



Oifig um Sholáthar Rialtais
Office of Government Procurement

Interim Amendments to the Public Works Contracts GCCC Information Sessions - June 2015



Part 1

Summary and review of the public works contracts





- Summary of the development and implementation of the public works contract
- Fixed price, lump-sum contracts
- Issues impacting on the successful performance of the public works contract
- Review process
- Review conclusion



Summary of the development and implementation of the public works contract

Key Driver:	Considerable cost overruns in works projects, Government Decision 2004
Requirement:	Greater cost certainty, better value for money and more efficient delivery of projects
Solution adopted:	Fixed price, lump-sum contracts introduced in 2007
Implemented by:	Transferring risk to main contractor to achieve cost and time certainty
Expected Outcome:	Increased contract sum in return for price certainty

Fixed price, lump-sum contracts

- Risk Transfer
- Notification requirements or 'conditions precedent' to any claim



Issues impacting on the successful performance of the public works contracts

- Competitive tendering environment
 - Very low prices bid by contractors and consultants alike;
 - Review of the performance of contracts challenging as a result
- Dispute resolution mechanisms
 - Notification requirements trigger early engagement in formal dispute procedures
 - No wider application from having engaged in dispute procedures



Review Process

- Invitations to stakeholders to make submissions – December 2013
- On-line questionnaire launched in May 2014
- Review of submissions
- Report to GCCC on submissions
- Response to review presented to GCCC
- Submission to Minister for Public Expenditure & Reform



Review Conclusion

- Report published 11 December 2014 on <http://constructionprocurement.gov.ie/category/news/>
- 4 interim recommendations -
 - Change to status of the Bill of Quantities
 - Direct engagement of key specialist works contractors
 - MEAT award for contracts above €2m
 - Overhaul the dispute resolution mechanisms in the contracts
- Medium-term strategy to be developed





interim amendments



Interim Amendments – Constraints

- Tight budgetary conditions;
- Key objectives in 2004 Reform still valid;
- Substantial capital programme to deliver;
- Imperative is to provide a means to deliver this programme efficiently with the best possible quality outcome and ensure all available money is directed to this end.



Interim Amendments – Objectives

1. To rebalance the risk currently transferred in recognition of changed circumstances;
2. To reduce the potential for costly disputes;
3. To provide greater detail on the tendered price;



Interim Amendments – Timeline

- Engagement with key stakeholders virtually complete;
- Paper setting out details of amendments published April 2015;
- Final meeting with stakeholders after conclusion of these sessions;
- Provisional deadline Q2 – Q3 2015;
- Transitional arrangements.



Amendment 1 – Status of the Bill of Quantities

Objectives 1 & 2

- Bill of Quantities to become the primary reference for tender purposes on Employer-designed projects;
- Omissions from the Bill will not limit the scope but will result in a Change Order;
- Items included in the Bill but not required in the other Works Requirements will result in a Change Order that will reduce the Contract Sum;
- Errors related to quantity will result in an adjustment to the Contract Sum – up or down.



Amendment 2 – Direct tendering to specialists

Objectives 1, 2 & 3

- To be used where the extent of specialist works on projects exceeds 15% of the total contract value;
- Provides greater insight into pricing of these elements;
- Reduces the extent of the Contract Sum for which the main contractor has responsibility;
- Reduces the tendering burden on the specialist sector.



Amendment 3 – MEAT award for projects >€2m

Objective 3

- Adopt quality MEAT criteria that are directly related to the project outcomes;
- Greater visibility of the price bid in the tender;
- Increased quality of completed project;
- Guidance required – may be delivered later than 3 other amendments.



Amendment 4 – overhaul ADR in the PWCs

Objective 2

- Provide alternatives to the costly procedures currently provided for in the contracts;
- Provisions for dispute avoidance to be strengthened;
- Dispute escalation measures prior to formal procedures;
- Nominated Conciliator on contracts in excess of €10m.





medium-term strategy



Medium-term Strategy – Imperatives

- Broader review of the procurement of public works;
- Including developments such as:
 - New procurement directives - eProcurement;
 - Building Regulations – BC(A)R, CIRI;
 - Building Information Modelling (BIM);



Medium-term Strategy – Key Topics

- Risk management;
- Encouraging co-operative behavior;
- Performance evaluation;
- Alternative forms of contract;





Summary





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Contract Administration – Public Works Contracts





Contract Administration

- **Responsibility of both parties**
 - **Employer's Representative** on behalf of the Employer
 - **Contractor's Representative** on behalf of the Contractor
- **For the efficient running of the contract to deliver the final product.**
 - **Clause 4 – Management** provides the instruments for efficient contract administration
 - Clause 8 – Quality, testing and Defects
 - Clause 11 – Payment





Clause 4 - Management

- **Clause 4.1 – Co-operation** [PW-CF1 to 5]
 - Drafted to encourage the parties to support co-operative behavior for the benefit of the project
 - **Negotiated agreements,**
 - **Efficient order and timing of information delivery,**
 - **Minimising effects of delay**
 - Either party may request clarifications, consultations, workshops, etc
 - Clause 4.1.2(1):
 - **“negotiation of agreements provided for in the contract”**
 - Clause 4.1.4:
 - **“The parties may agree to consult or communicate, without prejudice.”**

Question: Has Clause 4.1.2(1) and 4.1.4 always allowed for the Project Boards?

Clause 4 - Management

- **Clause 4.9 – Programme** [PW-CF1 to 4]
 - Produced to assist both parties to adequately resource the project.
 - Minimum standard presentation required of the Contractor
 - **Required Instructions**
 - **Procurement, manufacture, delivery, installation, construction, testing, commissioning, trial operation, sequence and timing of inspections and tests.**
 - **Resources on site & resources for each task**
 - Contractor's Responsibility to provide this information
 - Clause 4.9.3 –Employer can withhold 15% of payment.

Question: Do Contractors provide this level of information?

Question; Do Employer's Representatives seek this level of information?

Question; Do Employers withhold payment where a Contractor fails to submit a revised programme?



Clause 4 - Management

- **Clause 4.10 – Progress Reports** [PW-CF1 to 4]
 - Progress report to include;
 - Detailed description of progress against the current programme.
 - Details of Contractor's personnel
 - *resources as per programme*
 - Details of when instructions are to be given
 - *Clause 4.11*
 - Details of anything that might have an adverse effect on execution of the Works, the steps the Contract is taking or proposes to reduce those risks...
 - *Clause 4.1.2 (6) – “Efforts by the Contractor to minimize delay and Compensation events and their effects”*

Question: Should the progress report format mirror the programme format?

Question: Do Contractors provide this level of information?

Question; Do Employer's Representatives seek this level of information?



Clause 8 – Quality, Testing and Defects

- **Clause 8.5 – Defects** [PW-CF1 to 5]
 - Clause 8.5.1 – The ER may direct the Contractor to search for a defect..
 - Clause 8.5.2 – The ER may direct the Contractor to remove, demolish, reconstruct or not to deliver a Works Item with a defect
 - Project administration tool to ensure quality standards throughout the project and reduce defects lists at Substantial Completion



Clause 11 - Payment

- **Clause 11.1.1** [PW-CF1 to 5] - “the Contractor shall give a statement to the Employer’s Representative showing all of the following
 - The progress of the Works”

Question: Should the statement be linked to the Progress Report Clause 4.10?

- **Clause 11.1.2** [PW-CF1 to 5] - “The instalment of the Contract Sum that the Contractor shall be entitled to be paid on an interim basis shall be
 - The Contract value of the Works properly executed by the Contractor ...”

Question: Do interim payments take account of Defect Directions – Clause 8.5.2?





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Interim Amendment 1

Change to status of the Bill of Quantities

WHY USE A BQ?

PRINCIPLES –

- ▶ All tenderers base their price on carrying out the same extent of work
- ▶ The tender process is expedited
- ▶ The Employer benefits from cost advice during the tender process
- ▶ Both Contractor and Employer have confidence in the adequacy of the tender price accepted
- ▶ The document format facilitates valuation of ‘work in progress’ and any changes that may arise

A comprehensive BQ will:

- ▶ Contribute to comprehensive design development
- ▶ Allow tenderers have confidence in the BQ they are pricing
- ▶ Reduce the incidence of Contractors pursuing recovery of dubious extras as compensation for omissions from tender prices.

BQs SINCE PWC INTRODUCTION

➤ **Intention of PWC adoption**

- ▶ Works Requirements to fully define the scope
- ▶ Pricing Document to fully quantify the extent
- ▶ Risk of discrepancies between VWR and Pricing Document to be minor and risk of errors transferred to Contractor where reasonable – if there is confidence in accuracy of document.

➤ **What has happened**

- ▶ Works Requirements still not fully defined
- ▶ Risk of errors in BQ commonly transferred to Contractor, regardless of risk of discrepancies between it and the Works Requirements
- ▶ Facility to transfer BQ risk to Contractor reducing Design Teams / QS members focus on accurate BQ (*contributed to by downward fee pressure*)
- ▶ Loss of confidence in BQ accuracy by Contractors - tenderers commissioning independent checks to assist in pricing strategy – costs and time pressure for tenderers
- ▶ Disputes

CORE OBJECTIVES OF AMENDMENT

- ▶ To enhance the level of information provided as part of the tender documents for 'Employer-Designed' contracts.
- ▶ To provide greater visibility of the price tendered.
- ▶ To rebalance the level of risk currently being transferred under the Public Works Contracts conditions

HOW WILL CHANGES AFFECT BILLS OF QUANTITIES (AND QSs)

DIRECT

- ▶ BQ primary reference document for the price of the work and its calculation
- ▶ BQ status restored to what it was under GDLA 'yellow form' with respect to pricing of the work – drawings and spec still to take precedence for construction
- ▶ Discrepancies between BQ and Works Requirements to be Compensation Events – price can go up or down as appropriate.
- ▶ Detailed consideration of risk allocation before finalisation of Works Requirements and BQ – ground conditions, utilities, archaeology

INDIRECT

- ▶ QS role – importance of contribution to Design Team increased - highlight to Design Team any information believed to be outstanding.

WHAT IS NOT PROPOSED

- ▶ BQ will **not** determine the scope of the work or how it is to be done – role of Works Requirements
- ▶ QS will **not** fill in the gaps in the Works Requirements prepared by the designers – if deficits noted by QS then clarification / further design required
- ▶ QS **not** to design Work
- ▶ **No** reintroduction of Provisional Sums / Quantities in PW Contracts
- ▶ **No** BQ requirement for PW CF6 (Short Form) – to remain as ‘drawings and spec’ – use CF5 (*Minor Works*) if BQ required for small project

PRINCIPAL PWC AMENDMENTS WITH REFERENCE TO BQs

- ▶ Employer takes risk of errors in BQ – errors and omissions dealt with by way of Change Order (as in GDLA '82 'yellow' form)
- ▶ More options for risk allocation between Employer & Contractor
- ▶ New option for specialist subcontract work to be tendered directly by Employer – either before the Main Contract tender or before Main Contract award - *alternative to 'novation'*.
- ▶ BQ will contain 'Reserved Sums' to allow estimated (or actual) Specialist's amounts to be included in submitted tenders.
- ▶ Only in exceptional circumstances will contractors be required to appoint a Specialist beyond the Starting Date and only following an application by the Employer to the GCCC where a modified form of contract will apply;
- ▶ 'Reserved Sums' will be swapped for Specialist tender amounts prior to completion of MEAT process.
- ▶ Amounts for Specialists will be identified in Payment Certs and Specialists informed directly by ER of what is included for them

RISK ALLOCATION

- ▶ New flexibility in Schedule Part IK to allocate risks – ground conditions, utilities, archaeology.
- ▶ Risk assessment / allocation to be determined AT LATEST during preparation of tender documents - may affect feasibility decision
- ▶ **Principle – If no basis of assessment for the risk by the Contractor then Employer retains it**
- ▶ BQ must include items to allow Contractor price risks transferred to him.
- ▶ Scope changes arising from occurrence of Contractor risks **do not** result in remeasurement of the work affected.

METHODS OF MEASUREMENT - ARM

ARM STEERING GROUP CONSULTED – amendments, or a revised document, to be issued by SCSi/CIF to co-ordinate with updated PWC content.

ARM compliance needed to ensure consistency within individual documents and across different tenders.

No ad-hoc ARM amendments to be allowed – bad experiences with QS practitioners adopting global measurement of work items to reduce their costs / condense Pricing Document / accelerate tender issue.

ARM4 Supplement 2 for Mech and Elec services to be adopted as a minimum (full ARM4 at Employer discretion) – ARM4 Supplement 2 (drafted by CIF / SCSi) to provide less demanding set of measurement Rules for services than full ARM – delivers standard presentation and pricing format for services content.

ARM use requires buy-in from Services consultant - show the work needed on the Drawings, provide comprehensive Specs, do not rely on capacity of tenderers to interpret intentions of Consultant.

METHODS OF MEASUREMENT - ARM

- ▶ **ARM4 Supplement I – to be updated because**
 - ▶ Does not provide for specialist contractor appointment mechanism envisaged by PWC revision – inclusion of allowances in tender documents for such work, profit mark-up on it, special attendance requirements
 - ▶ Rules for some ARM Workgroups do not match current industry practice – e.g. prefabricated timber roofs where ARM requires detailed measurement of trusses, plates, bracing, shoes, brackets, etc. More widespread adoption of Contractor Design solution not envisaged in ARM.
 - ▶ Post-BC(A)R environment re design / assigned certifier certs, etc. not envisaged

METHODS OF MEASUREMENT - ENGINEERING

- ▶ **CESMM** – CESMM3 to continue is use pending drafting of required amendments to make CESMM4 compliant with PWC provisions.
- ▶ Amendments to CESMM3 published in GCCC Guidance 1.5 (Appendix D2) to be reviewed to comply with revisions to PWC provision.
- ▶ **MMRB** – NRA currently revising MMRB document and final version will comply with revised PWC provisions.

CHALLENGES - EMPLOYERS AND DESIGN TEAMS

- ▶ **Better assessment of the risks to transfer and to retain** – Beware of risk averse Design Teams / Employers and 'risk ignoring' Contractors . Asses potential for risk, consequences if it arises, mitigation opportunities, design alternatives. Only transfer a risk to Contractor where he is in position to assess and price it.
- ▶ **'Employer Design' – misnomer?** Conditions of Contract titled 'Employer Design' and 'Design Build'. Post BC(A)R recognition that Employer Design is not always the case – Designers do the elements they have the knowledge to detail and Contractor and Specialists do the rest. Works Requirements to clarify who is designing. If Contractor/Specialist doing it the BQ must include associated duties – i.e. provision of ancillary certs
- ▶ **Longer tender preparation duration** – more comprehensive tender documents will take longer or more resources. Set realistic programmes and fees.
- ▶ **Higher fees on some projects** – if more work then higher fees a possibility! Contracting Authorities' preference for reasonable fees and good service.
- ▶ **Payback - less disputes, better delivery and money spent on construction rather than Dispute Resolution**

CHALLENGES - DESIGN TEAMS AND QS PRACTICES

- ▶ **Buy-in to fully designing the work and bringing user confidence and relevance back to the Bills of Quantities**
 - ▶ QS asking for more information is not doing so to embarrass Design Team members. If QS forced into assumptions then the Contractor will have same problem – may turn into opportunity for claim.
 - ▶ Comprehensive BQ cannot be produced in very short time at the end of the design period. Design Team programmes should allow a realistic duration - QS agreeing to unreasonable programmes doing themselves and the Employer a disservice
 - ▶ Access to contractor tender lists for Public work now by open application with objective assessment – tender documents have to be robust enough to withstand challenges that may arise after Contract award.

Qs to have confidence in their own knowledge and be aware of the reliance placed on them by Employers to contribute to successful project conclusion



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Interim Amendment 2

Direct engagement of key specialist works contractors

Bill of Quantities as Primary Document

- Introduce BOQ as primary document in suite
 - M&E Consultants and contractors in many cases not familiar with ARM
 - Education process will be necessary
 - ARM 4, Supplement 2 for period of 18 months

Rules of Measurement

- ARM 4 Supplement 2
 - Very basic detail, simple rules
 - Main plant items
 - Schedules of equipment
 - Little or no quantities
- ARM 4
 - Full measure

Rules of Measurement

- OPW to provide template spreadsheet
 - For Supplement 2
 - For Full ARM

Tender of specialists

- Separate tender and subcontract for specialist works contractors
 - Tender of M&E Packages can be either before or at the same time as main contractor package
 - **Novation or appointment by Contractor can be used**
 - Price Certainty as actual tenders included in Main contractors price at contract award
 - Directly tendering gives greater control over quality
 - Reduces the value of the contract for which the main contractor is bidding directly

Issues relating to Specialist sub-contracts

- Right of refusal to accept specialist (does not apply to novated Specialists)
 - Limited scope of refusal
- Sub-contract conditions – CIF 'NN' form to be referenced in specialist tender;
- Requirement in conditions of main contract for a copy of signed subcontract form to be provided to Employer;
- Contractor retains full responsibility for performance of Specialist;
- No direct payment provision for Specialists;
- Payment details provided as part of certification;
- Replacement of specialist

Novation

- Still available for use
 - Design
 - Advance work

MEAT Assessment

- All projects >€2M assessed using M.E.A.T. with a significant weighting for Quality
- Useful for M&E packages
 - Lifts
 - BMS
 - Very Large Plant Items
- Considerations
 - Design
 - Life cycle cost



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Interim Amendment 4

Overhaul the dispute resolution mechanisms in the contracts

Key Objectives

- To encourage greater uptake and use of clause 4 of the contract
- To reduce the number of disputes being referred to the formal dispute procedures currently prescribed in the contract
- To better manage those disputes that do arise



Present Provisions

- Clause 4.1- Co operation
- Clause 10- Employers Rep. Decides.
- Clause 13.1 – Conciliation
- Recommendation within 42 days – unless otherwise agreed
- Further 42 days to consider – If not rejected then **Binding** !
- If rejected: Pay money subject to certain provisions
- Clause 13.2 -Arbitration

Proposed Dispute Provisions

Interim Measure No. 4

Dispute Escalation

- Dispute Escalation Procedure –
- High Level Management Group – “Project Board” for Claims the subject of ER’s determination and in dispute under Cl. 10.5.4 & Cl. 10.5.5 (*PW-CF1 to PW-CF5 (>€500k)*)
- Nominated Conciliator(NC) for contracts >€10m (*PW-CF1 to PWCF4*).
- NC will be available from beginning of Contract for disputes . Meeting / hearings at regular intervals.

Future

- CCA 2013- Adjudication - when CCA becomes operational.
- How will Conciliation provisions sit in the Contract with the legal entitlement to Adjudicate “at any time”
- Arbitration and / or Courts
- Arbitration – No “case stated” provision, Costly? Long?



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Thank You