

**Public Works Contract**  
**for**  
**CIVIL ENGINEERING WORKS**  
**designed by**  
**THE CONTRACTOR**

Public Works Contract for Civil Engineering Works Designed by the Contractor

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## Conditions

### 1 THE CONTRACT

#### 1.1 Definitions

The following terms have the following meanings in the Contract:

<b>Term</b>	<b>Meaning</b>
<b>Adjudication</b>	means adjudication under the Construction Contracts Act 2013
<b>Ancillary Certificate</b>	a certificate as prescribed by the Building Control Regulations, other than a statutory certificate of compliance, given by a competent person to confirm compliance of elements of the building, design or Works with Building Regulations; and "Ancillary Certifier" means the person proposed to issue such a certificate.
<b>Applicable Factor (Contractor)</b>	the number in the Schedule, part 3D identified as the Applicable Factor (Contractor).
<b>Applicable Factor (Specialist)</b>	the number in the Schedule, part 3B identified as the Applicable Factor (Specialist) for each Specialist.
<b>Assigned Certifier</b>	the person so assigned by the Employer to certify compliance with the relevant requirements under the Building Control Regulations.
<b>Building Control Regulations</b>	the Building Control Regulations 1997-2014 and any amendments thereto to the extent that they apply to the Works.
<b>Change Order</b>	an instruction of the Employer's Representative to change [including add to or omit from] the Works or to change [including impose or remove] constraints in the Contract on how the Works are to be designed or executed.
<b>Code of Practice for Inspecting and Certifying Buildings and Works</b>	The code of practice published by the Department of Environment, Community and Local Government with reference to Article 20G of the Building Control Regulations.
<b>Consent</b>	planning permission, order, approval, certificate, Design Certificate, Ancillary Certificate, fire certificate, licence, permit, environmental impact statement, or other consent required by Legal Requirement for the design, execution or completion of the Works, or identified as a Consent in the Works Requirements.
<b>Contract Date</b>	the date the Employer issued the Letter of Acceptance.
<b>Contract Sum</b>	the amount identified in the Agreement as the initial Contract Sum, as adjusted in accordance with the Contract.
<b>Contractor's Documents</b>	drawings, specifications, manuals, reports, Consents and other [eye readable and machine readable] written material relating to the Works that the Contractor uses, prepares or gives to the Employer or any other person, or is to use, prepare or give to the Employer or any other person <ul style="list-style-type: none"> <li>■ under the Works Requirements or</li> <li>■ under any Legal Requirement or</li> <li>■ to obtain any Consent or</li> <li>■ in connection with a proposal under sub-clause 4.8.</li> </ul>
<b>Contractor's Things</b>	equipment, facilities and other things the Contractor [or Contractor's Personnel] uses on or adjacent to the Site to execute the Works, except Works Items.
<b>Contractor's Personnel</b>	the Contractor's representative, supervisor, Design Certifier and Subcontractors, employees and other persons working on or adjacent to the Site for the Contractor or Subcontractors, and other persons assisting the Contractor to perform the Contract.

<b>Term</b>	<b>Meaning</b>
<b>Date for Substantial Completion of the Works or a Section</b>	the date identified as the Date for Substantial Completion of the Works or Section in the Schedule, part 1G or 2C, and, if the Schedule states a period, the last day of that period, starting on the Contract Date, in either case as adjusted in accordance with the Contract.
<b>Data Protection Law</b>	is all applicable data protection Law, including the General Data Protection Regulation (Regulation (EU) 2016/679).
<b>Defect</b>	non-compliance of the Works or a Works Item with the Contract [including a failed test and, after Substantial Completion, work that has not been completed].
<b>Defects Certificate</b>	a certificate of the Employer's Representative that the Defects Period has ended.
<b>Defects Period</b>	the period starting on Substantial Completion of the Works and continuing for the period stated in the Schedule, as may be extended under sub-clause 8.6.2.
<b>Design Certificate</b>	a statutory certificate of compliance as prescribed by the Building Control Regulations, given by a competent person to confirm compliance of the design of elements of the building or Works with Building Regulations; and "Design Certifier" means the person proposed to issue such a certificate.
<b>Designated Date</b>	the date 10 days before the last day for receipt of the Contractor's tender for the Works, or, if there was none, 10 days before the Employer received the Contractor's tender for the Works.
<b>Employer's Personnel</b>	any of the following: <ul style="list-style-type: none"> <li>■ the Employer's Representative</li> <li>■ the Employer's employees, agents and consultants in connection with the Contract when acting on behalf of the Employer but not when exercising authority under Law</li> <li>■ other contractors of the Employer working on the Site when acting within the scope of their contracts with the Employer</li> <li>■ anyone else the Employer's Representative notifies the Contractor is Employer's Personnel</li> <li>■ Assigned Certifier.</li> </ul>
<b>Employer's Representative</b>	the engineer or other person appointed by the Employer as its representative in accordance with the Contract.
<b>Inspection Plan</b>	the document prepared by the Assigned Certifier in accordance with the Code of Practice for Inspecting and Certifying Buildings and Works having regard to the Works Requirements. The Inspection Plan also includes the Inspection Notification Framework, both of which may be amended by the Assigned Certifier from time to time.
<b>Inspection Notification Framework</b>	the document prepared by the Assigned Certifier and agreed with the Contractor and the Employer in accordance with the Code of Practice for Inspecting and Certifying Buildings and Works identifying key stages or items of work that individual certifiers and the Assigned Certifier are to be notified by the Contractor as the Works are ready for inspection.
<b>Law</b>	enactments and statutory instruments, each as defined by the Interpretation Act 2005, and regulations, directives and decisions of the European Union having direct effect in Ireland.



<b>Term</b>	<b>Meaning</b>
<b>Legal Requirement</b>	a requirement that applies to the Works as a result of any of the following: <ul style="list-style-type: none"> <li>■ Law</li> <li>■ a Consent</li> <li>■ a decision of an Irish court, the European Court of Justice or the European Court of First Instance</li> <li>■ the requirements of any person having authority in connection with the Works under any Law</li> <li>■ the requirements of any person with whose systems the Works will connect</li> <li>■ the legal rights of any person.</li> </ul>
<b>Letter of Acceptance</b>	the Employer's letter to the Contractor accepting the Contractor's tender.
<b>Novated Design Documents</b>	specifications, drawings and other documents identified as Novated Design Documents in the Schedule, part 1B, that have been made by a designer whose contract is or is to be novated to the Contractor.
<b>Personal Data</b>	shall have the meaning set out in the General Data Protection Regulation in respect of any such personal data processed on behalf of the Employer.
<b>Project Board</b>	means the Project Board outlined in sub-clause 4.15.4 in the Contract
<b>Section</b>	a part of the Works identified as a Section in the Schedule, part 1G.
<b>Site</b>	any place <ul style="list-style-type: none"> <li>■ where the Works are to be executed according to the Contract or</li> <li>■ provided by the Employer for the Works or</li> <li>■ where the Contractor is to operate or maintain Employer's facilities or</li> <li>■ that the Works Requirements identify as part of the Site.</li> </ul>
<b>Site Working Day</b>	a day on which, according to the Contract and the Contractor's programme most recently submitted to the Employer's Representative, the Contractor is to execute the Works on the Site.
<b>Specialist</b>	any of the following: <ul style="list-style-type: none"> <li>■ a Subcontractor or supplier of a Works Item named in the Contract</li> <li>■ Contractor's Personnel who do or are to do design</li> <li>■ Contractor's Personnel stated in the Works Requirements to be Specialists.</li> </ul>
<b>Standing Conciliator</b>	the person appointed by the Parties, if so stated in Schedule Part 1N, and identified in Schedule Part 3C
<b>Starting Date</b>	the day the Contractor proposes to start work under the Contract, as notified by the Contractor to the Employer's Representative under sub-clause 9.1.
<b>Subcontractor</b>	a person to whom the design of all or part of the Works or the execution of part of the Works is subcontracted [by the Contractor or another Subcontractor].

<b>Term</b>	<b>Meaning</b>
<b>Substantial Completion of the Works or a part of the Works [including a Section]</b>	<p>all of the following have happened</p> <ol style="list-style-type: none"> <li>(1) the Works or the part of the Works are complete so that they can be taken over and used by the Employer for their intended purpose and there are no Defects other than <ol style="list-style-type: none"> <li>(a) Defects accepted by the Employer under sub-clause 8.5.4 or</li> <li>(b) minor Defects to which all of the following apply: <ol style="list-style-type: none"> <li>(i) they do not prevent the Works or the part from being used for their intended purpose</li> <li>(ii) the Employer's Representative considers the Contractor has reasonable grounds for not promptly rectifying them</li> <li>(iii) rectification will not prejudice the safe and convenient use of the Works or the part</li> </ol> </li> </ol> </li> <li>(2) all tests that are required by the Contract to be passed before Substantial Completion have been passed</li> <li>(3) the Contractor has given the Employer's Representative the Contractor's Documents that the Contract requires be provided before Substantial Completion</li> <li>(4) the Contractor has given the Employer's Representative the collateral warranties that the Contract requires for the Works or part.</li> <li>(5) the details in the Certificate of Compliance on Completion of the Works or a part thereof have been included on the Register maintained under Part IV of the Building Control Regulations.</li> </ol>
<b>Tender Inflation Indexation Date</b>	the date identified in the Schedule, part 3E.
<b>VAT</b>	value-added tax payable in Ireland under Law.
<b>Works Item</b>	a part of the Works, anything that the Contractor intends will become part of the Works, or temporary works for the Works.

1.2. **Interpretation**

- 1.2.1 The Parties intend the Contract to be given purposeful meaning for efficiency and public benefit generally and as particularly identified in the Contract.
- 1.2.2 Unless the context indicates otherwise, in the Contract
- (1) References to the **Works** are to the works described in the Works Requirements.
  - (2) Words in the singular include the plural and vice versa.
  - (3) References to an **individual** are to a human person.
  - (4) References to a **person** include human persons and corporate and unincorporated bodies.
  - (5) Words in any gender include all genders.
  - (6) References to any **Law** include amendments and replacements.
  - (7) References to the **Contract** or any other writing include amendments.
  - (8) References to a **day** mean a calendar day.
  - (9) References to a **week** mean a period of 7 days.
  - (10) References to a **month** mean a calendar month.
  - (11) References to a **working day** mean a day that is not Saturday, Sunday, a public holiday established under the Organisation of Working Time Act 1997 or Good Friday.
  - (12) References to a requirement to **submit** a document or proposed course of action to Employer's Representative mean to submit it according to sub-clause 4.7, or another procedure that applies according to the Works Requirements, and sub-clause 4.7 or the Works Requirements shall apply in every such case. [Accordingly the Contractor may not implement the submission until permitted by sub-clause 4.7 or the Works Requirements.]
  - (13) References to the Contractor's **current programme** are to the programme in the Works Proposals, if there is one, if not, to the programme first submitted by the Contractor under sub-clause 4.9, or, in either case, to any later programme submitted by the Contractor if the period for the Employer's Representative to review it has passed and there is no outstanding objection.
  - (14) References to **liability** include claims, demands and proceedings.
  - (15) Terms such as **including, in particular, such as, and for example**, are not to be read as exhaustive, or to limit, but may extend, the generality of the provisions to which they relate.
  - (16) References to the **Agreement** and **Schedule** are to the attached agreement and completed schedule.
  - (17) References to the **Works Requirements, Works Proposals** and the **Pricing Document** are to the Works Requirements, Works Proposals and Pricing Document identified in the Schedule, part 1B; in the case of Works Requirements, as changed by Change Orders; in the case of Works Proposals, as changed under sub-clause 4.6.2; and in the case of the Pricing Document, the rates shall be adjusted by multiplying the rates by the Applicable Factor (Contractor) or Applicable Factor (Specialist) in accordance with sub-clause 11.1.3.
  - (18) References to **Delay Events** and **Compensation Events** are to events identified as Delay Events and Compensation Events in the Schedule, part 1K.
  - (19) References to the **initial** Contract Sum are to the Contract Sum stated in the Agreement; references to an initial Date for Substantial Completion are to a Date for Substantial Completion identified in the Schedule; and references to the initial Works Requirements are to the Works Requirements identified in the Schedule.
  - (20) The Parties are the Employer and the Contractor
- 1.2.3 Clarifications, examples and reminders are included occasionally in square brackets to show that no significance is to be given to their absence elsewhere.
- 1.2.4 No rule of legal interpretation applies to the disadvantage of a Party on the basis that the Party provided the Contract or any of it or that a term of the Contract is for the Party's benefit

### 1.3 **Inconsistencies**

- 1.3.1 Except when the Contract states otherwise, the documents in the Contract are to be taken as mutually explanatory of each other if possible. If there is an inconsistency between the documents, they take precedence as follows:
- First, the Agreement, even if it has not been executed
  - Second, the attached Schedule and the Letter of Acceptance and any post-tender clarifications listed in it
  - Third, the Contractor's completed form of tender (excluding other documents in the tender)
  - Fourth, these Conditions
  - Fifth, the Works Requirements
  - Sixth, the Pricing Document
  - Seventh, the Works Proposals, if there are any
  - Eighth, any other documents in the Contract
- 1.3.2 If either Party becomes aware of any inconsistency between terms of the Contract, it shall promptly inform the other Party.
- 1.3.3 If there is an inconsistency between figured and scaled dimensions, the figured dimensions prevail.
- 1.3.4 The Employer's Representative may issue a direction to resolve any inconsistency within the Works Requirements, or between the Works Requirements and other parts of the Contract, and the direction shall be conclusive.

### 1.4 **Pricing Document and Works Proposals**

Nothing in and no omission from the Pricing Document or Works Proposals limits the scope of the Works or the Contractor's obligations. Nothing in the Pricing Document or Works Proposals imposes obligations on the Employer.

### 1.5 **Performance Bond**

Before the Starting Date, unless the Schedule, part 1E, says that no bond is required, the Contractor shall give the Employer a performance bond in the form in the Works Requirements, or, if there is none, a form approved by the Employer. The performance bond shall be in the amount stated in the Schedule, part 1E, and shall be executed by the Contractor and by a surety approved by the Employer.

### 1.6 **Parent Company Guarantee**

If the Schedule, part 2B, says that there is to be a parent company guarantee, the Contractor shall give the Employer such a guarantee before the Starting Date. It shall be executed by the parent company named in the Schedule, part 2B, and in the form in the Works Requirements, or, if there is none, a form approved by the Employer.

### 1.7 **Works Requirements**

- 1.7.1 The Contractor has satisfied itself before entering the Contract of the adequacy of the Works Requirements.
- 1.7.2 The Contractor is fully responsible for the adequacy of the Works Requirements, but is not liable to the Employer for either of the following:
- (1) statements of intended purpose of the Works or parts of them
  - (2) criteria for testing or performance of the completed Works or part of them
- 1.7.3 The Employer is not liable to the Contractor for the Works Requirements.

**1.8 Joint Ventures**

If the Contractor is a joint venture, consortium or other unincorporated grouping of two or more persons, those persons shall be jointly and severally liable to the Employer for the performance of the Contract.

**1.9 Assignment**

The Contractor may not assign the benefit of the Contract, or any part of it, without the Employer's consent.

**1.10 Miscellaneous**

1.10.1 The Contract and the documents referred to in it supersede all previous representations, arrangements, understandings and agreements between the Parties about the subject-matter of the Contract, and set out the entire agreement between the Parties about the subject-matter of the Contract. Neither Party has relied on any other written or oral representation, arrangement, understanding or agreement.

1.10.2 All the terms of the Contract are severable, and if any part is unenforceable, illegal or void, it is to that extent considered not to form part of the Contract, and the enforceability, legality and validity of the rest of the Contract will not be affected.

1.10.3 The Contract may only be changed by a document in writing signed by an authorised representative of each Party.

1.10.4 The rights of a Party will not be prejudiced or restricted by any indulgence or forbearance extended to the other Party, and no waiver by a Party of any breach will waive any other breach.

**1.11 Background Information**

1.11.1 In this sub-clause 1.11 Background Information means any information made available on, before or after the Contract Date to the Contractor or to anyone on the Contractor's behalf by the Employer or by anyone acting on the Employer's behalf in connection with the Contractor's tender for the Contract, which information is not included in this Contract. Background Information also includes any information stated to be 'Background Information'.

1.11.2 The Contractor acknowledges and agrees as follows:

- (1) The Employer has no liability whatsoever to the Contractor in contract, tort, under statute, or on any other basis whatsoever (including negligence and breach of statutory or other duty) in connection with Background Information.
- (2) The Employer has not made and does not make any warranty, representation, or undertaking in connection with Background Information.
- (3) The Employer has not authorised anyone to make any warranty, representation, or undertaking on the Employer's behalf in connection with Background Information.
- (4) Without limiting anything in this sub-clause 1.11, the Contractor irrevocably and forever waives any liability that the Employer may have to the Contractor in connection with Background Information 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:
  - a) whether or not Background Information is correct
  - b) whether or not Background Information is complete
  - c) whether or not any testing, investigation, surveys, or other work to prepare Background Information was done negligently or in breach of statutory or other duties
  - d) whether or not those who carried out any testing, investigation, surveys, or other work to prepare Background Information were properly selected or supervised
  - e) whether or not Background Information was suitable for the purposes for which the Contractor or anyone on the Contractor's behalf might use it
  - f) whether or not any errors or omissions in Background Information are major or numerous or both

- g) whether or not Background Information represents all the information available to the Employer
  - h) whether or not any works described in Background Information are done as described in Background Information or at all
  - i) whether or not the Employer had or has other information that might render Background Information misleading
  - j) the manner in which Background Information was made available
  - k) whether or not the Contractor had adequate opportunity to carry out any testing, investigations, surveys, or other work or otherwise to verify Background Information.
- (5) The Contractor has included in the Contract Sum for the risks that the Contractor has agreed to bear under this sub-clause 1.11.

## **2 THE LAW**

### **2.1 Law Governing the Contract**

Irish law governs the Contract and its interpretation.

### **2.2 Compliance with Legal Requirements**

The Contractor shall in performing the Contract comply with all Legal Requirements and ensure that the Contractor's Personnel comply with all Legal Requirements.

### **2.3 Consents**

2.3.1 The Employer has obtained, or shall obtain, the Consents that the Works Requirements say that the Employer is to obtain. The Contractor shall obtain all other Consents.

2.3.2 The Contractor shall give and comply with all notices and pay all taxes, fees and charges required under Legal Requirements to be paid in connection with performing the Contract, unless the Works Requirements say otherwise.

### **2.4 Project Supervisor**

2.4.1 If the Schedule, part 1C, states that the Contractor is to be appointed project supervisor for the construction stage or the design process or both in accordance with the Safety, Health and Welfare at Work (Construction) Regulations 2013 (the **Construction Regulations**) for the Works, or a project including the Works, the Contractor shall accept the appointment by entering into the appointment in the form in the Works Requirements. If the Schedule, part 1C, states that an individual or body corporate named in the Works Proposals is to be appointed project supervisor for the construction stage or the design process or both in accordance with the Construction Regulations for the Works, or a project including the Works, the Contractor shall ensure that the individual or body corporate named in the Works Proposals accepts the appointment by entering into the appointment in the form in the Works Requirements. The Contractor shall, if appointed as project supervisor, comply with its obligations under the Construction Regulations in connection with that appointment. If the Employer terminates the appointment of the Contractor or other person named in the Works Proposals as project supervisor for the construction stage or the design process or both as a result of that project supervisor's failure to comply with its obligations, the Contractor shall pay to the Employer all the Employer's cost resulting from the termination [including the cost of appointing and fees and expenses paid to a replacement project supervisor, or, if the Employer acts as project supervisor itself, the Employer's cost of doing so].

2.4.2 If the Contractor or a person named in the Works Proposals is to be appointed as project supervisor for the construction stage or the design process or both, the Contractor represents and warrants to the Employer that the Contractor or person named in the Works Proposals is competent and will allocate adequate resources to enable itself to perform its duties under the Construction Regulations.

2.4.3 If the Contractor or a person named in the Works Proposals is appointed as project supervisor for the construction stage or the design process or both the Contractor shall ensure that the project supervisor has the insurances required of the project supervisor under its appointment.

2.4.4 The Contractor shall [without adjustment to the Contract Sum or extension of time] comply with all the lawful directions of the project supervisors appointed for the construction stage and the design process in accordance with the Construction Regulations for the Works, or any project including the Works, and give them any copies of Contractor's Documents that they may request.

2.4.5 The Contractor shall, before Substantial Completion of the Works or any Section, give the Employer the documents required for the safety file (as defined in the Construction Regulations).

**2.5 Safety, Health and Welfare at Work Act 2005 and Safety, Health and Welfare at Work (Construction) Regulations 2013**

- 2.5.1 The Contractor shall [without limiting other obligations] ensure, so far as is reasonably practicable, that the Works:
- (1) are designed and are capable of being constructed to be safe and without risk to health and
  - (2) are constructed to be safe and without risk to health and
  - (3) can be maintained safely and without risk to health during use and
  - (4) comply in all respects, as appropriate, with the relevant statutory provisions.
- 2.5.2 The Contractor represents and warrants to the Employer that the Contractor is, and will, while performing the Contract, be a competent person for the purpose of ensuring, so far as is reasonably practicable, that the Works:
- (1) are designed and are capable of being constructed to be safe and without risk to health and
  - (2) are constructed to be safe and without risk to health and
  - (3) can be maintained safely and without risk to health during use and
  - (4) comply in all respects, as appropriate, with the relevant statutory provisions.
- 2.5.3 The Contractor represents and warrants to the Employer that the Contractor is and will, while performing the Contract, be a competent person to carry out the Works and has allocated and will allocate sufficient resources to enable itself to comply with the requirements and prohibitions imposed on the Contractor by or under the relevant statutory provisions.
- 2.5.4 In this sub-clause 2.5 and sub-clause 2.4, **competent person, reasonably practicable** and **relevant statutory provisions** are construed according to section 2 of the Safety, Health and Welfare at Work Act 2005.

**2.6 Ethics in Public Office**

The Contractor warrants that

- 2.6.1 neither the Contractor nor any person on the Contractor's behalf has offered, given or agreed to give to the Employer or to any of the Employer's Personnel any gift or consideration of any kind in connection with the Contract, nor will they make such an offer, gift or agreement and
- 2.6.2 neither the Contractor nor any person on the Contractor's behalf has committed any offence under the Prevention of Corruption Acts 1889 to 2010 or the Ethics in Public Office Acts 1995 and 2001 in connection with the Contract, nor will they commit any such offence and
- 2.6.3 no Minister of the Government or Minister of State, or officer or employee of the Employer, will have or receive any share or part of the Contract or any benefit from the Contract and
- 2.6.4 unless fully disclosed to and agreed by the Employer in advance
- (1) no former officer nor employee of the Employer nor of a consultant to the Employer whose duties related to the Works will, for 12 months after leaving the employment or office, be engaged as Contractor's Personnel and
  - (2) no consultant or former consultant to the Employer whose duties related to the Works will be engaged as Contractor's Personnel, except for a Specialist whose contract is to be novated from the Employer to the Contractor.



## **2.7 Legal Opinion**

- 2.7.1 If the Contractor or any person executing a bond, guarantee, warranty or other deed or agreement required by the Contract is not an individual or a company incorporated in Ireland the Contractor shall give the Employer, together with the Agreement or other document, a legal opinion that
- (1) the Contractor, or other counterparty, is an entity duly incorporated under the laws of its place of incorporation and is a separate legal entity, capable of being sued in its own name, is validly existing under the laws of that place and no steps have been taken or are being taken to appoint a receiver, examiner, administrator, liquidator, trustee or similar person over it or to wind it up and
  - (2) the Contractor has the necessary power and authority, and all necessary corporate and other action has been taken, to give it the power to execute, deliver and perform the obligations undertaken by it under the Contract or other document and
  - (3) the Contract, or other document, has been duly executed by the Contractor, or other counterparty, or on its behalf, and is binding on it under the laws of the place where it is incorporated and
  - (4) a judgment of an Irish court will be enforceable against the Contractor, or other counterparty, in the place where it is incorporated.
- 2.7.2 The opinion shall be written by a lawyer, approved by the Employer, who is authorised to practice in the place where the counterparty is incorporated. The opinion shall be in a form approved by the Employer. It shall be addressed to the Employer.

## **2.8 Data Protection**

- 2.8.1 The Contractor agrees that
- (a) the Contractor shall process Personal Data only in accordance with the Contract and Data Protection Law;
  - (b) the Contractor shall ensure persons authorised by the Contractor to process Personal Data are subject to confidentiality obligations as provided under Data Protection Law;
  - (c) the Contractor must take appropriate technical and organisational security measures as are required to comply with Data Protection Law;
  - (d) the Contractor may engage sub-processors to perform processing on its behalf, provided it gives prior written notice and informs the Employer of any changes concerning the status of such sub-processors and allows the Employer reasonable opportunity to object to such changes;
  - (e) where any sub-processor of the Contractor will be processing Personal Data on behalf of the Employer, the Contractor shall ensure that a written contract exists between the Contractor and the sub-processor containing clauses equivalent to those imposed on the Contractor by the Contract;
  - (f) the Contractor shall delete or return all Personal Data as directed by the Employer's Representative and not later than when the Contractor completes its contractual duties relating to such data processing;
  - (g) the Contractor shall: (i) make available to the Employer all information necessary to demonstrate compliance with this Clause; and (ii) allow for and assist with audits, including inspections, conducted by or on behalf of the Employer, in order to ensure such compliance, provided however that the Employer shall be entitled, at its discretion, to accept adherence by the Contractor to an approved code of conduct or an approved certification mechanism to aid demonstration by the Contractor that it is compliant;
  - (h) the Contractor shall inform the Employer's Representative immediately if, in its opinion, it receives an direction which infringes Data Protection Law;

- (i) the Contractor shall notify the Employer's Representative within 24 hours of becoming aware of any act or omission [including breach of security] leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of or access to Personal Data transmitted, stored or otherwise processed and shall provide co-operation and assistance to the Employer as is required to mitigate the effects of, and comply with applicable reporting obligations in respect of, such act or omission; and
- (j) no Personal Data shall be transferred outside the European Economic Area by the Contractor or any of its agents or sub-processors without the prior written consent of the Employer, and the Contractor shall comply with Data Protection Law in respect of Personal Data transfers outside the European Economic Area which the Employer has consented to.

### 3 **LOSS, DAMAGE AND INJURY**

#### 3.1 **Employer's Risks of Loss and Damage to the Works**

The Employer shall bear the risk of loss of or damage to the Works resulting from any of the following:

- (1) war, invasion, act of foreign enemies, hostilities whether war is declared or not, civil war, rebellion, revolution, insurrection, military or usurped power
- (2) pressure waves caused by aircraft or other airborne objects travelling at sonic or supersonic speeds
- (3) contamination by radioactivity or radioactive, toxic, explosive or other hazardous properties of any explosive nuclear assembly or its components, in each case not caused by the Contractor or the Contractor's Personnel
- (4) terrorism, but only if terrorism is a permitted exclusion from the Contractor's insurance of the Works
- (5) use or occupation of the Works by the Employer or the Employer's Personnel, other than
  - (i) as provided for in the Contract or
  - (ii) to the extent that the loss or damage is caused by the negligence of the Contractor or the Contractor's Personnel, or the Contractor's breach of the Contract (subject to sub-clause 3.8 if it applies)

#### 3.2 **Care of the Works**

3.2.1 The Contractor shall have full responsibility for the care of, and risk of loss of and damage to, the Works, Works Items, Contractor's Things, Works Requirements, Works Proposals, Contractor's Documents, and anything the Employer gives the Contractor for the Works (together, **Risk Items**) from and including the Starting Date until and including the date the Employer's Representative issues the certificate of Substantial Completion of the Works (or in respect of a Section, the date the Employer's Representative issues the certificate of Substantial Completion of the Section, or in respect of a part of the Works that the Employer takes over under sub-clause 9.7, the date the Employer takes over the part). After that date, the Contractor shall be responsible for loss of and damage to Risk Items due to any of the following:

- (1) Defects
- (2) occurrences before the Employer's Representative issued the certificate of Substantial Completion (or, where applicable, before the Employer took over the part)
- (3) activities of the Contractor or Contractor's Personnel.

But the Contractor's responsibility under this sub-clause 3.2 excludes loss of and damage to the Works that is at the Employer's risk under sub-clause 3.1.

3.2.2 The Contractor shall promptly rectify any loss and damage to Risk Items for which it is responsible under this sub-clause 3.2 [at its own expense if there are not sufficient insurance proceeds].

3.2.3 If loss of or damage to the Works, for which the Contractor is not responsible under this sub-clause 3.2, occurs before the Defects Certificate is issued, the Contractor shall rectify it in accordance with any instruction of the Employer.

**3.3 Insurance of the Works and Other Risk Items**

- 3.3.1 From the Starting Date, the Contractor shall insure the Works and other Risk Items against loss and damage. The insurance shall name the Contractor, the Employer and any other persons the Employer requires as insured. The insurance shall be kept in place for each Section until the date that the certificate of Substantial Completion of the Section is issued, and for the Works, except Sections that have a certificate of Substantial Completion, until the date that the certificate of Substantial Completion of the Works is issued. If so required in the Schedule, part 1D, the insurance for any Section or part of the Works that has reached Substantial Completion shall be extended until the Employer's Representative certifies Substantial Completion of the whole of the Works. In any event, after Substantial Completion, the insurance shall be kept in place until the Defects Certificate is issued, to cover loss and damage for which the Contractor remains responsible under the Contract. The limit of the insurance shall be, except for loss of or damage to Contractor's Things and Employer's property, for the full reinstatement cost of the property insured, including the cost of demolition, removal of debris, delivery, professional fees, inflation occurring during the construction and reinstatement periods, and profit. The sum insured for professional fees shall include at least the percentage of the Contract Sum stated in the Schedule, part 1D. The insurance shall include any Employer's property listed in the Schedule, part 1D, and the indemnity limit for those items shall be as stated in the Schedule.
- 3.3.2 The proceeds of the insurance of the Works, less the portion to cover professional fees that the Employer is to pay, shall be paid into a bank account in the joint names of the Employer and the Contractor. They shall be paid out of the account to the Contractor in instalments on the basis of interim payment certificates of the Employer's Representative of the Contract value of the work done and Works Items delivered to the Site to rectify the loss or damage, following generally sub-clause 11.1, and also paid out of the account to the Employer for its other costs. Any balance remaining in the account after the work of rectification is complete shall be paid to the Employer.

**3.4 Contractor's Indemnity**

- 3.4.1 The Contractor shall indemnify the Employer and the Employer's employees against
- (1) liability and
  - (2) loss of and damage to the Employer's property [including the Site], unless excluded under sub-clause 3.8
- arising from or in the course of the Contractor's performance or non-performance of the Contract.
- 3.4.2 The Contractor's indemnity in this sub-clause 3.4 does not apply to the Employer's liability under the Contract to the Contractor; nor does it apply to liability to the extent that the liability is covered by the Employer's indemnities in sub-clauses 3.5 and 6.2.
- 3.4.3 The Contractor's indemnity for liability for death, injury or illness of any Contractor's Personnel shall apply regardless of whether the death, illness or injury was caused wholly or in part by the negligence of the Employer or any Employer's Personnel.

**3.5 Employer's Indemnity**

The Employer shall indemnify the Contractor against:

- (1) liability for death, injury, or illness of any person or loss of or damage to any physical property that the Contractor incurs in the course of performing the Contract to the extent caused by the negligence of the Employer and
- (2) liability for property damage that is the unavoidable result of executing the Works in accordance with the Works Requirements.

### 3.6 **Public Liability and Employer's Liability Insurances**

- 3.6.1 From the Starting Date until the date the Defects Certificate is issued, the Contractor shall insure the Employer and the Contractor against their respective liabilities for
- (1) death, injury or illness of any person and
  - (2) loss of or damage to any physical property and
  - (3) obstruction, loss of amenities, nuisance, trespass, stoppage of traffic and infringement of light, easement or quasi-easement
- resulting from an accident arising from or in the course of the performance or non-performance of the Contract except to the extent covered by the Employer's indemnities in sub-clause 3.5 or sub-clause 6.2.2(2).
- 3.6.2 From the Starting Date until the date the Defects Certificate is issued, the Contractor shall insure itself against liability for death, injury or illness of Contractor's Personnel. For employees of Subcontractors, this obligation may be satisfied by ensuring that the Subcontractor maintains the insurance. The Contractor shall ensure that this insurance includes a provision that indemnifies the Employer against any liability for which the Contractor would be entitled to an indemnity, including costs, charges and expenses.
- 3.6.3 The minimum indemnity limit of the Contractor's public liability and employer's liability insurances shall be as stated in the Schedule, part 1D.
- 3.6.4 If the Contractor or the Contractor's Personnel return to the Site in connection with the Works after the Defects Certificate is issued, the Contractor shall ensure the insurances required by this sub-clause 3.6 are in place at all times that the Contractor or Contractor's Personnel are on Site.

### 3.7 **Professional Indemnity Insurance**

If the Schedule states that professional indemnity insurance is required, from the Starting Date until the sixth anniversary of the date that the Employer's Representative certifies Substantial Completion of the Works, or any other period stated in the Schedule, part 1D, the Contractor shall maintain professional indemnity insurance for its performance of the Contract. The indemnity limit shall be at least that stated in the Schedule, part 1D. This insurance shall include retroactive cover to when the Contractor's design of the Works and Works Items started.

### 3.8 **Existing Facilities and Use or Occupation by Employer**

This sub-clause 3.8 shall apply only if so stated in the Schedule, part 1D.

To the extent that (a) the Works involve alteration or extension of existing facilities owned by the Employer, or (b) to the extent that the Employer uses or occupies the Works, the Employer shall bear the risk of loss of or damage to those facilities and the part of the Works used or occupied by the Employer, and their contents owned by the Employer, caused by any of the following perils, as defined in the Works Requirements or, if not defined there, in standard fire and specified perils insurance policies available in Ireland:

- (1) fire, storm, tempest, flood
- (2) bursting or overflowing of water tanks, apparatus or pipes
- (3) Explosion, impact, aircraft
- (4) riot, civil commotion or malicious damage.

but the Contractor shall bear the risk of such loss and damage to the extent caused by the negligence of the Contractor or Contractors Personnel to the extent (and up to the limit) required to be insured under sub-clause 3.6.1.

### 3.9 **General Requirements Concerning Insurance**

- 3.9.1 The insurance required by the Contract (the **Insurance**) shall be placed with reputable insurers approved by the Employer.
- 3.9.2 The only exclusions from the Insurance shall be those listed in the Schedule, part 1D. The levels of excess shall be no higher than stated in the Schedule, part 1D.

- 3.9.3 The Insurance shall include any extensions and comply with any additional requirements in the Schedule and the Works Requirements.
- 3.9.4 Liability Insurance on which the Employer is required to be insured shall include a cross-liability clause. All Insurance on which the Employer is required to be insured shall provide that the insurer accepts the term "insured" as applying to each insured person as if a separate policy of insurance had been issued to each of them, but without the overall limit of indemnity being increased as a result, and that non-compliance by the Contractor or any other insured will not affect the Employer's rights.
- 3.9.5 The Contractor shall comply with the terms of the Insurance policies.
- 3.9.6 Within 10 working days of being requested to do so, the Contractor shall give the Employer evidence to the Employer's satisfaction that the Insurances are in effect, including copies of policies and receipts for premiums. For professional indemnity insurance, a certificate in the form included in the Works Requirements, or, if there is none, a form approved by the Employer, signed by the broker or underwriter, may be given instead of a copy of the professional indemnity policy.
- 3.9.7 The Contractor shall not make any material reduction to the Insurance cover unless approved in advance by the Employer. The Contractor shall promptly notify the Employer of any cancellation, renewal, non-renewal or material reduction by the insurer of any Insurance policy.
- 3.9.8 If the Contractor fails to maintain any of the Insurances in the terms required by the Contract, the Employer shall be entitled [without affecting its other rights] to take out the insurance and pay the premiums, and the Contractor shall pay the amount of the premiums to the Employer on demand.
- 3.9.9 If the Works Requirements include provision for an owner controlled insurance programme, the Parties shall comply with those provisions, including any amendments they make to this clause 3.

## **4 MANAGEMENT**

### **4.1 Co-operation**

- 4.1.1 The Employer [subject to restraints as a public authority] and the Contractor shall support reciprocal co-operation for the Contract purposes, including co-operation with and between Contractor's Personnel and Employer's Personnel.
- 4.1.2 Such support may be relevant particularly to any of the following:
- (1) negotiation of agreements provided for in the Contract
  - (2) value engineering
  - (3) use of most effective and compatible electronic and other methods of communicating and recording
  - (4) efficient order and timing of information provided for in the Contract
  - (5) minimising the effects of suspension
  - (6) efforts by the Contractor to minimise delay and Compensation Events and their effects
  - (7) Contractor's flexible management
- 4.1.3 Either Party, or the Employer's Representative, may request clarifications, consultations, workshops, exchange of information and expertise, or investigations, although not provided for elsewhere in the Contract. The request shall specify purposes and, as relevant, proposed participants, arrangements, methods and any proposals for recording or agreeing results.
- 4.1.4 The Parties may agree to consult or communicate, without prejudice. In any case, offering or giving co-operation does not imply any admission of any responsibility or alter either Party's rights or duties unless otherwise agreed in writing. The Parties shall convene meetings of the Project Board to review, without prejudice, disputes referred thereto.

### **4.2 Contractor's Representative and Supervisor**

- 4.2.1 The Contractor shall appoint, before the Starting Date
- (1) a representative with full authority to act on behalf of the Contractor in all matters concerning the Contract and
  - (2) a full-time supervisor of all the Contractor's activities on the Site, with full authority to receive instructions and other communications on behalf of the Contractor in all matters concerning the Contract.
- The representative and the supervisor may, but need not, be the same person.
- 4.2.2 Matters of which the Contractor's representative or supervisor are aware [including communications and instructions] are presumed to be within the Contractor's knowledge.
- 4.2.3 If the Contractor's representative or supervisor are named in the Works Proposals, the Contractor shall appoint the individuals named. If not, or either of them is changed, the Contractor shall submit details of the proposed representative or supervisor to the Employer's Representative. If the Contractor's representative or supervisor dies, or becomes incapable of performing their role, or is no longer available to the Contractor, the Contractor shall appoint a suitable replacement, having submitted details to the Employer's Representative. If the Employer's Representative so requires because of the misconduct, negligence or incompetence of either of them, the Contractor shall remove its representative or supervisor and appoint a suitable replacement, having submitted details to the Employer's Representative.

### **4.3 Employer's Representative**

- 4.3.1 If the Employer's Representative is not named in the Schedule, part 1A, the Employer shall, promptly after the Contract Date, appoint, and notify the Contractor of the identity of, the Employer's Representative.

- 4.3.2 If there are limitations on the authority of the Employer's Representative to perform its functions or powers under the Contract, they are stated in the Contract. But any act or instruction of the Employer's Representative under the Contract shall have effect as if within the Employer's Representative's authority, and the Contractor need not inquire into whether the Employer has actually authorised it.
- 4.3.3 The Employer's Representative may delegate in writing to named representatives any functions or powers under the Contract and revoke any delegation. The appointment of such a representative shall not prevent the Employer's Representative from exercising directly any functions or powers. The Employer's Representative shall notify the Contractor and the Employer of any delegation, and the names of representatives, and of any subsequent changes, within 5 working days after the event in each case.
- 4.3.4 Any opinion, certificate, determination, assessment or objection of the Employer's Representative under the Contract may be revised in accordance with clause 13, except for decisions stated in the Contract to be conclusive [such as rejection of a value engineering proposal under sub-clause 4.8 or rejection of a Defect under sub-clause 8.5.4].
- 4.3.5 The Employer may replace the Employer's Representative at any time, notifying the Contractor of the replacement, and shall do so promptly if the position of Employer's Representative becomes vacant before the Defects Certificate (or alternatively the certificates required following termination) have been issued. Pending appointment of a replacement, the Employer shall carry out the functions and powers of the Employer's Representative.

#### **4.4 Employer's Representative's Communications**

- 4.4.1 The Employer's Representative may give the Contractor
  - (1) instructions, which are either
    - (a) directions in accordance with the Contract or
    - (b) Change Orders and
  - (2) objections, in accordance with sub-clause 4.7
- 4.4.2 The Employer's Representative may give the Contractor or the Employer, or both
  - (1) opinions, assessments, determinations and certificates, in accordance with the Contract and
  - (2) other communications [including clarifications] in accordance with the Contract or the Employer's Representative considers appropriate.

#### **4.5 Instructions**

- 4.5.1 The Employer's Representative may issue instructions to the Contractor on any matter connected with the Works [whether or not mentioned elsewhere in the Contract] at any time up to the date the Defects Certificate is issued. The Contractor shall comply with an instruction of the Employer's Representative.
- 4.5.2 If the Employer's Representative gives an instruction and calls it a direction, but the Contractor considers that it is a Change Order, the Contractor shall be entitled to give notice under sub-clause 10.3, and have the issue determined under clause 10. In addition to the requirements of sub-clause 10.3, the Contractor must give this notice before starting to implement the instruction, otherwise it will be taken to be a direction.
- 4.5.3 The Employer's Representative shall not give a Change Order concerning the Works or a Section after its Substantial Completion has been certified, except concerning Defects or work to be done after Substantial Completion.
- 4.5.4 Instructions of the Employer's Representative shall be given in writing except when there is imminent danger to safety or health or of damage to property, in which case the Employer's Representative may give oral instructions, and shall confirm them in writing as soon as practicable.



**4.6 Works Requirements, Works Proposals and Novated Design Documents**

- 4.6.1 The Contractor shall ensure that all Works Proposals comply with the Works Requirements.
- 4.6.2 If any Works Requirements do not comply with the Legal Requirements or are physically impossible to comply with, the Contractor shall propose a change to the Works Requirements as necessary. If any Works Proposals do not comply with the Contract or Legal Requirements or are physically impossible to comply with, or otherwise need to be changed, the Contractor shall propose a change to the Works Proposals as necessary. In either case a change shall not take effect unless and until it has been agreed by the Employer's Representative. [There shall be no extension of time, use of programme contingency under sub-clause 9.4, or adjustment to the Contract Sum for changes or actions under this sub-clause 4.6 or their consequences.]
- 4.6.3 The Contractor adopts the Novated Design Documents as Works Proposals, and is fully responsible for them. [The Contractor shall submit any changes to the Novated Design Documents to the Employer's Representative.]

**4.7 Required Contractor Submissions**

Unless the Works Requirements say that a different procedure is to apply, whenever the Contract requires that a document or proposed course of action be submitted to the Employer's Representative, the following shall apply:

- 4.7.1 The Contractor shall give the document or a statement of the proposed action and all necessary supporting information to the Employer's Representative.
- 4.7.2 The Employer's Representative may [but is not bound to] make a written objection to a Contractor's submission, giving reasons.
- 4.7.3 The Employer's Representative may request additional information.
- 4.7.4 The Employer's Representative's period for objection is 10 working days from when the Employer's Representative has received from the Contractor enough information to make a purposeful review of the matter submitted should it wish to make one.
- 4.7.5 The Contractor shall apply in writing for any reduction of the period that it considers desirable in the interests of the Works, which the Employer's Representative may agree if it thinks fit.
- 4.7.6 The Employer's Representative may alter or withdraw an objection.
- 4.7.7 The Contractor shall not implement any submission before the period has ended, or contrary to any outstanding objection given within the period.
- 4.7.8 The Contractor shall make a new submission to meet any objection given within the period.
- 4.7.9 The Contractor shall also make new submissions as necessary to perform its duties under the Contract [whether or not it has received any objection], and in particular so that its submitted programme shows actual and current planned progress.
- 4.7.10 The Employer's Representative may object on the grounds that to proceed according to the submission
  - (1) would not comply with the Contract or
  - (2) would have an adverse effect on the Employer or the public interest or
  - (3) would impose an obligation on the Employer that the Contract does not require the Employer to bear or
  - (4) would be contrary to a Legal Requirement or
  - (5) would have an adverse effect on the Contractor's ability to comply with the Contract or any other ground stated in the Contract.
- 4.7.11 Neither the Employer's Representative's rights to object, nor objections or their absence, reduce any of the Employer's Representative's other powers, or reduce any of the Contractor's responsibilities.

#### 4.8 **Value Engineering**

- 4.8.1 The Contractor may give to the Employer's Representative a written value engineering proposal that will, if adopted, either
- (1) reduce the Contract Sum or
  - (2) accelerate the design or execution of the Works, or otherwise be of benefit to the Employer, with no increase to the Contract Sum.
- 4.8.2 The Contractor's proposal shall include all of the following:
- (1) any proposed changes to the Contract
  - (2) any proposed changes to the Contractor's Documents [including other Consents]
  - (3) a detailed breakdown of the Contractor's original tender cost for the relevant work and the projected cost of the proposal and any proposed adjustment to the Contract Sum to reflect a share of any saving
  - (4) details of any proposed changes to the programme.
- 4.8.3 The Employer's Representative shall, as soon as practicable, notify the Contractor whether the Employer agrees to or rejects the proposal. If the Employer agrees to the proposal, the Employer's Representative shall, if agreed, determine a reduction to the Contract Sum or an adjustment to the Date for Substantial Completion of the Works and any affected Section (or both) in accordance with the agreed proposal and the Contractor shall implement the agreed proposal. If the proposal is rejected, this shall be conclusive.

#### 4.9 **Programme**

- 4.9.1 Before the Starting Date, the Contractor shall submit to the Employer's Representative and the Project Board members, [and the Standing Conciliator where appointed], a detailed programme having regard to the requirements of the Inspection Plan and Inspection Notification Framework. If there is a programme in the Works Proposals that complies with the Contract, the Contractor shall submit that programme, with any required additional information [such as the actual programmed dates and any Inspection Plan requirements]. The programme shall be of a quality that will permit effective monitoring of the Works and shall, except to the extent that the Works Requirements say or the Employer's Representative agrees that anything may be omitted, include details of all of the following:
- (1) when the Contractor will require any instructions, Works Items or other things to be given by the Employer, or anything else the Contract requires the Employer, the Employer's Representative or others to give the Contractor
  - (2) the order in which and times at which the Contractor proposes to design and execute the Works, including details of procurement, manufacture, delivery, installation, construction, testing, commissioning and trial operation of Works Items and the sequencing and timing of inspections and of tests
  - (3) when Contractor's Documents will be submitted to the Employer's Representative
  - (4) the methods by which the Contractor proposes to execute the Works and any temporary works
  - (5) the Contractor's estimate of each category of Contractor's Personnel and Contractor's Things expected to be on Site for each period
  - (6) work to be carried out at the Site by Employer's Personnel and others as provided in the Works Requirements
  - (7) current critical path, critical resources, floats and other flexibility
  - (8) details of last review made of programme logic and durations, and of the purposes of any changes
  - (9) anything else required by the Works Requirements.
- 4.9.2 The Contractor's programme shall allow reasonable periods of time for the Employer and the Employer's Personnel to comply with their obligations under the Contract.

- 4.9.3 If the Contractor's programme most recently submitted to the Employer's Representative and the Project Board members, [and the Standing Conciliator where appointed], does not correspond with actual or reasonably projected progress or the Contractor's obligations, the Contractor shall, if so directed by the Employer's Representative, submit to the Employer's Representative and the Project Board members, [and the Standing Conciliator where appointed], a revised programme that complies with this sub-clause and the other provisions of the Contract, showing actual progress and progress projected by the Contractor. If the Contractor asserts that it is not possible to reach Substantial Completion of the Works or a Section by its Date for Substantial Completion, the revised programme shall show Substantial Completion by the earliest possible date. [Neither the programme nor its review will limit the Contractor's responsibility or liability for the delay.] If the Contractor fails to submit the revised programme within 15 working days of a request from the Employer's Representative, the Employer shall be entitled to withhold from the Contractor 15% of any payment to be made to the Contractor until the revised programme is submitted.

#### 4.10 **Progress Reports**

- 4.10.1 The Contractor shall give the Employer's Representative and the Project Board members, [and the Standing Conciliator where appointed], monthly progress reports from the Starting Date until the Contractor has completed all work outstanding on Substantial Completion of the Works. The first report shall cover the period from the Starting Date up to the end of the month in which it occurs, and each subsequent report shall cover one month. The Contractor shall give each progress report within 7 days after the end of the month it relates to. Each progress report shall be in a form agreed by the Employer's Representative.
- 4.10.2 Each progress report shall include all of the following, except to the extent that the Works Requirements say or the Employer's Representative agrees that any of the following may be omitted:
- (1) a detailed description of progress of each stage of the Works against the Contractor's current programme
  - (2) the names of Specialists and the off-site suppliers of the main Works Items, and progress and location of the design, manufacture, fabrication, delivery, installation, testing and commissioning of Works Items
  - (3) details of the Contractor's Personnel and Contractor's Things on the Site
  - (4) status of preparation and review of Contractor's Documents
  - (5) copies of quality assurance documents and test results and certificates
  - (6) details of when any instructions to be given by the Employer's Representative will be required, and any that are outstanding
  - (7) details of when any Works Items or other things to be given by the Employer will be required, and any that are outstanding
  - (8) details of any Delay Events and Compensation Events that have occurred during the period, or are unresolved, including any disputes referred to the Project Board or to conciliation or to Adjudication or to arbitration
  - (9) details of any accidents, injuries, hazardous incidents, environmental incidents, labour relations problems and public relations problems concerning or affecting the Works
  - (10) details of anything that might have an adverse effect on the execution of the Works, the steps the Contractor is taking or proposes to take to reduce those risks, and any steps that the Contractor proposes that the Employer or the Employer's Personnel take to reduce those risks
  - (11) anything else that the Contractor considers relevant to a progress report
  - (12) anything else relevant to a progress report that the Employer's Representative directs.

#### **4.11 Notice and Time for Employer's Obligations**

- 4.11.1 The Contractor shall give the Employer's Representative at least 10 working days advance notice of the date by which the Contractor requires any Works Items or other things that the Employer or Employer's Representative is to give including any requirements arising from the Inspection Plan and Inspection Notification Framework.
- 4.11.2 The latest date for the Employer or Employer's Representative to give the Contractor any required Works Item or other thing, shall be the latest of the following:
- (1) the date stated in the Contract, if any
  - (2) the date shown in the Contractor's current programme
  - (3) the date for which the Contractor first notifies the Employer's Representative under this sub-clause that it is required
  - (4) the date the Contractor requires the instruction, Works Item or other thing in accordance with its actual progress.

#### **4.12 Documents**

- 4.12.1 The Contractor shall keep on the Site all of the following:
- (1) a full up-to-date set of the Contract documents (but the Pricing Document may be unpriced), instructions of the Employer's Representative, and Contractor's Documents
  - (2) a log of all instructions and Contractor's Documents showing dates of issue for each and any subsequent revisions
  - (3) if requested by the Employer's Representative, all publications named in the Contract and the Contractor's Documents.
  - (4) Wage records [including time sheets and copies of all pay slips] applicable to all workers [as defined in sub-clause 5.3.1].
- The Employer's Representative, and any person authorised by the Employer's Representative, shall have a right of access to these at all reasonable times.
- 4.12.2 The Contractor shall retain the Contractor's Documents in relation to the Works for a period of six [6] years from the date of completion of the Works or if applicable from the date of termination of the Contract for any reason.

#### **4.13 Contractor's Management**

- 4.13.1 The Contractor's business includes expertise and experience in construction management.
- 4.13.2 The Works Proposals include details of the Contractor's initial management arrangements for performing its Contract responsibilities.
- 4.13.3 The Contractor shall implement the arrangements, and shall add to and otherwise change them, as desirable for its efficient performance.
- 4.13.4 The arrangements shall include systems, methods, planning and other preparations for providing personnel and resources, programming, recording, consultation, co-ordination, and co-operation, and for flexibility, as referred to in the Contract.
- 4.13.5 The Contractor shall keep the Employer's Representative fully informed about its current arrangements, in advance, and about their implementation.
- 4.13.6 The Contractor shall give the Employer's Representative all information, documents and records in the possession of, or available to, the Contractor or the Contractor's Personnel, that the Employer's Representative requires to perform its functions and powers under the Contract.

#### **4.14 Communications**

- 4.14.1 The Parties intend all communications between them to be interpreted purposefully, having regard to the Contract's purposes.
- 4.14.2 Whenever any communication [including a notice, decision, objection, approval, certificate, determination, instruction or request] is to be given under the Contract it shall, unless the

Contract provides otherwise, be in English, in writing and delivered as follows:

- (1) for notices under clause 12 or clause 13, delivered by hand or sent by pre-paid registered post to the address for those notices in the Schedule, part 1A, as updated by the relevant Party
- (2) for other communications, delivered by hand or sent by pre-paid post, fax or email according to the particulars for other communications in the Schedule, part 1A, as updated by the relevant Party.

4.14.3 Communications by pre-paid registered post are presumed to have been received at 10:00 a.m. two working days after posting. Fax and email communications are presumed to have been received when receipt is electronically recorded.

#### 4.15 **Meetings**

- 4.15.1 The Contractor's representative and the Employer's Representative shall attend regular meetings scheduled by the Employer's Representative and any special meeting called by either of them to discuss a particular issue identified when calling the meeting. The Employer's Representative may invite other Employer's Personnel and the Contractor may invite Contractor's Personnel to attend meetings. The Contractor shall arrange for the attendance at a meeting of any Contractor's Personnel requested by the Employer's Representative. The time and place of meetings shall be set by the Employer's Representative, after consulting the Contractor, acting reasonably.
- 4.15.2 Within 5 working days after each meeting the Employer's Representative shall issue minutes of the meeting to the Employer and the Contractor. The Contractor shall notify the Employer's Representative of any objection to the minutes within 5 working days of receiving them, otherwise, unless clearly wrong, they shall be considered correct. Thereafter within 5 working days the Employer's Representative shall issue copies of the minutes and objections thereto to the Project Board Members, [and to the Standing Conciliator where appointed].
- 4.15.3 The dispute management procedure, under Clause 13 of the Contract, includes meetings of the Project Board. The Project Board shall only review disputes, formally referred to the Project Board, arising from sub-clauses 10.5.4 and 10.5.5 of the Contract
- 4.15.4 The Project Board is comprised of the individuals so identified to be members in the Schedule Part 3A of the Contract. Proposed changes to any of the individuals shall be communicated to all members of the Project Board in advance of any replacement being made. Replacement individuals to the Project Board shall have equivalent authority to reach agreement as their predecessor.

#### 4.16 **Confidentiality and Secrecy**

- 4.16.1 The Contractor shall [and shall ensure that the Contractor's Personnel shall] keep confidential
  - (1) official information as defined in the Official Secrets Act 1963 and
  - (2) other information stated in the Works Requirements to be confidential or secret, or that the Employer or the Employer's Representative notifies the Contractor is confidential or secret.
- 4.16.2 The Employer shall keep confidential the Contractor's rates and prices in the Pricing Document or provided in accordance with the Contract, and any records given by the Contractor under the Contract that the Contractor notifies the Employer's Representative are confidential.
- 4.16.3 This sub-clause 4.16 shall not prevent disclosure of information, to the extent permitted by Law
  - (1) to the Contractor's Personnel, the Employer's Personnel or other professional advisors to the Contractor or Employer, who have first entered an undertaking in the terms of this sub-clause 4.16, to the extent necessary for the design or execution of the Works or to enforce the Contract or
  - (2) when required by Law or order of a court or, in the case of disclosure by the Employer, for governmental, parliamentary, statutory, administrative, fiscal or judicial purposes, or the publication of an award notice or
  - (3) that has, except as a result of breach of confidentiality, become available or generally

known to the public at the time of the disclosure.

4.16.4 The Contractor's obligations under this sub-clause 4.16 shall be perpetual. The Employer's obligations under this sub-clause shall expire when the commercial sensitivity of the relevant information has ceased, in any event 5 years after the information was given.

**4.17 Contractor's Things Not to Be Removed**

The Contractor shall submit details to the Employer's Representative before removing any Contractor's Things from the Site before the Employer's Representative issues a certificate of Substantial Completion of the Works or relevant Section.

**4.18 Contractor's Documents**

All Contractor's Documents shall be in English, except when the Works Requirements or the Law specify another language

## **5 CONTRACTOR'S PERSONNEL**

### **5.1 Contractor's Personnel to Carry Out Contractor's Obligations**

The Contractor is liable for the acts and omissions of Contractor's Personnel [including Specialists and any design they do] as if they were the Contractor's acts and omissions.

### **5.2 Qualifications and Competence**

The Contractor shall ensure that the Contractor's Personnel are suitably qualified and experienced and are competent to carry out their respective tasks.

### **5.3 Pay and Conditions of Employment**

5.3.1 The Contractor shall prominently exhibit copies of this sub-clause 5.3 for the information of persons at the Site. In this clause 5 **worker** means an individual employed by, or otherwise working for, the Contractor or the Contractor's Personnel on or adjacent to the Site.

5.3.2 The Contractor shall ensure that the rates of pay and the conditions of employment, including pension contributions, comply with all applicable law and that those rates 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 under 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 the 16 December 1996 as amended by Directive 2014/67/EU concerning the posting of workers in the framework provision of services), except that the Contractor's obligation to make pension contributions in accordance with any sectoral employment orders, registered employment agreements or employment regulation orders implemented under the Industrial Relations Acts 1946 to 2015 does not apply to posted workers who already contribute, or whose contributions are paid, to a supplementary pension scheme established in another member state of the European Union. The obligations in this sub-clause 5.3 apply regardless of what rates the Contractor has tendered for adjustments to the Contract Sum

5.3.3 The Contractor shall in respect of

- (i) workers employed by, or otherwise working for, the Contractor and
- (ii) all other workers, ensure that their employers, or the persons for whom they are working,

do all of the following:

- (1) pay all wages and other money due to each worker
- (2) ensure that workers' wages are paid in accordance with the Payment of Wages Act 1991 and are never more than 1 month in arrears or unpaid
- (3) pay all pension contributions and other amounts due to be paid on behalf of each worker
- (4) make all deductions from payments to workers required by Law, and pay them on as required by Law
- (5) keep proper records [including time sheets, wage books and copies of pay slips] showing the wages and other sums paid to and the time worked by each worker, deductions from each worker's pay and their disposition, and pension and other contributions made in respect of each worker, and produce these records for inspection and copying by any persons authorised by the Employer, whenever required by the Employer
- (6) Produce any other records relating to the rates of pay, pension and other contributions, deductions from pay and their disposition, conditions of employment of workers, rest periods, and annual leave for inspection and copying by any persons authorised by the Employer, whenever required by the Employer
- (7) respect the right under law of workers to be members of trade unions
- (8) observe, in relation to the employment of workers on the Site, the Safety, Health and Welfare at Work Act 2005 to 2014 and all employment law including the Employment

Equality Act 1998 to 2005, the Industrial Relations Acts 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 implemented under those Laws.

- 5.3.3A (1) Sub-clause 5.3.3A(2) shall only be included in the Contract if the Schedule, part 1J says so, and if not, neither sub-clause 5.3.3A(2) nor its omission shall be taken into account.
- (2) The Employer shall be entitled to make random checks requiring production of records under sub-clauses 5.3.3(5) and (6).
- 5.3.4 If the Employer so requests, the Contractor shall, within 5 working days after the receipt of the request, give to the Employer a statement showing the amount of wages and other payments due at the date of the request to and in respect of each worker, or, in respect of workers not employed by or otherwise working for the Contractor, ensure that their employer or the person for whom they are working does the same.
- 5.3.5 The Employer may seek information under sub-clause 5.3.3 only for the purpose of ensuring the obligations referred to in this sub-clause 5.3 to workers have been properly discharged. All documents and records received under sub-clause 5.3.3 shall be returned to the person providing them or destroyed if the Employer is satisfied that the relevant employer has complied with legal obligations to workers.
- 5.3.6 If the Contractor has not complied with this sub-clause 5.3, the Employer shall [without limiting its other rights or remedies] be entitled to estimate the amount that should have been paid to workers and contributions that should have been made on their behalf, and the Employer may deduct the estimated amount from any payment due to the Contractor, until the Employer is satisfied that all proper amounts have been paid.
- 5.3.7 The Contractor shall give the Employer's Representative with each interim statement under sub-clause 11.1 a certificate in the form in the Works Requirements, that, in respect of the work to which the interim certificate relates, the Contractor has complied in full with this sub-clause 5.3.
- 5.3.8 If the Contractor does not comply with this sub-clause 5.3, it shall pay to the Employer any costs the Employer incurs in investigating and dealing with the non-compliance.
- 5.3.9 The Contractor shall ensure that in the event of an official of a trade union representing workers who are affected by a sectoral employment order, employment regulation order or which is a party to a registered employment agreement affecting workers having concerns in relation to the Contractors 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 shall engage constructively to resolve matters at this point.

#### **5.4 Subcontractors and Specialists**

- 5.4.1 The Contractor shall not subcontract all of the Works to one or more Subcontractors. If the Contractor intends to subcontract part of the Works, other than when the Subcontractor and its scope are set out in the Contract, or the Contract provides other procedures, the Contractor shall first submit details to the Employer's Representative of the proposed Subcontractor and its proposed scope of work. The Contractor shall also submit details to the Employer's Representative of any proposed Specialist, other than one named in the Contract or when the Contract provides other procedures.
- 5.4.2 If Specialists or other Contractor's Personnel are named in the Contract, the Contractor shall ensure that they are engaged for and perform the work for which they are named.
- 5.4.3 If Schedule Part 3B names a Specialist whose contract with the Employer is to be novated to the Contractor, and the Works Requirements include a copy of that contract, the Contractor shall accept the novation, and the Parties shall, at the same time as entering the Agreement, enter the novation agreement in the Works Requirements.
- 5.4.4 The Employer's Representative may not instruct the Contractor to enter a contract with a particular Specialist selected by the Employer's Representative unless the Specialist is named in the Contract.
- 5.4.5 The Contractor shall fully comply with its obligations under any contract with a Specialist and shall not terminate, allow to be terminated or accept a repudiation of such a contract without



first submitting details to the Employer's Representative, except when an insolvency event, as set out in sub-clause 12.1, occurs in respect of the Specialist, or the Specialist has committed a serious breach of Law concerning safety, or the Specialist has failed to put or keep in effect insurance as required by the Specialist's contract. On any termination, the Contractor shall replace the Specialist, having submitted details of the replacement to the Employer's Representative. In the case of a named Specialist, referred to in sub-clause 5.4.3, the replacement Specialist proposed by the Contractor must meet minimum standards set out in the Works Requirements, if any.

- 5.4.6 In addition to the reasons in sub-clause 4.7, the Employer's Representative may object to the proposed replacement of Contractor's Personnel because the proposed replacement does not have at least the level of experience, qualifications, competence, technical capacity, and financial standing of the person being replaced.

## **5.5 Collateral Warranties**

If the Schedule, part 1F(i), states that a collateral warranty is required from any Specialist, before the date stated in the Schedule, the Contractor shall give the Employer a collateral warranty in the form included in the Works Requirements, or if there is none, a form approved by the Employer, executed by the Specialist and the Contractor. The minimum indemnity limit and maximum excess of professional indemnity insurance required of the Specialist shall be as stated in the Schedule, part 1F(i).

## **5.6 Removal of Workers**

The Contractor shall remove from the Site any Contractor's Personnel that the Employer's Representative directs, because of the Contractor's Personnel's negligence or incompetence, or on the basis that the Contractor's Personnel's presence on the Site is not conducive to safety, health or good order.

## **5.7 Weekly Labour Records**

Each Monday (or the next working day if Monday is not a working day) the Contractor shall give the Employer's Representative 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.

## **5.8 Ancillary Certificates**

If the Schedule, part 1F(ii) states that an Ancillary Certificate is required from the Contractor or the Contractor's Personnel, the Contractor shall obtain and provide to the Employer's Representative those Ancillary Certificates. [This does not limit the Contractor's obligation to provide all necessary Consents in accordance with sub-clause 2.3.1.]

## **6 PROPERTY**

### **6.1 Ownership of Works Items**

It is agreed, and the Contractor shall ensure, that each Works Item shall become the property of the Employer on the earliest of the following:

- (1) when it is delivered to the Site, if owned by the Contractor
- (2) when it is incorporated in the Works
- (3) when any payment for the Works Item is made by the Employer to the Contractor.

### **6.2 Infringement of Property Rights**

6.2.1 The Contractor shall indemnify the Employer against any liability resulting from any of the following infringing the property [including intellectual property] rights of any person:

- (1) the Contractor's performance or non-performance of this Contract, unless the liability is covered by the Employer's indemnity in this sub-clause
- (2) use of Works Items, Contractor's Things, or Contractor's Documents by
  - (a) the Contractor or Contractor's Personnel or
  - (b) the Employer or any other person to complete the Works following termination of the Contractor's obligation to complete the Works
- (3) use by the Employer of the Works, Works Items, or the Contractor's Documents for the purpose for which they were given.

6.2.2 The Employer shall indemnify the Contractor against any liability resulting from any of the following infringing the property [including intellectual property] rights of any person:

- (1) the unavoidable use by the Contractor, in accordance with the Contract, of the Works Requirements or Works Items or other things provided by the Employer
- (2) the use or occupation by the Works of the Area Provided by the Employer (defined in sub-clause 7.1.1), when that is the unavoidable result of performing the Contract.

### **6.3 Works Requirements**

The Works Requirements shall remain the property of the Employer and the Contractor shall not use them [and shall ensure that the Contractor's Personnel do not use them] for any purpose other than to perform the Contract or to prosecute or defend a dispute under the Contract.

### **6.4 Rights in Contractor's Documents**

6.4.1 The Employer may use, copy, modify, adapt and translate for any purpose in connection with the Works [including to construct, maintain, extend, use, operate, let, sell, promote, advertise, reinstate and repair the Works] the Contractor's Documents that are given, or, according to the Contract, must be given, to the Employer and the Works Proposals.

6.4.2 Where the Schedule, part 1O, so states, all copyright and other rights in the Contractor's Documents that are prepared for the Works and are given, or according to the Contract, must be given, to the Employer and the Works Proposals transfers to the Employer when the Employer receives them.

6.4.3 The Contractor shall ensure that the Employer obtains the rights and interests described in this sub-clause 6.4.

6.4.4 The Contractor has no liability for the use of the Contractor's Documents for any purpose other than that for which they were given to the Employer.

## **7 THE SITE**

### **7.1 Lands Made Available for the Works**

- 7.1.1 The Employer shall allow the Contractor to occupy and use each part of the area identified in the Works Requirements to be provided by the Employer (the **Area Provided by the Employer**) from a date on or before the latest of the following:
- (1) the Starting Date
  - (2) the day after the Contractor has done what sub-clause 9.1 requires the Contractor to do before the Starting Date
  - (3) the date stated in the Works Requirements, if any
  - (4) the day after the Contractor has submitted its programme according to sub-clause 4.9
  - (5) the date stated for work to start on that part in the Contractor's current programme
  - (6) ten working days (or another period stated in the Works Requirements) after the Contractor has informed the Employer's Representative that it is ready to start executing the Works on the Site
  - (7) the date the Contractor actually requires the part in accordance with its actual progress
  - (8) 10 working days after the Contractor has obtained all the Consents it needs to start executing the Works on the Site and given copies to the Employer's Representative.
- 7.1.2 The Contractor's right to occupy and use the Area Provided by the Employer or any part of it shall be subject to any limitations in the Works Requirements.
- 7.1.3 The Contractor shall not be entitled to exclusive possession of the Area Provided by the Employer or any part of it and shall facilitate any occupation and use of it by the Employer and others stated in the Works Requirements. The Contractor's occupation and use of the Area Provided by the Employer shall be solely for the purpose of performing the Contract.
- 7.1.4 The Contractor's right to occupy and use a part of the Area Provided by the Employer shall end when the Employer's Representative certifies the Works or the relevant Section as Substantially Complete. After then the Employer shall allow the Contractor access to comply with sub-clause 8.6.1.
- 7.1.5 The Contractor's right to occupy and use a part of the Area Provided by the Employer shall end if the Employer takes over the relevant part of the Works under sub-clause 9.7.
- 7.1.6 The Contractor's right to occupy and use the Site shall end if the Contractor's obligation to complete the Works is terminated.
- 7.1.7 The Employer has no responsibility or liability for the Area Provided by the Employer being sufficient for the Works.

### **7.2 Trespassers**

After the Employer has allowed the Contractor to occupy and use any part of the Area Provided by the Employer, the Contractor shall be responsible for activities of trespassers, protesters and others, that are not Employer's Personnel, on the Site, and the Employer shall have no responsibility to the Contractor for their activities or presence.

### **7.3 Contractor Responsible for All Site Operations**

The Contractor shall be responsible for all operations on the Site connected with the execution of the Works.

### **7.4 Services for Employer's Facilities**

The Contractor shall operate and maintain parts of the Site and facilities of the Employer if the Works Requirements so require.

## **7.5 Security and Safety of the Site and Nuisance**

- 7.5.1 From and including the date the Employer allows the Contractor to occupy and use the Site until the Employer's Representative certifies the Works or the relevant Section as Substantially Complete, or the Employer takes over the relevant part of the Works under sub-clause 9.7, the Contractor shall do all of the following [without limiting other obligations]:
- (1) be responsible for securing the Site and for keeping off the Site persons other than any of the following:
    - (i) the Contractor's Personnel and the Employer's Personnel
    - (ii) any other person notified to the Contractor by the Employer or the Employer's Representative as authorised to enter the Site
    - (iii) persons exercising public access to any roads, footpaths and areas on the Site
    - (iv) persons having a right to enter the Site under Legal Requirements
  - (2) keep the Site in good order and free from unnecessary obstructions
  - (3) take all necessary steps to secure the safety of all persons entitled to be on the Site and to protect users, owners and occupiers of land adjacent to the Site from hazards and interference arising from the Works [including providing any required fences, lighting, guarding, watching, roads and footpaths]
  - (4) take all necessary steps to ensure that the Contractor, the Contractor's Personnel and the execution of the Works do not do any of the following:
    - (i) unnecessarily cause a nuisance or inconvenience to the public or any user, owner or occupier of any land, road or footpath on or adjacent to the Site
    - (ii) unnecessarily interfere with the use of any such land, road or footpath.
- 7.5.2 The Employer shall ensure that Employer's Personnel on the Site comply with the Contractor's reasonable safety rules that have been notified to them by the Contractor.
- 7.5.3 This sub-clause 7.5 is subject to any exceptions in the Works Requirements

## **7.6 Other Contractors**

Where so stated in the Works Requirements, the Employer may arrange for work to be executed on the Site by Employer's Personnel. The Contractor shall co-operate with such Employer's Personnel and shall as far as practicable co-ordinate their activities with the design and execution of the Works.

## **7.7 Setting Out the Works**

The Contractor shall be responsible for the correct positioning of all parts of the Works and shall rectify any errors in the positions, levels, dimensions or alignment of the Works.

## **7.8 Archaeological Objects and Human Remains**

If any fossils, coins, antiquities, monuments or other items of value or of archaeological or geological interest or human remains are discovered on or adjacent to the Site unless the Works Requirements say otherwise, the Contractor shall not disturb them, but shall take all necessary steps to preserve them, and shall promptly notify the Employer's Representative [and comply with any instructions]. As between the Parties, these items shall be the Employer's property.

## **7.9 Access and Facilities**

- 7.9.1 The Contractor [and not the Employer] shall be responsible for securing access to and through the Site and possession and use of any parts of the Site that are not the Area Provided by the Employer.
- 7.9.2 The Contractor [and not the Employer] shall be responsible for the suitability and availability of access routes to and within the Site, and any required maintenance or upgrading of them, and any charges for use of them.

- 7.9.3 The Contractor shall take all reasonable steps to ensure that its traffic [including Contractor's Personnel's traffic]
- (1) complies with the restrictions concerning laden weight and dimensions in the Law and
  - (2) does not damage roads [except for ordinary wear], bridges or other property.

- 7.9.4 The Contractor shall also be responsible for obtaining any additional facilities, and for providing all power, water and other services it requires to perform the Contract.

**7.10 Condition of Site on Completion**

As soon as practicable after the Works or any Section reaches Substantial Completion, the Contractor shall remove from the Site Contractor's Things not required to perform the Contractor's remaining obligations, and leave the Works or Section in an orderly manner. At the end of the Defects Period, the Contractor shall remove from the Site any remaining Contractor's Things. In this sub-clause 7.10, Contractor's Things includes temporary works that have not become part of the Works.

**7.11 Working Times**

The Contractor shall ensure that the Contractor's Personnel work on the Site only during the working times set out in the Works Requirements, if any, unless

- (1) there is imminent danger to safety or health or of damage to the Works or other property or
- (2) otherwise agreed with the Employer's Representative.

**7.12 Charges**

The Contractor shall pay any charges provided for in the Works Requirements for occupation of the Site or any part of it or other place, or in respect of operation or maintenance of Employer's facilities, or in respect of services, or otherwise. [The Employer may deduct the amount of charges from payments to the Contractor. Payment of charges does not excuse the Contractor from any of its obligations].

## 8 **QUALITY, TESTING AND DEFECTS**

### 8.1 **Standards of Workmanship and Works Items**

The Contractor shall ensure all of the following:

- (1) that the Works are designed, executed and completed
  - (i) in accordance with all the requirements in, and reasonably inferred from, the Contract [including, where so required by the Contract, in accordance with Contractor's Documents that have been submitted to the Employer's Representative] and
  - (ii) in a proper and workmanlike manner and using good practice
- (2) that all Works Items [whether or not the Contractor is required to select them]
  - (i) comply with the Contract and the Legal Requirements and
  - (ii) are of good quality and, unless the Contract provides otherwise, new
- (3) that all materials and goods that are Works Items are fit for their intended purpose in the Works
- (4) that the completed Works are fit for their intended purpose as stated in or to be inferred from the Works Requirements.

### 8.2 **Quality Assurance**

The Contractor shall establish and implement quality assurance procedures as required by the Works Requirements, including procedures for establishing quality assurance systems for itself and Subcontractors. The quality assurance procedures shall be reflected in appropriate quality plans submitted to the Employer's Representative. The Contractor shall give the Employer's Representative copies of all reports prepared in accordance with the Contractor's quality assurance procedures. The Employer's Representative may monitor, spot check and audit the Contractor's quality assurance procedures.

### 8.3 **Inspection**

- 8.3.1 The Contractor shall ensure that the Employer's Representative, Assigned Certifier, and anyone authorised by the Employer's Representative, is 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 any place where any Works Items are produced, stored, extracted or prepared, or any other obligation of the Contractor under the Contract is being performed, and are able there to inspect, test, observe and examine all such items and activities.
- 8.3.2 The Contractor shall promptly give the Employer's Representative and the Assigned Certifier all particulars the Employer's Representative and the Assigner Certifier requests about the mode, place and time of manufacture, the source of supply and the performance capabilities of Works Items and any related information, including any test certificates that the Contract provides for.
- 8.3.3 The Contractor shall notify the Employer's Representative and the Assigned Certifier before any Works Item is covered or any Works Item that is to be inspected is packed or made impossible or difficult to inspect, in either case giving the Employer's Representative, and any person authorised by the Employer's Representative, a reasonable opportunity to inspect the Works Item.

### 8.4 **Tests**

- 8.4.1 The Contractor shall supply all Contractor's Things, documents, information, suitably qualified and experienced personnel, power, consumables and instruments required to carry out tests that the Contract [and the Inspection Plan] requires the Contractor to do [both before and after Substantial Completion]. The Contractor shall agree with the Employer's Representative and the Assigned Certifier the time and place for these tests. The Employer's Representative, and others authorised by the Employer, may attend and observe the tests, and the Contractor shall facilitate their attendance and observation. Regardless of whether any Employer's Personnel attends, the Contractor shall promptly give the Employer's

Representative a certified report of the result of every test.

- 8.4.2 If a test is failed, the Contractor may elect to repeat the test, or the Employer's Representative may require that the test be repeated. The Contractor shall, on request, pay the Employer any costs the Employer incurs as a result of any re-testing.
- 8.4.3 If the Contractor rectifies a Defect, it shall repeat any relevant test the Contract specifies for the relevant Works Item, if the Employer's Representative so directs.

## **8.5 Defects**

- 8.5.1 The Employer's Representative may direct the Contractor to search for a Defect or suspected Defect or its cause. This may include uncovering, dismantling, re-covering and re-erecting work, providing facilities for tests, testing and inspecting. If, through searching or otherwise, the Contractor discovers a Defect, the Contractor shall notify the Employer's Representative as soon as practicable.
- 8.5.2 If, through notification or otherwise, the Employer's Representative becomes aware of a Defect, the Employer's Representative may direct the Contractor to do any of the following [or any combination of them]:
  - (1) to remove the Works Item with the Defect from the Site
  - (2) to demolish the Works Item with the Defect, if incorporated in the Works
  - (3) to reconstruct, replace or correct the Works Item with the Defect
  - (4) not to deliver the Works Item with the Defect to the Site.
- 8.5.3 The Contractor shall comply with any direction under this sub-clause 8.5 within the reasonable times, if any, the Employer's Representative directs. If the Contractor fails to begin the work required to comply with the direction within the reasonable time directed, if any, or to complete it as soon as practicable, the Employer may have the work done by others and the Contractor shall, on request, pay the Employer its cost of doing so.
- 8.5.4 Alternatively, the Contractor and the Employer's Representative may, with the Employer's consent, agree that the Employer will accept the Defect, either in whole or subject to any change to the Works Requirements that the Employer's Representative directs. In this case, the Contract Sum shall be reduced by the amount that, in the opinion of the Employer's Representative, is the resulting decrease in the value of the Works to the Employer. If the Employer's Representative notifies the Contractor that the Employer will not accept a Defect, this shall be conclusive.
- 8.5.5 If a Defect deprives the Employer of substantially the whole benefit of the Works or any Section or other material part of the Works, the Employer's Representative may reject the Works or the relevant part of the Works (as the case may be) and [without limiting the Employer's other rights], the Contractor shall pay the Employer all sums the Employer has paid the Contractor for the Works or the relevant part, together with the Employer's financing costs and the cost of dismantling and removing the Works, clearing the Site and returning the Works Items to the Contractor.
- 8.5.6 The Employer's Representative may give a direction or rejection under this sub-clause 8.5 at any time before the Defects Certificate is issued. [The Contractor shall not be entitled to any adjustment to the Contract Sum or extension of time because of a direction given to deal with, or as a result of, a Defect or any other breach of the Contract by the Contractor.]

## **8.6 Defects Period**

- 8.6.1 As soon as practicable after Substantial Completion of the Works or any Section, the Contractor shall complete any outstanding work and rectify any Defects that the Employer's Representative directs before the end of the Defects Period. In doing so, and in doing any tests after Substantial Completion, the Contractor shall cause as little disruption as possible to occupants and users of the Works.

8.6.2 If work remains outstanding or Defects remain uncorrected at the end of the Defects Period, or if the Contractor has completed outstanding work or rectified Defects after Substantial Completion of the Works or relevant Section and before the end of the Defects Period, the Employer's Representative may [without limiting the Employer's other rights] make an appropriate extension to the Defects Period. With the Employer's agreement the Employer's Representative may, at the time that the Defects Period would have ended without this extension, issue an interim payment certificate conclusively making an appropriate reduction in retention, and the Contractor shall be entitled to invoice the Employer for that amount.

**8.7 Defects Certificate**

The Employer's Representative shall issue the Defects Certificate to the Contractor and the Employer within 20 working days after the end of the Defects Period. [Nothing in this clause 8, nor any exercise or non-exercise by the Employer or the Employer's Representative of their rights under this clause 8, nor the Defects Certificate, relieves the Contractor of any obligation, except to the extent that a Defect is accepted by agreement under sub-clause 8.5.4.]



**9 TIME AND COMPLETION****9.1 Starting Date**

- 9.1.1 The Contractor shall set the Starting Date, giving the Employer's Representative at least 15 working days notice, or any shorter period the Employer's Representative may agree, or any different period stated in the Works Requirements. The Starting Date shall, unless otherwise stated in the Works Requirements, be no more than 20 working days after the Contract Date. The Contractor shall give the Employer at least 20 working days' notice prior to the date that the Contractor intends to commence constructing the Works.
- 9.1.2 Before the Starting Date [unless already given by the Contractor before the Contract Date, for example in response to a letter of intent] the Contractor shall give the Employer all of the following, all executed, as relevant, by the relevant persons:
- (1) the Agreement
  - (2) a performance bond, if required by the Contract
  - (3) a parent company guarantee, if required by the Contract
  - (4) if the Works Requirements state that the Contractor or the Contractor's nominee is to be appointed as project supervisor for the construction stage or the design process or both, the required appointment, and the developed safety and health plan required by the Construction Regulations
  - (5) evidence that the insurances required by the Contract are in effect
  - (6) any collateral warranties required by the Contract
- However, collateral warranties may be given on a later date that the Employer's Representative has agreed to.
- 9.1.3 On the Starting Date, the Contractor shall start work under the Contract. The Contractor shall, unless the Employer's Representative directs otherwise, proceed regularly and diligently in order to achieve Substantial Completion of the Works and each Section by its Date for Substantial Completion.

**9.2 Suspension**

- 9.2.1 The Employer's Representative may at any time direct the Contractor to suspend all or part of the work under the Contract. The Contractor shall comply with the direction and, during suspension, shall protect, store and secure the affected Works Items against deterioration, loss and damage and maintain the Insurances.
- 9.2.2 After a suspension under clause 9.2.1, the Contractor shall resume work when so directed by the Employer's Representative. When a direction to resume is given, the Contractor and the Employer's Representative shall jointly examine the Works and Works Items affected by the suspension. If the Contractor is entitled to an adjustment of the Contract Sum or an extension of time because of the suspension, the Contractor's cost of rectifying any deterioration in or loss of the Works or Work Items that the Contractor could not have avoided shall be included in the determination of the adjustment, and any resulting delay shall be taken into account in determining the extension.
- 9.2.3 If a suspension, that did not result from a breach of the Contractor's obligations, has continued for more than 3 months, the Contractor may request the Employer's Representative's permission to proceed. If the Employer's Representative does not give permission within 28 days after being requested to do so, the Contractor may, by giving notice to the Employer's Representative
- (1) if the suspension affects part of the Works, treat the suspension as a Change Order to omit that part of the Works or
  - (2) if the suspension affects the whole of the Works, give notice to terminate the Contractor's obligation to complete the Works under the Contract.

**9.3 Delay and Extension of Time**

- 9.3.1 If the Contractor becomes aware that work under the Contract is being or is likely to be delayed for any reason, it shall as soon as practicable notify the Employer's Representative of the delay and its cause. As soon as practicable after that, and in any event within 40 working days after the Contractor became aware of the delay, the Contractor shall give the Employer's Representative full details of the delay and its effect on the progress of the Works. But if the Contractor has given notice and details of the delay under sub-clause 10.3.1 it does not have to give notice or details again under this sub-clause 9.3.1 for the same delay. In any event, the Contractor shall promptly give any further information about the delay the Employer's Representative directs.
- 9.3.2 If Substantial Completion of the Works or any Section has been, is being or will be delayed beyond the Date for Substantial Completion by a Delay Event and if all of the following apply:
- (1) the Delay Event is not a result of the Contractor's or Contractor's Personnel's act or omission or the Contractor's breach of the Contract
  - (2) the Contractor makes all reasonable efforts to avoid and minimise the delay
  - (3) the Contract does not provide otherwise
- then, subject to this sub-clause 9.3, sub-clause 9.4 and clause 10, there shall be an extension to the Date for Substantial Completion of the Works and any affected Section equal to the amount of the delay beyond the Date for Substantial Completion caused by the Delay Event, taking into account only Site Working Days. The Contractor and the Employer's Representative shall follow the procedure in clause 10.
- 9.3.3 The Employer's Representative may, at any time, revise a determination of an extension to the Date for Substantial Completion of the Works or any Section, but shall not bring those dates forward except by agreement with the Contractor under sub-clause 9.5 when work has been omitted.

**9.4 Programme Contingency**

- 9.4.1 In sub-clause 9.4.3
- references to the **first threshold** or **T<sub>1</sub>** and to the **second threshold** or **T<sub>2</sub>** are to the first threshold and the second threshold in the Schedule, part 1K
  - references to **delay** or **D** are to the total number of Site Working Days' delay to Substantial Completion of the Works caused by Compensation Events for which the Contractor would otherwise be entitled to an extension and Delay Cost, but for this sub-clause 9.4
  - references to **extensions** or **E** are to the total of extensions to the initial Date for Substantial Completion of the Works for delay caused by Compensation Events for which the Contractor is entitled to Delay Cost.
- 9.4.2 The Contractor has included in the initial Contract Sum and shall include in its programme a contingency for delays to the Date for Substantial Completion of the Works caused by Compensation Events.
- 9.4.3 The programme contingency is applied to derive extensions as follows:
- (1) Unless delay exceeds the first threshold, there are no extensions.
  - (2) If delay exceeds the first threshold but is less than or equals the sum of the first threshold and twice the second threshold, extensions equal half of the result obtained by subtracting the first threshold from delay.
  - (3) If delay is more than the sum of the first threshold and twice the second threshold, extensions equal delay minus the first threshold minus the second threshold.

[This can be expressed by the following rules:

**Rule 1:** If  $D \leq T_1$  then  $E = 0$

**Rule 2:** If  $T_1 < D$  but  $\leq (T_1 + 2T_2)$  then  $E = \frac{(D - T_1)}{2}$

**Rule 3:** If  $D > (T_1 + 2T_2)$  then  $E = D - T_1 - T_2$

For example, if the first threshold ( $T_1$ ) is 20 Site Working Days and the second threshold ( $T_2$ ) is 30 Site Working Days

- if delay ( $D$ ) is 10 Site Working Days, the Contractor would be entitled to no extensions, applying rule 1
- if delay ( $D$ ) is 28 Site Working Days, the Contractor would be entitled to 4 Site Working Days' extensions, applying rule 2
- if delay ( $D$ ) is 38 Site Working Days, the Contractor would be entitled to 9 Site Working Days' extensions, applying rule 2
- if delay ( $D$ ) is 90 Site Working Days, the Contractor would be entitled to 40 Site Working Days' extensions, applying rule 3.]

9.4.4 [This sub-clause 9.4 does not apply to extensions to the Date for Substantial Completion of a Section, nor to extensions of time resulting from Delay Events that are not Compensation Events.]

9.4.5 Use of the programme contingency provided for in this sub-clause shall be claimed and determined in accordance with this clause 9 and clause 10. Programme contingency may be drawn-down when Substantial Completion has been, is being, or will be delayed beyond the Date for Substantial Completion minus the unused part of the first and second thresholds. In making a determination under sub-clauses 9.3 and 10.5 in respect of a delay to Substantial Completion of the Works, the Employer's Representative shall notify the Contractor and the Employer of how much of the first threshold and the second threshold have been used-up by delays to Substantial Completion of the Works caused by Compensation Events.

## 9.5 Omissions and Reduction of Time

If a Change Order omits any of the Works, and the omission will result, or has resulted, in a reduction of the time required to complete the Works or any Section, the Date for Substantial Completion shall be reduced by any amount agreed between the Employer's Representative and the Contractor. [If there is no agreement, there shall be no reduction.]

## 9.6 Substantial Completion

9.6.1 The Contractor shall achieve Substantial Completion of the Works and each Section by its Date for Substantial Completion.

9.6.2 Within 20 working days after receiving the Contractor's request to certify Substantial Completion of the Works or a Section, the Employer's Representative shall give to the Contractor and the Employer

- (1) a certificate stating the date that Substantial Completion occurred or
- (2) the reasons for not issuing the certificate.

But if the Schedule, part 1H, so states, the Employer's Representative shall not be required to certify Substantial Completion of the Works or a Section before its Date for Substantial Completion. The certificate may include a list of Defects and any outstanding work [but nothing in the certificate, including the failure to list any Defect, relieves the Contractor of any obligations].

**9.7 Taking Over Part of the Works**

- 9.7.1 The Employer may take over a part of the Works before Substantial Completion of the Works or any Section including the part, provided that the Employer's Representative first issues a notice to the Contractor at least 5 working days before the Employer intends to take over the part, the notice stating all of the following:
- (1) the part to be taken over by the Employer
  - (2) any work remaining to be completed in that part
  - (3) the value, when it gets to Substantial Completion, of the part to be taken over and the proportion of the Contract Sum that this value represents
  - (4) the date the part will be taken over.
- 9.7.2 The Contractor shall have no liability for delay in completing the part to be taken over occurring after the date stated in the notice. The rate of liquidated damages for delay in achieving Substantial Completion of the Works and any relevant Section shall reduce by a fraction equal to the fraction of the Contract Sum represented by the Contract value of the part of the Works taken over, as certified by the Employer's Representative. The retention amount to be withheld under sub-clause 11.3 from interim payments until Substantial Completion shall reduce by the same fraction.

**9.8 Liquidated Damages**

- 9.8.1 If the Works do not reach Substantial Completion by the Date for Substantial Completion of the Works, the Contractor shall pay the Employer [and the Employer may deduct from payments to the Contractor] liquidated damages calculated at the rate stated in the Schedule, part 1G, for the period from the Date for Substantial Completion of the Works to the date of substantial completion of the Works.
- 9.8.2 If a Section does not reach Substantial Completion by its Date for Substantial Completion, the Contractor shall pay to the Employer liquidated damages calculated at the rate stated in the Schedule for the period from the Date for Substantial Completion of the Section to the date of substantial completion of the Section (or, if earlier and if the Schedule states a rate of liquidated damages for the Works, to the Date for Substantial Completion of the Works).
- 9.8.3 In this sub-clause 9.8 **date of substantial completion** means the date certified by the Employer's Representative that the Works or Section reached Substantial Completion.

## **10 CLAIMS AND ADJUSTMENTS**

### **10.1 Compensation Event**

10.1.1 Subject to and in accordance with this sub-clause 10.1, if a Compensation Event occurs the Contract Sum shall be adjusted [upward or downward] by the amount provided in sub-clause 10.6. However, if the adjustment is an increase it shall only take effect to the extent that all the following apply to the Compensation Event:

- (1) The Compensation Event is not a result of the Contractor's or Contractor's Personnel's act or omission or the Contractor's breach of the Contract
- (2) The Contractor makes all reasonable efforts to avoid and minimise the adverse effects of the Compensation Event
- (3) The Contractor has complied with this clause 10 in full [including giving notices and details within the time required]
- (4) The Contract does not provide otherwise.

10.1.2 The Contractor's sole remedies for a Compensation Event shall be those stated in the Contract.

10.2 (sub-clause not used)

### **10.3 Contractor Claims**

10.3.1 If the Contractor considers that under the Contract there should be an extension of time or an adjustment to the Contract Sum, or that it has any other entitlement under or in connection with the Contract, the Contractor shall, as soon as practicable and in any event within 20 working days after it became aware, or should have become aware, of something that could result in such an entitlement, give notice of this to the Employer's Representative. The notice must be given according to sub-clause 4.14 and prominently state that it is being given under sub-clause 10.3 of the Contract. Within a further 20 working days after giving the notice, the Contractor shall give the Employer's Representative details of all of the following:

- (1) all relevant facts about the claim
- (2) a detailed calculation and, so far as practicable, a proposal, based on that calculation, of any adjustment to be made to the Contract Sum and of the amount of any other entitlement claimed by the Contractor
- (3) if the Contractor considers that the programme contingency referred to in sub-clause 9.4 should be used or that there should be an extension of time, the information required under sub-clause 9.3, and, so far as practicable, a proposal, based on that information for any use of the programme contingency or any extension to the Date for Substantial Completion of the Works and any affected Section.

The Contractor shall give any further information about the event or circumstance requested by the Employer's Representative.

10.3.2 If the Contractor does not give notice and details in accordance with and within the time provided in this sub-clause 10.3, except where the Contractor has been required to and has given a proposal complying in full with sub-clause 10.4 [notwithstanding anything else in the Contract] the Contractor shall not be entitled to an increase to the Contract Sum or extension of time or use of the programme contingency referred to in sub-clause 9.4 [and the Employer shall be released from all liability to the Contractor in connection with the matter].

- 10.3.3 If the cause of the claim has a continuing effect, the Contractor shall update the information at monthly intervals
- (1) stating the extension of time and adjustment to the Contract Sum claimed for delay and cost already incurred and
  - (2) so far as practicable, proposing a final adjustment to the Contract Sum and Date for Substantial Completion of the Works and any affected Section and
  - (3) providing any other information the Employer's Representative reasonably requires.
- 10.3.4 The Contractor shall keep detailed contemporary records to substantiate any aspect of an event or circumstance about which it has given, or is entitled to give, notice under this sub-clause 10.3, and its resulting costs. These shall include any records the Employer's Representative directs the Contractor to keep. The Contractor shall give the records to the Employer's Representative if so directed.

#### 10.4 **Proposed Instructions**

The Employer's Representative may direct the Contractor to make proposals for a proposed instruction. The Contractor shall not implement the proposed instruction unless and until the Employer's Representative has confirmed the instruction as given. Within 20 working days after the Employer's Representative directs the Contractor to make proposals, the Contractor shall give to the Employer's Representative all of the following:

- (1) a detailed calculation and proposal, based on the calculation, of any adjustment to the Contract Sum that would result from the proposed instruction
- (2) if the proposed instruction would cause a delay, the information required under sub-clause 9.3, and a proposal, based on that information for any use of the programme contingency referred to in sub-clause 9.4 or extension to the Date for Substantial Completion of the Works and any affected Section
- (3) if the proposed instruction is to omit any of the Works, a revised programme and, if appropriate, a proposed earlier Date for Substantial Completion of the Works and any affected Section
- (4) any Contractor's Documents required in connection with the proposed instruction, or a timetable for them.

#### 10.5 **Employer's Representative's Determination**

- 10.5.1 If the Contractor has made a claim or proposal under sub-clauses 10.3 or 10.4, the Employer's Representative shall, within 20 working days of receiving it, do one of the following:
- (1) direct the Contractor to give additional information or revised proposals, in which case the Contractor shall do so within 10 working days and the Employer's Representative shall reply in accordance with this sub-clause within a further 10 working days, but that reply must not require the Contractor to give additional information or a revised proposal
  - (2) notify the Contractor and the Employer that the Contractor's proposals are agreed and make any resulting adjustments to the Contract Sum, use of the programme contingency referred to in sub-clause 9.4 or extension to the Date for Substantial Completion of the Works and any affected Section
  - (3) make a determination of any adjustments to the Contract Sum, use of the programme contingency referred to in sub-clause 9.4 or extension to the Date for Substantial Completion of the Works and any affected Section, and notify the Contractor and the Employer
  - (4) in response to a proposal under sub-clause 10.4, notify the Contractor that the proposed instruction will not be given.
- 10.5.2 The Employer's Representative may [but is not bound to] determine an extension of time for a Compensation Event that is a breach of the Contract by the Employer on its own initiative even if the Contractor has not made a claim or proposal under sub-clauses 10.3 or 10.4.
- 10.5.3 If the Employer's Representative fails to take any of the actions in sub-clause 10.5.1 within the time stated, the Employer's Representative will be taken to have made a determination

under sub-clause 10.5.1(3) that there be no adjustment to the Contract Sum, no use of programme contingency referred to in sub-clause 9.4, and no extension to any Date for Substantial Completion. The determination will be taken to have been made on the last day of the time provided for in sub-clause 10.5.1.

- 10.5.4 A determination of the Employer's Representative notified to the Contractor and the Employer under sub-clause 10.5.1(3) or 10.5.2 shall be final and binding on the Parties unless, within 28 days after receiving notice of the determination (or, if sub-clause 10.5.3 applies, within 28 days after the determination is taken to have been made), the Contractor or the Employer gives notice to the other under sub-clause 13.1.1 or under sub-clause 13.2.1 disputing the determination and referring the dispute to either;
1. the dispute management procedure under sub-clause 13.1; or
  2. conciliation under sub-clause 13.2
- 10.5.5 Notice of an agreement under sub-clause 10.5.1(2) shall be final and binding on the Parties unless, within 28 days after receiving the notice, either:
- (1) the Contractor both (a) notifies the Employer's Representative and the Employer that the Contractor disagrees that the notice correctly records agreed terms and (b) gives notice to the Employer under sub-clause 13.1.1 or under sub-clause 13.2.1 referring the dispute to either;
    1. the dispute management procedure under sub-clause 13.1; or
    2. conciliation under sub-clause 13.2.
  - or
  - (2) the Employer both (a) notifies the Employer's Representative and the Contractor that the Employer does not agree with the terms notified by the Employer's Representative and (b) gives notice to the Contractor under sub-clause 13.1.1 or under sub-clause 13.2.1 referring the dispute to either;
    1. the dispute management procedure under sub-clause 13.1; or
    2. conciliation under sub-clause 13.2

## 10.6 **Adjustments to the Contract Sum**

Adjustments to the Contract Sum for a Compensation Event shall only be for the value of any additional, substituted, and omitted work required as a result of the Compensation Event under this sub-clause 10.6 and any delay cost under sub-clause 10.7. [Where an adjustment to the Contract Sum arises from additional, substituted or omitted named Specialist Works, the percentage addition tendered by the Contractor, and included in the Schedule Part 3B, for that named Specialist shall be taken into account in the valuation]. Additional, substituted, and omitted work shall be valued as follows:

- 10.6.1 If the Compensation Event requires additional, substituted or omitted work, similar to work for which there are rates in the Pricing Document, to be executed under similar conditions, the determination shall use those rates.
- 10.6.2 If the Compensation Event requires additional, substituted or omitted work that is not similar to work for which there are rates in the Pricing Document, or is not to be executed under similar conditions, the determination shall be on the basis of the rates in the Pricing Document when that is reasonable.
- 10.6.3 If the adjustment cannot be determined under the above rules, the Employer's Representative shall make a fair valuation based on rates for similar work in the locality, if available.
- 10.6.4 Instead of sub-clause 10.6.1, 10.6.2 and 10.6.3 applying, the Employer's Representative may conclusively direct that additional or substituted work required as a result of a Compensation Event be determined (in full or in part) on the basis of the cost of performing the additional or substituted work, compared with the Contractor's cost without the Compensation Event, determined as follows:
- (1) the number of hours worked or to be worked by each category of work person engaged on the work to which the Compensation Event relates, on or off the Site, multiplied in each case by the basic hourly rate of pay for the relevant category of worker in any applicable sectoral employment order implemented under the Industrial Relations Acts 1946-2015 to which is applied the percentage addition to costs of labour as stated in the Schedule, part 2D. Where the additional or substituted work includes named Specialist

Works, the percentage addition to costs of labour tendered by the respective named Specialist in Appendix part 2C of their sub-contract is applied. (If the category of work person is not covered by an applicable order made in accordance with the Industrial Relations Acts 1946 – 2015 the Employer's Representative will determine the most appropriate basic hourly rate based on the category of work person's skills and experience) and

- (2) the cost of materials used in that work, taking into account discounts and excluding VAT, plus the percentage adjustment tendered by the Contractor and stated in the Schedule, part 2D. Where the additional or substituted work includes named Specialist Works, the percentage addition to costs of materials tendered by the respective named Specialist in Appendix part 2C of their sub-contract is applied (But if the percentage adjustment tendered is negative or blank it will be read as 0%) and
- (3) the cost of plant reasonably used for that work, whether hired or owned by the Contractor, at the rates in the document listed in the Schedule, part 1K (as that document may be modified according to the Schedule, part 1K) plus or minus the percentage adjustment tendered by the Contractor and included in the Schedule, part 2D. Where the additional or substituted work includes named Specialist Works, the percentage addition to costs of plant tendered by the respective named Specialist in Appendix part 2C of their sub-contract is applied. (But if the percentage adjustment tendered is a deduction of more than 50% it will be read as a deduction of 50% or if the entry is blank it will be read as 0%). If the document listed in the Schedule does not give a rate for a plant item, a market rental rate shall be used, plus or minus the percentage adjustment and
- (4) the cost of design, at the tendered rates in the Pricing Document.

## 10.7 Delay Cost

- 10.7.1 If the Date for Substantial Completion of the Works has been extended because of a Compensation Event [and not otherwise, and subject to sub-clause 10.7.2], there shall be added to the Contract Sum an amount for delay cost, either (whichever it says in the Schedule, part 1K)
  - (1) the expenses [excluding profit and loss of profit] unavoidably incurred by the Contractor as a result of the delay to the Date for Substantial Completion of the Works caused by the Compensation Event in respect of which that date has been extended under the Contract. or
  - (2) for each Site Working Day for which the Date for Substantial Completion of the Works has been extended because of the Compensation Event, the daily rate of delay cost tendered by the Contractor in the Schedule, part 2D
- 10.7.2 If the Works are concurrently delayed by more than one cause, and one or more of the causes is not a Compensation Event, there shall be no increase to the Contract Sum for delay cost for the period of concurrent delay.
- 10.7.3 If, as a result of a Compensation Event, the Date for Substantial Completion of the Works has been extended, so that there is a period of 7 or more consecutive non-working days in the time between the Starting Date and the Date for Substantial Completion of the Works, and that would not have occurred without the Compensation Event happening, then the Contractor's expenses [excluding profit and loss of profit] unavoidably incurred because of this delay shall be included in the determination of the addition to the Contract Sum for delay cost. But the amount so added shall not exceed the amount stated in the Schedule, part 2D, as the Contractor's tendered rate of delay cost multiplied by the number of additional non-working days, if there is an amount stated there. **Non-working day** means a day that, for good reason, is not a Site Working Day [such as a trade holiday].
- 10.7.4 Except as provided in this sub-clause 10.7 [notwithstanding anything else in the Contract] losses or expenses arising from or in connection with delay, disruption, acceleration, loss of productivity or knock-on effect shall not be taken into account or included in any increase to the Contract Sum, and the Employer shall have no liability for such losses or expenses.
- 10.7.5 [There shall be no delay cost paid as a result of extensions to the Date for Substantial Completion of a Section].



10.7.6 If the Schedule states more than one rate for delay cost, the rate for the period when the delay occurred or delayed part of the Works shall be used. This shall be determined by the Employer's Representative.

**10.8 Price Variation**

The Contract includes clause PV1 or clause PV2, whichever is stated in the Schedule, part 1M.

**10.9 Employer's Claims**

10.9.1 If the Employer or the Employer's Representative considers that, under the Contract, there should be a reduction of the Contract Sum, or that any amount is due to the Employer from the Contractor under the Contract, the Employer or the Employer's Representative shall, as soon as practicable, give notice and particulars of the event or circumstances to the other, and to the Contractor. The notice shall include

- (1) details of the event or circumstances giving rise to the notice, and all relevant facts and
- (2) a calculation, and a proposal based on that calculation, of any adjustment to be made to the Contract Sum or any amount due by the Contractor to the Employer.

10.9.2 The Contractor shall be entitled, within 20 working days of receipt of such a notice, to give a response to the Employer's Representative and shall, if the notice was given by the Employer, give a copy of any response to the Employer. Within 20 working days after receiving the Contractor's response, or after the time for responding has elapsed, if the Contractor has not responded within that time, the Employer's Representative shall determine the matter in accordance with the Contract.

10.9.3 The Employer may deduct from any amount due to the Contractor

- (1) any amount determined by the Employer's Representative to be due, or likely to become due, from the Contractor to the Employer under the Contract and
- (2) any amount due from the Contractor to the Employer under any contract.

10.9.4 The procedure in this sub-clause 10.9 shall apply until either the Defects Certificate or the certificates required following termination have been issued, but this does not limit the Employer's rights after then.

## 11 PAYMENT

### 11.1 Interim Payment

#### 11.1.1 At each of the following times

- (i) the periods for interim payment stated in the Schedule, part 1L, if the amount payable is more than the minimum amount stated in the Schedule and
- (ii) upon issue of the certificate of Substantial Completion for the Works or any Section the Contractor shall give a payment claim notice to the Employer's Representative, in the form of an interim statement, [not later than 5 days after the date agreed between the Parties to be the payment claim date], showing all of the following:
  - (1) the progress of the Works
  - (2) the instalment of the Contract Sum that the Contractor considers should, under the Contract, be paid on an interim basis
  - (3) a detailed breakdown using the Pricing Document, and individually detailing proposed payments to named Specialists so that payments to each named Specialists are easily distinguished from each other.
  - (4) any supporting evidence the Employer's Representative requires (including confirmation of whether and, if so, the extent to which, the rates have been adjusted by the Applicable Factor (Contractor) and Applicable Factor (Specialist)).

The interim statement given on Substantial Completion shall include all amounts due to the Contractor at that time for the Works or Section.

#### 11.1.2 The instalment of the Contract Sum that the Contractor shall be entitled to be paid on an interim basis shall be

- (1) the Contract value of the Works properly designed and executed by the Contractor [according to the Pricing Document, as a portion of the Contract Sum] and
- (2) any amount the Employer's Representative considers proper under sub-clause 11.2 and
- (3) amounts for adjustments to the Contract Sum for Compensation Events, as determined under the Contract and
- (4) any amount to be paid according to clause PV1 or PV2, whichever is part of the Contract and
- (5) amounts included in the Pricing Document for Contractor's Documents properly completed and supplied as required by the Contract.

#### 11.1.3 (a) So far as relates to that portion of the Contract Sum payable to the named Specialist, unless already adjusted either:

- (i) by a named Specialist in its application to the Contractor included in the detailed breakdown at sub-clause 11.1.1 (3), or
- (ii) if not so adjusted by the named Specialist, by the Contractor in the detailed breakdown at sub-clause 11.1.1 (3);

the rates in the Pricing Document for those portions of the Contract Sum payable to the named Specialists shall be adjusted by the relevant Applicable Factor (Specialist) for each named Specialist.

(b) So far as relates to that portion of the Contract Sum not payable to the named Specialists, unless already adjusted by the Contractor in the detailed breakdown at sub-clause 11.1.1 (3), the rates in the Pricing Document for those portions of the Contract Sum not payable to the named Specialists shall be adjusted by the Applicable Factor (Contractor).

#### 11.1.4 Within 14 days of receipt of the payment claim notice the Employer's Representative shall issue a response to the payment claim notice to the Contractor in the form of a certificate, sending a copy to the Employer, setting out the amount of interim payment that, in the Employer's Representative's opinion, is to be made by the Employer to the Contractor, taking account of retention under sub-clause 11.3 and deductions and amounts due from the Contractor to the Employer [including damages for delay and deductions under sub-clause

11.4], together with calculations and the reasons for the opinion. The Employer's Representative shall issue to the individual named Specialists, details of the gross and net amount included within the certificate to the respective named Specialists.

- 11.1.5 If there is a sum due to the Contractor, the Contractor shall send an invoice to the Employer for that sum after receiving the response to the payment claim notice. The Employer shall pay the amount due on the invoice within 21 days after receiving the invoice.

## 11.2 Unfixed Works Items

At the discretion of the Employer's Representative, but only when so provided in the Schedule, part 1L, interim payments may include any amount, not exceeding the percentage of value stated in the Schedule, part 1L, the Employer's Representative considers proper for each of the following:

- (1) the Contract value of any Works Items that comply with all of the following requirements, all to the satisfaction of the Employer's Representative:
  - (a) they have been completed and are substantially ready to be incorporated in the Works
  - (b) title to them has been vested in the Employer
  - (c) they are stored suitably at the Site
  - (d) they have not been delivered to the Site prematurely
- (2) the Contract value of any Work Items not delivered to the Site that comply with all of the following requirements, all to the satisfaction of the Employer's Representative:
  - (a) they have been completed and are substantially ready to be incorporated in the Works
  - (b) title to them has been vested in the Employer
  - (c) they are stored suitably and set aside and marked to show clearly that their destination is the Site and that they are the property of the employer
  - (d) they are clearly identified in a list given to the Employer's Representative, together with documentary evidence that title is vested in the Employer
  - (e) they are insured as required by the Contract, and will be insured as required while in transit
  - (f) the Contractor has given the Employer a bond in the form for such bonds in the Works Requirements, or if there is none, a form approved by the Employer, executed by a surety approved by the Employer's Representative, for the amount to be paid.

In this clause 11.2, the Contract value of a Works Item means a portion of the Contract Sum the Employer's Representative determines is for supplying of the Works Item, having regard to the Pricing Document. [If the Pricing Document has a rate or price for supplying and fixing a Works Item, the Contract value includes only the portion for supplying the Works Item, as determined by the Employer's Representative.]

## 11.3. Retention

- 11.3.1 There shall be deducted from each interim payment to the Contractor the retention percentage stated in the Schedule, part 1L.
- 11.3.2 Upon issue of the certificate of Substantial Completion of the Works, the Contractor shall be entitled to invoice the Employer for half of the amount so retained and the Contractor shall furnish the Employer's Representative with a copy of the invoice. Upon the issue of the Defects Certificate, the Contractor shall be entitled to invoice the Employer for the balance of the money so retained and the Contractor shall furnish the Employer's Representative with a copy of the invoice.
- 11.3.3 If, within 14 days of the issue of the certificate of Substantial Completion of the Works, or another date agreed by the Employer's Representative, the Contractor provides to the Employer a retention bond in the form in the Work Requirements, or, if there is none, a form approved by the Employer, for the amount retained by the Employer, and executed by a surety approved by the Employer, the Contractor shall be entitled to invoice the Employer for the balance of the money retained.
- 11.3.4 Upon issue of the certificate of Substantial Completion of a Section of the Works, the retention amount to be withheld until issue of the certificate of Substantial Completion of the

Works shall be reduced by the amount stated in the Schedule, part 1G, and the Contractor shall be entitled to invoice the Employer for that amount.

- 11.3.5 The Employer shall pay the Contractor the amount due on an invoice under this sub-clause 11.3 within 21 days after receiving the invoice [less any amount that the Employer is entitled to deduct according to sub-clause 10.9].

#### 11.4 **Full Payment**

The payments to the Contractor under this Contract are for compliance in full with the Contractor's obligations to the time of payment [including construction management, programming, reporting, payment of wages and observing employment requirements] [but payment does not imply acceptance that the obligations have been performed]. When the Contractor has not fully complied with its obligations, the Employer is not required to make payment in full [without limiting its other rights or remedies]. In particular

- 11.4.1 If the Contractor has not given a collateral warranty by the date stated in the Schedule, part 1F(i), the Employer is entitled to deduct from payment to the Contractor the amount stated in the Schedule, part 1F(i) until the collateral warranty is given.
- 11.4.2 If the Contractor has not submitted a programme or given a progress report when required by sub-clauses 4.9 and 4.10, the Employer is entitled to deduct 15% of each payment to the Contractor until the programme or report has been submitted or given.
- 11.4.3 If the Contractor has not complied with sub-clause 5.3, the Employer is entitled to make the deduction provided for in sub-clause 5.3.6.
- 11.4.4 If the Contractor does not give the certificate required by sub-clause 5.3.7 with an interim statement, there shall be no payment due under sub-clause 11.1 for the relevant Work Item until the certificate is given.
- 11.4.5 Deductions from payments because of obligations that the Contractor has still not complied with by the date the Defects Certificate was issued shall be deducted from the Contract Sum. In the case of a deduction from the Contract Sum because of failure to give the certificate required by sub-clause 5.3.7, the amount deducted shall be the portion of the Contract value of the relevant Work Item that the Employer determines to be the labour portion. The Contractor shall give the Employer any information the Employer requires for this determination.

#### 11.5. **Final Statement**

- 11.5.1 Within 2 months after Substantial Completion of the Works is certified, the Contractor shall give to the Employer's Representative a final statement. The Contractor shall include in that statement all money that the Contractor considers to be due from the Employer to the Contractor under or in connection with the Contract. The Employer shall have no liability to the Contractor under or in connection with the Contract for any matter not detailed in the final statement, except under the indemnities in the Contract or Compensation Events occurring after Substantial Completion of the Works was certified. If no final statement is given within the time required, the Employer shall be released from all liability to the Contractor under or in connection with the Contract.
- 11.5.2 Within 3 months after receipt of the Contractor's final statement, the Employer's Representative shall issue to the Contractor and to the Employer a penultimate payment certificate certifying the amount that, in the Employer's Representative's opinion, will be due from the Employer to the Contractor, less any final retention to be paid after the Defects Certificate is issued, or from the Contractor to the Employer.
- 11.5.3 As soon as practicable, no more than 3 months, after the Defects Certificate is issued, the Employer's Representative shall issue a final payment certificate certifying the amount that, in the Employer's Representative's opinion, is finally due from the Employer to the Contractor, or from the Contractor to the Employer. The amount in the final payment certificate shall be the same as the amount in the penultimate payment certificate, except for
- (1) the final payment of retention and
  - (2) adjustments to the Contract Sum because of Compensation Events that happen after Substantial Completion of the Works is certified and

- (3) amounts owed by the Contractor that were not included in the penultimate certificate [for example, for Defects that the Contractor has not rectified] and
- (4) deductions from the Contract Sum under sub-clause 11.4 and
- (5) other amounts that, according to the Contract, are to be paid after Substantial Completion of the Works [such as payments for testing after Substantial Completion].

11.5.4 If the penultimate or final payment certificate states that there is a sum owing to the Contractor, the Contractor shall issue an invoice to the Employer for that sum and the Employer shall pay the amount due on the invoice within 21 days after receiving the invoice. If the penultimate or final payment certificate states that there is a sum owing to the Employer, the Contractor shall pay the amount due within 14 days of receipt of the Employer's demand for payment. [Payments and certificates, including the penultimate and final payment certificates and the Defects Certificate, will not relieve the Contractor of any obligations, or be evidence of the value of work or that work has been completed satisfactorily].

#### 11.6 Time for Payment and Interest

- 11.6.1 When a payment is to be made under the Contract, and no time for payment is stated, the amount due shall be paid within 30 days of receipt of a demand for payment.
- 11.6.2 Interest shall be added to any payment not made within the time provided in the Contract, from the date the payment was due under the Contract, at the rate provided in the European Communities (Late Payment in Commercial Transactions) Regulations 2012.

#### 11.7 Value Added Tax

- 11.7.1 The Contractor's completed form of tender states whether, and to what extent, the Contract Sum includes VAT.
- 11.7.2 To the extent that the Contract Sum excludes VAT, the Employer shall pay the Contractor (or the Revenue Commissioners when required by Law or their practice) any VAT arising on the supply under the Contract in addition to the Contract Sum.
- 11.7.3 To the extent that the Contract Sum includes VAT,
  - (1) adjustments to the Contract Sum shall be on a net-of-Vat basis, and the appropriate sum for VAT shall be added or subtracted and
  - (2) any VAT included in the Contract Sum that the Employer is required to pay the Revenue Commissioners (by Law or their practice) shall be deducted from the Contract Sum.
- 11.7.4 So therefore, if the Contract Sum includes VAT chargeable at the standard rate only, then the Employer shall pay the Contractor (or the Revenue Commissioners when required by Law or their practice).
  - The Contract Sum, including the VAT chargeable at the standard rate that is included in the Contract Sum and also
  - Any VAT arising on the supply under the Contract that is chargeable at another rate.

In the Contract 'standard rate' means the VAT rate specified in section 46(1)(a) of the Value-Added Tax Consolidation Act, 2010.
- 11.7.5 Amounts in the Contract other than the Contract Sum exclude VAT, unless otherwise stated.
- 11.7.6 The Contractor shall send the Employer, for each payment, an invoice complying with 66 of the Value-Added Tax Consolidation Act, 2010.

#### 11.8 Withholding Tax

The Employer shall be entitled to make any deduction or withholding on account of tax required by Legal Requirements or the practice of the Revenue Commissioners.

**12 TERMINATION****12.1 Termination on Contractor Default**

- 12.1.1 The Employer may, without limiting any other right or remedy, terminate the Contractor's obligation to complete the Works by notice to the Contractor if any of the following occurs:
- (1) the Contractor fails to comply with its obligations under the Contract, and, if the failure can be cured, the Employer's Representative has directed the Contractor to put the matter right, and the Contractor has not done so within 14 days after receiving the direction
  - (2) the Contractor abandons or, except where required or permitted by the Contract, suspends the design or execution of the Works
  - (3) the Contractor fails to proceed regularly and diligently with the design and execution of the Works
  - (4) the Contractor fails to maintain the required insurances or performance bond
  - (5) the Starting Date has not occurred or the Contractor has not started work under the Contract within 6 weeks of the date the Contract requires
  - (6) any of the Contractor's warranties in sub-clause 2.5 or sub-clause 2.6 are untrue
  - (7) the Contractor has committed or caused the Employer to commit a serious breach of Legal Requirements concerning the Works
  - (8) the Contractor or Contractor's Personnel have committed a breach of the Safety, Health and Welfare at Work Act 2005 or any regulations or code of practice made under it concerning the Works
  - (9) the Contractor has not complied with sub-clauses 5.3.2 or 5.3.3 either (a) within 14 days after notice from the Employer requiring a failure to be put right or (b) persistently
  - (10) the Contractor has subcontracted all or any part of the Works in breach of the Contract
  - (11) any of the following **insolvency events** occur:
    - (a) a petition is presented to wind up the Contractor and is not dismissed within 10 working days of presentation
    - (b) any meeting of creditors or members of the Contractor is convened or held for the purpose of considering a resolution to wind up the Contractor
    - (c) any arrangement or composition with or for the benefit of its creditors [including any compromises or arrangements entered into under sections 201 to 204 of the Companies Act 1963] are proposed or entered into by or in respect of the Contractor
    - (d) a liquidator, supervisor, receiver, administrator, administrative receiver, trustee or encumbrancer takes possession of or is appointed over the Contractor or any of its assets, or any distress, execution or other process is levied or enforced, and not discharged within 10 working days, on the Contractor or any of its assets
    - (e) the Contractor ceases or threatens to cease carrying on business, or is, or is regarded by law or by a court to be, or declares itself to be, insolvent or unable to pay its debts as they fall due
    - (f) a petition is presented to appoint an examiner to the Contractor, or an order is made appointing an examiner to the Contractor
    - (g) the Contractor, being an individual, becomes bankrupt
    - (h) any event similar to the above insolvency events occurs in respect of the Contractor in any jurisdiction in which it is incorporated or has a place of business
  - (12) the Contractor, if an individual, dies or becomes incapable of performing the Contract.

- 12.1.2 If the Contractor is more than one person, if any of the insolvency events occur in respect of any of them, the Employer may either
- (1) terminate the Contractor's obligation to complete the Works or
  - (2) terminate the obligation to complete the Works of the person concerned and the others shall remain liable to perform the Contractor's obligations.
- 12.1.3 If any insolvency events occur in respect of any person who has guaranteed the Contractor's performance of the Contract to the Employer, or a guarantee ceases to be enforceable against the guarantor, the Employer may terminate the Contractor's obligation to complete the Works unless, within 10 working days of the event, the Contractor has arranged a replacement guarantee and guarantor to the Employer's satisfaction.

## 12.2 **Consequences of Default Termination**

If the Contractor's obligation to complete the Works is terminated under sub-clause 12.1, the following shall apply:

- 12.2.1 The Contractor shall leave the Site in an orderly manner.
- 12.2.2 Payment of all sums of money that may then be due from the Employer to the Contractor shall be postponed, and the Employer shall not be required to make any further payment to the Contractor except as provided in this sub-clause.
- 12.2.3 The Employer's Representative shall, as soon as practicable, determine the amount due to the Contractor under the Contract for the Works completed in accordance with the Contract and unpaid (the **termination value**).
- 12.2.4 The Contractor shall not remove any Works Items or Contractor's Things from the Site unless directed to do so by the Employer, and if directed, shall promptly remove from the Site any Works Items and Contractor's Things, as directed.
- 12.2.5 The Employer may engage other contractors, use any Works Items and Contractor's Things on the Site and do anything necessary for the completion of the Works.
- 12.2.6 The Contractor shall, if so directed by the Employer's Representative, assign to the Employer [without further payment] the benefit of any subcontract, contract for the supply of any Works Item, or other contract concerning the Contract.
- 12.2.7 The Employer may pay to any Subcontractor or supplier to the Contractor any amount due to it that the Employer's Representative certifies as included in any previous interim payment to the Contractor. The Contractor shall re-pay to the Employer such an amount on request.
- 12.2.8 The Contractor shall give the Employer all Works Requirements and Contractor's Documents it [or Contractor's Personnel] has.
- 12.2.9 When the Works have been completed and the termination amount as described below has been determined, the Employer's Representative shall give a certificate to the Contractor and the Employer setting out the total of the following (the **termination amount**):
- (1) the Employer's additional cost of completing the Works compared with the cost that would have been incurred if the Works had been completed by the Contractor in accordance with the Contract
  - (2) loss and damage incurred by the Employer as a result of the termination and its cause
  - (3) amounts due to the Employer by the Contractor under or in connection with the Contract or in connection with the Works.
- 12.2.10 If the Employer does not begin to put in place arrangements to complete the Works within 6 months after the termination, the Employer's Representative shall issue this certificate as soon as practicable after the end of this 6 month period, based, if necessary, on estimates.
- 12.2.11 If the termination amount is less than the termination value, the Contractor shall issue an invoice to the Employer for the difference and the Employer shall pay the amount due on the invoice within 15 working days after receiving the invoice. If the termination amount is more than the termination value, the Contractor shall pay the Employer the difference within 10 working days of receiving the Employer's demand for payment.

**12.3 Suspension by the Contractor**

If the Employer fails to pay any amount due under clause 11, the Contractor may, on giving notice to the Employer, in accordance with the Construction Contracts Act 2013, suspend execution of the Works until the amount has been paid. On receiving the payment or notice has been served by either Party referring the dispute to Adjudication, the Contractor shall resume execution of the Works.

**12.4 Termination by the Contractor**

The Contractor shall be entitled to terminate the Contractor's obligation to complete the Works by notice to the Employer if any of the following occur:

- (1) the Contractor has suspended the design and execution of the Works for 15 working days in accordance with sub-clause 12.3, and the Employer has still not paid
- (2) work has been suspended by direction of the Employer's Representative under sub-clause 9.2 and a right to terminate has arisen under that sub-clause
- (3) the execution of the Works or a substantial part of the Works has been suspended for a period of at least 3 months as a consequence of loss or damage that is at the Employer's risk under sub-clause 3.1
- (4) an event or circumstance outside the control of the Parties makes it physically impossible or contrary to Law for the Contractor to fulfil its obligations under the Contract for a period of at least 6 months.

**12.5 Termination at Employer's Election**

12.5.1 The Employer shall be entitled to terminate the Contractor's obligation to complete the Works at its election on 20 working days notice to the Contractor.

12.5.2 The Employer may not terminate the Contractor's obligation to complete the Works under sub-clause 12.5.1 for the purpose of retaining another contractor to design and execute the Works.

12.5.3 If the Contractor has not obtained any particular Consent by a date specified in the Works Requirements, the Employer may terminate the Contractor's obligation to complete the Works [and, if it so wishes, retain another contractor to design and execute the Works]. In this event the Employer's only liability to the Contractor will be to pay for design completed by the Contractor and given to the Employer any amount stated in the Pricing Document for that design.

12.5.4 The Employer shall return any performance bond required under this Contract to the Contractor on termination under this sub-clause 12.5.

**12.6 Consequences of Termination by Contractor or at Employer's Election**

If the Contractor's obligation to complete the Works is terminated under sub-clause 12.4 or sub-clause 12.5 the following shall apply:

12.6.1 The Contractor shall leave the Site in an orderly manner and remove any Contractors' Things.

12.6.2 The Contractor shall give the Employer all Works Requirements and all Contractors' Documents.

12.6.3 The Contractor shall, as soon as practicable, give the Employer's Representative a statement of the total of the following (the **termination sum**):

- (1) the unpaid value of the parts of the Works completed to the date of termination in accordance with the Pricing Document, disregarding any provision limiting the Employer's obligation to pay for partially completed work
- (2) the Contractor's reasonable costs of removal from the Site as a consequence of the termination
- (3) all other amounts due to the Contractor under the Contract but not damages.

On a termination under sub-clause 12.5.3, the termination sum shall be any amount due under that sub-clause.



12.6.4 Within 10 working days of receiving this statement, the Employer's Representative shall issue a certificate to the Contractor and the Employer of the amount due from the Contractor to the Employer or the Employer to the Contractor, including the termination sum in the calculation of the amount due from the Employer to the Contractor. If the certificate shows an amount owing to the Contractor, the Contractor shall issue an invoice to the Employer for that amount, and the Employer shall pay the amount due on the invoice within 15 working days after receiving the invoice. If the certificate shows an amount due to the Employer, the Contractor shall pay the amount due within 10 working days of receiving the Employer's demand for payment.

## 12.7 **Survival**

Termination of the Contractor's obligation to complete the Works shall not affect the Contractor's obligations under the Contract, other than the obligation to complete the Works. [In particular the following provisions of the Contract continue to have effect after termination: sub-clauses 1.1, 1.2, 1.3, 1.4, 1.7, 1.8, 1.9, 2.1, 2.6, 2.8, 3.4, 3.5, 4.16, 4.17, clause 6, this clause 12 and clause 13.]

## 12.8 **Payment**

On termination of the Contractor's obligation to complete the Works, the Employer's liability to the Contractor under or in connection with the Contract shall be limited to payment of the amount provided for in this clause 12, and any other amount that fell due under the Contract before the termination.

## 12.9 **Reference to Conciliation**

12.9.1 The Employer may [but is not required to] refer to conciliation under sub-clause 13.2 the issue of whether the Employer has become entitled to terminate the Contractor's obligation to complete the Works under sub-clause 12.1.

12.9.2 Sub-clause 13.2 shall apply to the conciliation, except that the conciliator's time to give the recommendation shall be 21 days after appointment. Clause 13.6 shall also apply.

12.9.3 If the conciliator recommends that the Employer is entitled to terminate the Contractor's obligation to complete the Works under sub-clause 12.1, and the Employer does so within 63 days after receiving the conciliator's recommendation, and it is subsequently found that the Employer was not entitled to do so, then the following shall apply:

- (1) the termination shall stand [even if the circumstances have changed] and have effect as if the Employer's termination notice under sub-clause 12.1 was a valid termination notice under sub-clause 12.5.1
- (2) sub-clauses 12.6.1 to 12.6.4 inclusive shall apply retrospectively from the date of the termination notice under sub-clause 12.1
- (3) sub-clause 12.5.2 shall not apply
- (4) the Contractor shall have no other rights or remedies under the Contract or otherwise at law for the termination.

**13 DISPUTES****13.1 Dispute Management Procedure**

13.1.1 If a dispute arises under sub-clause 10.5.4 or 10.5.5 of the Contract, either Party may, by notice to the other, refer the dispute for resolution under this sub-clause 13.1. The notice shall state that the dispute is given under sub-clause 13.1 of the Contract.

13.1.2 The dispute management procedure for resolution of disputes arising under sub-clause 10.5.4 or 10.5.5 of the Contract consists of meetings of the Project Board as detailed in this Clause.

The Project Board:

(1) shall meet at least every 60 days to review disputes referred under clause 13.1 and may, by agreement of the Project Board, call an interim Project Board Meeting sooner than the next scheduled date for a Project Board Meeting, to review disputes referred. Where no disputes are referred the Project Board may, by agreement of the Project Board, defer scheduled Project Board meetings until a dispute arises under clause 13.1. There shall be a minimum of 1 member from each Party and a maximum of 3 members from each Party, as named in Schedule Part 3A , at all Project Board meetings;

(2) shall ensure that all unresolved disputes at the end of a scheduled Project Board Meeting or interim Project Board Meeting are so notified to the Parties on the next Working Day after the Project Board meeting ("date of notification"). Either Party may refer such unresolved disputes to conciliation [in accordance with sub-clause 13.2] within 14 days of the date of notification to the Parties by the Project Board, otherwise the Employer's Representative's determination issued under sub-clause 10.5 shall be binding;

(3) shall communicate orally or in writing on a "without prejudice" basis, including all communications between the Project Board members and to the Standing Conciliator, [where appointed], and such communications may not be relied upon by either Party in subsequent dispute resolution proceedings under this Contract, other than the signed agreement as set out in sub-clause 13.1.2.(4);

(4) shall ensure all agreements to resolve a dispute between the Parties are in writing and signed by the Parties. This agreement is binding on the Parties;

(5) may, where the relevant appointment has been made, agree to have the Standing Conciliator or conciliator draft the binding agreement to be signed by the Parties. If the agreement is not signed by both Parties within 14 days of the date of issue of the agreement by the Standing Conciliator or conciliator, either Party may refer the dispute to conciliation as per 13.1.2(2) above within a further 14 days. If the dispute is not referred to Conciliation within this further 14 day period the Employer's Representative determination issued under sub-clause 10.5 shall be binding;

(6) may agree to have the Standing Conciliator, where one has been appointed, attend or chair the Project Board meetings;

(7) may agree to seek advice or opinion from the Standing Conciliator at the Project Board meeting, where one is appointed, either orally or in writing , in an effort to resolve disputes referred.

**13.2 Conciliation**

[Where Schedule Part 1N so states that a Standing Conciliator shall be appointed, the Standing Conciliator shall take the place of the conciliator under sub-clause 13.2 for all disputes referred to conciliation under sub-clause 13.2]

13.2.1 If a dispute arises under the Contract, [or where a dispute referred to the dispute management procedure has not been resolved], either Party may, by notice to the other, refer the dispute for conciliation under this sub-clause 13.2. The notice shall state that it is given under sub-clause 13.2 of the Contract. [No dispute referred to the dispute management procedure may be referred to conciliation without first completing the dispute management procedure.]

13.2.2 Except in the case where a Standing Conciliator has been appointed, [and in such cases the Standing Conciliator shall be the conciliator], within 10 working days of the referral of a dispute to conciliation, the Parties shall jointly appoint a conciliator who is competent to adjudicate upon the dispute and independent of the Parties. If the Parties fail to appoint a

conciliator within 10 working days of the referral, or if a person appointed refuses to act or becomes unable to act, the conciliator shall be appointed by the appointing body or person named in the Schedule, part 1N, on the application of either Party. If there is a fee for making the appointment, the Parties shall share it equally. If one Party pays the entire fee, it shall be entitled to reimbursement of the other Party's share from the other Party on demand.

13.2.3 Each Party shall, within the period set by the conciliator, send to the conciliator and the other Party brief details of the dispute stating its contentions as to the facts and the Parties' rights and obligations concerning the dispute. The conciliator may, for this purpose, suggest further actions or investigations that may be of assistance.

13.2.4 The Parties shall promptly make available to the conciliator all information, documents, access to the Site and appropriate facilities that the conciliator requires to resolve the dispute.

13.2.5 The conciliator shall consult with the Parties in an attempt to resolve the dispute by agreement. The conciliator may do any of the following, or any combination of them:

- (1) meet the Parties separately from each other or together and consider documents from one Party not sent or shown to the other
- (2) conduct investigations in the absence of the Parties
- (3) make use of specialist knowledge
- (4) obtain technical or legal advice
- (5) establish the procedures to be followed in the conciliation.

Where the dispute has been referred to the dispute management procedure and Sub-clause 13.1.2(5) and 13.1.2(6) of the Contract applies, the conciliator, with the agreement of the Parties, may forgo the requirements of 13.2.5(1) to 13.2.5(5) inclusive and give the Parties a written recommendation in accordance with 13.2.8.

13.2.6 The conciliator shall not be an arbitrator and the Arbitration Act 2010 and the law relating to arbitration shall not apply to the conciliation.

13.2.7 The conciliator's terms of appointment shall be those in the Works Requirements or, if there are none, those agreed by the Employer and the Contractor with the conciliator.

13.2.8 If the dispute is not resolved by agreement within 42 days after the conciliator was appointed, [or after referral of the dispute to conciliation where a Standing Conciliator has been appointed], or a longer period proposed by the conciliator and agreed by the Parties, the conciliator shall give both Parties a written recommendation. The conciliator shall base the recommendation on the Parties' rights and obligations under the Contract.

13.2.9 If either Party is dissatisfied with the conciliator's recommendation, it may, within 42 days after receiving the conciliator's recommendation, so notify the other Party. The notice shall state that it is given under sub-clause 13.2 of the Contract, and shall state the matters in dispute and the reasons for dissatisfaction. If the conciliator has failed to give a recommendation within 42 days after appointment, either Party may give a notice of dissatisfaction. If notice of dissatisfaction has been given in accordance with this clause, either Party may refer the dispute to arbitration under sub-clause 13.4.

13.2.10 If neither Party gives notice of dissatisfaction within 42 days after receiving the conciliator's recommendation, the recommendation shall be conclusive and binding on the Parties, and the Parties agree to comply with it. If, in such circumstances, a Party fails to comply with the conciliator's recommendation, the other Party may [without limiting its other rights] refer the failure itself to Adjudication, [where the dispute is a dispute relating to payment], or to arbitration under sub-clause 13.4, and need not invoke this sub-clause 13.2 for this reference.

13.2.11 If the conciliator has recommended the payment of money and a notice of dissatisfaction is given, the following shall apply:

- (1) The Party concerned shall make the payment recommended by the conciliator, provided that the other Party first
  - (a) gave a notice, complying with the arbitration rules referred to in sub-clause 13.4, referring the same dispute to arbitration and
  - (b) gave the paying Party a bond executed by a surety approved by the paying Party, acting reasonably, in the form included in the Works Requirements, or if there is none, a form approved by the paying Party, acting reasonably, for the amount of the payment.
- (2) If, when the dispute is finally resolved, it is found that the Party receiving payment on the conciliator's recommendation was not entitled to some or all of the amount paid, then that Party shall repay the amount it was paid and found not to be entitled to, together with interest.
- (3) When the dispute is finally resolved, interest will be deducted from final payment under the award or judgment.
- (4) Interest under this sub-clause is calculated at the reference rate referred to in the European Communities (Late Payment in Commercial Transactions) Regulations 2002 plus 2% per year and runs from the date of the original payment to the date of the repayment or final payment.
- (5) [This provision for interest is confidential under sub-clause 13.2.12, and in particular shall not be taken into account or referred to in arbitration until all other matters are resolved.]

13.2.12 The conciliation shall be confidential, and the Parties shall respect its confidentiality, except when any of the exceptions in sub-clause 4.16 apply, or to the extent necessary to enforce a recommendation that has become conclusive and binding. All documents provided by a Party in connection with a conciliation shall be returned when the conciliation is concluded.

### 13.3 **Adjudication**

- 13.3.1 The parties have recourse to Adjudication in accordance with the Construction Contracts Act 2013
- 13.3.2 Where an adjudicator reaches a decision on a dispute referred under the Construction Contracts Act 2013, that same dispute shall not be referred to the dispute management procedure or conciliation under the Contract.
- 13.3.3 If a dispute between the Parties is referred to Adjudication, any dispute management procedure or conciliation relating to that dispute immediately adjourns. In the event that no decision is reached by the adjudicator, the parties may continue to resolve the dispute under the dispute management procedure or conciliation from the date the dispute was referred to Adjudication. In the event that a decision is reached by the adjudicator, the dispute management procedure or conciliation for that dispute shall be terminated.

### 13.4 **Arbitration**

Any dispute that, under sub-clause 13.2, may be referred to conciliation shall, subject to sub-clause 13.2 be finally settled by arbitration in accordance with the arbitration rules identified in the Schedule, part 1N. For purposes of those rules, the person or body to appoint the arbitrator, if not agreed by the Parties, is named in the Schedule, part 1N.

### 13.5 **Jurisdiction**

Subject to the above provisions of this clause, the Parties submit to the jurisdiction of the Irish courts to settle any dispute that may arise out of or in connection with the Contract or the Works.

**13.6 Agent for Service**

If an agent for service of legal proceedings on the Contractor is named in part 2A of the Schedule, the Contractor confirms to the Employer that it has irrevocably appointed the named person as its agent for the service of all documents relating to legal proceedings, and that failure of the agent to notify the Contractor of receipt of a document will not invalidate any proceedings or the service of the document.

**13.7 Continuing Obligations**

[Despite the existence of a dispute, the Parties shall continue to perform their obligations under the Contract.]

## 14 **COVID-19 MANDATORY CLOSURE**

### 14.1 **Covid-19 Definitions**

- 14.1.1 **Covid-19** means Covid-19 or such variant thereof as each is listed in the schedule to the Infectious Diseases Regulations 1981.
- 14.1.2 **Covid-19 Mandatory Closure** means the closure of the Site due to Covid-19 mandated by Law and/or mandated by order of a public authority exercising authority under Law, that did not arise as a result of or in connection with an act, omission or breach of Legal Requirements of the Contractor or the Contractor's Personnel or a breach of the Contract by the Contractor.
- 14.1.3 **Site Closure Costs** has the meaning set out in the Site Closure Costs Supplement.
- 14.1.4 **Site Closure Costs Supplement** means the document of the same name in the Works Requirements or, if there is none, the version of the document of the same name published on the Office of Government Procurement website most recently before the Designated Date.

### 14.2 **Covid-19 General Provisions**

- 14.2.1 The Contractor's sole remedies for a Covid-19 Mandatory Closure shall be those stated in sub-clause 9.3 for a Delay Event under the Schedule Part 1K Event 15 and Site Closure Costs under this clause 14. The provisions of clause 10 shall apply in respect of any extension of time to the Date of Substantial Completion under sub-clause 9.3 for a Delay Event under the Schedule Part 1 K Event 15 and an adjustment to the Contract Sum for the Site Closure Costs under this clause 14 in respect of a Covid-19 Mandatory Closure.
- 14.2.2 The period of any Covid-19 Mandatory Closure shall not be taken into consideration in calculating the period under sub-clause 12.4(4).

### 14.3 **Covid-19 Costs**

- 14.3.1 In the event of a Covid-19 Mandatory Closure there shall be added to the Contract Sum the Site Closure Costs for the period of the Covid-19 Mandatory Closure[s], excluding the first [7] days in total of the Covid-19 Mandatory Closure or where there is more than one Covid-19 Mandatory Closure, the Covid-19 Mandatory Closures.
- 14.3.2 The Contractor shall only be entitled to Site Closure Costs to the extent that all of the following apply:
  - (1) the Site Closure Costs are not a result of the Contractor's or Contractor's Personnel's act or omission or the Contractor's breach of the Contract
  - (2) if the Works are concurrently delayed by more than one cause, and one or more of the causes is not a Covid-19 Mandatory Closure, there shall be no increase to the Contract Sum for Site Closure Costs for the period of concurrent delay
  - (3) the Contractor makes all reasonable efforts to avoid and minimise the adverse effects of the Covid-19 Mandatory Closure
  - (4) the Contractor has complied with sub-clause 10.3, clause 14 and the Site Closure Costs Supplement in full [including giving notices and details within the time required] and continues to comply with its obligations under the Contract
  - (5) the Contractor has not claimed or received as part of the Site Closure Costs, any costs in respect of which it is entitled to claim assistance or receive payment under any scheme, relief, benefit or otherwise [including under the Financial Provisions (Covid-19) (2) Act 2020 (Act No. 8 of 2020) or similar Law]

(6) the Contract does not provide otherwise.

- 14.3.3 The Contractor warrants that the details that it provides as required by the Site Closure Costs Supplement are a complete and full break-down of the relevant costs, on a transparent and 'open book' basis.
- 14.3.4 Any adjustment to the Contract Sum in accordance with sub-clause 14.3.1 shall be paid as part of the Contract value of the Works properly executed by the Contractor under sub-clause 11.1.2(1). The retention percentage at 11.3.1 shall not apply to payments under clause 14.

*End of Conditions.*

## **OPTIONAL CLAUSES PV1 AND PV2**

*(Included in the Contract as stated in Schedule, part 1M)*

### **PV1 PRICE VARIATION**

#### **PV1.1 Contract Sum Adjustment**

The Contract Sum is adjusted for fluctuations in costs of resources only in respect of increases or decreases that occur in workers' wages or expenses, or material prices, or are made by Law, as follows:

##### **PV1.1.1 Timing:**

- (a) The **Base Date** means the first day of the 25th month after the Tender Inflation Indexation Date.
- (b) No increase or decrease that comes into being after the Date for Substantial Completion shall be taken into account for the purpose of this clause PV1.

##### **PV1.1.2 Workers' remuneration and expenses**

The Contract Sum shall be adjusted by the amount of an increase or decrease in workers' remuneration and expenses that satisfies all these requirements:

- (i) it is made to the rates or remuneration payable to workers according to any sectoral employment orders implemented under the Industrial Relations Acts 1946 to 2015 and
- (ii) it becomes payable after the Base Date in accordance with the relevant sectoral employment order and
- (iii) the workers in respect of whom an increase is being claimed have received in Ireland for the relevant work at least the increased remuneration.

**Remuneration** has the meaning set out in Section 13 of the Industrial Relations (Amendment) Act 2015.

**Workers** means

- (a) any individuals employed by, or otherwise working for the Contractor or the Contractor's Personnel on or adjacent to the Site and fall within any categories of workers to whom a relevant sectoral employment order applies in accordance with its terms and
- (b) any foreperson, charge hand or other person who supervises or administers while performing duties within (a) but in respect only of the remuneration according to sub-clause PV1.1.2(i) applicable to those duties and 50% of their total hours worked.

[Site agents, managers, other full time supervisors and administrators, and surveyors, for example, are excluded.]

**Expenses** means PRSI payable by the Contractor as employer.

[All other increases are excluded, even where calculated as a percentage of a standard rate. So, for example, the Contractor is not entitled to any payment for local or site bargaining provisions; any parity or restructuring increases; subsistence or country money, any bonus under a site agreement, productivity, incentive, or other bonus; insurance premiums, other on-costs or consequential costs].

##### **PV1.1.3 Materials**

The Contract Sum shall be adjusted by the amount of an increase (in the case of an increase) or the amount of a decrease (in the case of a decrease) in the Price of material that results from either or both of these calculations where applicable:

- So far as the Price of any material at the Purchase Date has increased or decreased by more than 15 percent of the Price at the Tender Inflation Indexation Date, then that excess percentage over 15 percent is applied to its



Price at the Tender Inflation Indexation Date (the "First Adjustment").

- So far as the Price of any material at the Base Date has increased or decreased at the Purchase Date by more than 10 percent, then that excess percentage over 10 percent is applied to the Price at the Base Date (the "Second Adjustment")

**PROVIDED THAT**

- in the case of an increase arising from both the First Adjustment and the Second Adjustment, the Contract Sum shall only be adjusted by the amount of the higher of the two increases, but not the amount of both; and
- in the case of a decrease arising from both the First Adjustment and the Second Adjustment, the Contract Sum shall only be adjusted by the amount of the lower of the two decreases, but not the amount of both.

**Material** means only

- (a) material invoiced to the project
- (b) for incorporation in the permanent Works [as fixtures or unfixed goods],
- (c) or for temporary works used on the Site
- (d) and not used on any previous project or usable on any subsequent one [for example, replaceable components in formwork]. [Tools or equipment are not 'material'. There is no deduction of normal wastage from the allowable quantity of material, or of extra or surplus material taken over by the Employer].

**Purchase Date** means the date when the particular material was invoiced to the project.

**Price** means the average price at which the relevant volume of the relevant material is available in the market at the relevant time from a representative number of reputable manufacturers or suppliers.

[There is no adjustment for any alteration in the price of material except as specified in this sub-clause].

**PV1.1.4 Law**

The Contract Sum shall be adjusted by the amount of any increase or decrease in the Contractor's cost of performing its obligations under the Contract as a result of a change in Law made after the Designated Date that

- (i) changes [whether by alteration, addition or removal] VAT, customs or excise duties, requirements for a licence to import or export any commodity or Pay-Related Social Insurance and
- (ii) is not identified in the Works Requirements and
- (iii) has not resulted in an adjustment in the Contract Sum under another part of this clause PV1 or the Contract.

**PV1.2 Communications**

The Contractor shall maintain arrangements to become aware of any significant possibility of an increase or decrease in the Contract Sum that may arise in accordance with this clause PV1 and shall immediately notify the Employer's Representative of any such possibility and keep him informed of any opportunities to minimise an increase.

**PV1.3 Compensation Events**

The Pricing Document and the valuation rules in sub-clause 10.6 shall not cease to determine, apply to or be the basis of the valuation of a Compensation Event by reason of price fluctuations in material costs, but the following principles shall apply -

- (i) No departure from rates in the Pricing Document shall be made in respect of fluctuations affecting the cost of material omitted by a Change Order.
- (ii) Valuation of a Change Order shall include any increase in the cost to the Contractor of material substituted or added by the Change Order that is due to

price fluctuation after the Tender Inflation Indexation Date so far as it is likely to exceed the price fluctuation increase that under this clause PV1 would have been the Contractor's risk for the original material.

No adjustment under this clause PV1 shall apply to an adjustment or the part of an adjustment of the Contract Sum valued under sub-clauses 10.6.4 or 10.7.

**PV1.4 Efficiency**

[In addition to sub-clause PV1.1.1(b),] increases of the Contract Sum will only apply so far as the increased costs incurred by the Contractor occur despite its efficient progress and procurement and reasonable efforts to minimise increases.

**PV1.5 Certificates & Payment**

The Contractor shall fully detail and vouch any fluctuations in costs relevant to this clause PV1 as soon as practicable, and they shall then be allowed for in interim and final certificates and payments under and subject to clause 11.

**PV2 PRICE VARIATION****PV2.1 Definitions**

For the purpose of this clause definitions are set out in Appendix 1 [as well as elsewhere in the Conditions].

**PV2.2 Contract Sum Adjustment**

The Contract Sum, excluding the amount of Non-Adjustable Overheads and Plant, shall be subject to adjustment for price fluctuations or changes in Law only in the circumstances set out in this clause PV2. No increase or decrease shall be made in respect of any amount that relates to works before the Base Date except as provided in sub-clauses PV2.4, PV2.8.4A and PV2.8.4B.

**PV2.3 Proportions**

For the purpose of calculating adjustments to the Contract Sum, the proportions of Labour, Materials, Fuel, Non-Reusable Temporary Works, Plant and Non-Adjustable Overheads in the Contract Sum are set out in Appendix 7 [irrespective of the actual proportions of the work].

**PV2.4 Change in Law**

The Contract Sum shall be adjusted by the amount of any increase or decrease in the Contractor's cost of performing its obligations under the Contract as a result of a change in Law made after the Designated Date, or if a Recovery Date (Change in Law) has been agreed or determined, made after the Recovery Date (Change in Law), but before the Date for Substantial Completion of the Works or a Section, that

- (i) changes [whether by alteration, addition or removal] VAT, customs or excise duties, requirements for a licence to import or export any commodity or Pay-Related Social Insurance and
- (ii) is not identified in the Works Requirements and
- (iii) has not resulted in an adjustment in the Contract Sum under another part of this clause PV2 or the Contract.

**PV2.5 Failure to Complete on Time**

If the Contractor fails to complete the Works or a Section by its Date for Substantial Completion, adjustment of the Contract Sum in respect of the Works or Section after its Date for Substantial Completion shall be effected by the Index Figures or Consumer Price Index applicable to the Adjustment Period in which the Date for Substantial Completion occurs.

**PV2.6 Excluded Amounts**

The following are not subject to price adjustment (**Excluded Amounts**):

- (a) Delay cost under sub-clause 10.7
- (b) Adjustments or parts of adjustments of the Contract Sum valued under sub-clause 10.6.4
- (c) Amounts for unfixed materials or goods for which the Contractor is entitled to payment under sub-clause 11.2
- (d) Amounts based on actual costs or current prices
- (e) Credits allowed for old materials arising from the Works
- (f) Amounts for work executed under an agreement containing specific price arrangements
- (g) Costs incurred for making good defects under clause 8
- (h) [In addition to sub-clause PV2.5] amounts by which any cost incurred by the Contractor has been increased by a default of the Contractor.

**PV2.7 Revisions of Index Figures**

If an Index Figure used for a Material Category or a Fuel Category or the Consumer Price Index in relation to Non-Reusable Temporary Works is subsequently revised by the Central Statistics Office prior to the issue of the Final Certificate, any adjustments in accordance with this Clause shall be recalculated on the basis of the revised Index Figures.

**PV2.8 Materials and Fuel****PV2.8.1 Weightings**

For the purpose of calculating any adjustments to the amount payable in respect of Materials and Fuel in an Interim or Final Certificate, the weightings of Material and Fuel Categories in the Contract Sum are set out in Part I or Part II of Appendix 8, as applicable [irrespective of the actual constituents, weightings or proportions of the work].

**PV2.8.2 Materials**

Subject to sub-clause PV2.8.4A or PV2.8.4B, the amount payable in respect of Materials in an Interim Certificate or in the Final Certificate (other than amounts for price adjustments under this clause PV2 or any Excluded Amounts) in respect of an Adjustment Period shall be increased or decreased in accordance with the provisions of this clause PV2, and the total adjustment to the amount payable in such Interim Certificate or in the Final Certificate in respect of Materials shall be equal to the sum of the adjustments for each Material Category, which adjustments shall be calculated using the relevant formula set out in Appendix 2.

**PV2.8.3 Fuel**

Subject to sub-clause PV2.8.4A or PV2.8.4B, the amount payable in respect of the Fuel Percentage of an Interim Certificate or of the Final Certificate (other than amounts for price adjustments under this clause PV2 or any Excluded Amounts) in respect of an Adjustment Period shall be increased or decreased in accordance with the provisions of this clause PV2, and the total adjustment to the amount payable in such Interim Certificate or in the Final Certificate in respect of the Fuel Percentage shall be equal to the sum of the adjustments for each Fuel Category, which adjustments shall be calculated using the relevant formula set out in Appendix 3.

**PV2.8.4A Exceptional Increases for Materials and Fuel**

The amount payable in respect of a Material and/or the Fuel Percentage in an Interim Certificate or in the Final Certificate (other than amounts for price adjustments under this clause PV2 or any Excluded Amounts) may be increased for any Exceptional Increase in respect of that Material and/or Fuel after the Tender Inflation Indexation Date, or, if a Recovery Date (Inflation) has been agreed or determined, after the Recovery Date (Inflation) calculated using the relevant formula for Materials or Fuel set out in Appendix 4, as appropriate, **provided however** that adjustment of the Contract Sum under this sub-clause in respect of works after the Base Date shall be effected by the greater of the increase calculated in accordance with this sub-clause PV2.8.4A and the relevant increase calculated in accordance with sub-clause PV2.8.2 in respect of that Material or in accordance with sub-clause PV2.8.3 in respect of that Fuel.

**PV2.8.4B Exceptional Decreases for Materials and Fuel**

The amount payable in respect of a Material and/or the Fuel Percentage in an Interim Certificate or in the Final Certificate (other than amounts for price adjustments under this clause PV2 or any Excluded Amounts) may be decreased for any Exceptional Decrease in respect of that Material and/or Fuel after the Tender Inflation Indexation Date, or, if a Recovery Date (Inflation) has been agreed or determined, after the Recovery Date (Inflation) calculated using the relevant formula for Materials or Fuel set out in Appendix 4, as appropriate, **provided however** that adjustment of the Contract Sum under this sub-clause in respect of works after the Base Date shall be effected by the lower of the decrease calculated in accordance with this sub-clause PV2.8.4B and the relevant decrease calculated in accordance with sub-clause PV2.8.2 in respect of that Material or in accordance with sub-clause PV2.8.3 in respect of that Fuel.

PV2.8.5     **Non-Reusable Temporary Works**

The amount payable in respect of Non-Reusable Temporary Works in an Interim Certificate or the Final Certificate (other than amounts for price adjustments under this clause PV2 or any Excluded Amounts) issued in respect of an Adjustment Period shall be adjusted in accordance with the relevant formula set out in Appendix 5.

PV2.8.6     **Labour**

The amount payable in respect of Labour in an Interim Certificate or the Final Certificate (other than amounts for price adjustments under this clause PV2 or any Excluded Amounts) issued in respect of an Adjustment Period shall be adjusted in accordance with the relevant formula set out in Appendix 6, **but only** to the extent that the workers in respect of whom an increase is being claimed have received in Ireland for the relevant work at least the increased standard wage rates.

**Appendix 1 to Clause PV2: DEFINITIONS**

<b>Term</b>		<b>Meaning</b>
(a)	Adjustment Index Figure	the appropriate Index Figure for the Adjustment Month <b>provided however</b> that, the Index Figure for any Adjustment Month that occurs after the Date for Substantial Completion of the Works or a relevant Section shall be determined in accordance with sub-clause PV2.5.
(b)	Adjustment Month	the month during which the middle day of the Adjustment Period occurred (if the Adjustment Period is an even number of days the last day is not to be counted).
(c)	Adjustment Period	the period between the last preceding Interim Certificate and the current Interim Certificate or the Final Certificate, <b>provided however</b> that if any Certificate is calculated in respect of a period that includes works before and after the Base Date, then only that part of the period that falls after the Base Date will be the Adjustment Period for the purposes of that certificate.
(d)	Base Date	the first day of the 25th calendar month after the Tender Inflation Indexation Date, or if a Recovery Date (Inflation) has been agreed or determined, after the Recovery Date (Inflation).
(e)	Base Index Figure	the appropriate Index Figure for the Base Month.
(f)	Base Month	the month during which the Base Date occurs.
(g)	Category	any Material Category or Non-Reusable Temporary Works.
(h)	Consumer Price Index	the consumer price index (all items) published by the Central Statistics Office, Ireland (including any successor or replacement thereof).
(i)	Effective Value	<p>the difference between</p> <p>(I) the amount which is due in any Interim or Final Certificate (before deducting retention) less any amounts for price adjustments and Excluded Amounts</p> <p>and</p> <p>(II) the amount included in the last preceding Interim Certificate calculated in accordance with (I) above <b>provided that</b> in the case of the first Interim Certificate the Effective Value shall be the amount calculated in accordance with (I) above,</p> <p><b>provided however</b> that if any amount payable in any Interim or Final Certificate is calculated in respect of works before the Base Date, then only that part of the amount payable in such Interim or Final Certificate that refers to works after the Base Date (less any amounts for price adjustments and any Excluded Amounts) will be included in the Effective Value, except that works before the Base Date may be included in the Effective Value for the purposes only of sub-clause PV2.8.4A or PV2.8.4B.</p>
(j)	Exceptional Increase	means that part of an increase that is in excess of 15 % from a CSO monthly Index Figure for a particular Material or Fuel Category after the Tender Inflation Indexation Date or, if a Recovery Date (Inflation) has been agreed or determined after the Recovery Date (Inflation) to the extent that such increase is in excess of 15% above the CSO monthly Index Figure for that Material or Fuel Category at the Tender Inflation Indexation Date or, if a Recovery Date (Inflation) has been agreed or determined, at the Recovery Date (Inflation).

<i>Term</i>	<i>Meaning</i>
(k) Exceptional Decrease	means that part of a decrease that is in excess of 15% from a CSO monthly Index Figure for a particular Material or Fuel Category after the Tender Inflation Indexation Date or, if a Recovery Date (Inflation) has been agreed or determined after the Recovery Date (Inflation) to the extent that such decrease is in excess of 15% below the CSO monthly Index Figure for that Material or Fuel Category at the Tender Inflation Indexation Date or, if a Recovery Date (Inflation) has been agreed or determined, at the Recovery Date (Inflation).
(l) Final Certificate	a certificate provided by the Employer's Representative in accordance with sub-clause 11.5.3.
(m) Fuel and Fuel Category	any or all of the sources of energy listed in Part II of Appendix 8, as appropriate.
(n) Fuel Percentage	the percentage of the Contract Sum that consists of Fuel set out in Appendix 7.
(o) Index Figures	those index figures compiled by or on behalf of the Central Statistics Office, Ireland (or such other public body as is authorised to perform this function) applicable to each Material or Fuel Category listed in Appendix 8, or, where appropriate, Consumer Price Index figures.
(p) Interim Certificate	a certificate or penultimate payment certificate provided by the Employer's Representative in accordance with sub-clause 11.1.4 or sub-clause 11.5.2.
(q) Labour Percentage	the percentage of the Contract Sum that consists of Labour set out in Appendix 7.
(r) Material(s) and Material Category	any or all of the materials listed in Part I of Appendix 8, as appropriate.
(s) Materials Percentage	the percentage of the Contract Sum that consists of Materials set out in Appendix 7.
(t) Non-Adjustable Overheads	the percentage of the Contract Sum that consists of non-adjustable overheads set out in Appendix 7.
(u) Non-Reusable Temporary Works	those Work Elements identified in the Pricing Document or Works Requirements as being non-reusable temporary works.
(v) Non-Reusable Temporary Works Percentage	the percentage of the Contract Sum that consists of non-reusable temporary works set out in Appendix 7.
(w) Plant	the percentage of the Contract Sum that consists of plant set out in Appendix 7.
(x) Recovery Date (Change in Law)	the Designated Date adjusted by the period of delay to the Starting Date that results from the actions or omissions of the Contractor after the Contract Date, but prior to the Starting Date (the <b>Contractor's Period of Delay</b> ) as is agreed by the Parties. If the Parties do not agree the Recovery Date (Change in Law) then the Employer may deliver to the Employer's Representative full and detailed particulars of any claim to a Contractor's Period of Delay and the Recovery Date (Change in Law) shall be the Designated Date adjusted by the Contractor's Period of Delay, if any, that the Employer's Representative certifies as fair and reasonable.

	<i><b>Term</b></i>	<i><b>Meaning</b></i>
(y)	Recovery Date (Inflation)	the Tender Inflation Indexation Date adjusted by the period of delay to the Starting Date that results from the actions or omissions of the Contractor after the Contract Date, but prior to the Starting Date (the <b>Contractor's Period of Delay</b> ) as is agreed by the Parties. If the Parties do not agree the Recovery Date (Inflation) then the Employer may deliver to the Employer's Representative full and detailed particulars of any claim to a Contractor's Period of Delay and the Recovery Date (Inflation) shall be the Tender Inflation Indexation Date adjusted by the Contractor's Period of Delay, if any, that the Employer's Representative certifies as fair and reasonable.
(z)	Work Element	a constituent of the work in the Pricing Document, or such other tender document as appropriate, for which the Employer's Representative has identified a corresponding Material Category or that forms part of the Non-Reusable Temporary Works, and which is not an Excluded Amount, <b>provided however</b> that no work before the Base Date shall form part of a Work Element for the purposes of adjustment in accordance with this Clause, with the exception of sub-clause PV2.8.4A or PV2.8.4B.



**Appendix 2 to Clause PV2****MATERIALS**

The formulae for price fluctuations in Material Categories pursuant to sub-clause PV2.8.2 are as follows:

**A. Formula to be used where  $A1 - B1$  is less than or equal to zero:**

$$W \times Y \times Z \times P \times (A1 - B1)/B1 = K$$

**B. Formula to be used where  $A1 - B1$  is greater than zero:**

$$\{W \times Y \times Z \times P \times (A1 - B1)/B1\} - (10\% \times W \times Y \times Z \times P) = K$$

**PROVIDED THAT** if K under Formula B is less than zero for the relevant Material Category solely as a result of the deduction of the ten percent (10%), the adjustment for that Material Category shall be zero.

(Note: Formula B will deduct 10% from any increase in the indices and effectively sets Base Index + 10% as the threshold at which recovery starts.)

where:

W = The weighting attributed to a particular Material Category, as stated in Part I of Appendix 8.

Y = The Materials Percentage.

Z = Contract Sum (excluding VAT and any price adjustments under this Clause) less any Excluded Amounts.

P = The amount which is due in any Interim or Final Certificate for the relevant Material Category less the last amount, if any, for that Material Category included in an Interim Certificate with the resulting balance divided by the total amount for that Material Category in the Contract Sum **provided that** the aggregate value of P in respect of any Material Category calculated over the course of the contract shall not exceed 1. In the calculation of P all amounts relating to price adjustments under this Clause shall be excluded.

The amounts in the Interim Certificates and/or Final Certificate used to calculate this proportion P are those for Work Elements allocated to the relevant Material Category in the Pricing Document or other pricing document forming part of the Contract.

No amount for a Work Element (or part of a Work Element) in the Pricing Document, or other pricing document forming part of the Contract may be used for the calculation of adjustments for more than one Category.

A1 = The Adjustment Index Figure for the relevant Material Category.

B1 = The Base Index Figure for the relevant Material Category.

K = The amount of increase or decrease recoverable in relation to price fluctuations for the particular Material in an Interim or Final Certificate.

**Provided however** that if at any time the Central Statistics Office ceases to publish Index Figures in respect of a particular Material Category then the following formula shall apply for calculating any increases or decreases in respect of that Material in any Interim Certificate and/or Final Certificate issued in respect of works after such time **provided always** that any such increases or decreases shall only apply in respect of works after the Base Date:

**A. Formula to be used where  $CPI^A - CPI^B$  is less than or equal to zero:**

$$W \times Y \times Z \times P \times (CPI^A - CPI^B)/CPI^B = K$$

**B. Formula to be used where  $CPI^A - CPI^B$  is greater than zero:**

$$\{W \times Y \times Z \times P \times (CPI^A - CPI^B)/CPI^B\} - (10\% \times W \times Y \times Z \times P) = K$$

**PROVIDED THAT** if K under Formula B is less than zero for the relevant Material Category solely as a result of the deduction of the ten percent (10%), the adjustment for that Material Category shall be zero.

where:

CPI<sup>A</sup> = the Consumer Price Index for the Adjustment Month, subject to sub-clause PV2.5.

CPI<sup>B</sup> = the Consumer Price Index for the Base Month.

### Worked Example

A four year Roads Contract is in its 44<sup>th</sup> month and material price increases occurring after the expiry of the 37<sup>th</sup> month (i.e. after the Base Date) are claimable in Interim Valuations. The 43<sup>rd</sup> Interim Valuation has included in it a claim for an increase in the price of ready mixed mortar and concrete which occurred after the Base Date. The relevant particulars are as follows:

Z	The Contract Sum (excluding VAT and any price adjustments under this Clause) less any Excluded Amounts	€6,000,000
Y	The percentage of the contract sum (excluding VAT) attributable to Materials as stated in the tender documents Appendix 7	35%
W	The weighting for ready mixed mortar and concrete in the tender documents Appendix 8	0.2
B1	The Base Index Figure for ready mixed mortar and concrete	105.3
A1	The Adjustment Index Figure for ready mixed mortar and concrete	126.36
P	The proportion of the particular Material Category in the Contract Sum (prior to any adjustments) as accepted by the Employer's Representative being paid for in the Interim Valuation (as certified). (This percentage is arrived at by calculating the difference between the amount due in the Interim or Final Certificate for the relevant Material Category less the last amount, if any, for that Material Category in an Interim Certificate with the resulting balance divided by the total amount of that Material Category in the Contract Sum.)	25%

As A1 – B1 is greater than zero, K, the recoverable increase, is calculated using formula B, as follows:

$$\{W \times Y \times Z \times P \times (A1 - B1)/B1\} - (10\% \times W \times Y \times Z \times P) = K$$

$$\{.2 \times .35 \times 6,000,000 \times .25 \times (126.36 - 105.3)/105.3\} - (10\% \times .2 \times .35 \times 6,000,000 \times .25) = €10,500$$

The amount of the recoverable increase for ready mixed mortar and concrete is €10,500

*(This €10,500 will be added to the recoverable increase for other materials in order to determine the overall increase for materials in this certificate.)*

**Appendix 3 to Clause PV2****FUEL**

The formulae for price fluctuations in Fuel Categories pursuant to sub-clause PV2.8.3 are as follows:

**A. Formula to be used where  $A1 - B1$  is less than or equal to zero:**

$$W \times Y \times EV \times (A1 - B1)/B1 = L$$

**B. Formula to be used where  $A1 - B1$  is greater than zero:**

$$\{W \times Y \times EV \times (A1 - B1)/B1\} - (10\% \times W \times Y \times EV) = L$$

**PROVIDED THAT** if L under Formula B is less than zero for the relevant Fuel Category solely as a result of the deduction of the ten percent (10%), the adjustment for that Fuel Category shall be zero.

where:

- W = The weighting attributed to a particular Fuel Category, as stated in Part II of Appendix 8.
- Y = The Fuel Percentage.
- EV = Effective Value (excluding VAT).
- A1 = The Adjustment Index Figure for the relevant Fuel Category.
- B1 = The Base Index Figure for the relevant Fuel Category.
- L = The amount of increase or decrease recoverable in relation to price fluctuations in the particular Fuel Category in an Interim or Final Certificate.

**Provided however** that if at any time the Central Statistics Office ceases to publish Index Figures in respect of a particular Fuel Category then the following formula shall apply for calculating any increases or decreases in respect of that Fuel in any Interim Certificate and/or Final Certificate issued in respect of works after such time **provided always** that any such increases or decreases shall only apply in respect of works after the Base Date:

**A. Formula to be used where  $CPI^A - CPI^B$  is less than or equal to zero:**

$$W \times Y \times EV \times (CPI^A - CPI^B)/CPI^B = L$$

**B. Formula to be used where  $A1 - CPI^B$  is greater than zero:**

$$\{W \times Y \times EV \times (CPI^A - CPI^B)/CPI^B\} - (10\% \times W \times Y \times EV) = L$$

**PROVIDED THAT** if L under Formula B is less than zero for the relevant Fuel Category solely as a result of the deduction of the ten percent (10%), the adjustment for that Fuel Category shall be zero.

where:

- $CPI^A$  = the Consumer Price Index for the Adjustment Month, subject to sub-clause PV2.5.
- $CPI^B$  = the Consumer Price Index for the Base Month.

**Appendix 4 to Clause PV2**

**EXCEPTIONAL INCREASES AND EXCEPTIONAL DECREASES UNDER SUB-CLAUSE PV2.8.4A AND PV2.8.4B**

**Part I: Materials**

Exceptional increases arise only when F1 is greater than T1 plus 15%.

The formula for calculating exceptional increases in respect of any Material Category pursuant to sub-clause PV2.8.4A is:

$$\{W \times Y \times Z \times P \times (F1 - T1)/T1\} - (15\% \times W \times Y \times Z \times P) = M$$

Exceptional decreases arise only when F1 is less than T1 minus 15%.

The formula for calculating exceptional decreases in respect of any Material Category pursuant to sub-clause PV2.8.4B is:

$$\{W \times Y \times Z \times P \times (F1 - T1)/T1\} + (15\% \times W \times Y \times Z \times P) = M$$

where:

W = W as defined in Appendix 2.

Y = Y as defined in Appendix 2.

Z = Z as defined in Appendix 2.

P = P as defined in Appendix 2.

T1 = The Index Figure corresponding to the relevant Material Category at the Tender Inflation Indexation Date or, if a Recovery Date (Inflation) has been agreed or determined, at the Recovery Date (Inflation).

F1 = The Index Figure for the relevant Material Category applicable at the middle day of the period during which the works occurred that correspond to the relevant Interim Certificate or the Final Certificate, provided however that if any Certificate is calculated in respect of a period that includes works after the Date for Substantial Completion of the Works or a relevant Section, then the Index Figure in respect of the works after relevant Date for Substantial Completion shall be the Index Figure for that Material Category at that Date for Substantial Completion.

M = The amount of the exceptional increase or exceptional decrease recoverable under sub-clause PV2.8.4A or PV2.8.4B in respect of a particular Material Category in an Interim or Final Certificate.

**Part II: Fuel**

Exceptional increases arise only when F1 is greater than or equal to T1 plus 15%.

The formula for calculating exceptional increases in respect of any Fuel Category pursuant to sub-clause PV2.8.4A is:

$$\{W \times Y \times EV \times (F1 - T1)/T1\} - (15\% \times W \times Y \times EV) = N$$

Exceptional decreases arise only when F1 is less than T1 minus 15%.

The formula for calculating exceptional decreases in respect of any Fuel Category pursuant to sub-clause PV2.8.4B is:

$$\{W \times Y \times EV \times (F1 - T1)/T1\} + (15\% \times W \times Y \times EV) = N$$

where:

W = W as defined in Appendix 3.

Y = Y as defined in Appendix 3.

EV = EV as defined in Appendix 3.

T1 = The Index Figure corresponding to the relevant Fuel Category at the Tender Inflation Indexation Date or, if an Recovery Date (Inflation) has been agreed or determined, at the Recovery Date (Inflation).

F1 = The Index Figure for the relevant Fuel Category applicable at the middle day of the period during which the works occurred that correspond to the relevant Interim Certificate or the Final Certificate, provided however that if any Certificate is calculated in respect of a period that includes works after the Date for Substantial Completion of the Works or a relevant Section, then the Index Figure in respect of the works after the relevant Date for Substantial Completion shall be the Index Figure for that Fuel Category at that Date for Substantial Completion.

N = The amount of the exceptional increase or exceptional decrease recoverable under sub-clause PV2.8.4A or PV2.8.4B in respect of a particular Fuel Category in an Interim or Final Certificate.

**Appendix 5 to Clause PV2****NON-REUSABLE TEMPORARY WORKS**

The formulae for price fluctuations in Non-Reusable Temporary Works are as follows:

**A. Formula to be used where  $CPI^A - CPI^B$  is less than or equal to zero:**

$$Y \times Z \times P \times (CPI^A - CPI^B) / CPI^B = K$$

**B. Formula to be used where  $CPI^A - CPI^B$  is greater than zero:**

$$\{Y \times Z \times P \times (CPI^A - CPI^B) / CPI^B\} - (10\% \times Y \times Z \times P) = K$$

**PROVIDED THAT** if K under Formula B is less than zero for Non-Reusable Temporary Works solely as a result of the deduction of the ten percent (10%), the adjustment for Non-Reusable Temporary Works shall be zero.

(Note: Formula B will deduct 10% from any increase in the indices and effectively sets Base Index + 10% as the threshold at which recovery starts.)

where:

Y = The Non-Reusable Temporary Works Percentage.

Z = Z as defined in Appendix 2.

P = The amount which is due in any Interim or Final Certificate for Non-Reusable Temporary Works less the last amount, if any, for Non-Reusable Temporary Works included in an Interim Certificate with the resulting balance divided by the total amount for Non-Reusable Temporary Works in the Contract Sum provided the aggregate value of P in respect of any Non-Reusable Temporary Works calculated over the course of the contract shall not exceed 1. In the calculation of "P" all amounts relating to the recovery of price adjustments shall be excluded.

The amounts in the Interim Certificates and/or Final Certificate used to calculate this proportion "P" are those for Work Elements allocated to Non-Reusable Temporary Works in the Pricing Document or other pricing document forming part of the Contract.

No amount for a Work Element (or part of a Work Element) in the Pricing Document, or other pricing document forming part of the Contract may be used for the calculation of adjustments for more than one Category.

$CPI^A$  = The Consumer Price Index for the Adjustment Month, subject to sub-clause PV2.5.

$CPI^B$  = The Consumer Price Index for the Base Month.

K = The amount of the increase or decrease recoverable.

***Appendix 6 to Clause PV2***

***LABOUR***

The formula for Labour Variations (LV) pursuant to sub-clause PV2.8.6 is:

$$LV = (CPI^A - CPI^B) / CPI^B \times Y \times EV$$

*where:*

LV = The amount of increase or decrease recoverable in respect of Labour in an Interim or Final Certificate.

CPI<sup>A</sup> = The Consumer Price Index for the Adjustment Month, subject to sub-clause PV2.5.

CPI<sup>B</sup> = The Consumer Price Index for the Base Month.

Y = The Labour Percentage.

EV = Effective Value (excluding VAT).