

CONTRACTOR'S ENTITLEMENT AND DELAYS UNDER THE PWC

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INTRODUCTION:

- Our focus today on five headings:
- 1. The standard subcontract for use with the PWC when there is no “contractor determination”;
- 2. The calculation of payments to contractors under the PWC;
- 3. Clause 9.3 which relates to delay and extension of time versus clause 10.3 which relates to contractor’s claims;
- 4. Novated specialists and their ability to seek delay costs under the contract; and
- 5. The risks associated with including specialists in the tender documents in terms of claims or delay.

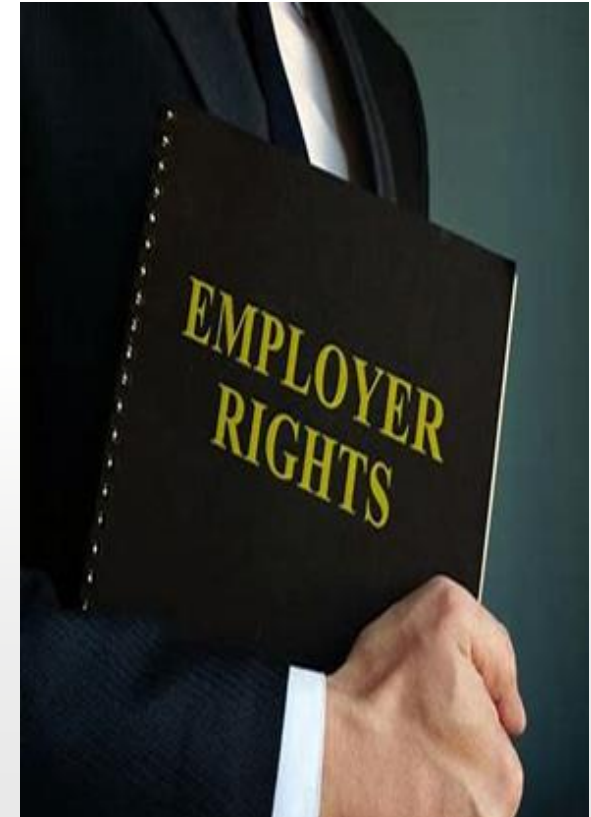
PWC Contracts are not to be read in a vacuum, following documents inform the relationships between Employer, Contractor and Specialists:

1. Letter of Acceptance issued by the Employer which indicates the acceptance of the tender;
2. Agreement which includes the contract date, the parties, the sum and post tender clarifications;
3. The Contract Conditions which are the contractual mechanisms contained in the II standard form PWC contracts PW-CFI to PW-CFII;
4. The Schedule which contains specific information fleshing out the contract conditions and is completed by the Employer and the Contractor;
5. The Works Requirements which in traditional procurement contains drawings, specifications, site investigations etc. and in design and build contains performance specifications, site investigation reports etc.
6. The Pricing Document which may fall under three categories, firstly, a cost summary, secondly, a Bill of Quantities and thirdly, a quantified schedule of rates.
7. The Works Proposal which identifies how a contractor intends to carry out works.



STANDARD SUBCONTRACT FOR USE WITH PWC WHEN THERE IS NO “CONTRACTOR DETERMINATION”

Under the PW-CF1 to PW-CF5, which contracts are the focus of today's presentation there are no provisions for Contractor Determination. The clause which deals with determination is contained at Clause 10.5 which states that if a contractor has made a claim under clauses 10.3 or 10.4 the Employer's Representative shall make a determination within 20 days of receiving the claim



Under PW-CF1 to PW-CF5 the subcontract which is directed to be used is the Reserved Specialist – Conditions of Sub-Contract (NN) published by the Construction Industry Federation (CIF)

Sub-contract (NN) contains 13 conditions mirroring the layout of the conditions of PW-CF1 to PW-CF5. Under clause 10 of this subcontract which deals with Claims and Adjustments, the sub-contractor is directed to submit all claims to the Contractor. The Contractor shall then apply methods similar to the provisions of the main contract in order to determine the sub-contractor's claim.

CALCULATION OF PAYMENTS TO CONTRACTORS

- Payments to contractors under the PWC are governed by three separate parts of the contractual documentation, namely, the pricing document, Clause 11 of the contract and Schedule 1 Part L.
- The pricing document which will be a Bill of Quantities in the case of PW-CF1 to PW-CF5 will set out the contractor's price against each item whether it will be a rate for a quantity or price per item.
- Measured by reference to 'Agreed Rules of Measurement 4' ('ARM4') published by the SCSl, Civil Engineering Standard Method of Measurement 3rd Edition (CESMM3) as amended for use with the Public Works Contract or Transport Infrastructure Ireland's Requirements for Measuring and Pricing (RMP).

Clause 11 of the conditions of contract which deal with payment.

A Payment Claim notice then given to Employer's Representative.

Under Clause 11.1.1(ii)(2) the statement should contain:

- Progress of the Works;
- Instalment the Contractor considers they are entitled to;
- Detailed breakdown of claimed value of work completed using the Pricing Document;
- Supporting evidence that the Employer's Representative requires.



Following the Payment Claim Notice, a Payment Certificate issues and is informed by:-

- The value of the works properly executed. Consideration should be given to any defects notified to the Contractor, resolved or unresolved, and defects agreed between the parties to be accepted by the Employer.
(Refer to Sub-clause 8.5 of PW-CF 1 to PW-CF5).
- Amounts owed by the Contractor for rectification of defects by the Employer or at the Employer's cost.
- The value of unfixed Works Items, see Schedule Part 1 L.
- Amounts for adjustments to the Contract Sum as determined under the Contract. Consideration should be given to Determinations of Contractor and Employer Claims where applicable.
- Amounts to be paid according to clause PVI or PV2 (price variation clauses.)
- Amounts included in the Pricing Document for Contractor's Documents properly completed and supplied as required by the contract.
- Amounts which can be withheld from the Contractor in accordance with sub-clause 4.9.3, 5.3, 11.4.1 and 11.4.2 of PW-CF1 to PW-CF5.
- Amounts to be withheld for retention
- Amounts for adjustments arising out of dispute resolution procedures.
- Amounts arising from Liquidated Damages
- Cumulative amount previously certified for payment.



CLAUSE 9.3 WHICH RELATES TO DELAY AND EXTENSION OF TIME VERSUS CLAUSE 10.3 WHICH RELATES TO CONTRACTORS CLAIMS

- **Clause 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 states:

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 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 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.



Clause 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 is 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.



Clause 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].

It is then necessary to consider Schedule 1K delay and compensation events.



NOVATED SPECIALISTS AND THEIR ABILITY TO SEEK DELAY COSTS UNDER THE CONTRACT

- Clause 5.4.3 of PW-CF1 to CF5 deals with novation of Specialists under the Contract the Specialist enters a Novation Agreement (form MF 1.9) which provides that when the novation has taken place the “Specialist is bound, and considered always to have been bound, to perform the Specialist’s obligations for the benefit of the Main Contractor, as if the Main Contractor were and always had been named as ‘the Employer’ in the Specialist Contract in place of the Employer”.
- Clauses 9 and 10 of Subcontract NN (discussed earlier) deal with delay claims of Specialists.

Clause 9(c)

If the NN Sub-Contractor becomes aware or should have become aware that the Sub-Contract Works are being or are likely to be delayed for any reason, it shall notify the Contractor of the delay and its cause as soon as practicable but in any event within ten working days. Within a further 20 working days the NN Sub-Contractor shall give the Contractor full details of the delay in writing and its effect on the progress of the Sub-Contract Works. The NN Sub-Contractor will promptly provide any further information in relation to the delay which either the Contractor or the Employer's Representative requests.



Clause 10(c)(1):-

To the extent that the NN Sub-Contractor is delayed or incurs loss by reason of a Compensation Event, subject to clauses 10(a) and 9(d) hereof, the NN Sub-Contractor will be entitled to be compensated.

....

Clause 10(c)(4):-

To the extent that the NN Sub-Contractor is entitled to compensation for delay caused by the Compensation Events under sub-clause 10(c)(1), there shall be added to the Sub-Contract Sum for each Site Working Day for which compensation is payable (calculated in accordance with clause 9(d) above) either of the following (depending on which option has been selected in the Schedule to the Main Contract Part 1 (K):-

- (i) the daily rate of delay cost tendered by the NN Sub-Contractor in the Appendix Part C2 hereto, or*
- (ii) the expenses (excluding profit and loss of profit) unavoidably incurred by the NN Sub-Contractor as a result of the delay caused by the Compensation Event.*



RISKS ASSOCIATED WITH INCLUDING SPECIALISTS IN THE TENDER DOCUMENTS IN TERMS OF CLAIMS OR DELAY

- The extent to which specialist works contractors are involved in construction projects varies according to the level of complexity of the project. The extent to which the Employer is involved in the selection of specialists is directly related to the extent of control that the Employer wishes to exert on the project direction and outcome



Levels of involvement:

1. The least level of involvement by the Employer applies to very simple projects where specialists may be engaged as sub-contractors to the main contractor with very basic requirements set down for their appointment by the Employer i.e. tax compliance.
2. The next level of involvement by the Employer is where the Employer sets down pre-qualification requirements for specialists but the Employer will have no direct involvement in the tender process for the specialist as the Main Contractor will appoint the Specialist in accordance with the Employer's pre-qualification requirements.
3. The highest level of Employer involvement is in the direct tendering of specialist works where the tender may result in either a) the appointment of the successful specialist tenderer by the Employer who is novated to the main contractor thereafter or b) the naming of the successful specialist tenderer who is to be appointed by the Contractor as a sub-contractor.



Given that the risk which falls to a Main Contractor under these contracts is a heavy burden, this further increases the risk.

The Novation Agreement provides that the Contractor replaces the Employer so that the parties are treated as if the Contractor had always been the Employer, the Contractor in that scenario is even taking on past risks of which they may be unaware.

Delay risks claimed by the Main Contractor under the Contract also must include delays by the Specialist under subcontract NN therefore compounding that delay risk.



CONCLUSION

- In conclusion, as can be seen Contractor's entitlements and delays under the Contract are narrowly assessed and can only be examined under the strict contractual criteria. Hopefully my presentation today has given you some understanding of how these contractual provisions operate and how they inter-relate.

THANK YOU!

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