

EMPLOYER'S NOTE

Brief Explanatory Note on the Public Works Contract for Early Collaboration (PWCEC)

Introduction

The Public Works Contract for Early Collaboration (PWCEC) form of contract is intended for use on large projects (e.g. over €100 million), or technically complex projects on which Contractor input is required at an early stage. A brief overview of the key features of PWCEC are given below.

Use Requires GCCC Approval

Any Contracting Authority wishing to use PWCEC must obtain prior approval from the Government Contracts Committee for Construction.

Overview

The Contract requires the Contractor to be appointed for a Project's Early Services, who may also be appointed for one or more Tasks. In a simple case, the Early Services is design development and obtaining planning consents, and the *Task* is the physical works. If there is more than one *Task*, they would normally be different phases of physical works.

Target Price

Apart from tendering an Early Service Fee¹ and a Fee Percentage for each Task a Contractor is also required to tender a Target Price for each Task. To assist a Contractor in this regard there can be pre-tender dialogue with potential bidders using the competitive dialogue procedure to enable them more accurately gauge the scope of the project. Where such dialogue takes place it is important that confidentiality is maintained to protect both contracting authority and tenderers. The marks for the Target Price should not be high in the context of the overall marks for price which includes an Early Services Fee, a Fee Percentage for each Task and other costs.

Brief

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

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¹ Capitalised Terms are defined terms in PWCEC

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Early Services

The Early Services will normally consist of design development and planning work. The Contractor is paid a tendered Early Services Fee for completing the Early Services. The Early Services will include taking the design development to a stage at which the Contractor can offer the Employer a Guaranteed Price for each Task. If the Guaranteed Price is accepted, the contract moves on to the Task(s).

Advance Works

The Early Services may also include some advance works, such as relocation of utilities. advance works would normally be provided for in the Employer's Brief. In exceptional cases, if the need for Advance Works was unforeseeable at the time of tender, it might be appropriate to add them by Change Order.

Design Team

The contract may be set up on the basis that the Contractor selects its own design team, or the Employer selects the design team and novates it to the Contractor on contract signature. Other options are outlined under "Supply Chain" section below. In any case, design work done in the Early Services is paid for as part of the Early Services Fee. Design work done as part of the Task(s) is paid for in the same way as other work on the Task(s).

Task(s)

Once the Guaranteed Price is accepted in accordance with sub-clause 2.2.5 the Employer must order the Contractor to precede with the first Task.

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Payment for Task(s)

In general, the Task(s) will consist of the physical work. As noted above, there will often be only one Task.

Work done on the Task(s) is paid for on the basis of cost plus a tendered Fee Percentage, subject to a guaranteed maximum. The Task(s) will only be awarded if a Guaranteed Price is agreed as part of the Early Services.

At tender time, bidders tender —

- the Early Services Fee
- a Target Price for each Task and
- a Fee Percentage for each Task.

As part of the Early Services, the successful Contractor is required to offer the Employer a Guaranteed Price for each Task. The Guaranteed Price must be less than the (tendered) Target Price. As design has developed during the Early Services, the Contractor should be in a position to release risk contingencies, allowing the budget to reduce.

Defined Cost means the Contractor's actual cost of the Works according to the rules in part 2 of Schedule 3. The Employer pays for work in the Task on the basis of Defined Costs plus the tendered Fee Percentage, up to the Guaranteed Price agreed at the end of the Early Services. In addition, the Contractor may be entitled to Saving Shares, which we look at next.

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Saving Shares

As noted above, the Guaranteed Price for each Task (which is agreed at the end of Early Services) must be lower than the Target Price originally tendered for the Task. The contract may provide for the Contractor to be paid a percentage of the difference between the agreed Guaranteed Price and the tendered Target Price for a Task. This is called an Initial Saving Share. The Initial Saving Share would be paid out on completion of specific stages of the Task, as set out in the contract.

The Contractor may be also be entitled to a share of any difference between the Guaranteed Price and the total out-turn cost for a Task. For this purpose, the out-turn cost means the total Defined Cost plus Fee Percentage.

Supply Chain

The contract provides for a number of options for the selection of the Contractor's Supply Chain. Supply Chain includes the Contractor's design team, sub-contractors and suppliers. This covered by Schedule 7.

- Some members of the Supply Chain may be entirely “domestic” and their selection essentially unregulated by the contract.
 - The Contractor may be free to select some members of its Supply Chain, subject to having them accepted by the Employer's Representative under the submittal procedure.
 - The Contractor may be required to identify certain Supply Chain members at tender (and indeed prequalification) time. Supply Chain so named in the Contractor's Tender Proposals must be used for the work for which they are named, unless a replacement is accepted under the submittal procedure.
 - The Contractor may be required to invite tenders for identified Work Packages. Schedule 7 part 2 contains the rules for tendering Work Packages. The accepted lump sum price of a Work Package is its Defined Cost.
 - The Employer may enter into one or more Supply Chain contracts and novate them to the Contractor at award of the main contract. In this case, details of the contracts must be included in the main contract tender documents.
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Performance Deductions and Bonus

Performance Goals are not necessarily contractual obligations of the Contractor, but are indicators of Contractor performance which can trigger payment deductions. They can be developed on a contract by contract basis.

Rather than having a contractual obligation to complete the Works in a specific period, the contract provides for milestone dates. If a milestone date is not achieved, this can result in a performance deduction (similar to liquidated damages under the other contract forms). Likewise, there can be a bonus for early achievement of milestones.

The other performance goals currently included in the Performance Goals Table cover the same ground as the provisions in the current public works contracts for deductions for failure to provide collateral warranties, programmes, and reports.

Tendering

Early Collaboration Contracts are likely to be awarded under the competitive dialogue procedure. This allows shortlisted candidates to submit their proposed solutions and discuss them with the Contracting Authority before final tenders are invited from at least 3 candidates.

The award criteria for an Early Collaboration Contract will usually include a combination of price and non-price elements. The price elements will normally be made up of the following tendered components:

- the Early Services Fee
- the Target Price for each Task
- the Fee Percentage for each Task.

The Contracting Authority must specify in its tender documents the weighting to be attached to each of these components. It must also explain the non-price elements of the award criteria and their weighting.

It is important to ensure that the quality price ratio is structured in such a way that price is always greater than quality (e.g. price is 70 marks and quality is 30 marks out of a total of 100 marks).

Design standards

Clause 5.2 provides for, among other things, a fitness for purpose design standard similar to that currently included in the public works contracts.

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Adjustment

Because payment for the Task(s) is mainly on a cost reimbursement basis, there is less need for provision for compensation events and delays events as there is in other forms of contract. However, there is provision for the Guaranteed Price etc. to be adjusted for Change Orders and Employer breaches of contract. Adjustments are on the basis of forecast effects of the change or breach.

Change Order

A change order can only increase the Target Price if it delays Substantial Completion of the Works in the Task beyond the Indexation Date, and then the Target Price is subjected to the formula in 11.1.8 (up or down). Otherwise, clause 11.4.3 applies to prevent the Change Order from increasing the Target Price, and allows the Contractor to refuse the Change Order.

Next Steps

If a Contracting Authority is considering using PWCEC, it must in the first instance contact the Government Contracts Committee for Construction (GCCC) at: construction@per.gov.ie

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