

Public Lecture
at
Engineers Ireland

on

**How the Public Works Contracts
might be used in the Private Sector**

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1. INTRODUCTION

In May 2004 the government decided as part of a reform of construction procurement in the Public Sector to introduce a new form of construction contract and this has been used in Public Sector projects since 2007. The stated strategic objectives were: greater cost certainty, value for money and more efficient delivery of projects.

This government initiative now comprises a comprehensive suite of contracts and associated documentation of which the five main forms of contract are:

- PW-CF1 Public Works Contract for Building Works designed by the Employer.
- PW-CF2 Public Works Contract for Building Works designed by the Contractor.
- PW-CF3 Public Works Contract for Civil Engineering Works designed by the Employer.
- PW-CF4 Public Works Contract for Civil Engineering Works designed by the Contractor.
- PW-CF5 Public Works Contract for Minor Building and Civil Engineering Works designed by the Employer.

All five forms of contract are based on a general set of conditions running to thirteen clauses with two optional price variation clauses together with a Form of Agreement and a Schedule which is in two parts, the first to be completed by the Employer before tender while the second part is to be completed by the Contractor and submitted with the tender. In all five contracts the layout and structure is similar with significant duplication in the thirteen clauses. The documents are not published in hardcopy but are readily accessible to be downloaded from the website: <http://constructionprocurement.gov.ie/>. As a consequence amendment of the documents is facilitated and has taken place regularly.

In all cases the five forms of contract lead to Lump Sum Contracts and, while in many instances a Bill of Quantities is prepared, its purpose is generally restricted to the evaluation of tenders, the valuation of change orders and also of interim payments.

The question which arises is whether the PWC is likely to be used by private sector clients anxious to achieve the same objectives as the public sector. This is not something which has really arisen to date because of the marked decline in private sector construction since 2007 when the PWC was introduced. However it is a question which is likely to be posed as and when private sector construction work hopefully returns to a healthy condition.

Although relatively unusual the Public Works Form of Contract has in fact been used in the Private Sector and one such instance led to the High Court case of *White Cedar Developments Ltd v Cordil Construction Ltd (in Receivership)* [2012] IEHC 525 where a judgment was given by Ms Justice Laffoy on 7 December 2012. This is the only instance of the PWC coming before the courts and it arose out of a building contract for a shopping centre in Co Galway in 2010 for approximately €17.5m plus VAT. This job

was originally tendered using the RIAI Form of Contract but ultimately was carried out using the PWC for Building Works Designed by the Contractor and disputes under the contract were referred to conciliation in 2011 and the outcome of that conciliation led to the judgment in 2012.

This paper originally set out to consider whether the PWC was suitable for use in the Private Sector, whether in building or in civil engineering work and, if so, what changes would be necessary or appropriate. In doing so it was decided to look at PW-CF5 V1.7 which is the PWC for Minor Building and Civil Engineering Works designed by the Employer as published on 28 July 2011 mainly because it is the most widely used and general of the five main contracts

The conclusion is that this form of contract can be made suitable for use in the Private Sector and the purpose of this paper is to set out in some detail, on a clause by clause basis, the amendments which are proposed for that end. The Conditions of Contract, together with the Agreement and the Schedule, as amended will be made available after this talk on the Engineers Ireland website at: <http://www.engineersireland.ie/Services/Dispute-Resolution.aspx>

The general approach adopted has been to make changes, where necessary, either to tailor the documents for use in the private sector, to improve clarity or to provide greater balance. In the Conditions of Contract an effort has been made to retain the same numbering system for ease of comparison purposes. Thus, where clauses have been omitted the expression “*not used*” has been inserted in order not to disturb the numbering sequence.

The form of the PWC considered is generally limited to contracts with a value up to €5.0m. It is suggested that the document, as amended, should not be similarly limited and as such should be suitable for use with medium to large size contracts although less applicable to relatively small projects.

In looking at the form of contract the biggest single issue was probably whether to retain the lump sum Form of Contract or alternatively to switch to a remeasured form of contract based on a Bill of Quantities. The decision was made to stick with the PWC approach, in other words, a lump sum contract in order to retain the same logic sense in any event it would be a relatively simple matter to modify the contract and turn it into a remeasured form. In addition it was decided to leave out a price variation clause because of the current low inflation environment and also because, if necessary, a price variation clause could be drafted and inserted with relative ease.

This exercise is being carried out in the context of the Construction Contracts Bill 2010 which is currently going through the Dail and which is going to have a significant impact on dispute resolution with the introduction of statutory adjudication. While the timing and details of this form of adjudication are still unclear, particularly in the absence of the Code of Practice referred to in the Bill, it was felt that clause 13 of the Conditions dealing with dispute resolution should take the proposed legislation into account. Thus the revised clause provides for adjudication and this is based on an Adjudication Procedure which is also being made available on the website: <http://www.engineersireland.ie/Services/Dispute-Resolution.aspx> The attached procedure

is based on the Adjudication Procedure of the Institution of Civil Engineers, the use of which is gratefully acknowledged.

This paper and the documents which accompany it are the work of the authors and have been prepared as a contribution to a debate on the form of contract most suitable for procurement of construction work within the Private Sector. That said, some of the comments and suggestions may also be seen as having application within the Public Sector where it is understood a general review of the form of contract is envisaged.

Finally, while this talk is being kindly facilitated by Engineers Ireland where the authors are both members of the Dispute Resolution Board, the views advanced in this paper are entirely personal and not in any way representative of an Engineers Ireland position.

2. AGREEMENT

The following words have been omitted from Article 4:-

“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”.

It was felt that the remaining sentence of Article 4 and the final sentence of Article 3 *“The Initial Contract Sum is a lump sum and shall only be adjusted when the Contract says so sufficiently protects the Employer’s position”.* Either the words deleted are superfluous or they seek to extend the liability beyond what is stated in the Conditions of Contract. If the latter, this should not be achieved by a general statement the purpose and meaning of which is unclear.

3. CLAUSE 1: THE CONTRACT

Sub-Clause 1.1: Definitions

The only alteration of any substance is in the definition of *“Substantial Completion”*. The PWC provides that Substantial Completion will not be achieved until the Contractor has given the Employer’s Representative the Collateral Warranties required under the Contract. This requirement has been deleted as there may be genuine difficulties experienced by the Contractor whereby it cannot obtain Collateral Warranties. At sub-clause 11.4.1 an entitlement has been provided for the employer to withhold 5% of any sum due to the Contractor pending receipt of the Collateral Warranties required by the Contract where these are in delay. It is thought that this is sufficient motivation to ensure that the Collateral Warranties are provided by the Contractor without unduly penalising the Contractor by the possibility of having to pay liquidated damages and other sanctions for failure to meet Substantial Completion.

Sub-Clause 1.10: Background Information

Sub-clause 1.9.1 provides that the Contract and the documents referred to in it supersede all previous representations and set out the entire agreement between the parties. It also

provides that neither party has relied on any other written or oral representation arrangement, understanding or agreement.

Sub-clause 1.10 was only introduced quite recently into the PWC. It seeks to state in the clearest possible terms that the Employer will have no liability in relation to Background Information and includes for instance at sub-clause 1.10.2(4) “.....*the Contractor irrevocably and forever waives any liability that the Employer may have to the Contractor in connection with Background Information*”.

This provision has been deleted for two reasons. Firstly it is unnecessary where the position is clearly enough stated at paragraph 1.9.1. Secondly, to the extent that it may seek to go beyond what is stated at 1.9.1 it is in contradiction with the definition of “*unforeseeable*” set out in the Schedule Part 1K which obliges the contractor to take “*into account any information in connection with the Site provided by the Employer*”.

It is worth noting in passing that Section 45 of the Sale of Goods and Supply of Services Act 1980 gives a Contractor a statutory entitlement to rely on representations made by the Employer and the Employer can only exclude liability in respect of such representations if the exclusion clause is fair and reasonable in all the circumstances.

4. CLAUSE 2: THE LAW

Sub-clause 2.2: Compliance with Legal Requirements

This sub-clause has not been amended but a significant change has been made to Event No 15 in the Schedule, Part 1K. The effect of the change to the Schedule is to:-

- a) Make the event both a Delay Event and a Compensation Event.
- b) Provide for compensation for disruption as well as delay.
- c) Extend the entitlement to cover all aspect of Legal Requirements.

The PWC Event 15 would only cover the first four elements contained within the definition of Legal Requirement.

Sub-clause 2.3: Consents

A substantial change has been made here. “*Consent*” is defined as including any planning permission, order approval, licence, permit or other consent required by law for the execution of the Works. The PWC simply says that the Employer has obtained whatever consents that the Works Requirements say that the Employer is to obtain. If therefore the designer omitted to obtain an approval or consent required by law, the obligation would be upon the Contractor to obtain it and to suffer the consequences of any delay. This was thought to be unfair, particularly where the works were designed by the Employer.

The amendment made seeks to attach liability to the Employer for obtaining the consents that are necessary to enable the works to be carried out in accordance with the Works Requirements, leaving the Contractor with the obligation to obtain such consents as are necessary to enable it complete the works by its chosen methods. A new Event 22 has been added to the Schedule Part 1K to provide for this.

5. CLAUSE 3: LOSS, DAMAGE AND INJURY

These are the provisions that provide for cross indemnities and insurance obligations. No changes have been made to the indemnities. Under the PWC the Employer is not obliged to take out insurance to cover his indemnities under sub-clause 3.5. In a private sector contract, it would be appropriate for the Employer to cover its indemnities to the Contractor under this sub-clause by insurance, and an appropriate amendment has been made in that regard.

6. CLAUSE 4: MANAGEMENT

Clause 4 is the longest of the thirteen in the Conditions of Contract running to eighteen sub-clauses. Under the title Management it deals essentially with the relationship of the Employer's Representative with the Employer and the Contractor. Interestingly the PWC makes no effort to define the Employer's Representative although a clear indication of the role to be played is provided in the name itself. Another unusual, not to say unique, feature of the PWC is that sub-clause 4.3.4 provides for the Employer's Representative to make certain decisions which are to be conclusive, in other words, not subject to revision under clause 13. This is a level authority not granted to either an Architect or an Engineer under more traditional forms of contract and, in addition, there is no indication in the PWC of how such authority is to be exercised.

The most significant changes in the revised contract relate to the Employer's Representative role and authority where, in particular, the power to make conclusive decisions is removed from 4.3.4. That same sub-clause now includes a sentence attempting to deal with the role of the Employer's Representative which states: *"Except as provided otherwise in the contract the Employer's Representative shall be deemed to act for the Employer whenever carrying out duties or exercising authority, specified in or implied by the contract."*

There is a new sub-clause 4.3.5 which attempts to set out how the Employer's Representative shall deal with matters and which says: *"Whenever the contract provides that the Employer's Representative shall agree or determine any matter, the Employer's Representative shall consult with each party in an effort to reach agreement. If agreement is not achieved, the Employer's Representative shall make a fair determination in accordance with the contract, taking due regard of all relevant circumstances."*

This approach to the Employer's Representative is largely based on the FIDIC Form of Contract and sub-clause 4.3.1 also sets out requirements for the Employer's Representative where it says: *"The individual appointed shall be suitably qualified and experienced to carry out the duties assigned to the Employer's Representative in the contract. The Employer's Representative staff shall include suitably qualified construction professionals who are competent to carry out these duties."* Finally, sub-clause 4.3.2 includes a new sentence which says: *"The Employer's Representative shall have no authority to amend the contract"*.

In addition the time periods provided within clause 4 have been tightened up with the period in both sub-clauses 4.7.4 and 4.11.1 reduced from ten to five working days. Sub-

clause 4.7.5 has been omitted and replaced by a new sub-clause 4.3 allowing the Employer's Representative to change the time periods, other than those in sub-clause 4.11.2, but only after consultation with the Employer and the Contractor and any changes made are to be on the basis of attempting to ensure the timely completion of the contract.

Sub-clause 4.7.10 has been simplified while clause 4.9, dealing with the programme, is unaltered apart from sub-clause 4.9.3 where the figure of 15%, in the event the Contractor fails to produce a programme in time, has been reduced to 7½%.

In clause 4.12 dealing with documents the requirement under 4.12(3) has been removed while in clause 4.14, dealing with communications, reference to fax communication has been removed.

In clause 4.15, dealing with meetings, the following sentence has been added to the end sub-clause 4.15.2: "*All minutes issued by the Employer's Representative shall highlight the provisions of this sub-clause.*" Finally, sub-clause 4.16.4 under Confidentiality and Secrecy has been rewritten so that it applies equally to both parties.

7. CLAUSE 5: CONTRACTOR'S PERSONNEL

The PWC include very elaborate provisions at sub-clause 5.3 relating to the consequences of the Contractor or any of its sub-contractors being in breach of its legal obligations to employees. The general principle has been retained to the effect that the Contractor will comply with all applicable law and have allowed the Employer to deduct estimated payments due to Employees where they have been underpaid provided these monies are placed on joint deposit.

Sub-clause 5.4.3 has been deleted. It deals with novated contracts, a concept which rarely arises in the public or private sector.

The desirability of providing for the traditional nominated sub-contract role was considered but it was thought that this was best dealt with by way of an amendment to the contract where this arises. The issue of delay in replacing a nominated sub-contractor has been the subject matter of much legal debate and many court decisions notably the *Bickerton* judgement (*Northwest Metropolitan Regional Hospital Board v TA Bickerton & Son Limited* [1970] All E.R. 1039). Basically the principle is that the Contractor should not be responsible for delay in replacing a sub-contractor who was imposed upon him and who proved to be unsatisfactory. Although the PWC does not contemplate the appointment of nominated sub-contractors the same issue arises to an extent in relation to the replacement of Specialists. The PWC overcomes the difficulty arising from *Bickerton* and other cases by placing the obligation on the Contractor to appoint a replacement Specialist rather than the Employer. The difference between the traditional power to nominate contained in contracts such as the RIAI and IEI forms, and the PWC is that the Specialist must be named in the Contract. Therefore the Contractor knows at tender stage who the Specialist is going to be and has ample opportunity to satisfy himself as to the competence and reliability of the Specialist. Apart therefore from deleting sub-clause 5.4.3, it was considered unnecessary to change sub-clause 5.4 in principle. However an obligation has been inserted into sub-clause 5.4.5 requiring the Employer's

Representative to co-operate in relation to the selection of a replacement Specialist to ensure the minimum possible delay or disruption is caused to the works.

Sub-Clause 5.5: Collateral Warranties

The PWC is rather loose as to the wording of the Collateral Warranty. It is unsatisfactory in a contract to state that the Collateral Warranty will be in the form included in the Works Requirements but if there is none, a form approved by the Employer. Instead it is intended that an appropriate form of Collateral Warranty will be annexed in the Schedule, Part 3.

8. CLAUSE 6: PROPERTY

Sub-Clause 6.1: Ownership of Works Items

The PWC provides that materials supplied by the Contractor become the property of the Employer when they are delivered to the site whether or not they have been paid for. This provision has been modified so that ownership does not pass to the Employer until the materials are incorporated in the Works or the materials are paid for.

Under sub-clause 6.2.2 the Employer indemnifies the Contractor in respect of any copyright or other property rights arising by reason of "*the unavoidable use by the Contractor*" of documents or other items provided by the Employer to the Contractor. The word "*unavoidable*" has been deleted.

9. CLAUSE 7: THE SITE

Clause 7 deals with the Site and covers access to it together with use and occupation of the Site during the course of the Contract by the Contractor. The clause, as written in the PWC, says that possession of the Site by the Contractor may be partial and also non exclusive and in broad terms that approach is also adopted in this version although expressed differently.

The latest version of the PWC introduces a further defined term namely the Area Provided by the Employer and the clause has been rewritten in order to dispense with the need for that term. This is achieved in 7.1.1 where it is stated: "*The extent of the Site to be provided by the Employer for use and occupation by the Contractor in carrying out the Works shall be set out in the Works Requirements which will also specify when and under what conditions parts of the site are to be made available*". In other words partial or staged possession of the site is envisaged but must be described in the Works Requirements while the latest date for the provision of parts of the site are specified using the same six headings in the PWC subject to a modification in relation to the provision of collateral warranties.

Sub-clauses 7.1.2 and 7.1.3 in the PWC have been combined into a single sub-clause, now 7.1.2, where the approach is that the Contractor is entitled to exclusive possession unless some other arrangement has been specified in the Works Requirements.

Sub-clause 7.2, which is entitled “*Trespassers*”, has been modified to provide for the impact of protest on the Works. The Contractor remains responsible for trespassers on Site but if the Works are affected by protests, except where such protests occur as a result of the work method chosen by the Contractor, the Contractor is to be compensated and Event 8 in the Schedule, part 1K has been redrafted to reflect this change.

Sub-clause 7.9 dealing with Access and Facilities has also been rewritten and expanded on the basis that the Works Requirements is to set out details of the access to the Site, which is to be provided by the Employer, but after that it is the Contractor’s responsibility to ensure access to and through the Site and to maintain and upgrade access routes if necessary and to pay any charges for their use. The Contractor is also responsible for liaising with relevant authorities and for the provision of traffic management generally along the access routes.

10. CLAUSE 8: QUALITY, TESTING AND DEFECTS

No changes of any great significance have been made. At paragraph 8.1.2 new provision has been inserted obliging the Employer to ensure that all materials and goods that are supplied by the Employer are fit for purpose.

Sub-clause 8.5.4 has been amended to provide for the eventuality that the cost of repairing a defect is grossly disproportionate to the impact of the defect on the Works. In these circumstances the Contractor is not obliged to rectify the defect but the Employer is entitled to compensation for the loss of value to the Works.

11. CLAUSE 9: TIME AND COMPLETION

Sub-clause 9.1.2 of the PWC requires that any collateral warranty required by the contract be provided prior to the starting date unless the Employer’s Representative agrees otherwise. This has been amended to take account of the fact that Collateral Warranties may be required of sub-contractors who have not yet been appointed as of the starting date.

The PWC at sub-clause 9.3.3 does not permit the Employer’s Representative to bring forward the date for substantial completion as a result of omissions except by agreement with the Contractor. The obligation for such agreement has been removed and an obligation to consult only has been provided. The Employer’s Representative must consult with the Contractor before making a determination to bring forward the date but nonetheless does have the discretion to do so.

The major change to clause 9 is through the deletion of 9.4 which provided for the Contractor having included in his price a contingency amount and period for delays caused by the Employer. The reality is that Contractors in a competitive market do not provide, in many cases, at all for such a contingency and in all cases not sufficiently. The effect of the provision is to avoid paying the Contractor compensation for a risk which is properly that of the Employer.

A new provision has been inserted at sub-clause 9.8.4. This provides that liquidated damages are only payable to the Employer if the Employer’s Representative certifies that

the delay is the Contractors liability under the Contract. This would be consistent with most standard forms.

12. CLAUSE 10: CLAIMS AND ADJUSTMENTS

Sub-Clause 10.3: Contractor Claims

Clause 10.3.1 requires the Contractor to give notice of any claim within twenty working days after it became aware, or should have become aware of something that could result in an entitlement to additional money or an extension of time. The requirement for notice is a condition precedent and the Contractor risks the loss of all entitlement if it does not comply. Two important changes have been made to this provision:-

- 1) The words "*whichever is the earlier*" have been inserted by way of qualification to the applicability of the clause to the date when the Contractor should have become aware, or actually became aware. In the light of the judgement of Mr. Justice Akenhead in the case of *WW Gear Construction Ltd v McGee Group Ltd* [2010] EWHC 1460 (TCC), the purpose of this provision might otherwise be defeated. This change therefore is by way of bolstering the Employer's entitlement to receive timely notice.
- 2) The PWC requires, as a condition precedent, that not only should notice be given but that also full details of the claim be given within a further twenty working days. Once the Employer has notice of the claim, he is in a position to protect himself. It was not considered necessary, or fair, to put the Contractor at risk of losing all entitlements by reason of a failure on his part to provide further details, or sufficient details, within a further period of twenty days. Accordingly the words "*and details*" have been omitted from the first sentence of sub-clause 10.3.2.

Sub-Clauses 10.6 and 10.7

As stated previously the PWC is a lump sum form of contract and Art. 3 of the Agreement states clearly "*The initial Contract Sum is a Lump Sum and shall only be adjusted when the Contract says so.*" In the PWC sub-clauses 10.6 and 10.7 deal with adjustments to the Contract Sum as a result of Compensation Events and the first sentence of sub-clause 10.6 provides a split between the valuation of "*work*" and "*delay*" with work being dealt with under sub-clauses 10.6.1 to 10.6.4 inclusive while the valuation of delay is dealt with in 10.7.

In this instance the basic structure has been retained and the first sentence of 10.6 has been emphasised by restating it as sub-clause 10.6.1. Thereafter additional substituted and omitted work is to be valued under sub-clause 10.6.2 while delay cost is to be valued under 10.7.

Valuation of work in the PWC follows the traditional model from a traditional remeasured form of contract moving from the use of bill rates directly through the use of bill rates as a basis to finally fair valuation while sub-clause 10.6.4 provides that the Employer's Representative may conclusively determine the value of additional or substitute work using figures provided by the Contractor in Schedule 2D.

In this instance a much simpler model has been adopted with additional, substituted or omitted work to be valued on the basis of fair valuation as this is felt to be more appropriate in a lump sum contract not based on a Bill of Quantities. In making such a valuation the Employer's Representative may refer to the rates in the Pricing Document, rates for "*similar work carried out in the locality*" or the cost to the Contractor together with an allowance for profit of 5% and 7½% for turnover.

This sub-clause 10.6.2 must be read in conjunction with Event 16 of the Schedule, part 1K which has been amended to read "*A breach by the Employer of the Contract delaying or disrupting the Works that is not listed elsewhere in this able.*" The question of whether disruption is allowable under sub-clauses 10.6 and 10.7 of the PWC has given rise to considerable debate in practice but in this instance it is intended that disruption should be compensable under 10.6.2. Sub-clause 10.6.4 is no longer required because of the changes described above and consequently it has been omitted.

The structure of sub-clause 10.7 has largely been retained but sub-clauses 10.7.2 and 10.7.3 have been omitted. The first of these deals with concurrent delay and it was felt more appropriate to leave this out of the contract and allow the issue to be dealt with by reference to the significant body of case law on this issue. In the case of sub-clause 10.7.3, this has proved to be one of the most contentious sub-clauses in the PWC Form of Contract and it has been omitted as it is now felt to be unnecessary because of the clearly stated position in relation to disruption.

Sub-clause 10.7.1 has been retained, in other words, there are two separate methods for the valuation of delay cost provided in Schedule, part 1K with the first of these, a daily rate of delay cost to be entered by the Contractor, applying as the default position. The second option is based on the expenses "*unavoidably incurred by the Contractor as a result of the delay*" and this has been retained except that the expression "*excluding profit and loss of profit*" has been changed to "*including profit at 5% but excluding loss of profit*".

Sub-clause 10.9: Employer's Claims

The possibility of including a condition precedent in respect of Employer's claims similar to that relating to Contractor's claims was considered. The obligation on the Employer is to present its claims "*as soon as practicable*". This is not as onerous as a condition precedent but nonetheless by reference to case law it may be considered quite onerous. Having regard to all of the circumstances whereby the parties need to be appraised of one another's claims, it was decided not to change this sub-clause.

13. CLAUSE 11: PAYMENT

The PWC provides at 11.2 a discretion on the part of the Employer's Representative to include in the certified value unfixed works items where title to those items has vested in the Employer. If title has passed, it seems appropriate that the value should be included in the certificate as a matter of right, and the contract has been amended accordingly.

Substantial amendments have been made to paragraph 11.4 (Full Payment). Under it the Employer is entitled to withhold 5% of any payment due to the Contractor if a collateral warranty has not been given within the time required by the contract and 7½% if any programme or progress report has not been provided within that time. However the money withheld by the Employer must be placed on deposit in the joint names of the parties and paid in full, including interest, to the Contractor when the Contractor meets the relevant contractual obligation. The percentages are new as is the obligation to place the money on deposit in the joint names of the parties.

The time for providing the Final Statement has been changed to three months following Substantial Completion rather than two. The PWC provides that if the final certificate is not furnished within the time limit the Contractor will have no entitlements under or in connection with the contract. This was considered a little harsh. It was therefore provided at sub-clause 11.5.1 for the Employer giving notice to the Contractor to the effect that it will have no further entitlements unless the account is submitted within a further period of three weeks from the date of the notice.

14. CLAUSE 12: TERMINATION

Some amendments have been made to sub-clause 12.1, primarily by way of requiring that only a material or serious breach on the part of the Contractor would justify termination, and that in certain circumstances requests for compliance would have to be made prior to termination being permitted.

The PWC provides for termination at the Employer's election without payment of compensation to the Contractor. Standard forms are fairly evenly divided in providing for such an entitlement or not. If the contract does not so provide, and the Employer nonetheless terminates the contract, this would constitute a breach and give rise to an entitlement to potentially substantial damages on the part of the Contractor. Obviously a Contractor could be at serious loss by reason of a termination at the Employer's election. It was decided it would be appropriate that in the event of a termination at the Employer's election the Employer would pay the Contractor 2½% of the difference between the value of the contract works completed and the Contract Sum. If therefore the contract was terminated at a very late stage, the compensation payable would be very small, but if at an early stage it could be significant.

There is provision under sub-clause 12.6.3(5) for 5% for loss of profit being payable to the Contractor in the event of the termination being by reason of the Employer's default. This is in keeping with a general philosophy to give certainty to the parties as to their entitlements rather than leave the Employer open to very large, and possibly exaggerated, claims. However the Contractor is entitled to be compensated in addition for any loss or damage he has sustained as a result of the termination.

The somewhat controversial sub-clause 12.9 has been deleted in its entirety.

15. CLAUSE 13: DISPUTE RESOLUTION

The resolution of disputes is dealt with in clause 13 of the PWC which runs to five sub-clauses. Sub-clause 13.1 deals with a dispute arising under the Contract which is to be

dealt with initially by means of conciliation or subsequently under Arbitration as set out in sub-clause 13.2. Sub-clause 13.3 provides that disputes arising out of or in connection with the Contract are to be submitted to the Irish courts while sub-clause 13.4 deals with the service of legal proceedings and sub-clause 13.5 provides that the parties are to continue to perform the Contract during any dispute.

Sub-clause 13.1 of the PWC Contract essentially provides for a form of adjudication and sets out the procedure to be followed in some detail. The process is a binding but not final one but it differs from adjudication in that the payment of any sum of money is to be contingent on the provision of a 100% bond. Finally, sub-clause 13.2 provides that any dispute, dealt with under sub-clause 13.1, may be referred to Arbitration with this to be carried out using Arbitration Rules referred to in the Schedule, part 1N. In 2011 a provision was inserted into the Form of Tender providing that the parties would normally bear their own costs in any arbitration but with a further proviso that if the Contractor secured an award less than a sealed offer the Contractor would be liable for the costs of both parties costs.

The revised clause 13 runs to three sub-clauses the first of which is essentially aspirational providing for non-adjudicative resolution while sub-clause 13.2 anticipates the new regime which will arise under the Construction Contracts Bill 2010 and provides for adjudication of *“any dispute arising in relation to the Contract.”* Finally, sub-clause 13.3 provides for Arbitration of any dispute that may be referred to adjudication.

Sub-clause 13.1 sets out the purpose of clause 13 in a general sense saying that it is to *“provide for speedy and proportionate resolution of any dispute”* and it is also to remind parties that a dispute may be resolved more efficiently and expeditiously at any stage by either direct or assisted negotiation.

Sub-clause 13.2.1 provides that any dispute *“in relation to the Contract”* may be referred to adjudication using an Adjudication Procedure which is attached in draft format. This sub-clause will obviously have to be amended in due course depending on what is ultimately legislated as a result of the passage of the Construction Contracts Bill 2010. For example that Bill, as currently drafted, provides for adjudication of payment disputes only while the draft Adjudication Procedure, which is based on the 2012 Adjudication Procedure, published by the Institution of Civil Engineers, is also likely to need revision in the light of the legislation. Sub-clause 13.2.4 provides that any Adjudicator’s decision is to be binding with specific reference to Rules 1.6 and 1.7 of the Adjudication Procedure.

Sub-clause 13.2.2 is included to ensure that in a Contract with a number of different adjudications the same Adjudicator is appointed unless the parties agree to appoint somebody else. Sub-clause 13.2.3 is included to make clear that while the adjudication process is confidential any documents presented at the adjudication and also the Adjudicator’s decision may be used subsequently in arbitral or litigation proceedings.

Sub-clause 13.3 provides for Arbitration for the final resolution of any disputes arising in relation to the contract and fixes the place of Arbitration as Ireland and the consequent application of the Arbitration Act 2010.

Sub-clause 13.3.2 provides that either party may refer a dispute, which has been dealt with in adjudication, to Arbitration but sub-clause 13.3.3 provides that the parties may, by agreement, proceed directly to Arbitration. The intention is to allow the parties to bypass adjudication and go directly to Arbitration where they feel that may be more appropriate.

Finally sub-clauses 13.3.1 and 13.3.4, taken together, provide that any Arbitration is to be carried out in accordance with the Engineers Ireland Arbitration Procedure 2011 except, in a case where the amount being sought in the Notice to Refer is less than €1m, the Engineers Ireland 100 Day Arbitration Procedure shall apply. The thinking behind this is to set a threshold under which disputes will be dealt with in a fast-track manner. The PWC 2011 tender provision as regards the allocation of arbitration costs has been ignored.

16. ADJUDICATION PROCEDURE

The Adjudication Procedure referred to in the proposed Conditions of Contract is provided separately and as stated previously is based on the current ICE Adjudication Procedure modified for Irish conditions. This document provides general background before going on to do to deal with initiation of adjudication, the appointment of the Adjudicator and the referral of the dispute. It provides also for the conduct of the adjudication and the making of the decision.

Obviously any such Adjudication Procedure will have to be rewritten in the light of any Act which is ultimately passed into law by the Oireachtas and in particular any Regulations made under that Act as well as the Code of Practice envisaged within the current bill.

While the document generally follows very closely what is in the ICE Procedure, a number of modifications have been made as follows:

- The scope of a dispute which may be referred to adjudication under Rule 1.2 has been broadened in line with clause 13 of the proposed Conditions.
- In Rule 3 the default appointment is to be made by Engineers Ireland.
- In Rule 6 the Adjudicator is required to provide reasons for any decision.

17. SCHEDULE

The Schedule, Part 1F where it is intended to list the sub-contractors who are to provide collateral warranties, has been altered. The PWC only provides for the collateral warranties being given by Specialists and of course Specialists must be named in the contract. This implies that every important aspect of work is going to be carried out by a Specialist as opposed to a domestic sub-contractor. In practice specialist work is often carried out by domestic sub-contractors. It is more appropriate therefore that the schedule should provide for collateral warranties in respect of both categories of sub-contractor and sub-clause 5.5 has been amended) accordingly.

The Schedule in the PWC is divided into two sections, one to be completed by the Employer before tender and the other to be completed by the Contractor and to be included in its tender. To the extent that this contract might be used in the private sector, it is intended to be a stand alone document. Therefore any reference to the Tender has been removed (except of course that the form of tender remains as a Contract Document). The Schedule therefore is a document prepared for the purpose of the contract and not necessarily for the purpose of the tender. This has led to a number of deletions from the Schedule. However to maintain consistency with the clauses, parts 1 and 2 have been retained as such. If one was starting from scratch, they would be possibly best amalgamated.

The weather measurement for the purpose of a weather event under Event 13 of the Schedule Part 1K has been retained but the final paragraph of the Schedule dealing with weather events has been amended with the intent that if a weather event delay occurs in the same month as some other Delay Event, the Contractor should be entitled to an extension of time and / or compensation, as appropriate, in respect of both events provided they do not occur concurrently.

18. CONCLUSION

The PWC has a number of advantages. They are well written and well presented. They are relatively easily read and understood. With the very minimum of adjustments they can be availed of to cater for civil engineering works as opposed to building works and design and build as opposed to employer's design. The authors are of the view that it would be of benefit to the industry as a whole if the one form of basic contract could be availed of not only for projects in the public sector but also in the private sector. The industry has already become familiar to a large extent with the provisions of the PWC. It is obviously easier for the industry to gain familiarity with contracts that are broadly similar to one another than it is to become familiar with contracts that are distinctly different such as those of the RIAI, Engineers Ireland and FIDIC.

The PWC is perceived by many as lacking balance in many areas and in this exercise the authors have sought to strike a more equitable balance between the needs and entitlements of the employer and those of the contractor. The guiding principle has been to produce a resulting document which is fair to both parties and which will result in more timely and efficient delivery of construction projects with particular reference to the private sector.