Conversion Date = 01 February 2015

As the Base Date occurs later than the Percentage Fee Conversion Date in this case,

Base Date = First Adjustment Date = 01 March 2016

Relevant Quarter = Quarter 1

Indexation Year	Period
Fixed Period Stage (ii a) was performed during fixed period Stage (ii b) Milestone 1 and Milestone 2 and 30% of Milestone 3	01 July 2014 to 29 February 2016
First Indexation Year (ii b) 70% of Milestone 3 (ii c) Milestone 1, Milestone 2, 70% Milestone 3	01 March 2016 to 28 February 2017
Second Indexation Year (ii c) 30% Milestone 3 (iii) 80% Stage	01 March 2017 to 28 February 2018
Third Indexation Year (iii) 20% Stage (iv) 2 Invoices	01 March 2018 to 28 February 2019
Fourth Indexation Year (iv) 12 Invoices	01 March 2019 to 29 February 2020
Fifth Indexation Year (iv) 10 Invoices	01 March 2020 to 28 February 2021
Sixth Indexation Year (v) 1 Invoice	01 March 2021 to 28 February 2022

Table 17

The Client must inform the consultant when known of the First Adjustment Date and consequently the date range of each indexation year for the contract. Consultants, when submitting draft invoices, must indicate within which Fixed Period and/or Indexation Year(s) the services were performed.

This will facilitate the Client checking the timeline and advising the Consultant on the appropriate COE-FAF. Client Project Managers should ensure that sufficient tracking is being undertaken through receipt of progress reports and programme, progress meetings and sight of drafts and services in progress to verify when services were completed.

Fee adjustment is paid with reference to when the services were performed regardless of when the related draft invoice is submitted to the Client for approval to submit Invoice for payment. For the purposes of this example, it is assumed that the Consultant has submitted draft invoices for approval that indicate the Fixed period or indexation year(s) the service was performed during and that the Client has approved that the service has been performed satisfactorily and that they agree that it was performed as outlined by the Consultant.

The COE-FAF will be published annually for the four Relevant Quarters for First and Subsequent indexation Years. The tool can be used to determine the First Adjustment Date, relevant quarter and COE-FAF of individual contracts. A step-by-step video tutorial has been produced on selection of the appropriate COE-FAF and utilising the tool, that is available [here](#).

The table below shows what the COE-FAF table might look like once the mechanism has been in operation for 10 years or so. In the case of this example the Base Date falls during Q1 2016. So Q1 is the Relevant Quarter and Q1 tables will apply to this contract. The relevant line of the table is highlighted in yellow. The values will be published annually COE-FAF of 1.00 in the first adjustment year, 1.00 in the second adjustment year, 1.01 in the third adjustment year etc.

Base Date Falling Within	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
Q1-2014	1.00	1.00	1.00	1.00	1.01	1.03	1.05	1.07	1.11	1.14	1.17
Q1-2015		1.00	1.00	1.00	1.01	1.03	1.05	1.07	1.10	1.13	1.17
Q1-2016			1.00	1.00	1.01	1.03	1.04	1.07	1.10	1.13	1.17
Q1-2017				1.00	1.01	1.03	1.05	1.07	1.10	1.13	1.17
Q1-2018					1.01	1.03	1.04	1.07	1.10	1.13	1.17
Q1-2019						1.02	1.04	1.06	1.10	1.13	1.16
Q1-2020							1.02	1.05	1.08	1.11	1.15
Q1-2021								1.03	1.06	1.09	1.13
Q1-2022									1.03	1.06	1.10
Q1-2023										1.03	1.07
Q1-2024											1.04

Table 18

The table below shows the indexation year dates and associated COE-FAF on this contract.

Indexation Year	Relevant Quarter	Start Date	End Date	COE FAF
First Indexation Year	Q1	1/3/2016	28/2/2017	1.00
Second Indexation Year	Q1	1/3/2017	28/2/2018	1.00
Third Indexation Year	Q1	1/3/2018	28/2/2019	1.01
Fourth Indexation Year	Q1	1/3/2019	28/2/2020	1.03
Fifth Indexation Year	Q1	1/3/2020	28/2/2021	1.04
Sixth Indexation Year	Q1	1/3/2021	28/2/2022	1.07

Table 19

The table below tracks expenditure through the contract. In reality this process would be undertaken on an invoice by invoice basis through the duration of the contract. As illustrated some services may straddle more than one inflation adjustment period.

Invoice	Fee (Exclusive VAT)		Inflation Adjusted Fee (Exclusive VAT)	Inflation Payment (Exclusive VAT)	Adjusted Fee (Exclusive VAT)
Stage (ii a)	€144,000		Fixed Period	€0 – Fixed	€144,000
Stage (ii b) MS1*	€35,000		Fixed Period	€0 – Fixed	€35,000
Stage (ii b) MS2	€35,000		Fixed Period	€0 – Fixed	€35,000
Stage (ii b) MS3	€65,000	€19,500	Fixed Period	€0 – Fixed	€65,000
		€45,500	1.00 x €45,500	€0 – IY1**	
Stage (ii c) MS1	€50,000		1.00 x €50,000	€0 – IY1	€50,000
Stage (ii c) MS2	€50,000		1.00 x €50,000	€0 – IY1	€50,000
Stage (ii c) MS3	€80,000	€56,000	1.00 x €56,000	€0 – IY1	€80,000
		€24,000	1.00 x €24,000	€0 – IY2	
Stage (iii) Stage Payment		€36,000	1.00 x €36,000	€0 – IY2	€45,000***
		€9,000 Consultant Delay	1.00 x €9,000 or 1.01 x €9,000	€0 – IY3	
Stage (iv) Invoice 1	€15,000		1.01 x €15,000	€150 – IY3	€15,150
Stage (iv) Inv. 2	€15,000		1.01 x €15,000	€150 – IY3	€15,150
Stage (iv) Inv.3	€15,000		1.03 x €15,000	€450 – IY4	€15,450
Stage (iv) Inv. 4	€15,000		1.03 x €15,000	€450 – IY4	€15,450
Stage (iv) Inv.5	€15,000		1.03 x €15,000	€450 – IY4	€15,450
Stage (iv) Inv.6	€15,000		1.03 x €15,000	€450 – IY4	€15,450
Stage (iv) Inv.7	€15,000		1.03 x €15,000	€450 – IY4	€15,450
Stage (iv) Inv.8	€15,000		1.03 x €15,000	€450 – IY4	€15,450
Stage (iv) Inv.9	€15,000		1.03 x €15,000	€450 – IY4	€15,450
Stage (iv) Inv.10	€15,000		1.03 x €15,000	€450 – IY4	€15,450
Stage (iv) Inv.11	€15,000		1.03 x €15,000	€450 – IY4	€15,450
Stage (iv) Inv.12	€15,000		1.03 x €15,000	€450 – IY4	€15,450
Stage (iv) Inv.13	€15,000		1.03 x €15,000	€450 – IY4	€15,450
Stage (iv) Inv.14	€15,000		1.03 x €15,000	€450 – IY4	€15,450
Stage (iv) Inv. 15	€15,000		1.04 x €15,000	€600 – IY4	€15,600

Invoice	Fee (Exclusive VAT)	Inflation Adjusted Fee (Exclusive VAT)	Inflation Payment (Exclusive VAT)	Adjusted Fee (Exclusive VAT)
Stage (iv) Inv. 16	€15,000	1.04 x €15,000	€600 – IY5	€15,600
Stage (iv) Inv. 17	€15,000	1.04 x €15,000	€600 – IY5	€15,600
Stage (iv) Inv. 18	€15,000	1.04 x €15,000	€600 – IY5	€15,600
Stage (iv) Inv. 19	€15,000	1.04 x €15,000	€600 – IY5	€15,600
Stage (iv) Inv. 20	€15,000	1.04 x €15,000	€600 – IY5	€15,600
Stage (iv) Inv. 21	€15,000	1.04 x €15,000	€600 – IY5	€15,600
Stage(iv) Inv. 22	€15,000	1.04 x €15,000	€600 – IY5	€15,600
Stage (iv) Inv. 23	€15,000	1.04 x €15,000	€600 – IY5	€15,600
Stage (iv) Inv. 24	€15,000	1.04 x €15,000	€600 – IY5	€15,600
Stage (v) Stage	€36,000	1.07 x €36,000	€2,520 – IY6	€38,520
Cumulative Totals			€14,310	€914,310

Table 20

*MS = Milestone

** IY1, IY2 etc = Indexation Year 1, Indexation Year 2 etc.

*** **Consultant Delay** - These services were not undertaken within the scheduled time period. The delay was caused by the Consultant. Clause 9 ¹⁴ *Where the performance of any element(s) of the Services are delayed due to the Consultant's breach of contract, the Consultant's entitlement to an adjustment to the Fee for inflation for those elements of the Services so delayed shall be calculated by reference solely to the lower of the COE Fee Adjustment Factor. In this case the factors are 1.0 and 1.01 so the lower is 1.0. Thus the payment of €90 would not be made in this case.*

11.3 Civil Engineering Project – (lump sum)

11.3.1 Project Description

There is a Civil Engineering Project, the consultant is a single point design team from a multi-disciplinary consultancy company. The project was tendered as a lump sum for Stage (i). The project had a lump sum fee of €100,000 + VAT. While a single stage payment usually pertains to Stage (i) services, the Client has decided to allow for a milestone payment of €40,000+VAT on the approved options report and a second payment on the submission of satisfactory Stage (i) documents.

Tender Submission Date = 10 March 2019

The tender submission date can be used to determine the Base Date. Tender Submission to Base Date is the fixed period with respect to inflation adjustment in a COE1 contract tendered as lump sum. The OGP COE-FAF tool will automatically calculate the Base Date once the Tender Submission Date is inputted.

The Base Date = First Adjustment Date = 01 April 2021

Relevant Quarter = Quarter 2 (Q2)

Base Date means the date that is the first day of the 25th month falling after the date that is 10 days before the last date of receipt of the Consultant's tender for the Services, or, if there was none, 10 days before the Client received the Consultant's tender for the Services. The stage services breakdown is outlined below.

Stage Name	Stage Duration	Fee Apportionment		Worked Example – Fee
		Stage (%)	Cumulative (%)	
Stage (i) Options Report	18 Months Milestone on completion of options report	40%	40%	€40,000 + VAT
	Provision of approved Stage (i) Documents	60%	100%	€60,000 + VAT

Table 21

First Adjustment Date and relevant quarter on lump sum contracts can be calculated once the tender submission date is known. The fixed period in the contract extends from the first instruction to commence stage/sub-stage until the First Adjustment Date. The tool will allow calculation of the First Adjustment Date and the COE-FAF for each Indexation Year.

Stage/Sub Stage	Stage Start Date (Client Instruction)	Stage Finished Date	Delay
(i) (Milestone Invoice)	01 September 2019	01 July 2020	N/A
(i) (Stage Completion Invoice)	01 August 2020	01 June 2021	3 Month Delay during contract <u>not</u> due to Consultant Breach.

Table 22

The relevant COE-FAF values for the example contract are highlighted in yellow in the table below. The milestone element of the contract is completed before the Base Date and so is not eligible for inflation adjustment. An unexpected delay occurred following completion of the options report. This resulted in the consultant commencing the second part of Stage (i) later than programmed.

Invoice	Fee (Exclusive VAT)		Inflation Adjusted Fee (Exclusive VAT)	Inflation Payment (Exclusive VAT)	Adjusted Fee (Exclusive VAT)
Stage (i) Milestone	€40,000		Fixed Period	€0 – Fixed	€40,000
Stage (i b) Payment	€60,000	€40,000	Fixed Period	€0 – Fixed	
		€20,000	1.02 x €20,000	€400	€20,400

Table 23

The delay caused an element of the Stage services to be completed in Index Year 1 later than scheduled through no fault of the Consultant. This would result in a payment of an additional €400 + VAT to the Consultant based on a COE-FAF of 1.02.

Base Date Falling Within	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
Q2-2014	1.00	1.00	1.00	1.00	1.01	1.03	1.05	1.08	1.11	1.14	1.18
Q2-2015		1.00	1.00	1.00	1.01	1.03	1.05	1.07	1.11	1.14	1.18
Q2-2016			0.95	1.00	1.01	1.03	1.05	1.07	1.11	1.14	1.18
Q2-2017				1.00	1.01	1.03	1.05	1.08	1.11	1.14	1.18
Q2-2018					1.01	1.03	1.05	1.07	1.11	1.14	1.18
Q2-2019						1.02	1.04	1.06	1.10	1.13	1.17
Q2-2020							1.02	1.05	1.08	1.11	1.15
Q2-2021								1.02	1.06	1.09	1.13
Q2-2022									1.04	1.07	1.11
Q2-2023										1.03	1.07
Q2-2024											1.04

Table 24

11.4 Lump Sum and Percentage Fee Contracts

The COE1 contract facilitates the scheduling of some stages as lump sum and others as percentage fee in a single contract. A full lifecycle appointment should only be countenanced on straightforward projects. Where it is envisaged to use this approach, the Client must either prepare themselves or procure a consultant to prepare the Preliminary Project Brief within Stage (i). This is the minimum that is needed to facilitate a full lifecycle appointment for the remainder of Stage (i) and Stages (ii) to (v). Stage (i) should always be tendered as a lump sum, Stage (ii) in this case may be tendered as a percentage fee as the definitive project brief would be yet to be fully developed.

From an inflation adjustment perspective, the First Adjustment Date relating to lump sum applies for the element of the fee scheduled as lump sum. In this case at the outset of the project the First Adjustment Date could be determined for the lump sum portion using the tender submission date. Only those Stage (i) services performed after the First Adjustment Date (if any) with reference to the lump sum would be eligible for inflation adjustment.

Stage (ii) Services would be eligible for inflation on the later of the Base Date and the Percentage Fee Conversion Date.

It would be unusual for a percentage fee to proceed a stage with a lump sum. One scenario where it may arise is on a Contractor-Designed contract where the initial sub-stages of Stage (ii) were scheduled as a percentage fee and the Client's consultant through the subsequent Contractor-Designed contract (stages (iv) & (v)) was scheduled as a lump sum. In that case the First Adjustment Date for the percentage fee element would be the later of the Base Date and the Percentage Fee Conversion Date. For the element of the fee that was tendered as lump sum, inflation adjustment is approached as per lump sum example in Section 3.

11.5 Client Changes

Client's Changes may be instructed by the Client on lump sum contracts and on percentage contracts that have been converted to lump sum. In the exceptional case where application of the percentage fee is used, Client Changes can be instructed only after application of the percentage fee after working design before preparation of the tender documents. In the case of a percentage fee, there is no mechanism in the contract to facilitate instruction of Client's Change before the conversion to lump sum or application of the percentage fee. An additional service associated with a Client Change that does not result in any change to the estimated value of the works would not be compensated where a percentage fee is current.

11.5.1 Client's Changes – Lump Sum, Lump Sum by conversion

Client's Changes are instructed by the Client, this can relate to an increase or decrease in scope. In the case of an increase in scope, a scope of services reflective of the additional service involved should be issued to the Consultant. Additional scope should have been anticipated insofar as is possible in the client risk register and anticipated in the scope of service, an appropriate budget allowance should have also been made. The Client has the option to seek a fee proposal in form of a pro-rata fee increase or calculated hourly rates or tendered time charges depending on which was chosen at the time of tender. In the case of tendered time charge, depending on the CWMF stage, tendered time charges can be applied to an estimate of the time required to arrive at a lump sum for the Client Change or tendered time charges are applied to the actual time.

Calculated time charges are calculated at time of change instruction or as indicated in the Management Services in the FTS9 for the particular contract using the formula in ITTS1a and ITTS2a (Section 5.5 Pricing). As calculated time charges are arrived at using current salary information, they are not eligible for inflation adjustment.

In the case of Client's changes arrived at using tendered time charges or through pro-rata of a scheduled lump sum, the fee associated with the Client Change should be agreed based on scheduled rates and recorded. These fees may be eligible for inflation adjustment depending on when the services related to the change are undertaken. The same approach is taken for these elements of the fee as outlined above. Inflation adjustment is considered and applied with reference to when the service was undertaken and advised by the Client at the time the invoice is processed once the services relating to the change have been performed satisfactorily. In the case of a contract where the lump sum was scheduled, the First Adjustment Date is the Base Date. In the case of a percentage fee that is later converted to a lump sum the First Adjustment Date is the later of the Base Date and the Percentage Fee Conversion Date.

11.5.2 Client's Changes – Percentage Total Fee

In the exceptional case where Percentage Fee might be applied (Clause 9.7.8) rather than converted to a lump sum and a Client Change (Clause 11.8.9) follows that gives rise to an increase in capital cost, the fee for each of the scheduled stages is updated. The Percentage Total Fee not already paid to the Consultant is eligible for inflation adjustment with reference to the First Adjustment Date, which in this case is the later of the Base Date and the Percentage Fee Application date. Inflation adjustment is determined with reference to when the service was performed regardless of when the invoice is submitted.