

Public Works Contract
for
EARLY COLLABORATION

Office of Government Procurement

PUBLIC WORKS CONTRACT FOR EARLY COLLABORATION

Public Works Contract for Early Collaboration
Document Reference PW-CF10 v1.3
24 May 2018

© 2018 Office of Government Procurement
Published by: Office of Government Procurement
Department of Public Expenditure and Reform
Government Buildings
Upper Merrion Street
Dublin 2

CONDITIONS

Contents

1.	THE CONTRACT	5
1.1	General Duties	5
1.2	Meanings	5
1.3	Forming this Contract	6
1.4	Contract Documents	6
1.5	Transfers	6
1.6	Collateral Warranty	6
2.	TASKS	7
2.1	Early Services	7
2.2	Guaranteed Price Offer	7
2.3	Breaking down the Guaranteed Price	7
2.4	Tasks	8
2.5	Scope of Early Services and Tasks	8
2.6	Suspension	8
3.	PAYMENT	9
3.1	Payment for the Early Services	9
3.2	Payment for Tasks	9
3.3	Payment Mechanics	10
3.4	Retention	10
3.5	Deductions	10
3.6	Saving Share and Bonus	11
3.7	Charges	11
3.8	Final Payment	11
3.9	Time for Payment and Interest	12
3.10	Value-Added Tax	12
3.11	Withholding Tax	13

4.	MANAGEMENT	14
4.1	Co-operation	14
4.2	Contractor's Management	14
4.3	Employer's Representative	15
4.4	Employer's Representative Acting independently	15
4.5	Instructions	16
4.6	Communications	16
4.7	Documents	16
4.8	Employer's Obligations	16
4.9	Language	17
5.	WORKS	18
5.1	Employer's Brief	18
5.2	Design	18
5.3	Execution	18
5.4	Inconsistencies	18
5.5	Inspection	19
5.6	Tests	19
5.7	Defects	20
5.8	Substantial Completion	20
5.9	Early Use	21
5.10	Defects Date	21
5.11	Completion Data	21
5.12	Employer's Rights	21
6.	SITE	22
6.1	Contractor's Use and Occupation	22
6.2	Site Operations, Safety and Security	23
6.3	Other Contractors	23
6.4	Access and Facilities	23
6.5	Working Times	24
6.6	On Completion	24

7.	CONTRACTOR'S PERSONNEL	25
7.1	Contractor Liable	25
7.2	Qualifications and Competence	25
7.3	Pay and Employment Conditions	25
7.4	Supply Chain	27
7.5	Removing Contractor's Personnel	27
7.6	Weekly Labour Records	27
8.	PROPERTY	28
8.1	Ownership of Things for the Works	28
8.2	Infringement of Property Rights	28
8.3	Employer's Documents	28
8.4	Contractor's Data	29
9.	LIABILITY	30
9.1	Employer's Risk of Loss and Damage of the Works	30
9.2	Care of the Works	30
9.3	Contractor's Indemnity	31
9.4	Employer's Indemnity	31
9.5	Employer's Liability	31
9.6	Insurance	32
9.7	Minimise losses	32
9.8	Joint venture	32
9.9	Waiver	32
10.	LAW	33
10.1	Irish law	33
10.2	Compliance with the law	33
10.3	Consents	33
10.4	Project Supervisor	33
10.5	Safety Health and Welfare at Work Act 2005 and Safety Health and Welfare at Work (Construction) Regulations 2013.	33
10.6	Ethics in Public Office	34

PUBLIC WORKS CONTRACT FOR **EARLY COLLABORATION**

10.7	Official Information	34
10.8	Disputes	35
10.9	Jurisdiction	35
10.10	Agent	35
11.	ADJUSTMENT	36
11.1	Adjustment Event	36
11.2	Valuing Changes	37
11.3	Limits on Adjustments	38
11.4	Change Orders	38
11.5	Contractor's Notice of Adjustment Event	38
11.6	Employer's Notice	39
11.7	Disputing the Employer's Representative Determination	39
12.	TERMINATION	40
12.1	Termination of Task or Early Service	40
12.2	Termination Value	40
12.3	Contractor's Default	40
12.4	Saving Shares	42
12.5	No Default	42
12.6	Employer's Liability on Termination	42
12.7	Early Services	42

Conditions

1 THE CONTRACT

1.1 General Duties

- 1.1.1 The Contractor must—
 - complete the Early Services¹ and
 - complete each Task¹ if the Employer so orders and
 - comply with its other obligations under this contract.
- 1.1.2 The Employer must—
 - pay the Contractor according to this contract and
 - comply with its other obligations under this contract.
- 1.1.3 Each Party must do all that it reasonably can to avoid hindering the other’s performance of this contract.

1.2 Meanings

- 1.2.1 The Parties intend this contract to be given purposeful meaning for efficiency and public benefit, generally and as particularly identified in this contract.
- 1.2.2 Superscript numbers (like this⁰) refer to annexed schedules of the same number where terms are defined or further information is given. The parts in Schedule 3 are referred to like this^{3.1}.
- 1.2.3 The following terms are defined or explained in Schedule 1, but the schedule number is not usually given because the terms are used so often:

Adjudication	Defects Date	Milestone Date
Adjustment	Design Document	Model Form
Adjustment Event	ER	Notice of Early Use
Change Order	Early Services	Party
Claim	Early Services Fee	Retention
Consent	Early Works	Site
Contractor	Employer	Substantial Completion
Contractor’s Data	Employer’s Brief	Supply Chain
Contractor’s Personnel	Employer’s Personnel	Target Price
Contractor’s Things	Fee Percentage	Task
Cost Breakdown	Guaranteed Price	Task Lump Sum
Data	Guaranteed Price Offer	Task Price
Day	Guaranteed Price Portion	Things for the Works
Deduction	Guarantor	Working Day
Direction	Individual	Works
Defect	Intellectual Property	
Defects Certificate	Key Amount	

- 1.2.4 When terms are used more than once in a sub-clause (or paragraph in a schedule) the

superscript number is not usually repeated.

1.2.5 Schedule 1 gives other rules for interpretation.

1.3 **Forming this Contract**

1.3.1 This contract is formed by the Employer and the Contractor executing Schedule 12.

1.3.2 Before the date of this contract¹² the Contractor should have given the Employer the documents listed in Schedule 10, executed by all the parties to them except the Employer. If this has not happened the Contractor must do so within 14 days after the date of this contract or a later time allowed by the ER.

1.4 **Contract Documents**

1.4.1 This contract is the entire agreement between the Employer and the Contractor about the Project¹² and is made up of the documents listed in Schedule 12.

1.4.2 The documents making up this contract explain each other, except when this contract says otherwise.

1.4.3 This contract supersedes any previous agreements, understandings, and statements between the Parties about the Project¹². Neither Party has relied on anything said by the other and not included in this contract.

1.4.4 This contract may be changed only by a writing signed by an authorised representative of each Party.

1.4.5 Nothing in, and no omission from, the Pricing Document¹² or Tender Proposals¹² limits the scope of the Early Services or a Task or the Contractor's obligations. Nothing in the Pricing Document or Tender Proposals imposes obligations on the Employer.

1.4.6 Any part of this contract that is unenforceable, illegal, or void is, to that extent, deleted and the rest of this contract stands.

1.5. **Transfers**

1.5.1 The Contractor may not assign this contract or part of it without the Employer's prior written permission.

1.5.2 The Employer may assign this contract.

1.5.3 The Employer may also transfer its rights and obligations under this contract by giving the Contractor a Model Form¹ transfer notice signed on behalf of the Employer and the transferee.

1.6. **Collateral Warranty**

The Contractor must execute Model Form¹ collateral warranties in favour of any organisations the ER Directs within 10 days after receiving the Direction.

2 TASKS

2.1 Early Services

- 2.1.1 The Contractor must start the Early Services when ordered by the Employer and perform them regularly and diligently.
- 2.1.2 The Parties must comply with Schedule 6.

2.2. Guaranteed Price Offer

- 2.2.1 As part of the Early Services the Contractor must, having consulted the Employer, give the Employer a Model Form¹ Guaranteed Price Offer¹ and a Cost Breakdown¹ for each Task.
- 2.2.2 The amount of the Guaranteed Price Offer¹ for a Task must be no higher than the Target Price¹ for that Task, and must be based on the applicable rates in the Pricing Document¹².
- 2.2.3 The Cost Breakdown¹ must include rates or prices for each item for which there are rates or prices in the Pricing Document¹². The rates or prices in the Cost Breakdown must be no higher than corresponding ones in the Pricing Document.
- 2.2.4 After the Contractor has given the Employer a Guaranteed Price Offer¹ for a Task, the Employer may, at its discretion accept the Guaranteed Price Offer for one or more Tasks and order the Contractor to proceed.
- 2.2.5 The Employer has until the latest of the following dates to accept a Guaranteed Price Offer¹:
 - the end of the scheduled period²
 - 28 days after the Employer receives written notice from the Contractor withdrawing the Guaranteed Price Offera later time set by Change Order made before the time to accept expires.
- 2.2.6 If the Employer has not accepted a Guaranteed Price Offer¹ for a Task within the time allowed, the Employer is taken to have rejected it.
- 2.2.7 Within 10 days after the Employer has accepted a Guaranteed Price Offer¹, the Contractor must give the Employer a Model Form¹ performance bond in the scheduled^{3.1} amount, unless the Contractor has already given the Employer the required performance bond for that Task. The ER may, during the Employer's time to accept a Guaranteed Price Offer for a Task, Direct the Contractor to give the Employer the required performance bond for the Task, in which case—
 - the Contractor must do so within 10 days after receiving the Direction and
 - if the Employer does not accept the Guaranteed Price Offer and order the Contractor to proceed with the Task, the Employer must reimburse the Contractor's reasonable irrecoverable cost of the performance bond.

2.3 Breaking down the Guaranteed Price

Before, or within 28 days after, the Employer orders the Contractor to proceed with a Task the ER should, acting independently and using the Cost Breakdown¹, allocate portions of the Guaranteed Price¹ to discrete parts of the Task. The portions should add up to the Guaranteed Price. The **Guaranteed Price Portion** allocated to Substantial Completion of Works in the Task should be as scheduled^{3.1}.

2.4 Tasks

If the Employer accepts a Guaranteed Price Offer¹ for a Task and orders the Contractor to proceed with it, the Contractor must start the Task within the time ordered and perform it regularly and diligently.

2.5 Scope of Early Services and Tasks

- 2.5.1 The scope of the Early Services and Tasks is described in the Employer’s Brief and elsewhere in this contract and includes—
- all work specifically referred to in or reasonably inferred from this contract and
 - all work not specifically referred to in this contract but nonetheless required to complete the Works in the Tasks so that they can be used, occupied, and operated effectively and efficiently and
 - all work required to implement Change Orders.

2.5.2 The Contractor confirms that it has satisfied itself before making this contract of all the circumstances that might affect the cost of performing this contract, and of the correctness and sufficiency of the amounts to be paid under this contract to cover those costs. The Contractor has included allowances in its tender for all risks and other circumstances that might affect its performance, whether they could or could not have been foreseen, except for events for which this contract provides Adjustments¹ or Employer indemnities.

2.6 Suspension

- 2.6.1 The ER may instruct the Contractor to suspend all or part of the Early Services or a Task. The instruction may include steps for safeguarding the Works, Things for the Works¹, and Contractor’s Things¹ during the suspension, and for orderly resumption of the Early Services or Task. The ER may instruct the Contractor to resume work after a suspension.
- 2.6.2 An instruction under this clause resulting from the Contractor’s breach of this contract or failure to achieve Performance Goals^{3.3} is a Direction. Any other instruction under this clause is a Change Order.

3 PAYMENT

3.1 Payment for Early Services

- 3.1.1 For completing the Early Services the Employer must pay the Contractor the Early Services Fee¹ less any Deductions¹ (except Temporary Performance Deductions^{3.3} and Retention¹).
- 3.1.2 Interim advances of the Early Services Fee¹ are payable as scheduled^{3.1}.
- 3.1.3 If the Early Services include Early Works¹, the Employer must also pay the Contractor for completed Early Works as scheduled^{3.1}.

3.2 Payment for Tasks

- 3.2.1 Payment for a Task is only due if the Employer has accepted a Guaranteed Price Offer¹ for the Task and ordered the Contractor to proceed with it.
- 3.2.2 For completing a Task (for which the Employer has accepted a Guaranteed Price Offer¹ and ordered the Contractor to proceed) the Employer must pay the Contractor—
 - the **Task Price** which is—
 - the Defined Cost^{3.2} of completing the Task
 - plus the Fee Percentage¹ of that Defined Cost
 - plus any Saving Share^{3.1} and Bonus^{3.3} for that Task up to the Guaranteed Price¹ for the Task
 - plus any Initial Saving Share^{3.1} for that Task
 - less any Deductions¹ (except Retention¹ and Temporary Performance Deductions^{3.3} that have not become Permanent Performance Deductions^{3.3}).

The maximum that will be due from the Employer to the Contractor for a Task is the Guaranteed Price¹ plus any Initial Saving Share^{3.1} for the Task (plus any VAT due under part 5 of Schedule 3).

- 3.2.3 The Employer and Contractor may agree in writing, signed by their authorised representatives, to convert the Task Price¹ for a Task into a Task Lump Sum¹ less than the sum of the Guaranteed Price¹ and any Initial Saving Share^{3.1}, specifying the manner in which it will be paid. In that case, the Task Lump Sum (plus any VAT due under part 5 of Schedule 3) is the only amount that will be due from the Employer to the Contractor for the Task.
- 3.2.4 Unless otherwise agreed in writing in agreeing a Task Lump Sum¹, interim advances of the Task Price¹ are payable at scheduled^{3.1} intervals, [payment claim dates], with each interim advance consisting of— the total of—
 - the Defined Cost^{3.2} of the Task up to the payment claim date
 - the Fee Percentage¹ of that Defined Cost
 - any Initial Saving Share^{3.1} that has become payable as scheduled^{3.1}
 - but only up to the lesser of—
 - the Guaranteed Price Portions¹ for completed parts of the Task
 - any Annual Payment Limits^{3.1} applicable at the time of payment
 - less total Deductions¹
 - less total previous payments to the Contractor for the Task.

3.3 Payment Mechanics

- 3.3.1 When a payment is to be made to the Contractor, not later than 5 days after the date agreed between the Parties to be the payment claim date the Contractor must give the ER a payment claim notice in the form of a detailed statement of the amount to be paid showing—
 - progress of the work under this contract and
 - the amount that the Contractor considers should be paid under this contract and
 - a detailed breakdown including evidence of any Defined Cost^{3.2} in the application and
 - Deductions¹ and
 - any other supporting evidence that the ER Directs.
- 3.3.2 Within 14 days after receiving the Contractor's statement the ER, acting independently, shall issue to the Contractor a response to the payment claim notice, in the form of a certificate, setting out the amount in the ER's opinion the Contractor should be paid under this contract, together with calculations and reasons for any difference between the amount in the certificate and the Contractor's statement.
- 3.3.3 If a certificate shows a sum owing to the Contractor, the Contractor shall send the Employer an invoice for that sum after receiving the response to the payment claim notice. The Employer shall pay the amount due on the invoice within the period stated in part 1 of Schedule 3.

3.4 Retention

- 3.4.1 The retention percentage scheduled^{3.1} is deducted from each interim advance for a Task or Early Works¹.
- 3.4.2 If there is a scheduled retention-free amount^{3.1} for a Task, Retention¹ is not deducted until total payments for the Task to the Contractor have reached that amount.
- 3.4.3 If there is a scheduled limit of retention^{3.1} for a Task, Retention¹ is not deducted from payments for that Task after the total Retention has reached that limit.
- 3.4.4 The Contractor may invoice the Employer for half the Retention¹ held for a Task with the next interim advance to be made after the ER has certified Substantial Completion of the Works in the Task. If, at the time of invoicing, the Contractor gives the Employer a Model Form¹ retention bond for the second half of the Retention¹, executed by a surety approved by the Employer, the Contractor may invoice the Employer for the whole Retention. Otherwise, the Contractor may invoice the second half after the ER issues the Defects Certificate¹.

3.5 Deductions

- 3.5.1 Payments to the Contractor are for full compliance with this contract (including, for example, construction management, design, programming, reporting, paying wages, and observing employment requirements) and also for achieving the Performance Goals^{3.3}. If the Contractor does not fully comply with this contract or achieve the Performance Goals the Employer is not required to pay in full. In particular the Employer may deduct from payments to the Contractor in accordance with part 3 of Schedule 3 and no payment is due if any Contractor's certificates are outstanding.
- 3.5.2 Temporary Performance Deductions^{3.3} are made from interim advances, but paid in the next subsequent interim advance after the breach or non-performance has been cured. If the

breach or non-performance has still not been cured by the Defects Date¹ the Temporary Performance Deduction becomes a Permanent Performance Deduction^{3.3}.

- 3.5.3 For the purpose of calculating when a Target Price¹, Guaranteed Price¹, Task Lump Sum¹, or Early Services Fee¹ has been paid, Permanent Performance Deductions^{3.3} count as payments made to the Contractor.
- 3.5.4 The ER, acting independently, should allocate each Permanent Performance Deduction^{3.3} to its relevant Task.
- 3.5.5 If the total of Deductions¹ exceeds the sum due from the Employer to the Contractor at any time, the Contractor must pay the Employer the difference on demand.
- 3.5.6 The Employer may deduct from payments to the Contractor any sum claimed by the Employer against the Contractor under this or any other contract or due from the Contractor to another public body under another contract funded (in whole or part) by the Sanctioning Authority⁸.

3.6 **Saving Share and Bonus**

- 3.6.1 Any Initial Saving Share^{3.1} for a Task is paid as scheduled^{3.1}. An Initial Saving Share is not affected by Adjustments¹ to the Task Price¹ or the Guaranteed Price¹.
- 3.6.2 Any Saving Share^{3.1} for a Task is paid with the next interim payment after Substantial Completion of the Task. A Saving Share is not affected by any Adjustments¹ to the Guaranteed Price¹ made after the Guaranteed Price Offer¹ was accepted.
- 3.6.3 Any Bonus^{3.3} for a Task is paid with the next interim payment after Substantial Completion of the Task.
- 3.6.4 Payments under this clause are subject to applicable Retention¹ and other Deductions¹.

3.7 **Charges**

The Contractor must pay any charges according to part 4 of Schedule 3.

3.8 **Final Payment**

- 3.8.1 Within 56 days after the ER certifies Substantial Completion of the Works in a Task, the Contractor must give the ER a final statement of the Task Price¹. The Employer will not be liable to the Contractor in connection with the Task for any matter or sum not detailed in the final statement, except under the indemnities in this contract or for Adjustment Events¹ happening after Substantial Completion was certified. If no final statement is given within the 56 days the Employer is released of all liability to the Contractor under or in connection with this contract.
- 3.8.2 Within 84 days after receiving the Contractor's final statement, the ER, acting independently, should give the Employer and the Contractor a penultimate payment certificate of the Task Price¹, and the amount to be paid at that time, taking account of any Deductions¹, Initial Saving Share^{3.1}, Saving Share^{3.1}, and earlier payments.

PUBLIC WORKS CONTRACT FOR **EARLY COLLABORATION**

3.8.3 Within 84 days after issuing the Defects Certificate¹, the ER, acting independently, should issue a final payment certificate of the amount finally due from the Employer to the Contractor, or the Contractor to the Employer, under this contract. This should be equal to the total of Early Services Fee¹, any amounts under this contract for Early Works¹, and the Task Price¹ stated in the penultimate payment certificate for each Task, less payments already made, and also—

- release of the balance of Retention¹ and
- Adjustment Events¹ happening after Substantial Completion of the Works and
- Deductions¹ not already included and

other payments that under this contract are to be made after Substantial Completion of the Works.

3.8.4 If a penultimate or final payment certificate shows an amount owing to the Contractor, the Contractor shall send the Employer an invoice, for that sum and the Employer shall pay the amount due on the invoice within the period stated in part 1 of Schedule 3. If a penultimate or final payment certificate shows an amount owing to the Employer, the Contractor must pay the amount due within 14 days after the Employer demands payment.

3.8.5 Neither payment nor certificates limit the Employer's rights, the Contractor's obligations, or the ER's powers; nor are they evidence of the value of work or that work has been completed satisfactorily.

3.9 Time for Payment and Interest

3.9.1 When this contract provides for the Contractor to send the Employer an invoice, the Employer must pay the amount due within the scheduled period^{3.1}, subject to this contract.

3.9.2 Interest at the scheduled^{3.1} rate is added to any payment not made within the time allowed by this contract or, if no time is stated, within 21 days after demand for payment.

3.10 Value-Added Tax

3.10.1 Part 5 of Schedule 3 states the extent to which amounts in this contract include value-added tax (**VAT**) on the supply under this contract.

3.10.2 To the extent that amounts in this contract include VAT—

- Adjustments¹ are on a net-of-VAT basis, and the appropriate sum for VAT added or subtracted and
- any VAT included in an amount to be paid to the Contractor that the Employer is required to pay to the Revenue Commissioners (by law or their practice) is deducted from the payment to the Contractor and
- amounts that include VAT are adjusted to take account of changes in the rate of included VAT.

3.10.3 The Contractor must send the Employer for each payment an invoice complying with section 66 of the Value-Added Tax Consolidation Act, 2010.

3.11 **Withholding Tax**

The Employer may make any Deduction¹ or withholding on account of tax required by law or the practice of the Revenue Commissioners.

4 MANAGEMENT

4.1 Co-operation

- 4.1.1 The Employer (subject to constraints as a public body) and the Contractor should support reciprocal co-operation for efficiency and public benefit, including co-operation with and between Contractor's Personnel¹ and Employer's Personnel¹.
- 4.1.2 Such support may be relevant particularly to—
- giving early warning of anything likely to affect the timing, cost, or quality of the Project¹²
 - informed consultations
 - negotiating agreements provided for in this contract
 - forecasting the timing and costs of the Project
 - deciding on Early Works¹
 - value engineering
 - using the most effective and compatible electronic and other methods of communicating and recording
 - efficient order and timing of information to be provided under this contract
 - minimising the effect of suspensions
 - minimising problems, delays, and Adjustment Events¹, irrespective of responsibility
 - Contractor's flexible management
 - assessing the consequences of Change Orders
 - inspection and testing, especially approaching Substantial Completion.
- 4.1.3 Either Party, or the ER, may request clarifications, consultations, workshops, exchange of information and expertise, or investigation, although not provided for elsewhere in this contract. The request should specify purposes and, as relevant, proposed participants, arrangements, and methods and any proposals for recording or agreeing results.
- 4.1.4 The Parties may agree to consult or communicate without prejudice.
- 4.1.5 In any case, offering or giving co-operation does not imply any admission of responsibility or alter either Party's rights or duties unless agreed in writing.
- 4.1.6 Failure to support co-operation under this clause does not result in liability but a Party is not entitled to an Adjustment¹ for delays or costs to the extent that they are increased by that Party's failure to support co-operation.

4.2 Contractor's Management

- 4.2.1 The Contractor's business includes expertise and experience in construction management.
- 4.2.2 Each Task includes the Contractor providing the management services in Schedule 4.

- 4.2.3 The Contractor must also implement the management arrangements in its Tender Proposals¹² and add to or (according to this contract) otherwise change them as desirable for its efficient performance. These arrangements include systems, methods, planning, and other preparations for providing people and other resources, programming, recording, consultation, co-ordination, and co-operation, and for flexibility. The Contractor must keep the ER fully informed about its current arrangements, in advance, and about their implementation.
- 4.2.4 The Contractor is taken to be aware of matters of which its representatives or supervisors are aware, including instructions and communications.

4.3 Employer's Representative

- 4.3.1 If the ER is not named in Schedule 4, the Employer must appoint an engineer, architect, surveyor or other person as the ER promptly after the date of this contract¹² and notify the Contractor.
- 4.3.2 The Employer may change the ER, and must notify the Contractor of changes. The Employer must do so promptly if the position becomes vacant before the Defects Certificate¹ (or the certificates required following termination) has been issued. Pending appointment the Employer performs the functions of ER.
- 4.3.3 If the ER is an incorporated or unincorporated organisation, it should appoint an Individual¹ to perform the functions of ER on its behalf, and notify the Employer and the Contractor. The ER may replace this Individual¹, notifying the Parties.
- 4.3.4 The ER may appoint one or more representatives to assist it, and may delegate some or all of its functions under this contract to a representative, retaining those functions to itself concurrently with the representative. The ER must keep the Employer and the Contractor informed of any appointment of representatives, delegations, and changes.

4.4 ER's Acting Independently

- 4.4.1 For the functions that this contract states the ER should perform acting independently—
- The ER may consult with the Parties; they may also give their views to the ER on their own initiative.
 - The Employer is not liable for the ER's actions.
- 4.4.2 The ER acts on behalf of the Employer when performing other functions under this contract.

4.5 Instructions

- 4.5.1 The ER may give the Contractor instructions on any matter connected with the Tasks, whether or not mentioned elsewhere in this contract. The Contractor must comply with the ER's instructions, except where this contract says otherwise.
- 4.5.2 Instructions may be—
 - Directions or
 - Change Orders.
- 4.5.3 The Contractor must comply with Directions at its own cost and with no extension of Milestone Dates¹.
- 4.5.4 If the ER gives the Contractor an instruction and calls it a Direction, and the Contractor considers that it is a Change Order, the Contractor may so notify the ER and have the issue determined under this contract. In addition to other contract requirements for notice, if the Contractor does not give this written notice before starting to implement the instruction, the instruction will be taken to be a Direction.
- 4.5.5 Instructions of the ER should be in writing except when there is imminent danger to safety or health or of damage to property, in which case the ER may give instructions orally, confirming them in writing promptly.

4.6 Communications

- 4.6.1 The Parties intend communications between them, and between them and the ER, to be interpreted purposefully, having regard also to this contract's purposes of efficiency and public benefit.
- 4.6.2 Notices and other communications are effective if given according to details in or agreed under Schedule 4.

4.7 Documents

The Contractor must keep and make available to the ER for inspection (and give the ER copies of) all Data¹ available to the Contractor or Contractor's Personnel¹ that the ER Directs.

4.8 Employer's Obligations

The Contractor must give the ER at least 14 days advance notice of the date by which the Contractor needs anything that this contract requires the Employer or ER to give the Contractor. The Employer or ER have at least until the latest of the following dates to give the Contractor anything required of them under this contract:

- the date for which notice is first given under this clause
- the date the Contractor actually needs it according to both actual progress and its current programme⁴
- another date in this contract.

4.9 **Language**

Communications between the Parties and the ER, Contractor's Data¹, and other Data¹ provided or maintained under this contract must be in English unless this contract or the law requires another language.

5 WORKS

5.1 Employer's Brief

The Contractor has satisfied itself before entering into this contract of the correctness, completeness, and suitability of the Employer's Brief. The Contractor is fully liable to the Employer for any design in the Employer's Brief. The Employer is not liable to the Contractor for anything in the Employer's Brief and the Employer's Brief does not impose obligations on the Employer.

5.2 Design

- 5.2.1 When designing Works that is included in the Early Services or a Task with which the Employer has ordered the Contractor to proceed, the Contractor must design the Works—
- in compliance with this contract and the Employer's Brief and
 - so that the completed Works comply with this contract, the Employer's Brief, and the law, and are fit for their intended purpose as stated in or reasonably inferred from the Employer's Brief and
 - using the standards of skill, care, and professional conduct reasonably to be expected from a designer with qualifications and experience suitable for the Project¹².

These are independent obligations; none limits the others.

- 5.2.2 The Contractor must ensure that the design of the Works is accurately recorded in Design Documents¹ that have been submitted to the ER under the appropriate procedure in Schedule 5 with no outstanding objections.

5.3 Execution

When executing Works that is included in the Early Services or a Task with which the Employer has ordered the Contractor to proceed, the Contractor must execute the Works—

- in compliance with this contract and the Employer's Brief and
- in compliance with Design Documents¹ that have been submitted to the ER under the appropriate procedure in Schedule 5 with no outstanding objections and
- so that the completed Works comply with this contract, the Employer's Brief, and the law, and are fit for their intended purpose as stated in or reasonably inferred from the Employer's Brief and
- in a proper and workerlike manner using good practice.

These are independent obligations; none limits the others.

5.4 Inconsistencies

- 5.4.1 If Tender Proposals¹² do not comply with the rest of this contract, or it becomes desirable to change them for efficient performance, the Contractor must propose to the ER any change to the Tender Proposals.
- 5.4.2 If Design Documents¹ or Supply Chain Documents⁷ do not comply with this contract, or it becomes desirable to change them for efficient performance, the Contractor must propose to the ER any change to them.
- 5.4.3 If it is or becomes physically or legally impossible for the Contractor to execute the Works according to the Employer's Brief¹, the Contractor must propose to the ER any necessary change to it.

- 5.4.4 A change proposed by the Contractor under this clause will not take effect unless it is agreed by the ER in writing.
- 5.4.5 If either Party becomes aware of an inconsistency within the Employer's Brief, or between the Employer's Brief and other parts of this contract, it must promptly notify the other and the ER.
- 5.4.6 The ER may resolve inconsistencies in the Employer's Brief by a Direction
- 5.4.7 There is no increase in Key Amounts¹ or extension of Milestone Dates¹ because of a change under this clause.

5.5 **Inspection**

- 5.5.1 The Contractor must ensure that the ER and anyone authorised by the ER are able at all reasonable times to have access to all places where the Works are being designed or executed, whether or not at the Site, and all places where Things for the Works¹ are being produced, stored, extracted, or prepared, or any other obligation of the Contractor is being performed, and are able there to inspect, test, observe, and examine Things for the Works, Contractor's Things¹, and activities.
- 5.5.2 The Contractor must promptly give the ER all details the ER Directs about the mode, place, and time of manufacture, the source of supply, and the performance capabilities of Things for the Works¹ and Contractor's Things¹ and any related information, including test certificates.
- 5.5.3 The Contractor must notify the ER before any part of the Works is covered or any Things for the Works¹ or Contractor's Things¹ that are to be inspected are packed or made impossible or difficult to inspect, giving the ER, and any person authorised by the ER, adequate opportunity to inspect them.

5.6 **Tests**

- 5.6.1 This clause applies to tests required by this contract, the Employer's Brief, or Contractor's Data¹, regardless of whether the Contractor, the ER, or others are to do the tests, and regardless of whether they are to be done before or after Substantial Completion.
- 5.6.2 The Contractor must supply all the equipment, Data¹, suitably qualified and experienced people, power, consumables, and instruments required for the tests, unless this contract says otherwise or the ER Directs otherwise.
- 5.6.3 The Contractor must agree with the ER the time and place for the tests.
- 5.6.4 The ER and others authorised by the Employer may attend and observe the tests and the Contractor must facilitate their attendance and observation. Regardless of whether the ER attends the Contractor must promptly give the ER a report of the results and Model Form¹ test certificate.
- 5.6.5 If a test is failed the Contractor may repeat it and must do so if the ER so Directs. The Contractor must, on demand, pay the Employer's cost resulting from re-testing.
- 5.6.6 If the Contractor rectifies a Defect¹, and the ER so Directs, the Contractor must repeat any tests specified for the part of the Works concerned.

5.7 Defects

- 5.7.1 Until the ER has certified Substantial Completion the Contractor must identify, inform the ER of, and promptly rectify all Defects¹ so that the Works comply with this contract.
- 5.7.2 The ER may, without limiting the Employer's other rights, instruct the Contractor to search for a Defect¹ or suspected Defect or its cause. This may include uncovering, dismantling, re-covering, and re-erecting work, testing, inspecting, and providing facilities for inspecting and testing.
- 5.7.3 If the ER instructs the Contractor to search for a Defect¹ or its cause and no Defect is found, and the instruction was not as a result of the Contractor's breach of this contract or failure to achieve Performance Goals^{3,3}, the instruction is a Change Order. Otherwise it is a Direction.
- 5.7.4 At any time before the Defects Date¹ the ER may Direct the Contractor to rectify a Defect¹ within a time Directed by the ER.
- 5.7.5 Alternatively, the Contractor and the Employer may (in their absolute discretion) agree that the Employer will accept a known Defect¹, either in whole or subject to agreed terms, on terms under which the Contractor pays the Employer agreed compensation. If agreement is not reached, the Contractor must rectify the Defect as Directed by the ER. The Contractor remains liable for any Defects other than the known Defect that the agreement is about
- 5.7.6 If a Defect¹ deprives the Employer of substantially the whole benefit of the Works in a Task, or a material part of them, the Employer may reject those Works, and, without limiting the Employer's other rights, the Contractor must repay the Employer all sums paid for the rejected Works, together with the Employer's financing costs and the cost of dismantling and removing the Works, clearing the Site and returning the Things for the Works¹ to the Contractor

5.8 Substantial Completion

- 5.8.1 In addition to any procedures agreed under or included in this contract, the Contractor must notify the ER when the Works in a Task reach or are approaching Substantial Completion and the ER, acting independently, should, within 28 days after receiving the Contractor's notification, give the Contractor and Employer either—
 - a certificate stating the date of Substantial Completion of the Works or
 - reasons for not giving the certificate.But, if so scheduled⁸, the ER should not give the certificate before the Milestone Date¹ for Substantial Completion of the Works unless the Employer agrees.
- 5.8.2 The certificate may include a list of any outstanding work and Defects¹ and the Contractor must complete the outstanding work and rectify the Defects within any time stated in the list, or as otherwise Directed by the ER.
- 5.8.3 When working after Substantial Completion (including complying with a Direction) the Contractor must cause as little disruption as possible to occupants and users of the Works.
- 5.8.4 If the Contractor fails to rectify a Defect¹ or complete outstanding work within the time Directed by the ER (under any clause of this contract) the Employer may, without limiting its other rights, have the work done by others. In this case—
 - the Contractor must, on demand, pay the Employer's cost of the work and the Contractor will be responsible for the work as if the Contractor has done it.

5.9 **Early Use**

- 5.9.1 The Employer may use or occupy part of the Works before Substantial Completion.
- 5.9.2 The sub-clauses below in this clause apply only if the Employer uses or occupies the Works before Substantial Completion is certified, when that is not provided for elsewhere in this contract, the Employer's Brief, or measures established under Schedule 6.
- 5.9.3 Completion, the Employer must first give the Contractor a written **Notice of Early Use**, specifying the parts of the Works the Employer is to use or occupy and the date from which the Employer will do so.
- 5.9.4 The ER, acting independently, should promptly give the Employer and the Contractor a certificate stating what percentage of the value of any relevant Task is made up of the value of the Works to be used or occupied by the Employer under a Notice of Early Use¹, and the Contractor may give the Employer an invoice for half of the same percentage of the Retention¹ for that Task.
- 5.9.5 If the Employer uses or occupies Works under a Notice of Early Use¹ it must not hinder the Contractor's work or allow anyone using or occupying those Works with the Employer's authorisation to hinder the Contractor's work unless the hindrance is under a Change Order.

5.10 **Defects Date**

- 5.10.1 Before issuing the Defects Certificate¹, the ER may, without limiting the Employer's other rights, extend the Defects Date¹ if—
 - work remains outstanding or Defects¹ remain uncorrected at the Defects Date or
 - the Contractor has rectified Defects after Substantial Completion
- 5.10.2 The ER should issue a Defects Certificate¹ to the Contractor and the ER within 28 days after —
 - the Defects Date¹
 - a later date on which the Contractor has submitted all the certificates and Contractor's Data¹ required under Schedule 5.

5.11 **Completion Data**

The Contractor must comply with part 3 of Schedule 5.

5.12 **Employer's Rights**

Neither certificates, nor exercise or non-exercise, of rights under this Condition limit the Employer's rights, the Contractor's obligations, or the ER's powers.

6 SITE

6.1 Contractor's Use and Occupation

6.1.1 Schedule 6 describes arrangements for the Contractor's use and occupation of the Site and identifies, or sets out measures for identifying, the parts of the Site that are the **Area Provided by the Employer**.

6.1.2 The Employer must allow the Contractor to occupy and use a part of the Area Provided by the Employer⁶ on or before the latest of the following dates:

- the date for which the Employer orders the Contractor to proceed with Early Works¹ or a Task that requires the Contractor to execute Works there
- the date the Contractor actually needs to use and occupy the part according to both its actual progress and its current programme

the day after the Contractor has given the Employer or the ER (as this contract requires) the documents listed in Schedule 10 and all other Data¹ to be given under this contract before starting to execute Works there.

6.1.3 The Contractor is responsible for obtaining occupation and use of other parts of the Site.

6.1.4 The Contractor's use and occupation of the Area Provided by the Employer⁶ is subject to any limitations in or reasonably to be inferred from or established under Schedule 6 or the Employer's Brief or both.

6.1.5 The Contractor must facilitate any use or occupation of the Site by the Employer or others referred to in or reasonably to be inferred from or established under Schedule 6 or the Employer's Brief or both.

6.1.6 The Contractor's use and occupation of the Area Provided by the Employer⁶ is solely for the purpose of performing this contract.

6.1.7 The Contractor's right to use and occupy a part of the Area Provided by the Employer⁶ ends on the earlier of—

- the date the ER issues a certificate of Substantial Completion of the Works in the part
- the date which the Employer issues a Notice of Early Use¹ for the part.

In either of these cases, the Employer must allow the Contractor to enter the Area Provided by the Employer to complete its work under this contract.

6.1.8 The Contractor's right to use and occupy a part of the Area Provided by the Employer⁶ ends when the Employer terminates the Early Services or Tasks involving Works on it.

6.1.9 It is the Contractor's responsibility, not the Employer's, to ensure that the extent of the Area Provided by the Employer⁶ is sufficient for the Contractor to perform this contract.

6.2 Site Operations, Safety and Security

Subject to any exceptions in Schedule 6–

- 6.2.1 The Contractor is responsible for all operations on the Site connected with the Works.
- 6.2.2 The Contractor must secure the Site and keep everyone who is not entitled to be there off the Site.
- 6.2.3 The Contractor is responsible for the presence and activities of trespassers, protestors, and others, that are not Employer's Personnel¹, on the Site.
- 6.2.4 The Contractor must keep the Site in good order and free from unnecessary obstructions.
- 6.2.5 The Contractor must keep people on and near the Site safe and protect them from hazards and interference caused by the Works. This includes providing any required lighting, guarding, watching, roads, and footpaths.
- 6.2.6 The Employer must take all reasonable steps to ensure that Employer's Personnel¹ on the Site comply with the Contractor's reasonable safety precautions notified to them by the Contractor.
- 6.2.7 The Parties' duties under this clause apply in relation to a part of the Site from when the Contractor starts to use or occupy it (or, if earlier, the Employer allows the Contractor to do so) until the Contractor's right to do so ends under this Condition. But at all times the Contractor is responsible for the safety and security of its activities and the activities of Contractor's Personnel¹.

6.3 Other Contractors

When so stated in or reasonably to be inferred from Schedule 6 or the Employer's Brief, or both, the Employer may arrange for work to be done on the Site¹ by others. This is not use or occupation of the Site by the Employer. The Contractor must co-operate with the others and, as far as practicable, co-ordinate their activities with its own. The Employer must ensure that these others do not hinder the Contractor's performance of this contract, except as stated in or reasonably to be inferred from this contract or the Employer's Brief or both.

6.4 Access Facilities

- 6.4.1 It is the Contractor's responsibility, not the Employer's, to ensure the suitability and availability of access routes to and through the Site, to maintain and upgrade them as required, and to pay any charges for their use.
- 6.4.2 The Contractor must ensure that its traffic (including Contractor's Personnel's¹ traffic) complies with the law and does not damage roads (except for ordinary wear), bridges, or other property.
- 6.4.3 It is also the Contractor's responsibility, not the Employer's, to obtain and pay for any facilities, power, water, and other services the Contractor requires to perform this contract.

6.5 Working Times

If there are restrictions on working times in, or reasonably to be inferred from, or established under Schedule 6, or the Employer's Brief, or both, the Contractor must observe them and ensure that Contractor's Personnel¹ observe them.

6.6 On Completion

As soon as practicable after Substantial Completion of the Works, the Contractor must remove from the Site all Contractor's Things¹ not needed for performing its remaining obligations. Immediately after the Defects Date¹ the Contractor must remove all remaining Contractor's Things¹ from the Site.

7 CONTRACTOR'S PERSONNEL

7.1 Contractor Liability

The Contractor is liable for Contractor's Personnel's¹ acts and omissions as if they were the Contractor's.

7.2 Qualification and Competence

The Contractor must ensure that Contractor's Personnel¹ are suitably qualified, experienced, and competent for their jobs.

7.3 Pay and Employment Conditions

7.3.1 The Contractor must prominently exhibit copies of this clause for the information of workers

7.3.2 **Workers** means Individuals¹ employed by or otherwise working for the Contractor or Contractor's Personnel¹ in connection with a Task on or near the Site.

7.3.3 The Contractor must ensure that workers' rates of pay and conditions of employment, including pension contributions, comply with all applicable law and that those rates of pay and conditions are at least as favourable as those for the relevant category of worker in any sectoral employment orders, employment regulation orders or registered employment agreements implemented in accordance with the Industrial Relations Acts 1946 to 2015 (including any such agreements registered prior to the Industrial Relations (Amendment) Act 2015, which have not otherwise been superseded). This applies to workers who are posted workers (within the meaning of Directive 96/71/EC of the European Parliament and the Council of 16 December 1996 as amended by Directive 2014/67/EU concerning the posting of workers in the framework of the provision of services) except in regard to pension contributions. The Contractor must ensure that workers who are posted workers receive the benefit of a supplementary occupational retirement pension scheme established in and complying with the laws of a member state of the European Union.

7.3.4 The Contractor must do the following with regard to workers employed by or otherwise working for the Contractor, and ensure that the employers of all other workers (or the persons or organisation for whom they work) likewise do the following:

PUBLIC WORKS CONTRACT FOR **EARLY COLLABORATION**

- 7.3.4
- pay all wages and all other money due to workers
 - ensure that workers' wages are paid according to the Payment of Wages Act 1991 and never more than one month is in arrears or unpaid.
 - pay all pension contributions and other amounts due on behalf of workers
 - make all deductions from workers required by law, and pay them on as required by law
 - keep proper records and timesheets, wagebooks, and copies of payslips, showing the wages and other sums paid to and time worked by each worker, deductions from their pay and their disposition, and pensions and other contributions made for workers, and make those records available for inspection and copying by persons authorised by the Employer whenever so required by the Employer
 - produce any other records relating to rates of pay, pensions and other contributions, deductions from pay and their disposition, workers' conditions of employment, rest periods and annual leave, for inspection and copying by persons authorised by the Employer whenever so required by the Employer.
 - respect the right under law of workers to be members of trade unions
 - observe, in relation to the employment of workers, the Safety Health and Welfare at Work Act 2005 to 2014 and all employment law including the Employment Equality Act 1998 to 2015, the Industrial Relations Act 1946 to 2015, the National Minimum Wage Act 2000 and 2015 and regulations, codes of practice, legally binding determinations of the Labour Court and sectoral employment orders, employment regulation orders or registered employment agreements determined under those enactments.
- 7.3.5 The Employer may make random checks requiring productions of records under this clause.
- 7.3.6 If the Employer so requires, the Contractor must, within 7 days after receiving the Employer's request, give the Employer a statement showing the amount of wages and other payments due at the date of the request to and for each worker or, in regard to workers not employed or otherwise working for the Contractor, ensure that their employers or the persons for whom they work do the same.
- 7.3.7 The Employer may seek information under this clause only for the purpose of ensuring that the obligations referred to in this clause have been discharged. Documents received under this clause must be returned to the person providing them or destroyed if the Employer is satisfied that the obligations have been discharged.
- 7.3.8 If the Contractor has not complied with this clause, the Employer may, without limiting its other rights, estimate the amount that should have been paid to workers and contributions that should have been made on their behalf, and deduct the estimated amount from any payment to the Contractor, until the Employer is satisfied that all proper amounts have been paid.
- 7.3.9 The Contractor must give the ER with each application for payment a Model Form¹ certificate that, in respect to the work to which the application relates, the Contractor has fully complied with this clause. No payment for work is due unless this certificate is given.
- 7.3.10 The Contractor must ensure that if an official of a trade union representing workers who are affected by a sectoral employment order, employment regulation order or which is party to a registered employment agreement affecting workers has concerns in relation to the Contractor's or Contractor's Personnel's compliance with the order or agreement, that official will have access to a designated member of the Contractor's management who engages constructively to resolve matters at this point.

7.4 Supply Chain

7.4.1 The Contractor must not subcontract the execution of the whole of the Works to one or more sub-contractors.

7.4.2 The Contractor must comply with Schedule 7.

7.5 Removing Contractor's Personnel

The Contractor must remove from work on the Project¹² any Contractor's Personnel¹ that the ER so Directs for reasons of negligence or incompetence or because their presence is, in the ER's opinion, contrary to safety, health, or good order.

7.6 Weekly Labour Records

Every Monday (or the next working day if Monday is not a working day) the Contractor must give the ER a list of the name of each worker who worked the week ending the previous Sunday and details of the category of and hours worked by each worker on the list.

8 PROPERTY

8.1 Ownership of Things for the Works

It is agreed, and the Contractor must ensure, that all Things for the Works¹ will become the Employer's property on the earliest of the following:

- when they are delivered to the Site, if they are owned by the Contractor
- when they are incorporated into the Works
- when the Employer makes any payment for them to the Contractor.

8.2 Infringement of Property Rights

8.2.1 The Contractor must indemnify the Employer against Claims¹ resulting from any of the following infringing property rights, including Intellectual Property¹ rights:

- the Contractor's performance or non-performance of this contract, unless covered by the Employer's indemnity in this clause
- use of—
 - the Works or
 - Things for the Works¹ or
 - Contractor's Things¹ or
 - other things or
 - Data¹

by the Contractor or Contractor's Personnel¹ (or, following termination, the Employer or any other person to complete the Works)

- use by the Employer or others of the Works, Contractor's Data¹ or things provided by the Contractor under this contract for the purpose for which they were provided.

8.2.2 The Employer must indemnify the Contractor against Claims¹ resulting from any of the following infringing property rights, including Intellectual Property¹ rights:

- the Contractor's use of things provided by the Employer under this contract
- the use or occupation by the Works of the Area Provided by the Employer⁶ for the Works

when, in either case, it is the unavoidable result of the Contractor complying with the Employer's Brief. This indemnity does not cover charges for use or occupation of land.

8.3 Employer's Documents

The Employer's Brief and any other Data¹ provided by the Employer for the Project remain, as between the Parties, the Employer's property. The Contractor may use them only for performing this contract (or as evidence in proceedings under this contract).

8.4 Contractor's Data

- 8.4.1 The Employer may use, copy, modify, adapt, and translate Contractor's Data¹ for any purpose in connection with the Project¹² (including constructing, maintaining, extending, using, operating, letting, selling, promoting, advertising, reinstating, and repairing) and the other scheduled purposes⁸. The Employer may sub-licence this licence.
- 8.4.2 Property, including Intellectual Property¹, rights in the scheduled⁸ Contractor's Data¹ transfers to the Employer when it is or should be given to the Employer.
- 8.4.3 The Contractor must ensure that the Employer obtains the rights referred to in this clause.
- 8.4.4 The Contractor is not liable for use of Contractor's Data¹ for a purpose other than that for which it is to be given to the Employer under this contract.

9 LIABILITY

9.1 Employer’s Risk of Loss and Damage of the Works

The Employer bears the risk of loss and damage of the Works caused by any of the following:

- war, invasion, act of foreign enemies, hostilities whether war is declared or not, civil war, rebellion, insurrection, military or usurped power.
- pressure waves caused by aircraft or other airborne objects travelling at sonic or supersonic speeds
- contamination by radioactivity or radioactive, toxic, explosive, or other hazardous properties of an explosive nuclear assembly or its components, in either case not caused by the Contractor or the Contractor’s Personnel¹
- terrorism, but only if the Contractor is to insure the Works and terrorism is a permitted exclusion from the insurance under this contract
- use or occupation of the Works by the Employer other than—
 - as provided for in this contract or
 - to the extent that the loss or damage is caused by the Contractor’s breach of this contract or the Contractor’s or Contractor’s Personnel’s negligence.

9.2 Care of the Works

9.2.1 The Contractor has full responsibility for the care of, and bears the risk of loss and damage of, the Works, Things for the Works¹, Contractor’s Things¹ and Contractor’s Data¹ until the earliest of the following:

- the date the ER issues the certificate of Substantial Completion of the Works concerned
- the date the Employer uses or occupies the Works concerned under a Notice of Early Use¹
- the date of termination of the Task concerned.

After that date the Contractor remains responsible for loss and damage caused by any of the following:

- Defects¹
- occurrences before that date
- activities of the Contractor or the Contractor’s Personnel¹

and remains responsible for, and bears the risk of loss and damage of any of the following:

- Things for the Works¹ that have not yet been included in the Works
- Contractor’s Data¹ not yet given to the Employer
- Contractor’s Things¹.

But the Contractor’s responsibility under this clause excludes loss and damage at the Employer’s risk under this Condition.

9.2.2 The Contractor must promptly rectify loss and damage for which it is responsible under this clause regardless of whether there are sufficient insurance proceeds, unless the reason for a shortfall is the Employer’s breach of this contract.

9.2.3 The proceeds of insurance of the Works under Schedule 9, except the portion for the Employer’s costs, are paid into a joint bank account in the Employer’s and Contractor’s names, and paid out to the Contractor in instalments on the basis of interim payment

certificates of the ER for work completed, and, if applicable, also paid out to the Employer for its costs. Any balance remaining in the account after the rectification is completed is paid out to the Employer.

- 9.2.4 If the Works are lost or damaged before the Defects Certificate¹ is issued, and the Contractor is not responsible under this clause, the ER may give a Change Order for their rectification.

9.3 **Contractor's Indemnity**

The Contractor must indemnify the Employer and the Employer's employees against—

- Claims¹ and
 - loss and damage of the Employer's property, unless excluded under Schedule 9
- arising from or in the course of the Contractor's performance or non-performance of this contract.

9.4 **Employer's Indemnity**

The Employer must indemnify the Contractor against

- Claims¹ for death, injury, or illness of any Individual¹ or loss of or damage to any physical property that the Contractor incurs in the course of performing this contract to the extent caused by the Employer's negligence and
- Claims for property damage that is the unavoidable result of executing the Works in compliance with the Employer's Brief.

9.5 **Employer's liability**

9.5.1 The Employer's only liability to the Contractor under or in connection with this contract, or in connection with the Project¹² (whether for breach of contract, negligence, or anything else) is to pay the Contractor the amounts due under this contract and comply with its express indemnity obligations in this contract.

9.5.2 Without limiting anything in this clause, the Employer does not warrant the correctness, completeness, or suitability of any Data¹ provided to the Contractor or Contractor's Personnel¹ on, before, or after the date of this contract, and has no liability in contract, tort, under statute, or on any other basis whatsoever in connection with it. Without limiting anything in this clause the Contractor irrevocably and forever waives any liability that the Employer may have to the Contractor in connection with such Data¹ regardless of any of the following circumstances (and the Contractor acknowledges that the Employer makes no warranty, representation, or undertaking in regard to those circumstances):

- whether or not the Data are correct
- whether or not the Data are complete
- whether or not any testing, investigation, surveys, or other work to prepare the Data was done negligently or in breach of statutory or other duties
- whether or not those who carried out any testing, investigation, surveys, or other work to prepare the Data were properly selected or supervised
- whether or not the Data were suitable for the purposes for which the Contractor or anyone might use it
- whether or not any errors or omissions in the Data are major or numerous or both
- whether or not the Data represent all the information available to the Employer
- whether or not any work described in the Data is done as described in the Data or at all

PUBLIC WORKS CONTRACT FOR **EARLY COLLABORATION**

- whether or not the Employer had or has other information that might render the Data misleading
- the manner in which the Data were made available
- whether or not the Contractor had adequate opportunity to carry out any testing, investigations, surveys, or other work or otherwise to verify the Data.

9.5.3 The Contractor has included in its tendered amounts for the risks that the Contractor agrees to bear under this clause.

9.6 **Insurance**

9.6.1 The Parties must comply with Schedule 9.

9.6.2 If a Party required to insure fails to comply with Schedule 9, it must indemnify the other against any resulting cost, loss, and Claims¹, including the cost of arranging substitute insurance.

9.7 **Minimise losses**

Each Party must do all that it reasonably can to minimise cost and loss for which it has recourse against the other.

9.8 **Joint venture**

If the Contractor is one or more persons (legal or Individual¹) they are jointly and severally liable under and for performance of this contract.

9.9 **Waiver**

A Party's rights are not limited by the Party not exercising them, except when this contract says otherwise. Waiver of a right or a breach does not waive any other right or breach.

10 LAW

10.1 Irish law

Irish law governs this contract, its interpretation, and the Parties' obligations to each other concerning this contract and the Project¹².

10.2 Compliance with the law

The Contractor must comply with the law and ensure that Contractor's Personnel¹ comply with the law in performing this contract.

10.3 Consents

10.3.1 The Employer has obtained or must obtain the Consents¹ to be obtained by the Employer under Schedule 6

10.3.2 The Contractor must obtain all other Consents¹.

10.3.3 The Contractor must give all notices and pay all taxes, fees, and charges required by law for performing this contract, unless otherwise stated in Schedule 6.

10.4 Project Supervisor

10.4.1 This clause applies if the Contractor or its nominee is to be appointed project supervisor under the Safety Health and Welfare at Work (Construction) Regulations 2013 (the **Regulations**) by a document listed in Schedule 10.

10.4.2 The Contractor must ensure that it, or its nominee, complies with its duties as project supervisor under the Regulations and its terms of appointment.

10.4.3 The Contractor represents and warrants to the Employer that the Contractor, or its nominee appointed as project supervisor for the Project¹², is competent and will make adequate resources available to enable itself to perform all the duties under the Regulations.

10.4.4 If the Employer terminates the appointment of the Contractor or its nominee as project supervisor as a result of the project supervisor's incompetence, lack of resources, or failure to comply with duties under the Regulations or terms of appointment, the Contractor must pay the Employer all the Employer's resulting cost, including the cost of securing a replacement or the Employer acting as project supervisor itself.

10.4.5 If the Contractor or its nominee is project supervisor for the design process the Contractor must ensure that the safety file (as defined in the Regulations) is given to the Employer before Substantial Completion of the Works in a Task or Early Works¹. Otherwise, the Contractor must give the Contractor's Data¹ required for the safety file to the project supervisor for the design process before Substantial Completion.

10.5 Safety Health and Welfare at Work Act 2005 and Safety Health and Welfare at Work (Construction) Regulations 2013

10.5.1 The Contractor must, without limiting other obligations, ensure, so far as reasonably practicable and relates to the Early Services and the Tasks with which the Employer has ordered the Contractor to proceed, that the Project¹²—

- is designed and is capable of being constructed to be safe and without risk to health and

PUBLIC WORKS CONTRACT FOR **EARLY COLLABORATION**

- is constructed to be safe and without risk to health and
 - can be maintained safely and without risk to health during use and
 - complies in all respects, as appropriate, with the relevant statutory provisions
- 10.5.2 The Contractor represents and warrants to the Employer that the Contractor is and will, while performing the contract—
- be competent to perform all its obligations under this contract, including this clause and
 - allocate sufficient resources to enable itself to comply with the requirements and prohibitions imposed on it under the relevant statutory provisions.
- 10.5.3 In this Condition **competent, reasonably practicable, and relevant statutory provisions** are construed according to section 2 of the Safety, Health and Welfare at Work Act 2005 and regulation 2.2 of the Regulations.

10.6 **Ethics in Public Office**

The Contractor represents and warrants to the Employer as follows:

- 10.6.1 Neither the Contractor nor anyone on the Contractor's behalf has offered, given, or agreed to give the Employer or any of the Employer's Personnel¹ any gift or consideration of any kind in connection with this contract; nor will they do so.
- 10.6.2 Neither the Contractor nor anyone on the Contractor's behalf has committed an offence under the Prevention of Corruption Acts 1889 to 2010 or the Ethics in Public Office Acts 1995 and 2001 in connection with this contract; nor will they do so.
- 10.6.3 No Minister of the Government, Minister of State, or officer or employee of the Employer, will have or receive any share or part of the Contractor's interest in this contract or any benefit from it.
- 10.6.4 Unless fully disclosed to and agreed in writing by the Employer in advance—
- no former officer or employee of the Employer or of a consultant to the Employer whose duties related to the Project¹² will, for 365 days after leaving the employment or office, be engaged as Contractor's Personnel¹ and
 - no consultant or former consultant to the Employer whose duties related to the Project¹² will be engaged as Contractor's Personnel¹ except where this contract so requires or permits.

10.7 **Official Information**

- 10.7.1 The Contractor must, and must ensure that Contractor's Personnel¹, keep confidential—
- official information as defined in the Official Secrets Act 1963 and
 - other Data¹ that the Employer or ER notify the Contractor is to kept confidential.
- 10.7.2 This clause does not prevent disclosure of information (to the extent permitted by law) —
- to Contractor's Personnel¹ or professional advisors who have first entered an undertaking in the terms of this clause, to the extent necessary for performing this contract
 - to Employer's Personnel¹ to the extent necessary for performing this contract
 - when required by law or order of a court or
 - that has, except as a result of a breach of obligation of confidentiality, become available or generally known to the public at the time of disclosure.

10.7.3 The Contractor's obligations under this clause last for ever.

10.8 **Disputes**

Disputes under this contract are resolved under Schedule 11.

10.9 **Jurisdiction**

Subject to Schedule 11, the Parties submit to the jurisdiction of the Irish courts to settle any dispute concerning this contract or the Project¹².

10.10 **Agent**

If an agent for service on the Contractor is named in Schedule 12, the Contractor confirms that it has irrevocably appointed the named person as its agent for service of all documents concerning legal proceedings, and the agent's failure to notify the Contractor of service does not invalidate service

11 ADJUSTMENTS

11.1 Adjustment Event

Subject to the other provision of this contract, an Adjustment Event¹ has the following consequences:

- 11.1.1 Milestone Dates¹ are extended (or, only with the Contractor's agreement, advanced) to take account of an Adjustment Event's¹ forecast effect on how long it will take the Contractor to complete the Milestone^{3.3}.
- 11.1.2 The Early Services Fee¹ is adjusted in proportion to the forecast value of work in the Early Services added, omitted, or changed by a Change Order.
- 11.1.3 Payment for Early Works¹ under part 1 of Schedule 3 is adjusted in proportion to the forecast value of Early Works added, omitted, or changed by a Change Order.
- 11.1.4 The Target Price¹ of a Task is never adjusted for Change Orders except under sub-clause .8 of this clause.
- 11.1.5 The Guaranteed Price¹ of a Task (for which a Guaranteed Price Offer¹ has been accepted) is adjusted in proportion to the forecast value of work in that Task added, omitted, or changed by a Change Order, but never to exceed the Target Price¹. An Initial Saving Share^{3.1} is not affected.
- 11.1.6 The Task Lump Sum¹ of a Task (for which a Task Lump Sum has been agreed) is adjusted in proportion to the forecast value of work in that Task added, omitted, or changed under a Change Order, but never to exceed the Target Price¹. An Initial Saving Share^{3.1} is not affected.
- 11.1.7 The Fee Percentage¹ for a Task (for which no Task Lump Sum¹ has been agreed) is adjusted in proportion to the forecast effect of a Change Order on the overhead cost of performing the Task (excluding costs covered by Defined Cost^{3.2} and Excluded Cost^{3.2}) to the extent not accounted for by applying the Fee Percentage to the Defined Cost.

- 11.1.8 To the extent that a Change Order delays Substantial Completion beyond the Indexation Date⁸, the Target Price¹ and Guaranteed Price¹ or Task Lump Sum¹ for any Task, Substantial Completion of whose Works are so delayed, is adjusted according to the following formula—

$$A = \left(\frac{A_i \times CPI_{md} \times DC_{ed}}{CPI_{id} \times DC} \right) + \left(A_i \times \left(1 - \left(\frac{DC_{ed}}{DC} \right) \right) \right)$$

where

- A is the adjusted Target Price¹, Guaranteed Price¹, or Task Lump Sum¹
- A_i is the Target Price, Guaranteed Price, or Task Lump Sum before applying this sub-clause
- CPI_{md} is the Consumer Price Index (all items) most recently published by the Central Statistics Office before the date occurring half way between the Indexation Date and the date to which the Milestone Date¹ for Substantial Completion of the Works in the Task is extended under this clause for the Change Order
- CPI_{id} is the Consumer Price Index (all items) most recently published by the Central Statistics Office before the Indexation Date
- DC_{ed} is the Defined Cost^{3.2} of the Task incurred by the Contractor during the period between the Indexation Date and the date to which the Milestone Date for Substantial Completion of the Works in the Task is extended under this clause for the Change Order
- DC is the Defined Cost of the Task.

- 11.1.9 Key Amounts¹ are increased, as appropriate, by the Contractor's additional cost of performing a Task resulting from the Employer's breach of this contract.

11.2 Valuing Changes

Adjustments¹ in proportion to the forecast value of work added, omitted, or changed by a Change Order are made—

- using rates in the Cost Breakdown¹ to value work if the rates are similar and the work is to be done in similar conditions or
- in proportion to rates in the Cost Breakdown if this is reasonable, although the work or conditions are not similar or
- if there are no rates in the Cost Breakdown that can reasonably be used, by making a fair valuation (based on rates for similar work in the locality if available).

For the Early Services, references to the Cost Breakdown are to the Pricing Document.

11.3 Limits on Adjustments

- 11.3.1 Amounts are increased and Milestone Dates¹ are extended for Adjustment Events¹ only to the extent that all the following apply:
- the Adjustment Event is not a result of or response to the Contractor's breach of this contract or failure to achieve the Performance Goals^{3.3}
 - the Contractor has done all it reasonably can to minimise the adverse effects of the Adjustment Event
 - the Contractor has complied with this Condition in full, including giving notices and detail within the time required
 - this contract does not provide otherwise.
- 11.3.2 Key Amounts¹ and Milestone Dates¹ are adjusted only when this contract expressly says so.

11.4 Change Orders

- 11.4.1 Before issuing a Change Order, unless it is urgent, the ER should give the Contractor details of the proposed change, and the Contractor and the ER should meet and attempt to agree the consequences of the proposed change, including any consequential changes to the Works and working methods and Adjustments¹. If the ER so Directs, the Contractor must give the ER, within the time Directed, a written proposal dealing with these consequences of a proposed change.
- 11.4.2 If the consequences of a proposed change are agreed in advance the Parties must confirm the agreed terms in writing and, if the ER issues the Change Order, the Parties must implement the agreed terms.
- 11.4.3 The ER should not issue a Change Order that would increase the value of the work in a Task to more than the Target Price¹. If the ER does so, the Contractor may give the ER notice of this within 7 days after receiving the Change Order, and then the Change Order will take effect initially only as a Direction to submit a written proposal dealing with the consequences of the proposed change, and will take effect only if it is finally agreed or determined that the forecast value of the work in the Task would not exceed the Target Price. If the Contractor does not give the notice within the 7 days it must implement the Change Order as issued.

11.5 Contractor's Notice of Adjustment Event

- 11.5.1 If an Adjustment Event¹ occurs (and it is not a Change Order terms for which have been agreed in advance), the Contractor must give written notice of the Adjustment Event to the ER within 28 days after it became aware of the Adjustment Event, or should have become aware with reasonable diligence on its part.
- 11.5.2 The Contractor's notice of an Adjustment Event¹ must include sufficient information for the ER to make the decisions required without having to seek further information. This includes details about the forecast effects of the Adjustment Event on the Works and the Contractor's working methods, costs, and timing, and any claimed Adjustments¹, with detailed backup.

PUBLIC WORKS CONTRACT FOR **EARLY COLLABORATION**

- 11.5.3 The Contractor must keep detailed contemporary records of Adjustment Events¹ and their consequences, including any details the ER Directs. The Contractor must make these records available to the ER for inspection and give the ER copies when Directed.
- 11.5.4 The Contractor must give the ER any additional information the ER Directs about a notified Adjustment Event¹.
- 11.5.5 If the Contractor does not give notice and details as required by this clause (including within the time required) the Contractor is not entitled to an Adjustment¹ and the Employer is released from all liability to the Contractor in connection with the Adjustment Event¹.
- 11.5.6 Within 28 days after the ER has received from the Contractor sufficient information to make a meaningful assessment on a Contractor's notice of an Adjustment Event¹, if all outstanding issues have not been agreed between the Employer and the Contractor, the ER, acting independently, should determine any Adjustments¹ consequent on the notified Adjustment Event and give written notice to the Parties of its determination.

11.6 Employer's Notice

- 11.6.1 If the ER has issued a Change Order (terms for which have not been agreed in advance), the ER, or the Employer, may, as soon as practicable after the Change Order is issued, give written notice to the other and the Contractor that it considers a Key Amount¹ should be reduced according to this contract.
- 11.6.2 The Contractor may, within 28 days after receiving the notice, give written notice of its response to the ER and the Employer.
- 11.6.3 Within 28 days after receiving the Contractor's response (or the time for responding elapsing with no response) the ER, acting independently, should notify the Employer and the Contractor in writing of its determination of any Adjustments¹ consequent on the notified Adjustment Event¹.

11.7 Disputing the ER's Determination

- 11.7.1 Within 56 days after receiving an ER's determination under this Condition, the Contractor or the Employer may notify the other that it disputes the ER's determination and refer the disputed issue for resolution under Schedule 11.
- 11.7.2 If the ER has not made a determination within the time permitted under this Condition, the ER is taken to have determined that there be no Adjustments¹. In that case, the Employer or the Contractor may notify the other that it disputes the determination, and refer the disputed issue for resolution under Schedule 11, within 56 days after the ER's time for making a determination elapsed.
- 11.7.3 If neither Party gives notice disputing an ER's determination under this Condition within the time allowed, the ER's determination is final and binding on the Parties and Adjustments¹ will take effect, or not take effect, as determined by the ER.

12 TERMINATION

12.1 Termination of Task or Early Services

12.1.1 The Employer may terminate one or more Tasks by giving written notice to the Contractor, without the need to give reasons, and may engage others to complete the Task.

12.1.2 Following termination of a Task the Contractor must, as required in the Employer's notice, or Directed by the ER, do all of the following:

- bring the Task to an orderly end
- deliver to the Employer all complete and incomplete Contractor's Data¹ for the Task
- as Directed by the ER, deliver to the Site complete or incomplete Things for the Works¹ for the Task
- leave the Site in an orderly manner and, unless the Employer's notice or an ER Direction says otherwise, remove all Contractor's Things¹
- as Directed by the ER, assign to the Employer the benefit of Supply Chain¹ contracts, and any other contracts for the Task.

12.2 Termination Value

12.2.1 As soon as practicable after termination the Contractor must give the ER a statement of the **termination value** which is—

- for the Early Services, the portion of the Early Services Fee¹ and amounts payable for Early Works¹ applicable to the work done before termination less any Deductions¹
- for a Task, the total of—
 - the Defined Cost^{3.2} of work done
 - plus the Fee Percentage¹ of that Defined Cost
up to the Guaranteed Price¹ (or Task Lump Sum¹, if there is one)
 - plus any Initial Saving Share^{3.1} to be included in the termination value under this Condition
 - less any Deductions¹ (except Temporary Performance Deductions^{3.3} and Retention¹).

If the Employer's notice or a Direction of the ER requires the Contractor not to remove Contractor's Things¹ from the Site, the termination value also includes their Defined Cost.

12.2.2 Within 14 days after receiving the Contractor's statement of the termination value, the ER, acting independently, should issue a certificate of the termination value.

12.3 Contractor's Default

12.3.1 A Contractor default is—

- a substantial breach of this contract by the Contractor
- a warranty of the Contractor in this contract being untrue
- the Contractor failing to achieve a Milestone^{3.3} by its scheduled Longstop Date^{3.3} (if any)

- the ER, acting independently, issuing a certificate that the Contractor was not performing the Early Services or a Task diligently to achieve a Milestone^{3.3} by its Milestone Date¹ (or the earliest possible date if that is not possible) and, following written notice from the ER, has still not taken sufficient steps to achieve the Milestone by its Milestone Date (or the earliest possible date if that is not possible)
- any of the following (or similar event anywhere) occurring in relation to the Contractor or a Guarantor¹—
 - a petition being presented to wind it up and not being dismissed within 14 days after presentation
 - a meeting of its creditors or members being held for the purpose of considering a resolution to wind it up
 - entering or proposing to enter an arrangement with or for the benefit of its creditors
 - a petition being presented to appoint an examiner
 - a liquidator, examiner, supervisor, receiver, administrative receiver, trustee, encumbrancer, or similar being appointed for it or any of its assets
 - ceasing or threatening to cease its business
 - becoming insolvent or unable to pay its debts as they fall due
 - being an Individual¹, becoming bankrupt or the Contractor dying or becoming incapable of performing this contract.

If the Contractor or a Guarantor is more than one legal or Individual¹ person, a Contractor default includes any of these occurrences in regard to any of them.

- 12.3.2 If a Task is terminated following a Contractor default, the sub-clauses below of this clause apply.
- 12.3.3 Payment of the termination value and any other money due to the Contractor is postponed according to this clause.
- 12.3.4 When the terminated Tasks have all been completed the ER, acting independently, should give the Employer and the Contractor a certificate of the **termination amount**, which is the total of the following—
- the Employer's additional cost of completing the terminated Tasks, above what the Employer would have paid under this contract (including any sums paid to the Supply Chain¹ that had been due to them for work on the Task and included in Defined Cost^{3.2} paid to the Contractor)
 - other costs and losses incurred by the Employer as a result of the termination and its causes
 - other amounts due from the Contractor to the Employer under this contract.
- 12.3.5 If the Employer does not begin to put in place arrangements to complete a terminated Task with 180 days after the termination, the ER should certify the termination amount within 14 days after the 180 days, based if necessary on estimates.
- 12.3.6 If the certified termination amount is less than the certified termination value, the Contractor may give the Employer an invoice for the difference after receiving both of the ER's certificates. If the certified termination amount is higher than the certified termination value, the Contractor must pay the Employer the difference within 14 days of the Employer's demand.

12.4 Saving Shares

- 12.4.1 If a Task is terminated following a Contractor default, the Contractor is not entitled to any Initial Saving Share^{3.1}, Saving Share^{3.1}, or Bonus^{3.3} for that Task.
- 12.4.2 If a Task is terminated and there has been no Contractor default—
 - the termination value includes any Initial Saving Share^{3.1} for that Task and
 - the Contractor is not entitled to any Saving Share^{3.1} or Bonus^{3.3} for that Task

12.5 No Default

- 12.5.1 If a Task is terminated and there has been no Contractor default, the Contractor may give the Employer an invoice for the termination value after receiving the ER's certificate.
- 12.5.2 If a Task with which the Employer has ordered the Contractor to proceed is terminated and
 - there has been no Contractor default and
 - within 365 days after the termination the Employer proceeds with the Taskthe Employer must pay the Contractor, in addition to the termination value, the scheduled percentage⁸ of the difference between total payments to the Contractor for the Task (including termination value) and its Guaranteed Price¹ or Task Lump Sum¹ (if one has been agreed).

12.6 Employer's Liability on Termination

The Employer's liability to the Contractor on termination is as stated in this Condition and the Employer has no other liability for breach of contract, negligence or anything else.

12.7 Early Services

In this Condition **Task** includes the Early Services.