

# *The Amendments to the Public Works Contracts – What will they mean for you?*

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*@mhclawyers*



# *Welcome*

*Susan Bryson  
Partner, Construction  
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# *Speakers and topics*

*Welcome and Outline of the New Dispute Resolution Procedures*

*Susan Bryson, Partner*

*Return to the top for the Bill of Quantities*

*Gerry O'Sullivan, Mulcahy McDonagh & Partners*

*Direct Tendering of Specialist Works Packages –  
Nomination, Novation or something else?*

*Rory Kirrane, Partner & Head of Construction Law*



# *Outline of the New Dispute Resolution Procedures*

*Susan Bryson  
Partner, Construction  
Mason Hayes & Curran*



# *Introduction*

- Report on the Review of the Performance of the Public Works Contract – December 2014
- Implementation of the interim measures to amend the Public Works Contracts – April 2015
- Information Meetings – July 2015
- Circular 01/16 – 18 January 2016

([www.constructionprocurement.ie](http://www.constructionprocurement.ie))

# *The Dispute Management Procedure (DMP)*

- Clause 13.1
- The Project Board
  - 1-3 members nominated from each side. Tender and Schedule Part 3
  - Capacity to negotiate/Senior Management/ One internal and construction qualification
- 10.5.4 and 10.5.5 Determinations only
- Preliminary Meeting
- Meeting every 60 days

# *Conciliation*

- Clause 13.2
- The Standing Conciliator
  - contracts > €10 million – Mandatory
  - contracts > €5 million < €10 million – optional
  - can Chair the Project Board and advise/draft binding agreements
  - furnish Contract Documents and Programme/progress reports
  - 50% of fee – Reserved Sum in Pricing Document (excludes fees for 13.2 conciliations)

# *Return to the top for the Bill of Quantities*

*Gerry O'Sullivan*

*FSCSI FRICS Barrister-at-Law, FCI Arb  
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# *Report on the Review of the Performance of the Public Works Contract December 2014*

## The Problem

- Become the norm to neutralise the risk that the bill of quantities (BQ) by reducing it to secondary importance with respect to the Works Requirements
- Errors between Work Requirements and BQ at Contractor's risk
- Simply a schedule of rates for evaluating progress payments or the value of claims
- BQs fall short on measure and description
- Reliability on rates put in question
- Perceived reduced onus on QS to interrogate adequacy of design

# *Report on the Review of the Performance of the Public Works Contract December 2014*

## 2.1.1. RECOMMENDATIONS

- Make the BQ the primary reference document for the pricing of public works tenders for projects designed by the contracting authority.
- The State engages consultants who prepare the BQ under an Employer – on the designed public works contract, it is appropriate that the risk associated with it be retained by the State.
- Best practice project management should see the inclusion of a detailed BQ prepared by the design team engaged by the contracting authority in the tender documents describing a project.

# *Report on the Review of the Performance of the Public Works Contract December 2014*

## 2.1.1.RECOMMENDATIONS

- BQ provides a detailed itemised list of the building elements against which a contractor prices a rate for each item
- The rate applied to a quantity provided by the QS provides a price for that building element.
- The element prices totalled up provide a price for the project in question.
- In preparing the BQ, the QS would 'interrogate' the design to ensure all the information is available to prepare the BQ
- Process of BQ prep acts as a natural review of tender documents to improve quality

## *Circular 01/16: Construction Procurement- revisions*

- Revised Requirements 3
- The Pricing Document is now a Compensation Event to the extent defined in the revised Form of Tender and Schedule, part 1K (17) associated with the Employer-designed forms PW-CF1, PW-CF3 and PW-CF5 only.
- Three new guidance notes
  - GN 1.5.3 –The Pricing Document
  - GN 2.3.3 – Specialists and the Public Works Contracts

## *Circular 01/16: Construction Procurement- revisions*

- Implementation 5
- Procurement commences from 4<sup>th</sup> April
- Optional before if scope of services of services providers allows
- Derogation 6 –until 8<sup>th</sup> January 2017
- Where service providers engaged or deadline to receive service providers tender is before April 4<sup>th</sup> –scope of services does not extent to new requirements

# *PWC –CF1-CF3 –CF5 V 2.0*

Amended clauses for status of Pricing  
Document

## *Inconsistencies 1.3.4*

- Inconsistencies between the Works Requirements and the Pricing Document shall be resolved by an instruction of the ER under sub-clause 4.4.1 (1) of the contract.
- Where inconsistencies are found between the Works Requirements and the Pricing Document the Works Requirements take precedence with respect to the works to be completed and a compensation event shall arise in accordance with the Schedule Part 1 K (17)

## *Schedule Part 1 K 17*

- A difference between the Contract value of the Works according to the quantities and descriptions in a Bill of Quantities in the Pricing Document ,if there is one [ taking into account the method of measurement and any amendments identified below] and the Contract value of the Works described in the Works Requirements, because the Bill of Quantities when compared with the Works Requirements
  - Includes an incorrect quantity or
  - Includes an item that should not have been included or
  - Excludes an item that should have been included or
  - Gives an incorrect item descriptionAnd the difference for an item in, or that should have been in the Bill of Quantities is more than €500



## *Status of BQ*

- Contract sum is the tendered amount adjusted for named specialists and standing conciliators fee where relevant and inserted in the executed Agreement
- Priced BQ or quantified schedule of rates must add up to the tendered amount
- The Contract sum reflects the intention of the Work Requirements
- The BQ as a document purporting to itemise, describe and measure the work requirements in accordance with the stated method of measure should give rise after being priced and extended and tabulated to the same contract sum – errors in extending or calculation of sums or adjustment /rebalancing of rates to apply before award without adjustment of end total
- Conflicts between BQ and Work requirements per quantum and description a matter for adjustment on directions of the ER by way of change order where necessary
- Errors in BQ due to incorrect application of method of measurement only adjustable if they give rise to inconsistencies with the work requirements

## *Guidance Note 1.5.3*

### The Pricing Document

## *1.3 Bill of Quantities*

- A Bill of Quantities is a document that provides project specific descriptions and measured quantities for the work to be undertaken to complete a Contract
- Against each item in the Bill of Quantities, the Tenderer inserts their unit rate for that work and then extends it by the stated quantity to arrive at the total cost for the work described in that Bill of Quantities item
- All extended amounts are then totalled to arrive at the tender amount

## *1.3 Bill of Quantities*

- The Cost Consultant
- BQ prepared by a person of entity experienced in the preparation of such documents
- A format specified in the Schedule to the Contract
- The format required should be stated in the Schedule to the Conditions of Engagement for the Design Team members and appointment is for a Cost Consultant

## *1.3 Bill of Quantities*

### The Format

- Civil Engineering Standard Method of Measurement 3<sup>rd</sup> Edition, (CESMM3), as amended for use with the Public Works Contract (revision pending March 2016)
- The Agreed Rules of Measurement 4, Supplement 1, Issue 2 (ARM4) (issue pending March 2016). The Agreed Rules of Measurement 4 with Supplement 2, should be used for tendering for Mechanical and Electrical Specialist works only
- Transport Infrastructure Ireland's Method of Measurement for Road Works.

## *2.2 PW-CF1, PW-CF3 and PW-CF5 and the Pricing Document*

### The Pricing Document

- Be a Bill of Quantities
- Prepared in compliance with a method of measurement approved for use with the Public Works Contracts
- No other document is to be included for these forms of contract
- The Schedule to the Contract will define which approved Method of Measurement

## *2.2.1 Resolution of inconsistencies*

- Inconsistencies between the Works Requirements and Pricing Document shall be resolved by an instruction from the Employer's Representative under sub-clause 4.1.1(1) of the Contract
- Where inconsistencies are found to exist the Works Requirements take precedence with respect to the Works to be completed and a Compensation Event may arise in accordance with Schedule Part 1K (17)

## *2.2.1 Resolution of inconsistencies*

1. Where a Works Item is described in the Works Requirements but has not been included in the Bill of Quantities:
  - a) The Contractor will be required to complete the Works, if so directed by the Employer's Representative, and shall be entitled to an adjustment to the Contract Sum
  - b) The Employer's Representative may direct the Contractor not to complete the Works Item, but there will be no entitlement to adjust the Contract Sum



## ***2.2.1 Resolution of inconsistencies***

2. Where a Works Item is described in the Bill of Quantities but has not been included in the Works Requirement
  - a. The Employer's Representative may direct the Contractor to complete the Works Item but the Contractor shall have no entitlement to an adjustment to the Contract Sum
  - b. The Employer's Representative may direct the Contractor not to complete the Works Item and the Employer's Representative or Employer shall be entitled to adjust the Contract Sum

## *2.2.1 Resolution of inconsistencies*

3. Where both the Bill of Quantities and the Work Requirements have included the Works Item but an inconsistency exists between the quantities in each document;

- a) If the Employer's Representative directs that the quantity as described in the Works Requirements is to be completed, then the Contract Sum may be adjusted
- b) If the Representative directs that the quantity as described in the Bill of Quantities is to be completed, then the Contract Sum shall not be adjusted

## *2.2.1 Resolution of inconsistencies*

- Where an inconsistency is found to exist, the allocation to the Contractor of other specified risks in Schedule Part 1 K must be taken into account when determining any contractual entitlement for a Compensation Event
- For example, where the risk of unforeseeable ground conditions under Schedule Part 1K (19) is passed to the Contractor and the event arises, resulting in quantities of work increasing or decreasing, then K (19) shall overrule K (17) and a Compensation Event shall not arise from the unexpected ground conditions being encountered
- The Bill of Quantities shall identify the allocation of risks, as per Schedule Part 1K

### ***3.2.1 Role of the Employer***

- The Employer when planning the Design Team's service delivery and project timeline must allow adequate provision for the design and production of the necessary suite of tender documents to a sufficient standard. (Refer to GN 1.1 Project Management section 1.4 – Managing the Project Programme)

## ***3.2.1 Role of the Designer***

- Ensure documentation to be included in the tendered Works Requirements prepared and coordinated in such a fashion suitable for the production of a fully measured BQ
- Shall comply with procurement rules when defining or describing the works on drawings or in specifications with respect to the naming of products
- Ensure the provision of design information in a timely manner to the Cost Consultant, to afford adequate time to produce a fully measured BQ

## *3.2.1 Role of the Designer*

- Ensure requests for clarification or further information from the Cost Consultant are adequately responded in time
- The Designer must advise the Employer and liaise with the Cost Consultant on issues surrounding design that cannot be adequately defined to allow for the production of a fully measure Bill of Quantities
- Review with the Employer regarding the option to directly tender such an element of works

## *3.2.4 Design Team Leader*

- The Design Team Leader
- must ensure that all designers provide their designs in a timely manner to the Cost Consultant, to allow adequate time to produce a fully measured Bill of Quantities
- The Design Team Leader must ensure that all Designers respond adequately and in a timely manner to all requests for clarification, or further information

### ***3.2.3 Role of the Cost Consultant***

- When preparing the BQ must not make assumptions to cover for inadequate or incomplete design information.
- To interrogate the design documentation and, where there are omissions, contradictory or ill-defined elements to request supplementary information from the relevant design team member
- Shall comply with procurement rules when defining or describing the various item descriptions in the BQ with respect to the naming of products.
- Must advise the Employer and liaise with the Designer on issues surrounding design that cannot be adequately defined to allow for the production of a fully measured BQ



## 3.3 *Evaluating Tender BQs*

- Bill of Quantities totalled of extended costs from the Bill must equal the tendered amount on the Form of Tender.
- 3.3.2 sets out 16 minimum basis for assessing the tendered priced BQ
- 3.3.3 Prior to issue of the Letter to Unsuccessful Tenderers (MF 1.2), it may be necessary to correct errors to deal with inconsistencies between tendered rates and to rebalance the distribution of costs across elements of the Pricing Document where a pattern contrary to the Employer's interests has been noted during tender assessment.
- **The outcome must not alter the Tender sum**
- Outcome should be notified to and accepted by the preferred tenderer in advance of the issue to all tenderers of the notice of the Employer's intention to award the Contract

# *Guidance Note 2.3.3*

## Specialists and the Public Works Contracts

## ***1.6.2 Main Contract Tenderers***

### Requirements for the Pricing Document

- Reserved Sums and Contract Sums (for appointed Novated Specialists) for each of the named Specialist works categories are to be provided in the Pricing Document
- The Pricing Documents (unpriced) for each of the named Specialist works categories should be provided in the main contract Pricing Document and labelled as such. It must be clearly stated that the named Specialists' Pricing Documents are not to be completed by main contract tenderers

## *1.6.2 Main Contract Tenderers*

### Requirements for the Pricing Document

- Pricing Document must include items to allow for the pricing of the following:
- General attendances to each named Specialist listed as an item for each of the Specialists and priced as a lump sum for each.
- Special attendances defined as required for each named Specialist and separately listed as priceable lump sum items
- Single priceable lump sum item for management, Contractor's management, risk acceptance and indirect overhead costs associated with the employment of each of the named Specialists to be engaged
- An item for main contractor's profit required for each of the named Specialist's Sums, rated as a percentage of each named Specialist's Reserved/Contract Sum, adjusted before contract awarded
- Lump sum items priced less than zero will be deemed to be zero and negative percentages will be treated as zero percent

## ***1.6.2 Main Contract Tenderers***

- Adjustment of the Reserved sums and associated profit item in the Pricing Document for Named Specialists sub-contract sums prior to award of the contract
- Therefore the main contractor's tender sum is termed a notional tender sum until the adjustment

# *Direct Tendering of Specialist Works Packages – Nomination, Novation or something else?*

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## *Specialist Subcontractors*

- Prior to January 2016, very limited provision for specialist subcontractors
- Many industry participants called for introduction of 'nomination' process, including contractor interests and the OPW
- What is nomination? The GDLA structure
- The dangers of nomination:-
  - Bickerton v North West Metropolitan Regional Hospital (1970)
  - Norta Wallpapers v Sisk (1979)
- Approach in January 2016 amendments. Expansion of Clause 5.4.3

## *Amendments to Public Works Form*

“5.4.3 If the Schedule, Part 3B names a Specialist, the following apply

- (i) Where the Specialist’s contract with the Employer is to be novated to the Contractor, (novated Specialist) and the Works Requirements includes 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 case of novated Specialists who were required to obtain a performance bond by the Employer, once the novation agreement is executed by the parties, the Employer shall write to the surety who has provided the performance bond to the novated Specialist informing them that they are assigning the benefit of that bond to the Contractor.
- (ii) Where the Contractor is to enter a sub-contract with a named Specialist, (Reserved Specialist), the Reserved Specialist sub-contract shall be an unamended form of sub-contract as identified in Schedule Part 1F(iii) and the Contractor shall enter into the sub-contract with the Reserved Specialist before the Starting Date.



## *Amendments to Public Works Form*

- 5.4.5 Now provides in relation to replacement of a named specialist:
  - “.....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”
- What happens in the event of termination of the specialist by the main contractor where the remaining contract value is greater than EU Procurement thresholds?

## *What the amendments do*

- Allow for contracting authority flexibility
- Direct tendering of specialist packages
- EU Procurement Directives will apply to large packages
- Novated specialists or reserved specialists
- By no means a nomination structure. All key attributes of nomination are missing.
- Particular care required in document completion when specialists used

# *Risk Transfer: The Significance of the 'Agreement'*

PUBLIC WORKS CONTRACT FOR **BUILDING WORKS** DESIGNED BY THE **EMPLOYER**

## **Agreement**

**THIS AGREEMENT** is made on [date] **BETWEEN**

*The Employer:*

*Principal office of Employer:*

**AND**

*The Contractor:*

*Registered office / principal  
place of business of  
Contractor:*

## **Background**

The Employer has accepted the Contractor's tender to complete the Works, which consist, in general, of

# *Risk Transfer: The Significance of the 'Agreement'*

## **Article 4**

The initial Contract Sum is a lump sum and shall only be adjusted when the Contract says so.

The Contractor has satisfied itself before entering into the Contract of all the circumstances that may affect the cost of executing and completing the Works and of the correctness and sufficiency of the Contract Sum to cover the cost of performing the Contract. The Contractor has included in the initial Contract Sum allowances for all risks, customs, policies, practices, and other circumstances that may affect its performance of the Contract, whether they could or could not have been foreseen, except for events for which the Contract provides for adjustment of the initial Contract Sum.

# Q&A



*Thank you*

*For any queries on upcoming events,  
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