Changes to dispute resolution mechanisms in the Public Works Contracts

A Dispute Management Procedure has been introduced, which it is hoped will reduce the number of references to the formal dispute resolution procedures.

The Minister for Public Expenditure announced on 18 January 2016 that revised arrangements were being put in place for the procurement of public works using forms 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) and PW-CF5 (Contract for Minor Building & Civil Engineering works designed by the Employer).

The Government Contracts Committee for Construction undertook a Performance Review of the Public Works Contracts and the results were published in 2014. A series of recommendations was made following engagement with stakeholders and interim measures were announced in the first half of 2015. These interim measures addressed a number of key areas that impact upon claims and payment and were widely recognised as being intended to shift the focus away from adversarial handling of claims and on to dispute avoidance. Further developments in this sphere had been expected in 2016 and the revised arrangements introduce a number of changes to the dispute resolution mechanisms of forms PW-CF1, CF2, CF3 and CF4. The notable changes to these forms include the introduction of a Dispute Management Procedure (DMP) using a Project Board (PB) nominated to represent each Party to the contract and the inclusion of a Standing Conciliator (SC).

With the introduction of the DMP, it is hoped that this less formal means of dispute resolution will assist in reducing the number of disputes and the number of references to the formal dispute resolution procedures in the Contract. At Letter to Successful Tenderer stage a PB, with a maximum of three members, will be proposed by the Employer. At Letter of Acceptance stage, the Contractor will be required to disclose details of its own PB. The PBs will review disputed Employer Representative Determinations under sub-
clauses 10.5.4 and 10.5.5, which are referred to the DPM under sub-clause 13.1. The PB appointed by each Party to the contract is recommended to include senior management figures, with knowledge and experience of the construction industry and dispute resolution, and the capacity and authority to reach a resolution. It is intended that resolutions will be negotiated without the need for formal reference to Conciliation. Disputes that arise under clauses 10.5.4 and 10.5.5 must be referred to the DPM and have gone through this process before they may be referred to Conciliation.

The SC is to be mandatory for projects valued in excess of €10 million, but optional for projects between €5 million and €10 million. The introduction of a SC is again intended to assist the parties with dispute avoidance and the early resolution of issues that may lead to a dispute. Once appointed, the SC is to fulfill the role of Conciliator in all cases, taking the place of the conciliator under sub-clause 13.2 of the Contract.

The relationship between the PB and the SC will require careful management in order to maximise its benefits.

Contracting authorities are to use the amended forms of Public Works Contracts on all works procured from 4 April 2016, unless they are in a position to avail of the limited derogation provided. This limited derogation permits use of the latest versions of PW-CF1-PWCF-5 (and associated documents) until 8 January 2017, but not thereafter unless approved by the Government Committee for Construction. The derogation may be availed of where deadline for receipt of tenders is before 4 April 2016, or where service providers have been engaged prior to that date and the scope of service required does not extend to the requirements of the amended conditions of contract.

The amended forms of contract may be used prior to 4 April 2016 if scope of service requirements meet those of the amended conditions and tender documents have been prepared in accordance therewith. The implementation arrangements recognise that the Design Team scope of service must reflect the procedures provided for in the revisions to the Public Works Contracts. It would be important that post 4 April 2016, the Design Team scope of services meet the requirements of the amended Public Works Contract and that where procurement has commenced before that date appropriate amendments be made and an extension provided to the tender period.

Guidance notes have been published on each of the amendments and are available online at www.constructionprocurement.gov.ie along with the amended forms of Public Works Contracts.

April 2016

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