



A&L Goodbody

# Utilities – How is risk allocated under the Public Works Contract (PWC) ?

Siobhan Kearney

Senior Associate, A&L Goodbody LLP

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# How is risk allocated under PWC?

- A. Trends and issues arising out of the energy crisis
- B. Approach to utilities risk generally in construction contracts
- C. Risk allocation under PWC



# Utilities – an introduction

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## Definition

Organisations that supply communities with commodities such as water and waste water treatment, electricity, gas and telecommunications

## Utilities in Ireland

In Ireland, the utility market is made up of state agencies organisations.

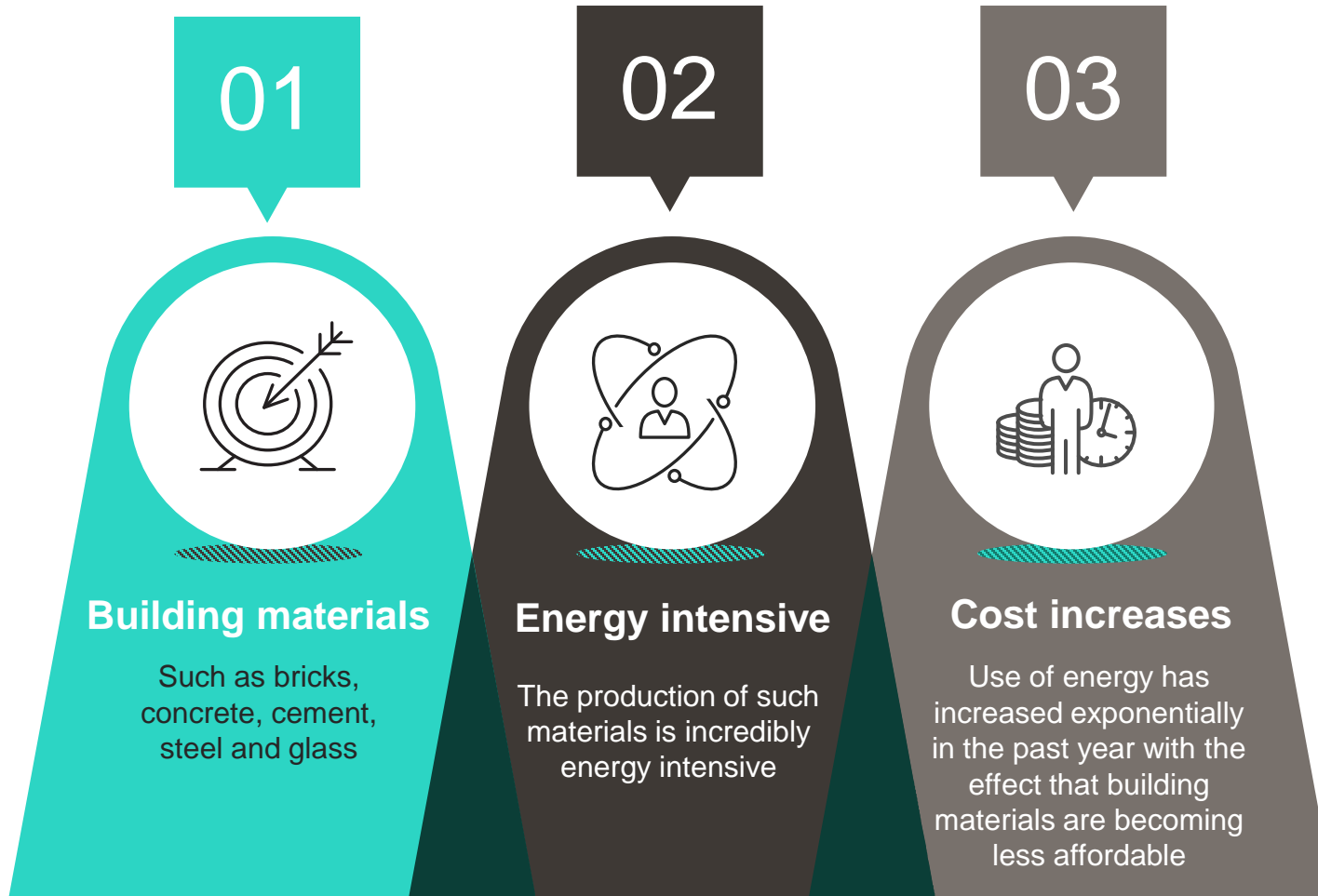


# Utilities in Ireland are:

- ESB Networks
- Eirgrid
- Gas Networks Ireland
- Uisce Éireann (formerly Irish Water)



# The impact of the energy crisis



# The impact of the energy crisis

01

Protracted and  
lengthy negotiations

02

Increased contractual  
disputes

03

Move towards  
alternative sources of  
energy

## B. Approach to utilities risk generally in construction contracts

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First principles – a contract seeks to pass risk for:

- (1) Quality
- (2) Cost
- (3) Time

1

Risk should be placed with the party best placed to manage it

2

## B. Approach to utilities risk generally in construction contracts

01

Delay on site due to utility related issues is typically an event that gives rise to a claim for an extension of time under the contract

02

FIDIC – time for delay or disruption by public or private utility entities provided the contractor has diligently followed the procedures set down by such provider and the delay was unforeseeable by an experienced contractor

03

JCT – time for delay or failure by statutory undertakers to carry out work



# Utilities risk in PWC

- There are two commonly used form of PWC:
  1. the Building Works designed by the Employer (CF1)
  2. the Building Works designed by the Contractor (CF2)



# Who takes the risk?

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## Within the Contract

1. Tender and schedule (Part 1K) for PWC for building works
2. The works requirements – but watch clause 1.3 on order of priority

1

## If risk not included in the Contract

The risk will automatically fall to the contractor – for Utilities, this means time not cost

2



# Schedule | Part 1K – CF1

- Delay Event v Compensation Event
- Event 20: *“The Contractor encounters unforeseeable Utilities in the ground on the Site”*
- Event 21: *“Owners of Utilities on the Site do not relocate or disconnect Utilities as stated in the Works Requirements, when the Contractor has complied with their procedures and the procedures in the Contract, and the failure is unforeseeable”*
- Both are Delay Events and optional Compensation Events





	Event	Delay Event	Compensation Event
1	The Employer's Representative gives the Contractor a Change Order	Yes	Yes
2	The Employer's Representative directs the Contractor to search for Defects or their cause and no Defect is found, and the search was not required because of a failure of the Contractor to comply with the Contract	Yes	Yes
3	The Employer's Representative directs the Contractor to suspend work under sub-clause 9.2	Yes	Yes
4	The Contractor suspends work in accordance with sub-clause 12.3	Yes	Yes
5	There is a factual error in information about the Site or setting out information in the Works Requirements.	Yes	Yes
6	The Employer takes over part of the Works before Substantial Completion of the Works and any relevant Section	Yes	Yes
7	The Employer's Representative does not give the Contractor an instruction required under sub-clause 4.5.4 within the time required under sub-clause 4.11.2 when the Contractor has asked for the instruction in accordance with sub-clause 4.11.1	Yes	Yes
8	The Employer does not allow the Contractor to occupy and use a part of the Site in accordance with sub-clause 7.1	Yes	Yes
9	The Employer does not give the Contractor a Works Item or other thing as required by the Contract when the Contractor has asked for it in accordance with sub-clause 4.11.1	Yes	Yes
10	Employer's Personnel working on the Site under clause 7.6 interfere with the execution of the Works on the Site, and the interference is unforeseeable and not in accordance with the Contract	Yes	Yes
11	The Employer instructs the Contractor under sub-clause 3.2.3 to rectify loss of or damage to Risk Items for which the contract is not responsible	Yes	Yes

	Event	Delay Event	Compensation Event
12	Loss of or damage of the Works that is at the Contractor's risk a risk in accordance with sub-clause 3.2	Yes	No
13	A weather event as described as below	Yes	No
14	A strike or lockout affecting the construction industry generally or a significant part of it, and not confined to employees of the Contractor or any Contractor's Personnel	Yes	No
15	Delay to the works caused by the order or other act of a court or other 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 of a breach of the contract by the contractor	Yes	No
16	A breach by the Employer of the Contract delaying me Works that is not listed elsewhere in this table	Yes	Yes
17	<p>A difference between the Contract value of the Works according to the quantities and descriptions in the Pricing Document and the Contract value of the Works described in the Works Requirements, because the pricing Document, when compared with the works Requirements</p> <ul style="list-style-type: none"> <li>includes an incorrect quantity or</li> <li>includes an item that is not included in the Works Requirements or</li> <li>excludes an item that is included in the Works Requirements or</li> <li>gives an incorrect item description</li> </ul> <p>and the difference for an item in, or that should have been in, the Pricing Document is more than €500.</p>	No	Yes
18	An item of archaeological interest or human remains is found on the Site and it was unforeseeable	Yes	No
19	The Contractor encounters on the Site unforeseeable ground conditions (not resulting from weather) or unforeseeable human-made obstructions in the ground, other than Utilities	Yes	No
20	The Contractor encounters unforeseeable Utilities in the ground on the Site	Yes	No
21	Owners of Utilities on the Site do not relocate or disconnect Utilities as stated in the Works Requirements, when the Contractor has complied with their procedures and the procedures in the Contract and the failure is unforeseeable	Yes	No

# Definition of utilities

- Conducting media and apparatus for water, sewage, electricity, gas, oil, telecommunications, data, steam, air or other services and associated apparatus and structures.





# Definition of unforeseeable

- A condition, circumstance or occurrence is unforeseeable if an experienced contractor tendering for the works could not have reasonably foreseen it on the designated date, having inspected the site and its surroundings and having satisfied itself, insofar as practicable and taking into account any information in connection with the site provided by the employer, as to all matters concerning the site, including its form and nature and its geotechnical, hydrological and climatic conditions.





# Schedule | Part 1K – CF2

- Similar list of delay and compensation events but notably, Event 20 (unforeseeable Utilities in the ground on Site) is not applicable in the schedule for the contract for works designed by the contractor (or Event 19 i.e. contractor assumes all ground risk).





# Events 20 and 21

- Events 20 and 21 are quite balanced but narrow.
- No relief for utilities' delay in connecting services required for the works or permanent connections on completion, such as permanent electricity and water.





# Event 10

10	Employer's Personnel working on the Site under clause 7.6 interfere with the execution of the Works on the Site, and the interferences is unforeseeable and not in accordance with the Contract	Yes	No
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Clause 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 execution of the Works”.*



# Defining employer's personnel – clause 1.1 of contract

## Employer's Personnel

any of the following:

- the Employer's Representative
- 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
- other contractors of the Employer working on the Site when acting within the scope of their contracts with the Employer
- anyone else the Employer's Representative notifies the Contractor is Employer's Personnel
- assigner Certifier

In order for the Utilities provider to fall within the scope of the third bullet point, the following criteria must be satisfied:

- the utilities provider must have been engaged by the employer
- the utilities provider must be working on the site
- the utilities provider must be acting within the scope of its contract with the Employer



# Consents and permits

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Who is responsible?





# Clause 2.3.1 of the contract

- 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.



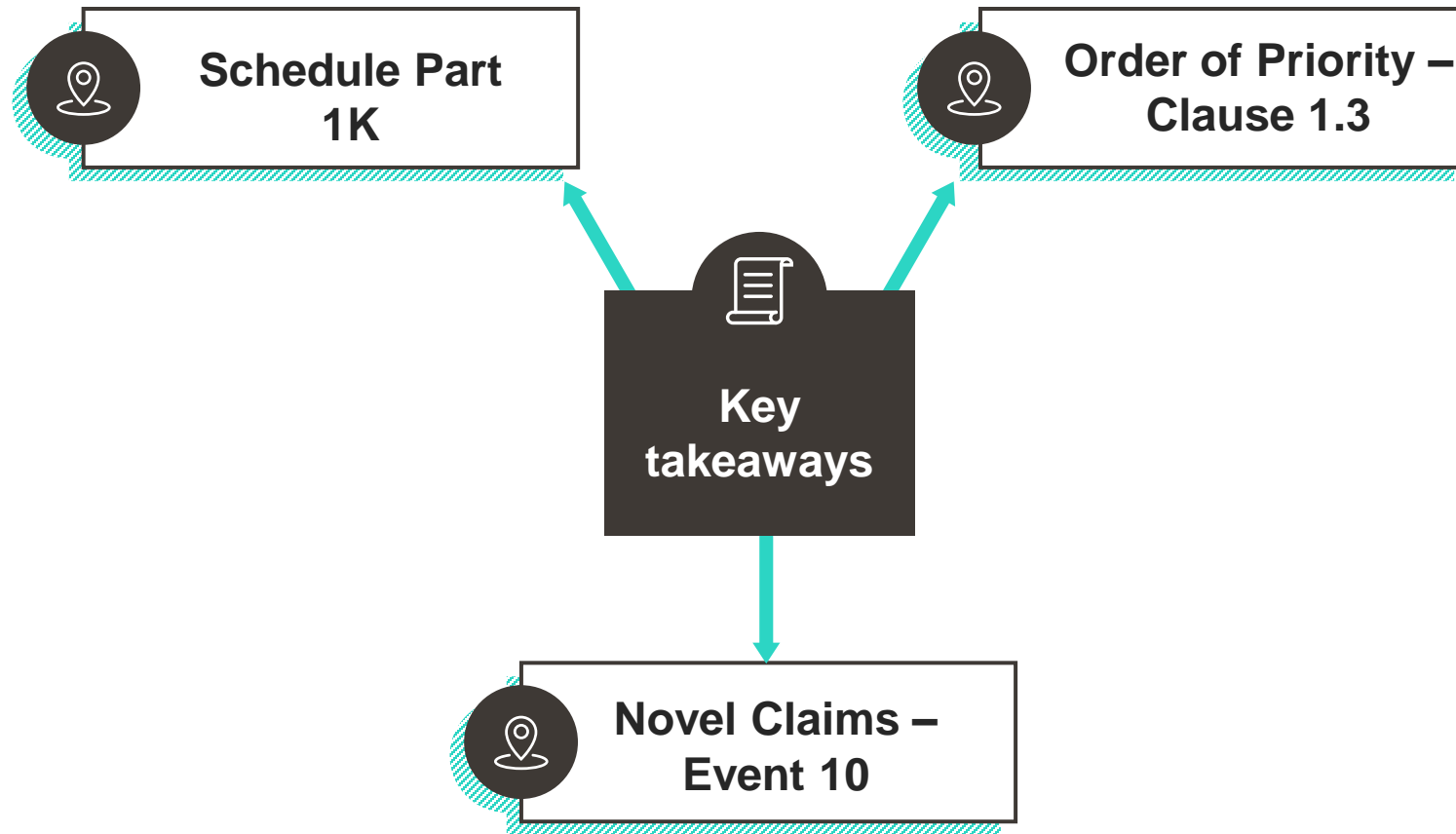


# Definition of consents

- Planning permission, order, approval, certificate, Ancillary Certificate, fire certificate, license, permit, environmental impact statement, or other consent required by Legal Requirement for the execution or completion of the Works, or identified as a Consent in the Works Requirements.



# Utilities under PWC | Key Takeaways







Thank you

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