

Implementation of the interim measures to amend the Public Works Contracts

Implementation of the interim measures for amendments to the Public Works Contracts, as published in the Report on the Review of the Performance of the Public Works Contracts, following engagement with industry stakeholders

Construction Procurement Policy Unit of the Office of Government
Procurement

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Introduction

A review of the Public Works Contracts commenced in December 2013 with a call for submissions from industry stakeholders. A number of industry groups, private individuals and public sector bodies contributed to the review. In May 2014 an on-line questionnaire was launched with an invitation to all those involved in the delivery of public works to submit key performance data – feedback on this was disappointing.

In December 2014 the Government Contracts Committee for Construction, (GCCC), published its *Report on the Review of the Performance of the Public Works Contract*. The report proposed 4 interim measures to amend the Public Works Contracts “*In recognition of the changed market and to encourage more realistic pricing of public works projects...*”

These measures included:

1. reducing the level of risk currently being transferred by making the bill of quantities the primary reference document for tender purposes on employer-designed contracts;
2. direct tendering of specialist works packages where specialist works make up a significant proportion of the overall project value or where they have a significant impact on the long-term performance of the project;
3. in awarding works projects, a greater concentration on quality criteria that are directly linked to the project in order to deter unsustainable pricing, and;
4. the inclusion of informal dispute resolution methods to reduce the volume of disputes that are currently being referred to the formal procedures prescribed in the contract.

Following publication of the report the Construction Procurement Policy Unit of the Office of Government Procurement, (OGP) invited representative groups from the construction industry to make further representations on the 4 interim measures proposed. In addition, submissions were received from individuals engaged in various capacities in the sector.

The following are the list of representative groups who engaged with the OGP:

1. The Association of Electrical Contractors (Ireland) – [AECI](#).
2. Chartered Institute of Arbitrators – Irish Branch – [CIArb](#).
3. Engineers Ireland – [EI](#).
4. The Royal Institute of the Architects of Ireland – [RIAI](#).
5. Society of Chartered Surveyors Ireland – [SCSI](#).
6. Association of Consulting Engineers of Ireland – [ACEI](#).
7. Construction Industry Federation – [CIF](#).
8. Various public bodies.

Part 1 – Comments and representations on interim measures

Following publication of the *Report on the Review of the Performance of the Public Works Contracts*, the OGP arranged for bilateral meetings with industry stakeholders to facilitate a forum for discussion on the interim measures. At the outset the OGP informed all stakeholders that the intent was to have interim measure 1, 2 and 4 enacted by end of the 2nd quarter 2015. Interim measure 3 would be a longer term goal and the OGP would invite industry stakeholders to sit on a working group, chaired by the OGP, to further expand the measure prior to its committal.

Representative parties were given the opportunity within the bilateral meetings to openly express their views on the interim measures. Members of the OGP took the opportunity to interrogate the views expressed and further offered the parties the opportunity to formally make submissions thereafter to either express the views of their representative body or their own personal views if desired.

In addition to bilateral meetings with industry stakeholders, the OGP engaged with various public bodies through a one-day workshop. Various officials with the appropriate competencies presented the interim measures and a discussion followed where those attending were invited to express their views.

Following conclusion of the meetings and engagements the OGP tabulated the views expressed by all, collating the information under the subheading of the individual interim measures. In general the common thread throughout was one of support for the measures with provisos expressed as to how each interim measure should be structured. Some bodies and individuals elected not to comment on certain interim measures instead concentrating on those that they view as most relevant to them.

Following collation and review of the representations made to the OGP, the Construction Procurement Policy Unit has set out the details as to how the interim measures are to be implemented in Part 2 of this report.

Part 2 – Implementation of interim measures

Interim measure 1

reducing the level of risk currently being transferred by making the bill of quantities the primary reference document for tender purposes on employer-designed contracts;

Interim measure 1 proposes amending the existing situation where the Employer has the option to transfer the risk of quantities to the Contractor in PW-CF1, PW-CF3 and PW-CF5. It is proposed to remove this option, and retain the risk by making the Bill of Quantities, (BoQ.), the primary reference for pricing purposes in PW-CF1, PW-CF3 and PW-CF5

The current situation under clause 1.3.1 of the contract places the Pricing Document, (which will include the BoQ.), below the Works Requirement when inconsistencies are to be resolved. The contract is in essence a drawings and specification contract for both pricing and construction. The BoQ, if produced, is used to support uniformity or resolve inconsistency in the higher ranked documents, as a tool for the pricing of adjustments to the Contract Sum and evaluating interim payments

The proposed interim measure will make production of a BoQ mandatory for PW-CF1, PW-CF3 & PW-CF5¹ and elevate the BoQ to the level of the Works Requirements where it will become the primary reference document for the purposes of pricing the contract in the tender stage. The Contractor will now be able to rely upon the BoQ to arrive at their Tender Sum. The drawings and specification shall remain the primary reference documents for the purposes of delivering the finished project, and the following are examples of how inconsistencies between the BoQ and the Works Requirements Documents, (WRD), will be resolved:

- 1. Where a Works Item is described in the WRD but has not been included in the BoQ;**
 - a. The Contractor will be required to complete the works, if so directed by the Employer's Representative, (ER), and shall be entitled to an adjustment to the Contract Sum in accordance with Cl.10 of the Contract.
 - b. The ER or Employer may direct the Contractor not to complete the Works Item, but there will be no entitlement to adjust the Contract Sum in accordance with Cl.10.9 of the Contract.

- 2. Where a Works Item is described in the BoQ but has not been included in the WRD;**
 - a. The ER or Employer may direct the Contractor to complete the Works Item but the Contractor shall have no entitlement to an adjustment to the Contract Sum in accordance with Cl.10.
 - b. The ER or the Employer may direct the Contractor not to complete the Works Item and the ER or Employer shall be entitled to adjust the Contract Sum in accordance with Sub-CL.10.9 of the Contract.

¹ PW-CF6 makes no reference to Works Requirements and so a different approach is required. The same policy imperative will apply as to PW-CF1, CF3 & CF5 where a BoQ is named as an 'other document in this Contract' in the Schedule to the Short Public Works Contract (PW-CF6).

3. Where both the BoQ and the WRD have included the Works Item but an inconsistency exists between the quantity;

- a. If the BoQ indicates a larger quantity than the WRD and the ER directs that the quantity as shown in the Works Requirements is to be completed, then the ER or the Employer shall be entitled to adjust the Contract Sum in accordance with Sub-CL.10.9 of the Contract
- b. If the BoQ indicates a lesser quantity than the WRD and the ER directs that the quantity as shown in the WRD is to be completed, then the Contractor shall be entitled to an adjustment to the Contract Sum in accordance with Cl.10 of the Contract
- c. If the WRD indicates a larger quantity than the BoQ and the ER directs that the quantity as described in the BoQ is to be completed, then neither the Contractor, the ER nor the Employer shall have entitlement to adjust the Contract Sum in accordance with Cl.10 of the Contract.
- d. If the WRD indicates a lesser quantity than the BoQ and the Employer's Representative directs that the quantity as described in the BoQ is to be completed, then neither the Contractor, the ER nor the Employer shall have entitlement to adjust the Contract Sum in accordance with Cl.10 of the Contract.

Important Notes

1. All elements of the works must be described in the BoQ prior to going to tender under an unamended, agreed method of measurement². The Employer shall be required to define the agreed method of measurement that the BoQ is to be produced in accordance with, when engaging the services of the cost controller. All BoQs shall be produced by a competent cost control expert, (such as a Quantity Surveyor) following interrogation of the design. BoQs shall not be produced by specialist consultants without the input of a competent cost control expert.
2. For M&E works it is proposed that *Supplement 2 of ARM 4* shall be used until such a time that the industry has up skilled to produce fully measured BoQs. A defined period of 18 months would be a reasonable period to permit the acquisition of such capabilities.
3. The QS should be given overall responsibility for the production of the BoQ on a building project.
4. The finalised BoQ shall be interrogated by the Design Team Leader to ensure it is an accurate reflection of the designed works.
5. The Contractor is required to deliver a project in accordance with the WRD, or as so directed by the Employer's Representative and the Contract Sum shall be adjusted up or down to reflect any inconsistencies between the Bill of Quantities and the WRD and ER Directions.
6. The risk of quantities will remain with the Employer under schedule K17 only where such a risk is not affected by another risk that has been passed to the contractor elsewhere under schedule K. For example where the risk of unforeseeable ground conditions under schedule

² These shall be ARM4 for building works, CESSM3 for standard civil engineering works, (both as amended for use with the Public Works Contracts), and the NRA's MMRW for road construction.

K19 is passed to the contractor and a situation arises where quantities of defined work increases then K19 shall overrule K17. This shall be noted at the relevant item in the BoQ.

7. Inclusion of Provisional Sums, Provisional Quantities or Provisional Descriptions within the Bill of Quantities in lieu of adequate design will not be allowed, [except where temporarily used until the successful completion of direct tendering of a specialist by the Employer for the purposes of *nomination* or *novation* all such sums must be converted to lump sums prior to finalising the main contract]
8. No contingency sums shall be included in the BoQ at tender stage.
9. Claims arising from inconsistencies between the BoQ and the other Works Requirements Documents will be subject to the same rules as all other claims, i.e. sub clause 9.3, 10.3 & 10.9.
10. It is proposed to define the Pricing Document (in fixed text) in the schedule Part 1B to PW-CF1 as a BoQ to ARM 4, (as amended for Public Works Contracts), in PW-CF3 as a BoQ to CESSM/MMRW, (as amended for Public Works Contracts), and in PW-CF5 three options will be provided depending on whether the subject is a building or civil engineering or roads construction contract. This will preclude the inclusion of any other document as a Pricing Document.

Effects of measure on the Conditions & Schedules

| PW-CF | Doc Title | Clause | Interim measure | Comment |
|----------------|------------|------------|-----------------|---|
| 1, 3 & 5 | Conditions | 1.3.1 | 1 | <i>Pricing Document currently lower in hierarchy of Contract Documents than the Works Requirements. to be amended to state 'Fifth, the Works Requirements and the Pricing Document'</i> |
| 1, 3 & 5 | Conditions | 1.3.4 | 1 | <i>Revised wording required to define how inconsistencies will be resolved for the purposes of project completion</i> |
| 1, 2, 3, 4 & 5 | Conditions | 11.1.1 (3) | 1 | <i>The detailed breakdown shall be based upon the BoQ</i> |
| 1, 3 & 5 | Schedule | Part 1 B | 1 | <i>The pricing document will be a BoQ to an agreed method of measurement</i> |
| 1, 3 & 5 | Schedule | Part 1 K17 | 1 | <i>Redraft of K17 required where risk of quantities is held by the Employer - compensation event only in fixed text.</i> |
| 6 | Conditions | 1.4 | 1 | <i>Clause to be reworded</i> |

Interim measure 2

direct tendering of specialist works packages where specialist works make up a significant proportion of the overall project value or where they have a significant impact on the long-term performance of the project;

Interim measure 2 proposes an addition to the existing provision for *novation* to allow for a separate tendering process by the Employer of Specialists Contractors who would then be *nominated* to the Main Contractor as sub-contractors. The tendered price for the specialist works package(s) will either be included in the Pricing Document in advance of the Main Contract tender if the specialist works tender(s) is concluded prior to the Main Contract tender or by way of an adjustment to the Main Contractor's Tender Sum in advance of setting the Contract Sum by means of substituting the specialist works tender sum(s) in place of the pre-determined Prime Cost Sum(s).

The current situation under PW-CF1 to PW-CF5 inclusive allows for a separate tender process for specialist work packages, following the tender process the Employer awards a public works contract with the Specialist on the understanding that the contract will be *novated* and the Main Contractor shall take the place of the Employer. One of the main criticisms of the current procedure is that the public works contracts are main contract forms and they do not suit the nature of sub-contract works once novated.

The interim measure proposes to allow for *nomination* of the specialist to the Main Contractor after the Employer has carried out a tendering procedure to identify the successful tendering specialist. The *nomination* will require the Main Contractor to enter into a contract with the identified specialist using an industry agreed sub-contract, without amendments. The OGP does not intend to publish a sub-contract form since such forms govern the relationship between two, private entities. It is therefore proposed to adopt the 'Conditions of Sub-Contract (NN)' published by the Construction Industry Federation. It is acknowledged that this form has been agreed only between the representative bodies of main contractors and subcontractors who are members of the CIF. Notwithstanding this, it and its sister 'Domestic Sub-Contract' are those most used between sub-contractors where the public works contract forms the Main Contract and are tailored for the nature of a traditional sub-contract relationship whilst reflecting the conditions of the public works contract.

Collateral Warranties will be required between the Specialist and the Employer, but no direct contract and thus no *novation* will occur in this instance. The Employer will bring their tendering procedure up to the point of confirming the successful tenderer, but will **not** enter formal agreement or contract.

Where early engagement of specialists is required, particularly those with a significant design input, then novation should continue to be used since a contract must be awarded in such circumstances because payment will be required for the performance of the contract. In this instance, as is the practice currently, the specialist to be novated will be required to provide a Collateral Warranty to the Contracting Authority since, upon conclusion of the novation process, the specialist will cease to have a contract with the Contracting Authority.

Provisional or Prime Cost Sums may be used in the main contract tender up to the point of award of the main contract for the purposes of establishing an approximate cost for the tendering contractors

of the nominated specialist packages. The full cost of any nominated specialist works must be established via the conclusion of a tendering process in advance of signing the main contract.

In extremely limited circumstances and only with the prior approval of the GCCC will it be permissible to include PC or provisional sums in the BoQ post award of the main contract. Such limited circumstances would include specialist fit-out works in large hospital projects where the rate of technological development would not be conducive to awarding the specialist contract at the same time as the main contract since the performance of the sub-contract may not take place for some years.

Important Notes

1. The proposal to include *nomination* does not replace *novation* as an option under the contract. Both options will remain in place and either may be used, where considered most suitable by the Employer. Typically *novation* will be used where the specialist is to be engaged well in advance of the main contractor.
2. The timing of the nominated specialists' and main contract tenders is a matter for the Contracting Authority providing the identification of the successful tender of each of the specialist sub-contracts is made in advance of concluding (signing of) the main contract. The tendering specialists shall be furnished with the shortlist of tendering main contractors and tendering main contractors shall be provided with the shortlists of the tendering specialists for each specialist sub-contract.
3. Specialist tenderers to have sight of the form of contract and completed schedule part 1 of the main contract at tender stage to allow adequate pricing of risk transferred to the main contractor.
4. Main contract tenderers to have sight of the form of sub-contract and completed schedule part 1 thereof.
5. Specialist tenders must be sought, returned and reported upon prior to award of the main contract so that the value of the sub-contract can be input into the main contract sum. No Prime Cost or provisional sums will be allowed in the awarded contract sum except in the limited circumstances outlined above.
6. A new 'Model Form' to be published specifically to deal with Nomination.
7. For specialist works tenders it is proposed to use the Construction Industry Federation's 'Conditions of Sub-Contract (NN)' form which has been specifically designed to sit *back to back* with the PWC.
8. A provision is to be included in the PWC to allow the Employer sight of the signed sub-contract form to ensure no amendments have been made.
9. The shortlist(s) of specialist subcontractors will be provided as 'Background Information' and their pre-qualification requirements will be provided in the WRD for tendering main contractors. Therefore, only limited grounds for objection by the Main Contractor to the appointment of a nominated specialist will be allowed, these include:
 - Inability to provide any bond required as part of the tender process;

- Inability to provide tax clearance or any other evidence to demonstrate compliance with Legal Requirements;
 - Inability to provide the insurances required as part of the tender process;
 - A change in circumstances of the nominated specialist such that they would not meet the standards upon which they pre-qualified.
10. The default of a nominated sub-contractor will result in no relief for the Main Contractor on the basis that:
- The Contracting Authority will have performed a pre-qualification process as part of the specialist procurement. The minimum standards required as part of that process will be provided to the main contractor as part of the WRD.
 - The shortlist of specialists tendering will be provided to the main contract tenderers, as 'Background Information'.
 - They had a right to object prior to appointment – albeit on limited grounds.
11. The Main Contractor will be responsible for replacement of any nominated sub-contractor whose default leads to termination under the terms of the sub-contract. The replacement sub-contractor must meet the minimum pre-qualification standards provided as part of the WRD for that category of specialist.
12. The Main Contractor's cost of managing the specialist sub-contractor(s) (either nominated or novated) will be identified as an item for pricing in the Preliminaries to the Bill of Quantities.
13. No mechanism for the direct payment of nominated or novated specialist sub-contractors will be provided under the Main Contract. The Construction Contracts Act provides mechanisms whereby sub-contractors will be able to enforce payments due under their sub-contract. However each payment certificate to the main contractor will be accompanied by a breakdown of the amounts included in that payment for each of the nominated or novated specialists.

Effects of measure on the Conditions & Schedules

| PW-CF | Doc Title | Clause | Interim measure | Comment |
|----------------|-------------|-------------|-----------------|---|
| 1, 2, 3 & 4 | Conditions | 4.10.2 (2) | 2 & 3 | Clause should also include reference to nominated specialists and contractor proposed products/suppliers assessed at tender appraisal stage |
| 1, 2, 3, 4 & 5 | Conditions | 5.4.3 | 2 | Nomination of Specialist Sub-Contractors needs to be added to this clause or separate clause added |
| 1, 2, 3, 4 & 5 | Conditions | 9.1.2 | 2 | Include in clause that the Contractor must provide copies of signed agreement with nominated subcontractors before start date unless a later date is agreed with the ER |
| 1, 2, 3, 4 & 5 | Conditions | 11.1.1(3) | 2 | The detailed breakdown shall include details of payments due to Nominated Specialists |
| ITT | W1, W2 | 5.11 | 2 | Requirement for note detailing nominated specialists and possible options prior to contract signing. - Are nominated specialists known, what type of subcontract etc. |
| ITT | W1, W2 | Particulars | 2 | Change Specialist Section: provide text prompt to set out the specialist procurement option selected by the Employer |
| 1, 2, 3, 4 & 5 | Model Forms | 5.4.3 | 2 | New Model Form required to instruct the Contractor to enter a sub-contract with a Nominated sub-contractor. |

Interim measure 3

In awarding works projects, a greater concentration on quality criteria that are directly linked to the project in order to deter unsustainable pricing;

Interim measure 3 proposes Most Economically Advantageous Tender, (MEAT), award criteria with additional marking for Works Items proposed at Tender Stage by the Tenderer that exceed the minimum performance specification stated by the Employer in the Works Requirements.

The most commonly used quality criteria do not easily allow for separation of tenders on the basis of a MEAT award. All too often criteria such as methodology and approach result in very similar scores meaning that ultimately, *Price* becomes the determining factor.

The new measure mandates the inclusion of the quality of integral project elements, as an effective MEAT award criteria on projects with an anticipated Contract Sum of €2m or greater. Integral project elements should include Works Items that are inextricably linked to the *Whole Lifecycle Cost* of the project. The quality and long term performance of such Works Items should have significant effect on the outturn cost of the project at its end of life. Examples of such Works Items may include; Lifts, Window Systems, Roofing Systems, B.M.S., plant, etc.

Tendering Authorities may select within the Schedules, specific Works Items that are to be considered to form part of the award criteria in addition to methodology, approach, programme, etc. Works Items are governed by the specification provided as part of the Works Requirements. The relevant section of the specification for Works Items which are selected as award criteria will be referenced under a new section in the Schedule Part 2 and tenderers will be required to name each product/material they propose to use in response to the category of Works Item inserted by the Employer and provide supporting evidence of the performance (data sheets, certified test results, etc.) as part of their Works Proposals.

Products/materials proposed meeting the specification will pass the criterion with additional marks (up to a stated maximum) awarded to products/materials under pre-determined performance sub-criteria that exceed the minimum requirements. Examples of performance sub-criteria may include; minimum life guarantee, minimum parts warranty, maximum energy consumption, maintenance cycle, availability of aftersales & technical support, etc.

Important Notes:

1. The proposal shall be mandatory for projects over €2m and optional for projects under €2m
2. The Contracting Authority should only list elements for MEAT evaluation which have significant cost impact during their service life, e.g. products/materials that offer reduced maintenance and/or maintenance costs or reduce the energy consumption of the finished project.
3. The Contracting Authority should not draft minimum performance criteria so as to close the specification to a single available product/supplier in the market.
4. The Contracting Authority should never name a product/supplier as a way of setting minimum performance specification.

5. The Contracting Authority should never allow weighting of marks for quality so that price is no longer the majority weighting. (The exception to this rule is in the case of complex or innovative projects).
6. The successful Contractor shall be allowed to substitute alternative products/materials to those proposed during the course of the contract, only if the alternative meets or exceeds the score awarded to the product/material proposed at tender stage.
7. As a precursor to the introduction of the full MEAT evaluation tendering contractors will be required to name the products they propose to use in response to the specification as part of their Works Proposals submissions. This will take the form of a matrix prepared by the Contracting Authority listing the major components and materials, each tenderer will be required to complete the matrix with the manufacturer's details for each listed item. The Works Proposals of the lowest/MEAT tenderer will be examined in tandem with their priced BoQ to establish the basis of the price submitted. Where products are identified that do not meet the specification the tenderer will be offered an opportunity to replace the product with a compliant product at no additional cost to the Employer or withdraw their tender.
8. Upon development of the guidance material for the MEAT evaluation the Works Proposal submission will be retained for the purposes set out above but those elements selected for MEAT evaluation will be set out in schedule part 2.

Effects of measure on the Conditions & Schedules

| PW-CF | Doc Title | Clause | Interim measure | Comment |
|----------------|------------|------------|-----------------|--|
| 1, 2, 3, 4 & 5 | Conditions | 4.6.2 | 3 | <i>Amendment to clause required to allow the Contractor to propose alternatives to Contractors proposed Products & Suppliers at Tender Stage</i> |
| 1, 2, 3 & 4 | Conditions | 4.10.2 (2) | 2 & 3 | <i>Clause should also include reference to nominated specialists and contractor proposed products/suppliers assessed at tender appraisal stage</i> |
| 1, 2, 3, 4 & 5 | Schedule | Part 1 B | 3 | <i>Volume A - Works requirements shall detail minimum standards to which Contractor proposed products / suppliers shall reach for purposes of MEAT analysis</i> |
| 1, 2, 3, 4 & 5 | Schedule | Part 2 E | 3 | <i>Include under E a table to allow the Tendering Authority to include a list of integral Works Items, for which a minimum Performance Specification is listed, that the Tenderer may propose a list of products/suppliers that can be assessed as part of the Award of Contract</i> |

Interim Measure 4

The inclusion of informal dispute resolution methods to reduce the volume of disputes that are currently being referred to the formal procedures prescribed in the contract;

Interim measure 4 proposes a reform to the existing dispute resolution procedures. Currently parties are required to proceed to conciliation where a dispute arises between the parties, typically following an ER Determination. The Conciliator has 42 days to bring about agreement between the parties, (which may be extended by agreement), failing which, the Conciliator must issue a recommendation to the parties, in line with their rights and obligations under the contract. The parties have 42 days to issue a notice of dissatisfaction, in the absence of which the recommendation becomes binding. If a notice of dissatisfaction is issued the parties may refer the dispute to ultimate resolution under Arbitration.

Many stakeholders have expressed the opinion that the requirement for disputes to be conciliated has led to a costly time consuming exercise that could be avoided by engagement between the parties on a 'without prejudice' basis. Many stakeholders believe the referral of ER determinations to conciliation has become the norm rather than the exception and the process of conciliation itself has started to resemble an arbitral processes with large volumes of paperwork being exchanged accompanied by legal submissions more suited to arbitration or court.

The interim measure has three proposed amendments to the dispute resolution process for PW-CF1 to PW-CF 5;

Amendment 1

(Applicable to PW-CF1 to PW-CF5 inclusive)

Proposes a contractual requirement for the parties to engage in a, without prejudice, dispute resolution process between upper level management, (*Management Escalation Process*), prior to any formal Conciliation process being instigated. The process will be detailed under clause 4 & 10, with references under clause 13, and will require the parties to name individuals senior to the Employer's Representative and Contractor's Representative to sit on a *Project Board* which will have responsibility for engaging in dispute resolution and will have the authority to make agreements and reach settlements on behalf of the parties. If the *Project Board* fails to resolve the dispute the parties shall proceed to conciliation as per clause 13.

Important Notes:

1. The obligation for a contractor to notify under 10.3 and the ER to determine under 10.5 shall remain. The *Project Board* shall not discuss claims or disputes which have not satisfied these obligations.
2. The named individuals on behalf of both parties shall be senior to the grade / level of those involved in the project implementation team.
3. The named individuals will collectively be known as the *Project Board*.
4. The *Project Board* shall include a maximum of 3 persons from each party, 1 of whom must have a construction related background, construction related qualification or construction related role within their organisation that is relevant to the project.
5. The Employer may appoint a third party person to the *Project Board* to act on their behalf and that person shall have the authority to reach agreement on the Employer's behalf
6. The *Project Board* shall be equally balanced with equal numbers from each party represented.
7. The *Project Board* shall meet at a minimum every 25 working days to discuss disputes with the intent of resolving. Longer periods of time may be considered where the necessity for regular meetings is minimal due to minimal disputes.
8. All disputes must first be discussed by the *Project Board* before referral to Conciliation.
9. If the contract allows for a Nominated Conciliator, (NC), (discussed below), then the *Project Board* must meet 10 working days prior to the next visit of the NC to confirm what disputes are to be referred to the NC for conciliation.
10. Any dispute discussed by the *Project Board* must be resolved through agreement by the *Project Board* within 25 working days of referral of a dispute to the *Project Board*, otherwise it shall be automatically referred to conciliation or to the NC (if there is one) for resolution.
11. The operating procedure by which the *Project Board* hears and discusses the disputes is at the discretion of the parties but shall be detailed and agreed in advance of the first meeting of the *Project Board*.
12. All discussion, engagement and correspondence between the parties, via the mechanism of the *Project Board*, will be 'without prejudice' until a binding agreement is reached.
13. If the contract allows for an NC then the parties may agree to have the NC draft the wording of any binding agreement / settlement of any dispute discussed by the *Project Board*.

Amendment 2

Proposes that for PW-CF1 – PW-CF4 Contracts with a contract value in excess of €10m the Employer shall, at tender stage, require the parties to appoint a standing conciliator called a Nominated Conciliator (NC) for the duration of the project prior to Contract Award. Because PW-CF1 – PW-CF4 may be used for contracts with a value as low as €5m this will have to be provided as an optional clause triggered by the Schedule, part 1. Should a project so warrant it, contracting authorities may opt to use PW-CF1 – PW-CF4 and trigger the Nominated Conciliator clause.

Important Notes:

1. The cost of the NC will always be shared equally between the parties.
2. The NC shall be required to attend site to discuss disputes referred to them from the *Project Board* at a minimum every quarter.
3. The NC shall dictate to the parties the format of the NC visit and how disputes are to be communicated by the parties.
4. To allow the NC to have project oversight, to gain standing knowledge of the relationship between the parties prior to the crystallisation of the dispute. The NC will be included on correspondence surrounding clause 4.10 and 4.15 from each party. [The NC will not discuss or comment on any correspondence regarding a claim until a dispute is referred by the *Project Board*.]
5. The NC may make a recommendation to the parties to advance the dispute to the arbitral process, (Adjudication or Arbitration), if the NC feels that the parties will not reach agreement or where they are unlikely to accept a recommendation based on the rights and obligations of each party.
6. The NC shall reason their recommendation where a recommendation in line with the rights and obligations of the party is produced. The recommendation shall detail the clause, sub-clause and schedule part K category under which a compensation event or delay event has occurred giving rise to any payment or non-payment to be made.
7. Agreement on the appointment of the NC and subsequent appointment of the NC shall be a precondition of contract award.

Effects of measure on the Conditions & Schedules

| PW-CF | Doc Title | Clause | Interim measure | Comment |
|----------------|------------|------------|-----------------|--|
| 1, 2, 3, 4 & 5 | Conditions | 4.1.4 | 4 | <i>The "Project Board" to which disputes will be escalated shall be detailed under this clause</i> |
| 1, 2, 3, 4 & 5 | Conditions | 4.10.1 | 4 | <i>Progress Reports to be furnished to the Project Board and the Nominated Conciliator in addition to the ER.</i> |
| 1, 2, 3 & 4 | Conditions | 4.10.2 (8) | 4 | <i>Details of Disputes currently at Project Board, Conciliation, Adjudication and Arbitration to be itemised</i> |
| 1, 2, 3, 4 & 5 | Conditions | 4.15 | 4 | <i>Details of meeting of Project Board to discuss disputes referred to be include. Limitations of the Project Board to be detailed</i> |
| 1, 2, 3, 4 & 5 | Conditions | 4.15.2 | 4 | <i>Minutes of progress meetings shall be copied to the Project Board Members and the Nominated Conciliator</i> |
| 1, 2, 3, 4 & 5 | Conditions | 10.5.4 | 4 | <i>Disputed Determinations shall be referred to the Project Board.</i> |
| 1, 2, 3, 4 & 5 | Conditions | 10.5.5 (1) | 4 | <i>Disputed agreements to be referred to the Project Board</i> |
| 1, 2, 3, 4 & 5 | Conditions | 12.9.1 | 4 | <i>Disputes under this clause may bypass Project Board Stage.</i> |
| 1, 2, 3, 4 & 5 | Conditions | 12.9.2 | 4 | <i>Disputes under this clause may bypass Project Board Stage.</i> |
| 1, 2, 3, 4 & 5 | Conditions | 13 | 4 | <i>Insert new Sub-Clause before 13.1 - Conciliation - on Management Escalation Procedure to be orchestrated by parties or by NC where applicable not withstanding parties rights under CCA2013</i> |
| 1, 2, 3, 4 & 5 | Conditions | 13.1.1 | 4 | <i>Re-word clause to have disputes referred to Management Escalation procedure prior to conciliation and that where a Nominated Conciliator is appointed they shall take the place of the Conciliator in this clause.</i> |
| 1, 2, 3, 4 & 5 | Conditions | 13.1.2 | 4 | <i>Clause to apply only where the option to appoint an NC has not been exercised or where the appointed NC through agreement with the parties will not hear the dispute or has become incapable of hearing the dispute</i> |
| 1, 2, 3, 4 & 5 | Conditions | 13.1.5 | 4 | <i>If the parties have reached an agreement under "Management Escalation" the parties may agree to request the conciliator to draft the wording of the agreement without hearing the cases</i> |
| 1, 2, 3, 4 & 5 | Conditions | 13.1.8 | 4 | <i>All recommendations issued in line with parties rights and obligations shall be reasoned in accordance with schedule part 1k</i> |

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|----------------|------------|----------|---|--|
| 1, 2, 3, 4 & 5 | Conditions | 13.1.8 | 4 | <i>The recommendation may either propose a reasoned agreement for the parties to consider or may propose the parties proceed to the arbitral processes under 13.3 or 13.4 - Adjudication or Arbitration.</i> |
| 1, 2, 3, 4 & 5 | Conditions | 13.1.9 | 4 | <i>Dissatisfaction to recommendation for proposed agreement only required. No need to notify dissatisfaction if the NC proposed the parties proceed to adjudication/arbitration</i> |
| 1, 2, 3, 4 & 5 | Conditions | 13.1.10 | 4 | <i>Recommendation to proceed to adjudication or arbitration shall not be binding if no notice of dissatisfaction is served</i> |
| 1, 2, 3, 4 & 5 | Schedule | Part 1 A | 4 | <i>Details of individuals to sit on Project Board on behalf of the Employer</i> |
| 1, 2, 3, 4 & 5 | Schedule | Part 1 N | 4 | <i>Tick box required to allow option for a Nominated Conciliator, (NC), to be appointed in advance of start date on site</i> |
| 1, 2, 3, 4 & 5 | Schedule | Part 2 A | 4 | <i>Details of individuals to sit on Project Board on behalf of the Contractor</i> |

Amendment 3

Proposes that the contract makes provision for adjudication in line with the Construction Contracts Act 2013.

Effects of CCA 2013 on the Conditions & Schedules

| PW-CF | Doc Title | Clause | Interim measure | Comment |
|----------------|------------|---------|-----------------|---|
| 1, 2, 3, 4 & 5 | Conditions | 11.5.2 | CCA2013 | Clause to be re-worded to fall in line with CCA 2013. |
| 1, 2, 3, 4 & 5 | Conditions | 13 | CCA2013 | Insert new Sub-Clause after Conciliation and before Arbitration titled Adjudication in accordance with Construction Contracts Act 2013 |
| 1, 2, 3, 4 & 5 | Conditions | 13.1.10 | CCA2013 | Failure to comply with a N.C. recommendation to resolve a dispute where it becomes binding, (i.e. no notice of dissatisfaction served), may be referred to adjudication assuming payment required and failure to pay arises |
| 1,2,3,4 & 5 | Conditions | 13.1.11 | CCA2013 | A conciliator's recommendation shall be binding in the event that the existing conditions of 13.1.11 (1) (a) and (b) are met until a different decision is reached upon reference of a payment dispute to adjudication under CCA 2013 or a dispute not covered by CCA 2013 to arbitration. New clause required where an adjudicator reaches a decision on a payment dispute referred under the CCA 2013, the same payment dispute may not be referred to conciliation under clause 13. Having commenced conciliation on a payment dispute which is then referred to adjudication under CCA 2013 [by either party] prior to the parties resolving through agreement or a conciliator's recommendation being issued, the conciliation must be halted until the adjudicator reaches a decision. In the event that a decision is reached, the conciliation shall be terminated. In the event that no decision is reached by the adjudicator parties shall re-engage in the conciliation process commenced under clause 13. |
| 6 | Conditions | 15 | CCA2013 | Adjudication reference requirement to be input at end of clause to satisfy Construction Contracts Act 2013 |
| 7 | Conditions | 16.2 | CCA2013 | Allowance for right to have payment disputes decided by adjudication under Construction Contracts Act 2013 needs to be made |
| 8 | Conditions | 16 | CCA2013 | Adjudication reference requirement to be input at end of clause to satisfy Construction Contracts Act 2013 |
| 11 | Conditions | 14.3 | CCA2013 | CCA 2013 right to refer dispute relating to payment to Adjudication |