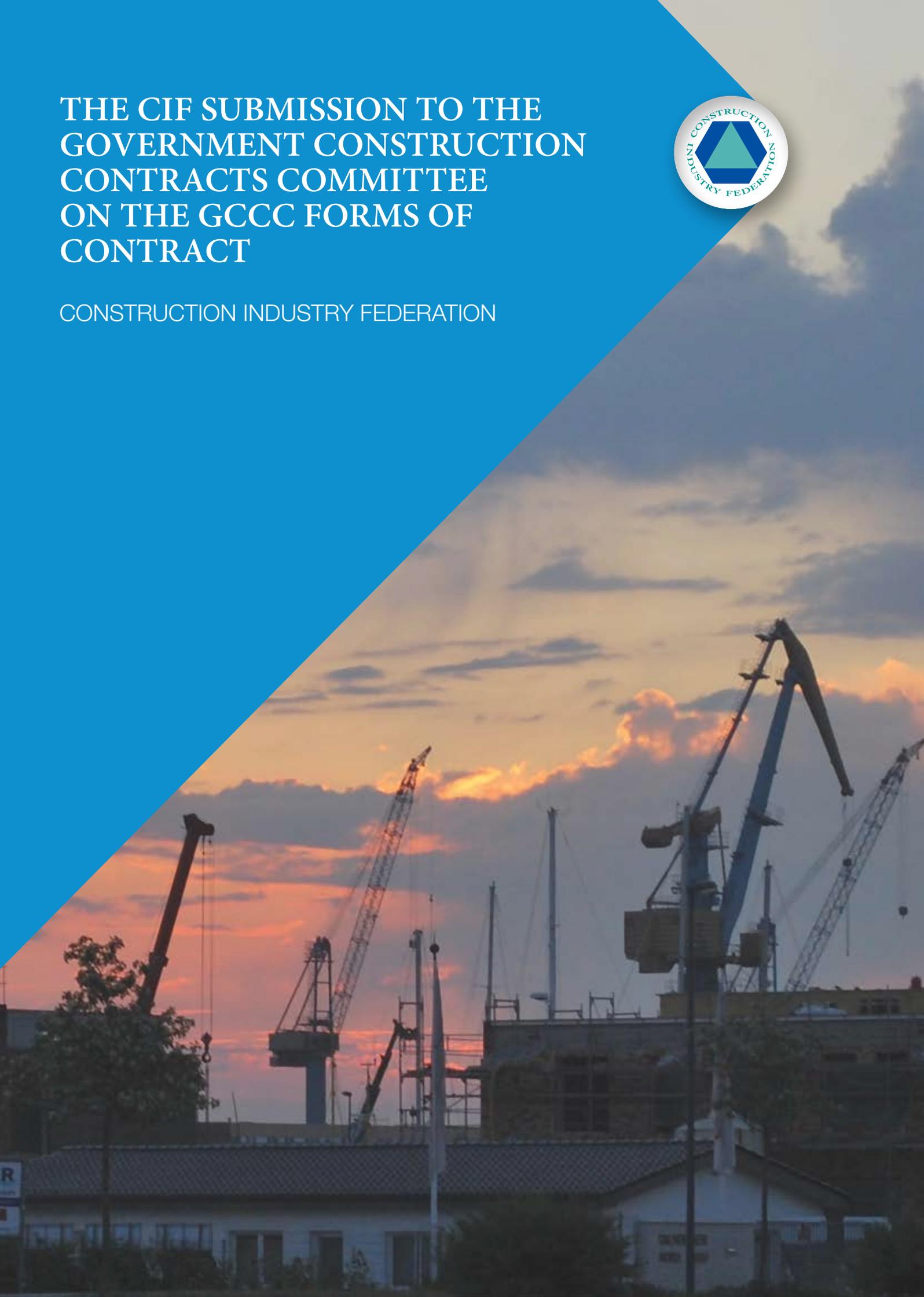


# THE CIF SUBMISSION TO THE GOVERNMENT CONSTRUCTION CONTRACTS COMMITTEE ON THE GCCC FORMS OF CONTRACT



CONSTRUCTION INDUSTRY FEDERATION



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## Introduction

In 2007, the new forms of contract were introduced by the Government Construction Contracts Committee (GCCC) and a commitment was given to the industry by the then Minister for Finance Mr. Brian Cowen that the contracts would be reviewed after an initial three-year period. This review was not undertaken in 2010, on the basis that there was not yet sufficient data concerning the outcome of projects carried out to undertake a meaningful review. As of 2012, it was estimated that approximately 5,000 contracts had been entered into using the GCCC Forms of Contract, and that as many as 3,500 of these had progressed to final account or beyond. Given those figures the CIF now believes it is appropriate for a review to be carried out.

In preparing for this review, the CIF consulted widely with its members by way of user experience surveys, workshops and issues' identification. These consultations identified various and ongoing dissatisfaction with the GCCC contracts, and showed that the experience of the past six years has done little to assuage the industry's concerns expressed during the consultations of 2006 and 2007. Whilst many in the industry recognise the need for updated and efficient forms of contract, and have welcomed the clarity, layout and straightforward language of the GCCC contract, they remain extremely concerned regarding the distribution of risk between the contracting parties, the level of uncertainty, and the inadequacy of tender documents. Other issues include the programme contingency provisions, delays and extensions of time, change orders, selection of specialists and dispute resolution. These various aspects have been identified as the areas of greatest concern for CIF members following a large scale sentiment survey carried out amongst members throughout the country. Members have also reported dissatisfaction regarding the manner in which amendments are made to the conditions of contract and form of tender without identification of these changes.

CIF wishes to support the Government in seeking to achieve certainty of outcomes on construction contracts whilst also achieving best value for money. CIF considers that its members have a vital role to play and could contribute to the achievement of better value if aspects of the contract were improved and best practice procurement procedures were adopted. The Department of Public Expenditure and Reform must act now to put in place efficient and equitable terms of contract for public works projects. The primary aim should be to promote collaboration and co-operation between all of the parties responsible for project delivery. Success should be delivered by careful planning, operational efficiencies and practical innovation.

*CIF wishes to support the Government in seeking to achieve certainty of outcomes on construction contracts whilst also achieving best value for money. CIF considers that its members have a vital role to play and could contribute to the achievement of better value if aspects of the contract were improved and best practice procurement procedures were adopted.*

The CIF continues to believe that this can best be achieved by using tried and tested international forms of contract such as FIDIC, JCT and the NEC suite of contracts. Nonetheless, whilst our experience of the GCCC contract has been negative, we remain hopeful that if difficulties identified in the past four years of experience are meaningfully addressed, it will be possible to achieve something more equitable.

Prior to the commencement of the review, it will be necessary to establish its parameters and to clearly define the subject documentation. The review of the forms of contract should extend to the forms of tender and agreement along with associated schedules and invitations to tender. In addition it should include the extent and quality of tender documentation, and seek to establish the minimum requirements to ensure proper tendering. Furthermore in order to have an open and transparent review, the CIF believes that it will be necessary for all participating stakeholders to be willing to share the information they possess regarding the operation of the contracts in relation to issues including disputes, outturn costs and problems arising.

The procurement of construction service in Ireland operates within the legal framework set out in the EU procurement directives, and the requirement of national policy. In this context, the CIF recognises the excellent infrastructure put in place by the Department of Public Expenditure and Reform, including the e-tenders procurement portal along with the standard documentation available on the Department's website. Notwithstanding, many construction companies report dissatisfaction with the current procurement regime and they believe that it is intrinsically linked to and is an integral part of the GCCC contracts. Accordingly, the CIF believes that it will not be possible to carry out a meaningful review of the contracts without consideration of some aspects of the procurement system. The CIF seeks to identify elements of procurement which provide unnecessary difficulty for contractors, and will suggest changes designed to ensure that to the greatest possible extent fair and open competition will prevail.

## Executive Summary

This is a summary of the detailed report which provides the Construction Industry Federation's (CIF) response to the Government's review of the Government Construction Contracts Committee (GCCC) forms of contract.

Whilst it is accepted that the current engagement with the GCCC is in relation to the forms of contract, the CIF believes that in view of the intrinsic link between the prequalification process and the contract itself, it will not be possible to carry out a comprehensive review of the contract without taking the prequalification process into account.

CIF has undertaken a review of the GCCC forms of contract introduced in 2007 and has consulted widely with members to identify any issues arising from the use of the contracts. A wide range of issues have been identified which are set out and prioritized in the report. The issues relate to:

- the conditions of contract and associated risk allocation;
- the application and management of the contract by public sector clients; and
- potential improvements to associated procurement procedures to reflect best practice adopted elsewhere.

The introduction of the new forms of contract has also given rise to a more adversarial industry wherein contractors are spending more and more time in consultation with the legal profession. The adversarial nature of these contracts is not conducive to the collaborative working practices which have shown great improvements in efficiency and value for money in other jurisdictions.

CIF considers that its members have a vital role to play in the delivery of best value from the money invested by the Government in the building and construction sector. At present CIF is seeing practices associated with the GCCC contracts which are unsustainable over an extended period of time and which will ultimately drive construction companies out of business. CIF considers that by addressing the issues raised in the report, the Government would achieve better value for money and promote a more efficient and sustainable construction market. While the coincidence in time of the downturn of the industry with the introduction of the new forms of contract renders it somewhat difficult to differentiate the effects of one from the other, the CIF is of the view that the contracts have caused serious difficulties for the industry.

Under the current approach CIF considers that the Government is missing out on substantial potential benefits by using conditions of contract with inappropriate allocations of risk and by not adopting best practice procurement principles. Furthermore, the contracting environment has given rise to a reduced appetite for involvement in public procurement and an adversarial nature which forces contractors to focus on contract management rather than project delivery. Experience elsewhere has shown that selection of contractors on the basis of best value together with the development of collaborative working relationships leads to the delivery of more successful outcomes for all of the parties. As it stands the adversarial nature of the GCCC forms of contract mean that Irish contractors are not prepared for collaboration. The potential added value that could be delivered if the issues set out in the report are addressed include:

- Well developed, highly capable and strong supply chains;
- Sustainable efficiencies based on incentivised delivery rather than low price tendering;
- Increased skills investment and opportunities for SMEs;
- A more effective procurement process for clients and contractors alike
- Better value through innovation;
- Delivery of environment and sustainability objectives;
- Improved cost transparency / benchmarking to support better value investments;
- More effective risk management;
- Better whole life value;
- Sharing of lessons learnt to support continuous improvement; and
- Reputational benefits for the parties involved.

The main issues identified by CIF are set out below.

### Conditions of contract and associated risk allocation

It is widely recognised that the best value approach to risk allocation is achieved where a risk is owned by the party best able to manage it. CIF does not consider that this is fully achieved in the GCCC contracts. Contract clauses which transfer risk to the contractor which they are unable to manage effectively are identified below and set out in more detail in item 15 of this submission.

There are seven key issues which the CIF consider top priorities for improving the current contract. These deliver more equitable arrangements which would provide employers with better value for money and result in more effective risk management. These are set out in the table opposite.

Clause	CIF's concerns / proposals
<p><b>Clause 1.3 Inconsistencies</b></p>	<p>This clause sets out the priorities of the documents which make up the contract and sets out that if there is an inconsistency they take precedence in the order listed. The pricing document has a lower priority than the works information.</p> <p>CIF is concerned that the provisions of this clause mean that tenderers cannot rely on the quantities in the pricing document and are exposed to the risk that may not represent the work set out in the works information. In practice tenderers do not have sufficient time during the tender period to fully review the pricing document and can only guess at the reliability of the quantities which form the basis of the pricing. This situation does not provide a robust or equitable position on which to base the award of contracts.</p> <p>CIF considers that the pricing document should be included as part of the works information and provision made for a compensation event when quantities vary above a certain level.</p>
<p><b>Clause 4.1 Cooperation</b></p>	<p>This clause requires the employer and the contractor to support reciprocal cooperation for the contract purposes.</p> <p>CIF considers that cooperation and collaborative working between the parties is essential for the delivery of successful outcomes for all parties. Based on the feedback provided to CIF it appears that there are few contracts where full collaborative working has been achieved and in many cases the employer's personnel show little evidence of being aware of this intended approach under the contract.</p> <p>CIF considers that the provisions of the contract should be strengthened to place an obligation on the senior management of the parties to promote collaborative working and to monitor how it is working within the teams. The establishment of a more effective collaborative relationship on Government contracts will help to deliver more successful contractual outcomes and better value for money.</p> <p>In addition the cooperative working clause should be directly linked to other contract clauses which would benefit from a cooperative approach to achieve effective and efficient delivery of contract processes. Aspects of the contract that CIF considers should be directly covered by the cooperative working requirements include:</p> <ul style="list-style-type: none"> <li>• Clause 4.7 Contractors submissions</li> <li>• Clause 10.5 ER's determination</li> <li>• Clause 11.6 Time for payment</li> </ul>
<p><b>Clause 5.4 Subcontractors and specialists</b></p>	<p>This clause sets out provisions for the appointment of specialist contractors.</p> <p>There is widespread dissatisfaction and concern in all sectors of the industry regarding the selection and procurement of specialist contractors.</p> <p>The CIF believes that where the employer wishes to be involved in the selection of specialists that the contract should provide that the contracting authority may hold a separate competition for the procurement of specialist works.</p> <p>The successful specialist should be appointed by the contracting authority following negotiation of the tender competition. A novation process would then be used to complete the appointment of the specialist to the known contractor using unamended standard forms of contract agreed by the industry. Either party would reserve the right to make reasonable objection against the other party and to accept/withdraw from the competition following identification of the successful specialist/contractor for the works.</p>
<p><b>Clause 8.1 Standards of workmanship and work items</b></p>	<p>This clause requires that any items designed by the contractor must be fit for their intended purpose in the works.</p> <p>CIF has serious concerns that this requirement is not a standard for which contractors can obtain insurance and is a higher standard than the reasonable skill and care required of design professionals in Government design contracts.</p> <p>The requirements in the construction contracts should be made consistent with the standards required in design contracts. This would provide employers with the additional benefit of allowing the risk to be fully insured by contractors.</p>

Clause	CIF's concerns / proposals
<p><b>Clause 9.4 Programme contingency</b></p>	<p>This clause sets out complex provisions including thresholds and mathematical formula to define the programme contingency which is used to determine entitlement.</p> <p>CIF has found that this complex and unusual approach causes much confusion for tenderers. In general there is little correlation between periods specified for the first and second contingency thresholds and the actual level of delay likely on a project. The lack of reasonable and proportionate periods provided by employers suggests that employers' personnel are also confused by the provisions. The approach is inequitable as tenderers will interpret the risk in different ways and employers apply it in different ways. The lack of detailed design information available to contractors at tender stage further complicates the use of the programme contingency.</p> <p>The practice of having unrealistic extended programme thresholds encourages experienced and competent contractors to under price for such thresholds in the knowledge that the delay periods will not be utilised. This is inequitable to tenderers who provide realistic figures and is an unsustainable approach over time. It will also disincentivise contractors from participation in public works contracts</p> <p>CIF considers that this unnecessarily complex approach should be dropped and alternative methods considered for achieving price certainty in a simpler way. CIF suggests that a percentage of the contract period be utilised for defining thresholds based on available historical data for similar projects and that this be updated as more such data becomes available. CIF considers that guidance be issued along such lines to facilitate the employers in applying the provisions in a consistent way and which would allow tenderers assess the risk in a consistent way.</p>
<p><b>Clause 10.6 Adjustments to the contract sum</b></p>	<p>This clause sets out the procedure for adjustments to the contract sum. Clause 10.6.4 states that the employer's representative (ER) may conclusively direct that additional or substituted work be determined on the basis of the comparative cost rates in the schedule part 2.</p> <p>The current practice in tender documents for price comparison quantum and therefore costs is inconsistent and militates against fair valuation and collaborative working which is in both the employers and contractors interests.</p>
<p><b>Clause 10.7 Delay cost</b></p>	<p>Clause 10.7.4 sets out that amongst other things the employer shall have no liability for losses or expenses arising from delays caused by the employer or others, or by acceleration required by the employer.</p> <p>CIF considers clause 10.7.4 to be a very high risk to contractors which is outside of their control and the position is totally unreasonable. To fully reflect the risk tenderers would need to include a high risk premium which would be unlikely to represent good value for money to the employer. Tenderers are however, encouraged to submit low prices which result in them being very exposed if inadequate provision is made.</p> <p>CIF considers that the best and fairest solution would be to delete sub-clause 10.7.4. As a minimum CIF considers that the clause should be revised so that the contractor would be compensated for losses due to delay outside his control.</p>
	<p>Furthermore, the CIF has identified the risks arising in the area of heritage contracting as being unique to that specific sector and requiring separate consideration.</p>

### Issues arising from poor contract management

There are other aspects of the contract which are reasonable in principle but are unsatisfactory in practice because they are not administered appropriately or consistently by employers' personnel. It is widely recognised that the success of a contract will rely on the parties performing their roles and fulfilling their obligations effectively and promptly in accordance with the provisions of the contract. The CIF review has identified a number of areas where it is considered that employers are not delivering their obligations fully in accordance with the contract.

CIF has identified contract management problems associated with the following clauses:

a	Clause 4.1	Cooperation;
b	Clause 4.5	Instructions;
c	Clause 4.7	Contractor submissions
d	Clause 4.11	Time for employer's obligations
e	Clause 5.3	Pay and conditions of employment
f	Clause 5.5	Collateral warranties
g	Clause 9.4	Programme contingency
h	Clause 10.4	Proposed instructions
i	Clause 10.5	ER's determination
j	Clause 10.9	Employer's claims
k	Clause 11.6	Time for payment

CIF considers that many of the difficulties arise largely from a failure to establish a cooperative working culture as intended under clause 4.1 of the contract. CIF believes that public sector contracting authorities need to do more to train contract management staff in the development of an appropriate collaborative culture and associated behaviours, and to amend the contract to facilitate this.

Other contract management problems are caused by a lack of consistency in the application of contract procedures. In some instances this arises from the complexity and a lack of understanding of some of the provisions of the contract. CIF considers that the position would be improved by the development of simpler guidance for contract management teams supported by more comprehensive training schemes. CIF also considers that these joint training schemes should be introduced for individual contracts and attended by the contracting authority's and contractor's teams. This would support the development of cooperative working and would help to provide a common understanding of how the contract procedures will be operated.

CIF considers it is very important that a client understands its own capabilities and the skills they need in order to manage contracts effectively to help deliver successful contract outcomes. The delivery of contracts can be undermined by poor contract management which does not recognise the need to perform duties and obligations promptly and the benefits of dealing with contract issues and claims in a fair and reasonable manner. The CIF review has highlighted a number of issues in this respect and it is important that clients understand the consequences and inefficiencies associated with poor contract management.

### Improvements to procurement strategies and procedures

CIF recognises that the subject of the current review is the GCCC forms of contract. CIF considers however, that in order to successfully deliver the Government's objectives and optimize value for money the contract needs to be considered in the context of the overall procurement strategy and the system of prequalification. It is important therefore, to be aware of best practice in other countries and consider if lessons learnt are transferable to the construction sector in Ireland.

CIF considers that the primary aim of procurement strategies should be to promote collaboration between all of the parties responsible for project delivery. This approach is very much in line with what is recognised as best practice in many other countries. It is widely recognized that maximum benefits of collaboration are achieved where the parties are brought together in integrated delivery teams as early as possible in the development of a project. The potential benefits of early contractor involvement (ECI) include:

- Better value solutions;
- Improved buildability;
- More scope for innovation;
- Better H&S planning & risk management;
- Better cost estimating & budgeting;
- Better resource planning; and
- Greater certainty of outcomes.

A key element in a procurement strategy is the procedure used to award contracts. Most employers focus on the use of lowest price as the basis of the award of contracts but this has a range of undesirable outcomes. It is generally used by clients in the belief that combined with maximum risk transfer it will achieve certainty of price and provide best value. In other countries it has been

established that successful contracts are more likely to result from contracts awarded on the basis of best value rather than lowest price. Problems of lowest price tendering include:

- Tenderers submitting unrealistically and unsustainably low prices to win contracts;
- Tenders not reflecting outturn prices;
- Claims culture / confrontational relationships;
- Quality of work or services threatened;
- Design solutions are not best value; and
- Reduced competition.

CIF considers that a review of best practice procurement elsewhere should be undertaken to identify options which could be piloted in Ireland to demonstrate the potential benefits.

#### Way forward

CIF would be pleased to be part of a working group to discuss how best to improve the GCCC forms of contract to address the issues set out above and to allow the Government to achieve the identified benefits including better sustainable value for money.

CIF would also be pleased to support the development and implementation of opportunities for pilots of best practice identified elsewhere to assess whether they may deliver improved value for money and enhanced outcomes in Ireland. In its report “Ireland’s Construction Sector: Outlook and Strategic Plan to 2015”, Forfás highlighted the importance of the internationalisation of the construction industry, which will require Irish contractors to prepare for opportunities across Europe and which would be facilitated by having conditions of contract that are not so much at variance with EU norms.



## CIF Submission

This report provides the Construction Industry Federation's (CIF) response to the Government's review of the Government Construction Contracts Committee (GCCC) forms of contract.

CIF is the national and regional representative body for construction industry employers in Ireland. It is recognised by Government and public bodies across the country as the representative body and voice of the construction industry in Ireland. CIF has a wide range of members representing all parts of the construction industry and the supply chain. It has sectorial groups within its structure that ensure that each area of the industry has a voice in the decision making process within the Federation.

CIF has undertaken a review of the GCCC forms of contract introduced in 2007 and has consulted widely with their members to identify any issues arising from the use of the contracts. CIF has also considered best practice identified in other countries to help inform its response. The members have identified a wide range of issues relating to:

- the conditions of contract and associated risk allocation;
- the application and management of the contract by public sector clients; and
- potential improvements to associated procurement procedures to reflect best practice adopted elsewhere.

CIF wishes to support the Government in seeking to achieve certainty of outcomes on construction contracts whilst also achieving best value for money. CIF considers that its members have a vital role to play and could contribute to the achievement of better value if aspects of the contract were improved and best practice procurement procedures were adopted. At present CIF is seeing practices associated with the GCCC contracts which are unsustainable over an extended period of time and which will ultimately drive construction companies out of business.

Whilst the Irish economy has not yet recovered from the economic downturn, it is in the country's interest to have a strong construction industry that can provide an engine for economic growth as the country moves towards recovery. This requires the industry to have contractors with the necessary skilled and competent resources needed to deliver new projects. It also requires contractors to be willing, able and motivated to bid for and to deliver successful public sector contracts. The requirements should be supported by the use of contracts which provide a fair and transparent allocation of risk which allow contractors to make a fair and reasonable profit for delivering the client's requirements.

CIF considers that there are a wide range of potential benefits that the Government is missing out on by using conditions of contract with inappropriate allocations of risk and also by not adopting best practice procurement principles. The potential added value that could be delivered if the issues set out in this submission are addressed include:

- Better value through innovation;
- Sustainable efficiencies based on incentivised delivery rather than low price tendering;
- Cost transparency / benchmarking to support better value investments;
- Effective risk management;
- Skills investment / SME opportunities;
- Well developed, highly capable and strong supply chains;
- Delivery of environment and sustainability objectives;
- Better whole life value;
- Share lessons learnt; and
- Reputational benefits.

For the purposes of this report the issues identified by CIF have been categorised for discussion in the following sections:

- a General comments.
- b Conditions of contract – risks transferred to the contractor which are unmanageable.
- c Conditions of contract – common risks experienced by failings in the management of the contract.
- d Conditions of contract – other unreasonable contract provisions with potential undesirable effects.
- e Procurement strategy best practice issues/prequalification

### General comments

Around 5000 contracts have been entered into using the GCCC forms of contract. CIF has consulted its members and identified wide dissatisfaction with the GCCC contract and has also identified particular aspects that cause most concern. Problems and issues with the contracts have been identified which are likely to mean that employers are not achieving best value for money. The issues also clearly indicate that unnecessary constraints are being imposed on the supply chain which restricts their ability to deliver optimal value and the supply chain is carrying risks which are likely to be unsustainable in the medium term.

CIF is disappointed that the Government has not been issuing data on performance monitoring of the use and outcomes of the contracts since they were introduced. This would have made it possible

to establish appropriate performance mechanisms to allow reliable comparisons and benchmarks to be produced. It is in the Government's interests to be in a position to understand how its contracts are performing and to have performance data available which could be used to drive continual improvement.

In future the CIF considers it would be desirable if performance monitoring arrangements were established to provide relevant evidence to contractors on the use of the GCCC contracts in terms of indicators such as:

- a Cost overruns;
- b Time overruns;
- c Value for money;
- d Claims and disputes;
- e Quality of works;
- f Supply chain profitability and sustainability;
- g Health and safety;
- h Strength of competition;
- i Adequacy of tender prices; and
- j Reputational issues

The CIF supports the stated intention in clause 4.1 of the GCCC forms of contract which requires that the contracts should be administered and managed in a cooperative working culture. It is apparent however, that a cooperative culture is not being widely practiced by employers and therefore, the potential value of the contract provisions is not being obtained.

Experience elsewhere has shown that collaborative working arrangements in the delivery of construction contracts have produced substantial benefits particularly through the earlier identification of risks and more effective risk mitigation. Benefits from collaborative working have been achieved in other countries where the contracting background was very confrontational between contractors and clients and where little trust existed between the parties.

The problems identified in the CIF review reflect problems which have been identified in other countries. Reviews elsewhere have identified the causes of some these problems including:

- Poor understanding and inappropriate allocation of risk;
- Poor change control;
- Perverse contract incentives;
- Unreasonable contract provisions;
- Lack of supply chain integration;
- Poor contract management; and
- Use of lowest price tendering.

A number of the issues that have been identified link back to the use of lowest price tendering as the contract award criterion. In most other countries construction contracts are awarded on the basis of the most economically advantageous offer which is provided for in procurement regulations under Article 43(1) "Contract award criteria" of the EU Procurement Directive 2004/18. Whilst this approach is used in Ireland the emphasis continues to be predominantly on the price and there is a general suspicion about the use of non-financial criteria.

The Construction Contracts Act 2013 will affect numerous provisions of the current standard forms of contract. Account must be taken of its requirements in any review going forward.

#### Conditions of contract – risks transferred to the contractor which are unmanageable

It is widely recognised that the best value approach to risk allocation is achieved where a risk is owned by the party best able to manage it. CIF does not consider that this is fully achieved in the GCCC contracts. Contract clauses which transfer risk to the contractor which they are unable to manage effectively are set out in the table below.

Clause	Consequence
<p><b>Clause 1.3 Inconsistencies</b></p> <p>Provisions of clause</p>	<p>This clause prioritises the documents which make up the contract and sets out that if there is an inconsistency they take precedence in the order listed. The pricing document is listed below the works requirements.</p>

Clause	Consequence
The issue	<p>CIF supports the clause in principle with the exception of matters relating to the pricing document. The pricing document does not always contain a full bill of quantities and in the time available in most tender periods the contractor has to base their tender on the quantities in the pricing document. The contractor cannot however, rely on the pricing document where there are any inconsistencies with the works requirements.</p>
Proposed solution	<p>In order to ensure the adequacy of the tender price a tenderer would need to include a risk premium to cover the risk of the quantities being underestimated. Tenderers could only guess at the accuracy of the quantities and will make different assumptions about the risk. This means that competitions could be won on an inequitable basis about risks and the employer may pay an unnecessary risk premium.</p> <p>The position would be more equitable by the employer taking the quantities risk by including the pricing document as part of the works information. Alternatively the quantities risk to the contractor could be capped by making provision for a compensation event when quantities vary above a certain level. The latter is a common approach used elsewhere and would provide a more equitable position between the tenderers.</p> <p>Either of these approaches would allow tenderers to quantify the risk more reliably which would provide the employer with better value for money.</p>
<b>Clause 1.10 Background information</b>	
Provisions of clause	<p>This clause relates to any information made available to the contractor on behalf of the employer which is not included in the contract. It sets out that the employer has no liability for any such background information.</p>
The issue	<p>In a similar way to clause 1.3, tenderers cannot rely on the background information and they are required at tender stage to make a judgment on its reliability. A contract could be won simply because a tenderer was willing to accept that it was correct and ignore any deficiencies without including a risk premium. This is considered to be unfair on tenderers and is not a sustainable position where the risks are underestimated.</p> <p>CIF considers that much background information will have been produced by professional consultants or surveyors and there should be sufficient confidence for it to be used as the basis for producing tender prices. It would seem to be poor value for money to incur the cost of compiling background information but not then using it in any meaningful way. Furthermore professional consultants have a more considerable period of time to consider these documents than is allowed to contractors at tender stage</p>
Proposed solution	<p>CIF considers that the position would be fairer and would produce more consistency in tender prices if the employer took the risk for background information which is considered by an employer to be reasonably robust.</p> <p>Alternatively the risk to the contractor relating to the reliability of the background information could be capped by making provision for a compensation event when conditions vary beyond defined circumstances. The latter approach has been used successfully elsewhere, including the current Crossrail project in London, and would provide a more equitable position between the tenderers.</p> <p>Where the contractor is involved in the project from an early stage through early contractor involvement, this facilitates contractor-led resolution of issues. The CIF is aware that difficulties for design teams are resulting in problems with design that could be more easily rectified by having a contractor involved in the process from an early stage.</p> <p>In general, CIF considers that it should be possible for employers to set out which aspects of the background information tenderers can rely on and identify any aspects where information is not fully robust and the risk lies with the contractor. This would make the employer's contract compilers understand the risks more fully and allow tenderers to assess the risks more reliably.</p>

Clause	Consequence
<p><b>Clause 5.4 Subcontractors and specialists</b></p> <p>Provisions of clause</p> <p>The issue</p> <p>Proposed solution</p>	<p>This clause makes provisions for the possible employment of subcontractors and specialists. Amongst other things it allows employers to name specialists in the contract who must be engaged by the contractor.</p> <p>There is widespread dissatisfaction and concern in all sectors of the industry regarding the selection and procurement of specialist contractors.</p> <p>The CIF believes that where the employer wishes to be involved in the selection of specialists that the contract should provide that the contracting authority may hold a separate competition for the procurement of specialist works .</p> <p>The successful specialist should be appointed by the contracting authority following negotiation of the tender competition. A novation process would then be used to complete the appointment of the specialist to the known contractor using unamended standard forms of contract agreed by the industry. Either party would reserve the right to make reasonable objection against the other party and to accept/withdraw from the competition following identification of the successful specialist/contractor for the works.</p>
<p><b>Clause 8.1 Standards of workmanship and work items</b></p> <p>Provisions of clause</p> <p>The issue</p> <p>Proposed solution</p>	<p>This clause places a fitness for purpose obligation on the contractor in relation to materials and goods, and also any items designed by the contractor must be fit for their intended purpose in the works.</p> <p>CIF considers this requirement to be unreasonable and unfair. It is inconsistent with Government design contracts and it is not a standard for which contractors can obtain insurance [confirmed by Tony Gill, First Ireland – in fact many PI insurance policies disclaim contractual liabilities]. It is a higher standard than the reasonable skill and care required of design professionals and no explanation has been provided as to why a similar standard should not also apply to contractors.</p> <p>In reality it would be difficult for an employer to pursue a claim based on fitness for purpose because fitness of purpose is linked to the standards and specifications set out by the employer. If a design or a product meets the required standards then it could be considered to be fit for the intended purpose. Claims brought against contractors under this clause would inevitably be strongly contested if a contractor could not obtain insurance. It would not be in either party's best interests for there to be costly legal proceedings arising from a clause which is clearly unreasonable.</p> <p>The clause should be revised to reduce the required standard to that applied to design professionals which is to use reasonable skill and care in designing projects to the employer's requirements. This would provide employers with the additional benefit of allowing the risk to be insured by contractors.</p>
<p><b>Clause 10.7 Delay cost</b></p> <p>Provisions of clause</p> <p>The issue</p>	<p>This clause covers delay costs and 10.7.4 sets out that amongst other things the employer shall have no liability for any losses or expenses arising from delays caused by the employer or others, or by acceleration required by the employer.</p> <p>Sub-clause 10.7.4 is high risk to the contractor and is outside of his control. CIF considers it to be an unreasonable and unmanageable risk. Contractors would have to include a high premium for this risk and could be very exposed if inadequate provision is made. It is not a sustainable position for the industry over an extended period of time which is not in the best interests of any of the parties.</p> <p>In practice the contractor will be responsible for liaising with some other parties in order to progress the works and it is reasonable that they would not be entitled to compensation if they do not manage those obligations successfully. There will also be other parties who need to take actions or give approvals in order for the works to progress and in developing their prices tenderers have to assume that those obligations will be fulfilled. It may well be that the employer also has a role in supporting those liaison and approval requirements.</p>

Clause	Consequence
Proposed solution	<p>CIF considers that the best and fairest solution to this issue would be to delete sub-clause 10.7.4. Failing that, CIF considers that employers would get better value tenders by revising the clause so that the contractor would get compensation for losses due to delay outside his control but no compensation for losses where he is responsible for ensuring that others support the works programme. This would then become a more manageable risk.</p> <p>It is particularly inequitable that the employer could require acceleration without paying appropriate compensation. This specific concern could be addressed by including acceleration requirements as a compensation event.</p>

**Conditions of contract – common risks experienced by failings in the management of the contract**

The success of a contract will normally rely on the employer performing its role and fulfilling its obligations effectively and promptly in accordance with the provisions of the contract. The CIF review has identified a number of areas where it is considered that employers are not delivering their obligations fully in accordance with the contract. Contract clauses requiring the employer to perform duties in a reasonable and/or cooperative manner which may have unreasonable consequences if not fulfilled are set out in the table below.

Clause	Consequence
<p><b>Clause 4.1 Cooperation</b></p> <p>Provisions of the clause</p> <p>The Issue</p> <p>Proposed solution</p>	<p>This clause requires the employer and the contractor to support reciprocal cooperation for the contract purposes including co-operation with and between contractors' personnel and employer's personnel.</p> <p>CIF fully supports cooperative or collaborative working and considers that it is an approach that should deliver benefits to both parties where full cooperation can be achieved. CIF recognises that cooperative working does not relieve either party of their obligations under the contract. CIF considers it important however, to set out the intent of the employer that a cooperative culture should be applied to the management and delivery of the contract supported by cooperative behaviours.</p> <p>The problem identified by CIF is that there are few contracts where fully collaborative working has been achieved and in many cases the employer's personnel show little evidence of being aware of this intended approach under the contract.</p> <p>Cooperation may be perceived as being difficult to measure but partnering arrangements are now common place around the world and the most successful ones are supported by performance measurement arrangements which are overseen by senior managers from the parties. Clause 4.1 should be revised to include a requirement for senior managers of both parties to meet to monitor the success of the cooperative working arrangements and to be required to agree remedial actions where necessary. This input from the leaders from each party would send a strong message to the team members and would help to maintain the cooperative approach.</p>
<p><b>Clause 4.5 Instructions</b></p> <p>Provisions of clause</p> <p>The issue</p> <p>Proposed solution</p>	<p>This clause sets out that the employer's representative (ER) may issue instructions to the contractor but does not place an obligation on the ER to do so.</p> <p>The clause provides the ER with discretion which in practice may not be exercised properly or appropriately.</p> <p>CIF considers that it is clearly in the employer's interest that when an instruction is required in order for the contract to proceed efficiently and without delay, that the ER should have an obligation to issue an instruction promptly.</p> <p>In order to ensure that an ER does not use discretion as a reason for delaying an instruction it would be better to revise the clause accordingly and to set out the required timescale in clause 4.11.</p>

Clause	Consequence
<p><b>Clause 4.7 Contractor submissions</b></p> <p>Provisions of clause</p> <p>The issue</p> <p>Proposed solution</p>	<p>This clause sets out the procedure for the submission and assessment of contractor's documents or proposed courses of actions. It provides an objection period for the ER of 10 working from when he has received enough information to make a purposeful review. It also makes provision for the ER to request additional information.</p> <p>It is vital for the efficient progress of the work that the contractor can rely on the contractual provisions for responses in programming and delivering the works. CIF's review has shown that ERs are often taking longer to process approvals than provided for in the contract.</p> <p>One of the contributory factors to delays appears to be that the provision for the ER to request additional information is often abused. In practice it is often used as an excuse by ERs for not taking prompt decisions and they may ask for unnecessary information as a way of giving them more time. This type of inappropriate action inevitably creates considerable inefficiency and it is clearly not in accordance with the aim of cooperative working set out in clause 4.1.</p> <p>CIF considers that the ER's entitlement to ask for more information should be restricted to only that which is reasonable and essential for the purposes of taking a decision on the proposal. It would also be desirable to cross-refer to clause 4.1 to make it clear that the ER should use reasonable endeavors to progress the processing of the submission as quickly as possible within the permitted timescale. It would also be desirable for the process to make provision for the contractor to call a meeting of the parties to discuss the submission and seek to agree any issues that need further consideration.</p>
<p><b>Clause 4.11 Time for employer's obligations</b></p> <p>Provisions of clause</p> <p>The issue</p> <p>Proposed solution</p>	<p>This clause sets out the obligations for giving notice and for the ER to take necessary actions. It imposes an obligation on the contractor to give the ER at least 10 working days' notice of the date by which the ER is required to give an instruction or give anything else required under the contract. The clause also sets out four possible ways for establishing the latest date by which the ER must meet his obligations.</p> <p>CIF considers that the provision for 10 working days' notice is too long and acts as an unnecessary constraint on the efficient progress of the works. There are regularly opportunities on complex building or construction contracts to find more efficient ways of delivering contract requirements but this clause can present a barrier to achieving those efficiencies.</p> <p>CIF considers that the wording of the clause does not support cooperative working and is therefore, in conflict with clause 4.1. CIF's review has indicated that it is common for ER's to fail to meet obligations and this can seriously undermine relationships and the desired cooperative working culture. There is no set timeframe within which the ER must give information to the contractor.</p> <p>CIF considers that the contract provisions for four options for determining the latest response date is unnecessarily complex and inefficient. CIF is of the view that this encourages ER's to focus on leaving things to the last minute rather than encouraging earlier responses which would support more efficient programming and working. Any information to be given to the contractor by the ER should be so given immediately or at the earliest possible time.</p> <p>CIF considers that sub-clauses (1) and (4) should be deleted from sub-clause 4.11.2 as these are unnecessary options. The cooperative working arrangements should also include arrangements for regular meetings to review and agree forthcoming requirements based on the programme.</p>

Clause	Consequence
<p><b>Clause 5.3 Pay and conditions of employment</b></p> <p>Provisions of clause</p> <p>The issue</p> <p>Proposed solution</p>	<p>This clause sets out the contractor’s obligations for ensuring that minimum pay and conditions of employment are achieved during the delivery of the contract.</p> <p>It is clear to CIF that minimum pay obligations are not always being met in practice and employers are not making appropriate checks to monitor the position. Failure to meet these obligations provides a clear unfair advantage to the contractor over tenderers who would have met the obligations.</p> <p>Combining the minimum pay obligations obligation with the approach to award contracts on the basis of lowest price can result in some tenderers taking a risk and hoping that they can avoid meeting these obligations.</p> <p>In order to discourage the approach of the attempted avoidance of meeting obligations as to minimum pay and to ensure that these obligations are delivered, the employer should be obliged to monitor the contractor’s performance. The contractor should be required to submit regular reports and provide the employer with access to all records.</p> <p>To support this clause 5.3.5 should be strengthened to place an obligation on the ER to seek information for the purposes of ensuring that obligations are fulfilled rather than the current discretionary provisions.</p>
<p><b>Clause 5.5 Collateral warranties</b></p> <p>Provisions of clause</p> <p>The issue</p> <p>Proposed solution</p>	<p>This clause sets out provisions for any collateral warranties to be put in place. It includes provision for the contractor to give the employer a collateral warranty from any specialist before the date stated in the schedule.</p> <p>CIF has identified that in practice problems are being encountered where some employers require a collateral warranty to be in place in advance of the contract. It is difficult to understand why this would be required and would appear to be meaningless if the main contract is not in place. There are no envisaged risk circumstances where a collateral warranty would be of any benefit to the employer in advance of the contract.</p> <p>If the intention of employers is to ensure that the warranty is in place at the start of the contract then this can be achieved through the contract execution arrangements. This may not however, be sufficient to prevent an employer seeking to obtain a warranty in advance of the contract and so the clause should be revised to state that a collateral warranty, where required, should be in place before the first payment becomes due to the subcontractor.</p>
<p><b>Clause 10.4 Proposed instructions</b></p> <p>Provisions of clause</p> <p>The issue</p> <p>Proposed solution</p>	<p>This clause makes provision for the ER to require the contractor to submit proposals for a proposed instruction.</p> <p>CIF considers this to be beneficial in principle by allowing proposals to be properly considered before decisions are taken. CIF members have suffered experiences however, of incurring substantial costs in developing proposals which are not taken forward and there is no provision for the contractor’s costs to be reimbursed. In such circumstances there is a clear risk that some ERs may be tempted to ask the contractor to review options which are very unlikely to be taken forward.</p> <p>CIF consider it would be more equitable for there to be provision for the contractor’s demonstrable costs to be reimbursed when the proposal is not implemented by the ER and the clause should be revised accordingly. If the proposal is taken forward it should be stated that the preparation costs are covered by the implementation costs. This would help ensure that ERs act appropriately in exercising the provisions of this clause.</p>

Clause	Consequence
<p><b>Clause 10.5 ER's determination</b></p> <p>Provisions of clause</p> <p>The issue</p> <p>Proposed solution</p>	<p>This clause sets out the provisions in relation to the ER's response to claims or proposals made under clauses 10.3 and 10.4. It includes the provision that if the ER fails to take any action within the time stated that it will be deemed that the contractor has no entitlement to compensation or extension of time.</p> <p>CIF considers the provisions of this clause to be entirely unfair and unreasonable and is likely to have the effect of incentivising the ER not to take any action. It is clearly not in accordance with the aim of cooperation set out in clause 4.1.</p> <p>The clause should be revised so that the ER is required and incentivised to manage the contract in a fair and efficient manner and to take the necessary action within the timescale. This would be best achieved by revising sub-clause 10.5.3 so that failure by the ER to take action results in an entitlement to the contractor to an adjustment to the contract sum, programme contingency and an extension of time.</p>
<p><b>Clause 10.9 Employer's claims</b></p> <p>Provisions of clause</p> <p>The issue</p> <p>Proposed solution</p>	<p>This clause sets out provisions for employers to make claims to reduce the contract sum.</p> <p>In principle CIF considers the clause to be reasonable and appropriate. It does consider however, that the detailed provisions are inequitable because the same notice periods that the contractor has to give for contractor's claims are not applied in this clause to employer's claims. This is another example of where the detailed procedures are inconsistent and are not aligned with the intended cooperative nature of the contract set out in clause 4.1.</p> <p>The notice periods for employer's claims should be revised to be consistent with those applicable to contractor's claims.</p>
<p><b>Clause 11.6 Time for payment</b></p> <p>Provisions of clause</p> <p>The issue</p> <p>Proposed solution</p>	<p>This clause sets out the time for the employer to make payments and makes provision for payment within 30 days, and sets out the provisions for the payment of interest on late payments.</p> <p>CIF members report that the record for payment on time by employers is not good. Late payment clearly has a financial cost to the contractor and can cause substantial cash flow problems to smaller companies down the supply chain. Cash flow problems are the most common cause of companies going bust and this is considered to be unacceptable where it may be caused by public sector employers failing to make payments on time.</p> <p>Whilst the contract makes provision for interest to be added to compensate for late payment CIF members have found that employers are very reluctant to pay interest and they normally seek to negotiate out of this obligation. This puts contractors under unfair pressure.</p> <p>The Government should take the lead in ensuring fair and prompt payment and employers should be obliged to pay interest in accordance with the contract provisions. If they are not going to do this the tenderers should be told so that they can make allowance in their tender prices. It would be preferable however, to strengthen the wording of the clause to state that interest must always be payable on late payment.</p> <p>There has been a major initiative to improve prompt payment on construction contracts in the UK and performance in relation to prompt payment has improved considerably. Project bank accounts were introduced in the UK in 2006 and are becoming more prevalent. It is considered that in Ireland the government should do more to monitor the prompt payment performance of public sector employers and should publish the results.</p>

**Conditions of contract – other unreasonable contract provisions with potential undesirable effects**

The CIF review has identified concern about the possible consequences of certain aspects of the GCCC contracts on the adequacy of contract prices. The aspects of the contracts which influence tender proposals and pricing, with potentially undesirable consequences are set out in the table below.

Clause	Consequence
<p><b>Clause 9.3 Delays and extensions of time</b></p> <p>Provisions of the clause</p> <p>The Issue</p> <p>Proposed solution</p>	<p>This clause sets out provisions for dealing with delay and extensions of time. The cost of delay is reimbursed to the contractor on the basis of delay costs bid at tender stage.</p> <p>The problem created by this clause is the requirement to bid delay costs in advance when the circumstances are not known, combined with a focus on lowest tender price for awarding contracts. Delay thresholds are frequently excessive and the overall consequence is for delay costs to be underestimated by tenderers, who submit low rates to win contracts which do not adequately reflect the actual costs. This is another example of the encouragement of unsustainable low pricing which is not in the interests of any of the parties over an extended period of time.</p> <p>The position would be better if tender documents were normally of high quality, robust and not requiring significant change during the course of the contract. The GCCC has stated that the quality of tender documents will improve but in practice there is little sign of improvement. The high risk of change and subsequent delays make the current provisions and arrangements unfair and unsustainable.</p> <p>The use of inadequate rates will have undesirable consequences as the contractor seeks to recover their costs. This may be in the form of reduced quality, claims, disputes and seeking to use other opportunities to maximize their returns. These factors could clearly undermine the desired cooperative relationships.</p> <p>Employers could review delay costs proposals to ensure that they are reasonably sufficient and to consider rejecting bids in accordance with the abnormally low provisions of the procurement regulations. In practice however, the CIF recognises that this would be unlikely to have much impact.</p> <p>CIF considers that the fairest solution would be to revise the contractual provisions to allow for fair and reasonable reimbursement for delay costs based on demonstrable actual costs with incentives to minimize costs. Employers should be required to demonstrate the basis for delay, and should be able to substantiate the reasoning for it using historical data. Delay costs should be calculated on the basis of a fair formula. Further suggestions on specific solutions to this issue are detailed in Appendix E.</p>
<p><b>Clause 9.4 Programme contingency</b></p> <p>Provisions of clause</p> <p>The issue</p> <p>Proposed solution</p>	<p>This clause sets out complex provisions including thresholds and mathematical formula to define the programme contingency which is used to determine entitlement in relation to the thresholds. The contractor is required to have made allowance in their tender for the arrangements set out in the clause.</p> <p>CIF members report that this complex and unusual approach causes much confusion for tenderers. In general it is found that there is little correlation between periods specified for the first and second contingency thresholds and the actual level of delay likely on a project. The lack of reasonable and proportionate periods provided by employers suggests that employers’ personnel are also confused by the provisions.</p> <p>The aim of the clause appears to be to bring a greater degree of certainty to costs associated with delay, however the approach is likely to be inequitable as tenderers will interpret the risk in different ways and employers are likely to apply it in different ways.</p> <p>In practice, as with delay costs, tenderers are tempted by the use of lowest price tendering to ignore or make a very low provision for programme contingency which is unsustainable over an extended period of time. Again, the lack of detailed design information at tender stage makes it even more difficult for tenderers to accurately make allowance for a programme contingency.</p>

Clause	Consequence
Proposed solution	<p>CIF considers that this approach is unnecessarily complex and is not adequately understood by contractors or employers. There are other clearer ways of achieving greater price certainty which should be considered but at the very least guidance needs to be issued so that employers apply the provisions in a consistent way and tenderers can also assess the risks on a consistent basis.</p> <p>In addition, contractors should be entitled to full recovery of costs for delay after the expiry of the contingency period. Further suggestions on specific solutions to this issue are detailed in Appx. E.</p>
<p><b>Clause 10.6</b> <b>Adjustments to the contract sum</b></p>	<p>This clause provides a framework for the adjustment of the contract sum arising from a compensation event. The clause provides a number of alternative approaches to the valuation of additional, substituted and omitted work.</p>
Provisions of clause	
The issue	<p>CIF considers that the first three valuation methods are in line with common practice but the fourth is potentially unfair because it is linked back to tender rates which could be artificially low driven by the lowest price award criterion. CIF believes that there is evidence of tenderers submitting labour rates significantly below their legal and contractual obligations, and material and plant rates below actual cost. Employers appear to be accepting these rates without challenge even though they must be aware that they are not consistent with the contractual obligations for minimum levels of pay. This is unfair on tenderers who are committed to meeting their obligations.</p> <p>In practice employers should accept that they should pay a fair price for compensation events to which the contractor is entitled to compensation under the contract. This should fairly reflect the actual cost consequences of the cause of the compensation event otherwise the known problems of unsustainable pricing will impact undesirably on the delivery of the contract.</p>
Proposed solution	<p>The provisions of clause 10.6.4 are fundamentally flawed and should be deleted from the contract. The provisions of clauses 10.6.1, 10.6.2, and 10.6.3 provide the ER with sufficient options to be able to make a fair assessment of the adjustments for compensation events. Further suggestions on specific solutions to this issue are detailed in Appendix E.</p>
<p><b>Clause 11.3</b> <b>Retention</b></p>	<p>This clause makes provision for the employer to deduct the retention percentage set out in the contract.</p>
Provisions of clause	
The issue	<p>It is reported that on occasions retention has been as high as 10% which is well above normal practice elsewhere and is a figure which CIF considers to be unjustifiable. The retention of money has a considerable impact on the contractor's and supply chain's cash flow and it is inevitable that allowance is made in tender prices for the contractor's financing requirements.</p> <p>In other countries the practice of applying retention percentages is reducing because there is little evidence to show that it helps avoid defects and there are other ways of providing protection. The contract includes provision for performance bonds, parent company guarantees and provisions for defects. Retention bonds are used by others as an option to retention money.</p>
Proposed solution	<p>If retention is to be used then it would be desirable for employers to adopt a standard and reasonable percentage, and should ensure that it is released promptly when requirements have been fulfilled. It would also be sensible to do a value for money review to see if a better value approach could be adopted to achieve efficiencies.</p>
<p><b>Clauses 12.5 &amp; 12.6</b> <b>Termination at the employer's election</b></p>	<p>These clauses make provision for the employer to terminate the contract.</p>
Provisions of clause	
The issue	<p>Termination in these circumstances is likely to be very rare but the provisions do not compensate for financial loss which is clearly unfair. It could become a significant deterrent to the appetite of contractors to bid for contracts on this basis.</p>
Proposed solution	<p>The reasonableness of the provisions should be reviewed.</p>

Furthermore, the CIF has identified the risks arising in the area of heritage contracting as being unique to that specific sector and requiring separate consideration.

#### Procurement strategy best practice issues

CIF considers that the primary aim of procurement strategies should be to promote collaboration and cooperation between all of the parties responsible for project delivery. This approach is very much in line with what is recognised as best practice in many other countries. It is widely recognized that maximum benefits of collaboration are achieved where the parties are brought together in integrated delivery teams as early as possible in the development of a project. The potential benefits of early contractor involvement (ECI) include:

- Better value solutions;
- Improved buildability;
- More scope for innovation;
- Better H&S planning & risk management;
- Better cost estimating & budgeting;
- Better resource planning; and
- Greater certainty of outcomes.

The use of lowest price tenders as the basis of the award of contracts has a range of undesirable outcomes. It is generally used by clients in the belief that combined with maximum risk transfer it will achieve certainty of price and provide best value. It is widely recognized that this approach is not the best way of developing optimal solutions and the use of integrated teams working collaboratively and appointed on the basis of most economically advantageous offers is a better way of delivering a clients objectives. Problems of lowest price tendering include:

- Tenderers submitting unrealistically and unsustainably low prices to win contracts;
- Tenders not reflecting outturn prices;
- Claims culture / confrontational relationships;
- Quality of work or services threatened;
- Design solutions are not best value; and
- Reduced competition.

Developing strong competition is an important consideration in a procurement strategy. It should be important for a client to want the best contractors and their best teams wanting to win contracts. Where a client has a strong pool of contractors wanting to win work they will not only provide good competition on price but will also drive up the standard of service delivery and performance particularly where a client has a long-term programme of work. Contractors will not be so willing to work for a client over a long-term programme where they are not treated fairly and they are unable to make a fair and reasonable return on contracts where they have delivered the requirements. It is important that a client seeks to develop their reputation so that they can attract strong and healthy competition and this has additional benefits in the value of the client and their investments being more widely recognised.

It is also important that a client understands its own capabilities and the skills they need in order to manage contracts effectively to help deliver successful contract outcomes. The delivery of contracts can be undermined by poor contract management which does not recognise the need to perform duties and obligations promptly and the benefits of dealing with contract issues and claims in a fair and reasonable manner. The CIF review has highlighted a number of issues in this respect and it is important that clients understand the consequences and inefficiencies associated with poor contract management.

CIF considers that a review of best practice procurement elsewhere should be undertaken to identify options which could be piloted in Ireland to demonstrate the potential benefits.

#### Way forward

CIF would be pleased to be part of a working group to discuss how best to improve the GCCC forms of contract to address the issues set out above and to allow the Government to achieve the identified benefits including better sustainable value for money.

CIF would also be pleased to support the development and implementation of opportunities for pilots of best practice identified elsewhere to assess whether they may deliver improved value for money and enhanced outcomes in Ireland.

## Appendix A – Prequalification

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While it is accepted that the review currently taking place has the forms of contract introduced in 2007 as its main focus, the CIF believes that given the difficulty in separating the procurement process from the contract itself, it will not be possible to carry out a meaningful review of the contract without consideration of aspects of the procurement system. The CIF seeks to identify elements of procurement which cause unnecessary difficulty to contractors and to suggest changes designed to ensure that, to the greatest possible extent, fair and open competition will prevail.

Comments on the prequalification system and suggestions for change:

To enhance the likelihood of the most competent PQQ contractors coming through the prequalification system through the use of more straightforward PQQ processes, the recommended changes include:

- Similar projects time frame 7-10 years;
- Past performance (rather than experience) preferable with points for performance on technical, safety and contractual issues,
- Marks should be given for certified quality and environmental management systems,
- Safety systems should be given a graded marking system

The current system of pre-qualification does not provide adequate due diligence to ascertain whether or not tendering parties have the financial capacity to deliver a project with the required cash-flow. This lack of due diligence has resulted in costs to the State as a result of company failures mid-project. Self declaration at pre-qualification stage is too loose and is ineffective as a measurable outcome in the process. The CIF view is that any assessment of financial capacity should be carried out by a competent party.

A standardised format for prequalification should be developed to permit a once or bi-annual application process for the verification of audited or authenticated documentation. Parties should be permitted to upload data onto the database thus streamlining the application process. The data should be held at the tendering party's risk of validity and should only be accessible when a tenderer expresses an interest and applies to pre-qualify for a project. CIF understands from discussion with Tom O'Brien of eTenders that the intention is for all pre-qualification to be online by 2016, using this type of process whereby information is uploaded to the site and accessible by procuring authorities once a submission has been completed

With respect to specialist works, the selection criteria should include for a loading mechanism to encourage applicants with direct employees. This mechanism should incentivise compliant contractors and enhance recruitment, training and the long term health of our apprenticeship system.

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## Appendix B – Selection of specialists

There is widespread dissatisfaction and concern in all sectors of the industry regarding the selection and procurement of specialist contractors.

The CIF believes that where the employer wishes to be involved in the selection of specialists that the contract should provide that the contracting authority may hold a separate competition for the procurement of specialist works.

The primary issues related to the procurement of specialist works are:

- 1. the method of selection and appointment**
- 2. contractual risk**
- 3. the need for standardised conditions of sub-contract on public works contracts**

### 1 The method of selection and appointment

The CIF believes that where the employer wishes to be involved in the selection of specialists that the contract should provide that the contracting authority may hold a separate competition for the procurement of specialist works.

The successful specialist should be appointed by the contracting authority following negotiation of the primary works tender competition. A novation process would then be used to complete the appointment of the specialist to the known contractor using unamended standard forms of contract agreed by the industry. Either party would reserve the right to make reasonable objection against the other party and to accept/withdraw from the competition following identification of the successful specialist/contractor for the works

The contracting authority ultimately pay for both the specialist works designer and the specialist works contractor's work. CIF believe that the client should ensure at pre-contract stage that all parties have a clear understanding of what is required by the client and that the award will be based on that.

There are extensive problems with the existing approach. There does not appear to be a cohesive policy to determine the method of selection for specialist works and individual contracting authorities appear to be developing their own method of selection and appointment. This leads to difficulty with both main and specialist contractors. There is no standardised appointment process or standardised form of contract where a client has chosen and appointed (or indicated the intention to award a contract to) a specialist contractor. The process should be regularised where a client wishes to identify and award a specialist works package.

The use of the naming provisions only serve to confuse matters. Competition law demands that a main contractor can put forward an alternative candidate for a specialist works packages. This can effectively eradicate any perceived benefit from a parallel client run competition to establish a shortlist of names for a specialist works package. Such naming processes have simply led to dissatisfaction within specialist contractors and effectively limited participation in public sector competitions. If the client wishes to select part of the contracting team based on their particular objectives then that should be a complete competition and not a half way house.

### 2 Contractual risk

In previous models where a client chose to have an interest in the selection of specialist works contractors there was an opportunity for both parties (main contractor and specialist works contractor) to examine their position in advance of contractual agreement.

The absence of this process prevents both parties having a clear, pre-contract understanding of what the clients brief is and what the contract performance requirements are. Reintroducing a pre-contract clarification meeting, for both main and specialist works contractors, would permit both parties to be clear on client expectations and perhaps prevent early change orders at post-contract stage and an adversarial approach, due to such late clarification.

Both parties need full visibility on who they are contracting with.

Both the main contractor and the specialist works contractor should have a right to reasonably object to forming a contract with the other. A timeframe for this process should be set.

Traditionally conditions of contract provided "in-trust" clauses to provide protection for the entire supply chain. Project Bank Accounts deliver the required security for the supply chain by ring fencing funds in a separate trust account and providing direct payment to appropriate tiers of the supply chain. They also establish a regime of prompt payment for procuring authorities which should benefit the entire contracting industry.

### 3 The need for standardised conditions of sub-contract on public works contracts

Direct selection and novation as a means of appointment has been relatively limited since the introduction of the PWC form of contract in 2007. CIF have developed a form of contract (2008 Named-Novated) for use with the PWC-CF1 where a contracting authority has chosen to name or novate a specialist works contractor.

A standard novation agreement exists under the PWC framework. In previous competitions where the novation process has been introduced into a competition, client advisors have also introduced a schedule of amendments to be read in conjunction with the PW-CF1 form. These amendments are not capable of being interpreted without judicial review.

The novation agreement should be straightforward and for the purpose it is intended. A standard form of contract for use post-award and following novation already exists. It is the N-N form referred to above which the industry has agreed and developed.

The GCCC have clearly stated that they wish to encourage positive working relationships and establish plain english pro-forma documentation that lend themselves to accessible interpretation and better working relationships. As such it would be advisable to have a standard format for the novation agreement and the post-novation contract that is unambiguous. They do not need to be redrafted every time a different contracting authority decides on a particular procurement path.

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## Appendix C – Better qualitative assessment & whole life cycle costs

The CIF believes that a number of changes could be made to the manner in which tenders are assessed that would give rise to better value for money for the Government in public projects, and better quality in the carrying out of those projects. There are two elements to this:

### 1 Better qualitative assessment

CIF is concerned that insofar as qualitative assessment is used, the industry does not have confidence that it is a real exercise. Tenderers are required to provide large volumes of detailed information for qualitative assessments, the scores of which are unlikely to have an impact on the tender competition. CIF believes that where information of this nature is sought, it should be a real exercise which has an influence on the tender competition. The proper use of qualitative assessment should be encouraged.

Examples of where qualitative assessment serves a real purpose can be found, for example in a recent project for Cluid Housing where the price only accounted for 40% of the marks, with 60% for quality. The items assessed under the heading of quality included programme management, quality management, site establishment, logistics and methodology, proposed resources allocation, project and cost management and technical solution. Each of these items had clearly set out criteria and marks to enable tenderers to focus on each issue as appropriate.

CIF is also concerned that it is not possible for tenderers to offer alternative designs or products that may be more cost effective in the completion of a project. Tenderers are prohibited from qualifying their tenders in any way, for example by stating that their price would reduce by X amount if they could do/use Y. Such a facility if provided would enable contractors to suggest more economic alternatives to employers under the GCCC forms of contract.

### 2 Whole life cycle costs

The assessment of whole life cycle costs is provided for in the capital works management framework in guidance note 2.2 on planning and control of capital costs, which states:

*Whole life costs are an important consideration throughout the design process, and should be integrated at each stage in cost plan development:*

- In the outline cost plan – at outline sketch scheme / preliminary planning
- In the developed cost plan / outline cost plan (revised) – at developed sketch scheme / preliminary planning; and
- In the pre-tender cost check.

An in depth guide to life cycle costing has been published by the Society of Chartered Surveyors Ireland, which explains whole life cycle costing as being:

*“An economic evaluation in which all costs arising from owning, operating and maintaining a building over a certain study period or building life cycle are considered to be potentially important in option appraisal, design decisions, and cashflow forecasting.”*

The report goes on to state that:

*“Projects where the design team solely focus on reducing capital costs can lead to a building which is expensive to maintain, operate, occupy and eventually dispose of.”*

Given that the process of whole life cycle costing is already provided for in the capital works management framework and the potential for savings over the lifetime of a building, it is difficult to see why this is not used more widely.

## Appendix D – Alternative forms of contract

The CIF has two issues with regards to alternative forms of contract. Firstly, the potential for the use of internationally recognised forms of contract in Ireland. Secondly, the need for a separate form of contract for use on heritage works.

With regards to the use of internationally recognised forms of contract, the CIF recommends that a number of pilot schemes be carried out using these alternative forms. This recommendation is on the basis of the importance of collaboration and the limited nature of collaboration in the Government forms of contract as compared to other forms. Furthermore, technological advancements in the industry including the introduction of building information modelling and the potential move towards the use of lean construction principles will necessitate the use of other forms of contract where the current GCCC suite is not appropriate.

It is also noted that the European Commission's strategy for the construction sector and its enterprises focuses on five key objectives, including strengthening the internal market for construction. As part of this objective the commission has highlighted the need to have a clear and predictable legal framework and proportionate administrative costs. A review of regulations and administrative provisions is hoped to assist with the convergence of different regulatory approaches across the EU. The use of a standard internationally recognised form of contract in Ireland would be beneficial in this aim.

### 1 Use of internationally recognised contracts

#### NEC3

The NEC3 suite of contracts were considered in the development of the GCCC forms of contract and as such are the closest to what the Irish industry is currently using. The PWC1 form has been likened to the NEC3 Option A form, and the PWC5 form has been likened to the NEC3 Option B form however there are a wide range of options available under NEC3 which are not currently part of the PWC suite.

NEC3 has always been a forward thinking contract. Its collaborative, straightforward approach has won praise and support from across the spectrum of public and private sectors. It has also resulted in well documented time and money savings on some of the biggest projects around the world.

NEC3 is possibly the only form of contract to offer an integrated and complete procurement package, whether you are involved in works, services, supply or a mixture of the three.

In the UK the Construction Clients Board [formerly the Public Sector Clients Forum] recommends that public sector organisations use the NEC3 contracts when procuring construction.

The main forms of NEC3 contracts are listed below and give the procurer a tailor made solution to the various types of procurement and contract they wish to employ.

- 1 NEC3 Engineering and Construction Contract [ECC]
- 2 NEC3 Option A [Priced Contract with activity schedule]
- 3 NEC3 Option B [Priced Contract with BOQ]
- 4 NEC3 Option C [Target Contract with activity schedule]
- 5 NEC3 Option D [Target Contract with BOQ]
- 6 NEC3 Option E [Cost Reimbursable Contract]
- 7 NEC3 Option F [Management Contract]
- 8 NEC3 Subcontract
- 9 NEC3 Short Contract
- 10 NEC3 Short Subcontract
- 11 NEC3 Framework Contract

Furthermore there is an appetite for the use of NEC3 contracts as evidenced by the recent advertisement for an NEC3 contract advisor on the Luas cross city works. In addition, it is worth noting that the vast majority of public sector works in Northern Ireland (all save health estates projects) are procured on NEC3 forms of contract.

#### JCT

JCT has always been a forward thinking contract. Its collaborative, straightforward approach has won praise and support from across the spectrum of public and private sectors. It has also resulted in well documented time and money savings on some of the biggest projects around the world.

JCT is possibly the only form of contract to offer an integrated and complete procurement package, whether you are involved in works, services, supply or a mixture of the three.

This form of contract is extensively used in public sector contracting in the UK

The main forms of JCT contracts are listed opposite and give the procurer a tailor made solution to the various types of procurement and contract they wish to employ. There are also a number of other more specific forms of documentation available under the JCT suite.

- 1 JCT Design & Build 2011
- 2 JCT Intermediate Building Contract 2011
- 3 JCT Intermediate Building Contract with Contractors Design 2011
- 4 JCT Minor Works Building Contract 2011
- 5 JCT Minor Works Building Contract with Contractors Design 2011
- 6 JCT Standard Building Contract with Quantities 2011
- 7 JCT Standard Building Contract With Approximate Quantities 2011
- 8 JCT Standard Building Contract Without Quantities 2011
- 9 JCT Construction Excellence Contract 2011
- 10 JCT Construction Management Trade Contract 2011
- 11 JCT Sub-Contract 2011
- 12 JCT Short Form of Sub-Contract
- 13 JCT Major Project Construction Contract 2011
- 14 JCT Major Project Construction Sub-Contract
- 15 JCT Prime Cost Building Contract 2011
- 16 JCT Tendering Practice Note 2012

### **FIDIC**

The FIDIC forms of contract have long been renowned for use between employers and contractors on international construction projects, with the following suite of contracts:

- Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer: The Construction Contract
- Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (MDB Harmonised Edition) - for bank financed projects only: The MDB Construction Contract
- Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant and for Building and Engineering Works Designed by the Contractor: The Plant and Design-Build Contract
- Conditions of Contract for EPC/Turnkey Projects: The EPC/Turnkey Contract
- Short Form of Contract: The Short Form
- Dredgers Contract (based on the Short Form of Contract): Dredgers Contract - See more at: <http://fidic.org/node/149#sthash.18EKGQ30.dpuf>

It is not unusual for projects for the design, build and operation of water treatment plants to use FIDIC forms of contract.

Given the fact that Ireland is subject to the EU procurement directives and is part of the EU market, with many contractors operating across the EU, it is logical to consider the use of an accepted international contract in this jurisdiction.

### **2 Separate form of contract for heritage works**

The use of the GCCC forms of contract in the public procurement of heritage (conservation and restoration) works fails to recognise the level of skills needed and the sensitivities involved in such projects by comparison to greenfield development or capital infrastructure projects.

All stakeholders working within the conservation fraternity agree that the current GCCC forms of construction contract are ill-suited to heritage projects. The principal concerns and current difficulties experienced within the heritage contracting sector began immediately following the introduction of the GCCC forms of contract in 2007. Their introduction aimed to reform public procurement and fix problems which had never actually existed in heritage contracting to begin with.

At present public expenditure on construction works for heritage projects is subject to the same constraints as expenditure for works on a greenfield site. Rather than a dedicated contract for heritage projects the procurement system has adopted a two-contract heritage strategy.

The strategy involves the use of two public works contracts: an investigation contract to inform the design and tender documentation prior to tendering the main works package using an employer-designed fixed price lump sum contract. This strategy was introduced with the objective of achieving greater cost certainty at the tender stage. The GCCC forms of contract approach to heritage projects results in a separation of the design from the construction function. Heritage contractors, who are conservation experts, are largely excluded from the design process with the result that more innovative, reserved or sustainable solutions may be overlooked. The strategy results in a loss of continuity (and therefore knowledge of the building on both the part of the contractor and professionals) between investigative contract and main contract as the client is obliged to tender again. Ironically this loss comes at a cost: the money and time involved in engaging in two tender processes.

Heritage contractors appreciate that public bodies are concerned with issues such as value for money, greater cost certainty at tender stage and more efficient delivery of projects. However, to ensure greater cost certainty at tender stage is achieved on heritage projects, which by their nature involve working with existing structures where the type and quantum of work is difficult to define

in advance, it is recommended that the GCCC review and replace the current 'heritage contract strategy' with a solution that is specifically designed to cater for the unique characteristics and sensitivities of heritage projects.

#### THE PROBLEMS

- i) The risk transfer to the contractor using the current GCCC forms of contract is too onerous for heritage (conservation and restoration) projects and does deter competent heritage contractors from tendering.
- ii) The cost involved in preparing the voluminous tender documentation is onerous on small scale contractors and specialists; if these skilled contractors cannot afford to tender the advantage is given to large commercial operators, some of whom may not have the necessary level of specialist traditional building skills in-house.
- iii) Successful, good value heritage projects are by nature achieved collaboratively and are dependent on good client, contractor and professional relations, which is not engendered through the GCCC forms of contract.
- iv) The use of provisional sums to cover unforeseen issues that arise on practically all heritage projects is excluded from the GCCC forms of contract. Claims for alterations and variations can typically mount up in projects dealing with existing buildings, especially heritage projects, increasing the final project costs (when the aim of the GCCC forms of contract was certainly concerned with determining the final cost of all projects in advance).
- v) The current GCCC forms of contract prevent any discussion taking place with contractors following receipt of tender. The client and the professional team should be in a position to sit down with the contractor and review the specifications, methodologies, etc., which would in turn help to ensure better quality outcomes and respect for the authenticity and integrity of historic buildings at less cost.
- vi) The current GCCC forms of contract have resulted in a more adversarial and rigid working environment for the heritage contractor, the professionals and the client; which was never the case prior to their introduction in 2007. Successful heritage projects are by their very nature highly collaborative and require careful research and preparation for conservation works; an understanding of the value of materials being conserved; an understanding of the conservation principle of minimum intervention; competence in the technical execution of works; a capacity to collaborate to devise appropriate works, capacity to collaborate with relevant specialist heritage sub-contractors; capacity to accept or propose changes of methodology required to minimise intervention due to unanticipated site conditions and capacity to do things more than one way.

#### THE EXAMPLES

- i) Risk transfer: Due to the nature of heritage projects it is impossible to investigate, design and specify all works that will be required by the completion stage. For example, unlike greenfield site development heritage projects involve existing structures which can result in the discovery of issues that have remained hidden and will only come to light once opened up. Such issues can include: defective timbers in walls, defective structural support timbers, issues in the ground condition or the discovery of archaeological evidence. At present all these risks are transferred to the contractor and the cost of covering them is often prohibitive. For example, the current situation might not encourage contractors upon finding unknown archaeological remains to advise the architect or the client.
- ii) Specialist works form a significant part of heritage projects. Under the older forms of contract the client had a much greater say in the specialist sub contractors or materials to be used on site. This gave the client more control over quality. It also facilitated discussions with winning or selected specialist sub contractors to commence early on or even before the contract was awarded, which in turn helped to ensure that quality materials or craft persons were available to complete the actual works.
- iii) The purpose of investigation contracts is to obtain sufficient information to allow comprehensive designs and specifications be developed and competitively priced so as to ensure greater cost certainty for main works at contract award stage. However, in practice due to the nature of heritage projects, differing views of the amount of work and quality of work can be taken by various tendering contractors. For example, one contractor might assume that 40 square metres of plaster has to be repaired, while a more experienced and competent contractor will know that closer to 100 square metres of plaster needs to be repaired. This additional costing may put the more experienced contractor immediately out of the contest. A competent heritage contractor will also be better able to advise the client on additional strengthening methods or the reuse of proposed demolition materials which otherwise could be overlooked. A solution to this issue is to allow for the inclusion of a bill of quantities in the contract so that all tendering contractors price the same amount of

works, which would give the client a better opportunity for selecting the most competent contractor for the project. The GCCC forms of contract typically only provide for a pricing document to enable the client to prescribe to prospective tenderers the way in which they should break down their tendered lump-sum price and to provide details of other tender cost information, but this is not adequate enough for heritage projects.

- iv) Nearly all heritage projects entail any number of unforeseen additional works to be completed during the project works. Investigations are limited and are works that are carried out in advance of permanent works to identify and quantify potential risks that are concealed. While the intention may be to develop comprehensive design information before the contractor for the construction stage is appointed, it is impossible to know the full heritage implications of the project. One of the reasons is that it is impossible to open every area on site for inspection prior to tendering as this is not only cost prohibitive but could also put the building or structure out of commission. Provisional sums, formerly used in public works contracts, are no longer permitted. A provisional sum was a sum provided for work or for costs that could not be entirely foreseen, defined or detailed, as a result of incomplete design by the client at the time the tender invitation was issued. It is recommended that the professional have some provisional sum in place for contingencies. It would result in better cost projection from the start and would prevent overruns which in turn can cost the client's professional team. The GCCC should bear in mind that presently it is generally agreed that there is over-specification of projects to take into account the worst case scenario, which increases the project cost. If the worst case scenario does not come to pass the client does not benefit from a cost reduction. Inclusion of a bill of quantities would lessen the likelihood of this happening.
- v) Efforts to reduce costs can lead to product substitution and unless the contractor has a collaborative relationship with the specifier (which is difficult using the GCCC forms of contract), product substitution (such as substituting expensive but durable roofing materials) can be detrimental to the performance of the building in the medium to long term.

#### THE SOLUTIONS

- i) Develop a new contract for heritage works (conservation and restoration) that does not have the same level of risk transfer to contractors.
- ii) Encourage discussions with tendering contractors post design development stage in order to achieve best value for the works before contract is awarded.
- iii) Due to the unique nature of heritage projects, make a provision for the inclusion provisional sums for variations and contingencies based on the nature of the proposed works and site specific factors.
- iv) Provide a bill of quantities and client specifications to include particular suppliers/manufacturers so that contractors can price effectively and fairly at tender stage.
- v) Seek greater emphasis on assessment of quality at tender stage by changing the criteria and by reducing the ability of contractors to substitute sub-contractors and specialists from those initially specified.



## Appendix E – Method for evaluation of compensation events

CIF considers that equitable consistency in programme contingencies, delay costs quantum and calculation for compensation events would be conducive to less adversarial and more collaborative contracts. This would reduce the differential between tender and out turn costs.

The following is suggested:

- Programme contingencies: more realistic durations and relevance to contract period. Pending review of historical data when available a maximum of 5% of the contract duration is considered reasonable, to be reviewed periodically as more data becomes available.
- Comparative costs delays: delay costs can only be priced correctly by contractors to reflect the likely outturn value of the contract where the duration given for delay cost calculations in excess of the threshold is realistic and reasonable. Pending review of historical data, when available, the CIF considers a maximum of 5% reasonable. This can be reviewed as more data becomes available.
- Comparative costs labour and plant: If the quantities/amounts given do not reflect the size of the contract as is currently common in tender documents, disproportionate and inaccurate pricing will result giving rise to potential conflict during the contract.
- Compensation events: Currently evaluated under clause 10.6 of the contract. Clause 10.6.4 stipulates that the employers representative may conclusively direct that additional works be determined as per schedule. Schedule 2D (comparative cost schedule) does not reflect true costs because of the inaccuracies of the quantities to which rates are applied for comparative costs (and which are referred to above).



## Appendix F – Dispute resolution

Issues arising in relation to dispute resolution:

### 1 Costs in arbitration

Since July 2011 the standard form of tender document for use on public sector contracts includes the following wording:

*“[tenderers] agree that should a dispute arise under any contract formed by acceptance of this tender that is referred to arbitration, to the extent permitted by law, under the Arbitration Act 2010 and a sealed offer has not been made, or where a sealed offer has been made and the contractor’s award is greater than the sealed offer, then each party will bear their own costs in relation to the arbitration proceedings. If an award is equal or less than the sealed offer, the contractor is liable for the costs of both parties in relation to the arbitration proceedings.”*

This requirement means that contractors are liable for their own costs should a dispute proceed to arbitration regardless of the outcome, and may even be liable for the costs of both parties if an award made is less than or equal to any sealed offer. This breaches the requirement that conditions imposed on tenderers be proportionate and non-discriminatory, reduces access of SMEs to public procurement, and breaches the fundamental right of EU citizens of access to justice. The CIF view is that this wording should be removed and costs payable as per the arbitrator’s award.

### 2 Final Stage of dispute resolution

The question of what should be the final stage of dispute resolution for any disputes arising under the GCCC forms of contract has been raised by the Minister in the past, with an indication that the Government intends to take arbitration out of the contract and replace it with litigation.

The CIF has not yet determined its policy on this matter, however a general view has emerged that there are substantial benefits to be had from litigation in court, as the setting of precedents will enable contractors to be aware of how disputes are decided, instead of the current process of arbitration whereby all decisions are confidential.

### 3 Construction Contracts Act

The Construction Contracts Act will bring adjudication into the contracts which will need to be amended accordingly, however does this affect the requirement to refer disputes to conciliation within 28 days or lose the entitlement? Yes, this is a contractual requirement, the Construction Contracts Act applies in the absence of any contract conditions.

The Construction Contracts Act is likely to be enacted by the time that the review of the contracts is complete and as such provision will have to be made in the revised documents for the requirements of the legislation.

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## Appendix G – Experience elsewhere

The CIF believes that the Government should look to successes and achievements elsewhere in order to facilitate the development of a more appropriate form of contract for the Irish construction industry. The submission document refers to a number of areas in which experience gained elsewhere may benefit this jurisdiction as follows:

### 1 Collaboration

In the UK, two highly influential government reports on the construction industry were prepared in the 1990s, which came to be known as the Latham Report and the Egan Report. Both of these reports identified the detrimental effect on the industry of its adversarial and confrontational nature, and recommended the implementation of collaborative working practices.

The implementation of collaborative working practices in the UK has been identified subsequently by a number of organisations as resulting in benefits and improvements. For example, a report called *“The Business Case for Integrated Collaborative Working: benefits for both clients and contractors”*, was carried out by an organisation called Constructing Excellence in 2007. That report indicated that the adoption of new relationships based on the principles of the Latham and Egan reports had led to significant improvements directly benefitting clients. This report referenced statistics collated by the National Audit Office in 2005 on an analysis of government projects in that year compared with 1999, which found that collaboration had resulted in an increase in projects delivered on budget from 25% to 55%, and an increase in projects delivered on time from 34% to 63%. Further information on performance improvement in the industry is also set out in the 2009 report by the same organisation called *“Never Waste a Good Crisis: A review of Progress since Rethinking Construction and Thoughts for Our Future”*.

Other countries which have identified benefits from the adoption of collaborative approaches to construction procurement and delivery include South Africa, Australia, New Zealand and Hong Kong

### 2 Best value v. lowest price

The 2009 report carried out by Constructing Excellence in the UK *“Never Waste A Good Crisis: A review of Progress since Rethinking Construction and Thoughts for Our Future”* identified the importance of best value as against lowest price, noting in its executive summary that participants in the construction industry need to understand “how value is created over the whole life cycle of an asset, rather than simply looking at the building cost, which is only part of the total equation”.

The use of best value through the application of MEAT (Most Economically Advantageous Tender) criteria rather than lowest price criterion only has also been identified by the European Construction Industry Federation [FIEC] as a key issue, set out in its presentation to the European Parliament – IMCO Hearing “Public Procurement – Meeting the new challenges” hearing on 27th January 2010.

### 3 Problems identified in other countries

As part of its contribution to the European Parliament discussed above, FIEC set out further issues that had not been addressed in the hearing on 27th January 2010. They identified that the main problems encountered by contractors lay either in the bad implementation of the directives at national level, or in bad practice being applied on the ground. The two main issues set out by FIEC in its submission were the cancellation of projects prior to contract award, and abnormally low tenders [ALTs]. FIEC identified the following as possible solutions to these two issues:

#### **Project cancellation:**

- Better education of contracting authority staff working in procurement
- Compensation to all tenderers where projects are cancelled
- Sanctions for contracting authorities where the reason for cancellation of a project is poor preparation

#### **Abnormally low tenders:**

- Use of MEAT award criterion rather than lowest price
- Provision for contracting authorities to be able to reject all tenders identified as abnormally low where no plausible explanation given
- Requirement that all social and environmental legislation is respected during the period of the works
- Liability on contracting authority for consequences of accepting ALT
- Development of guidance notes on preparing MEAT tenders and identifying/evaluation ALTs

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## Appendix H – Impact of the Construction Contracts Act

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The CIF is concerned about the impact that the implementation of the Construction Contracts Act will have on those contracts to which the schedule does not apply. That is to say, while all sub-contractors are to be paid within 30 days according to the timeframe set out in the schedule, the same period does not apply to the main contractor [unless they are employed by a project management company as a sub-contractor]. This may lead to a situation whereby a main contractor operating on a 60 day payment schedule is required to pay the sub-contractor prior to being paid himself, and may even be required to pay twice in the event of any delay. This situation is simply untenable and cannot be allowed to proceed as it will have a detrimental impact on the cashflow of main contractors

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## Quotes

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*“Many clients still do not understand that fiercely competitive tenders and accepting the lowest bid do not provide value for money in construction ... Experience has shown that acceptance of the lowest priced bid does not provide value for money in either the final cost for construction or through whole life and operational costs.”*

Latham, M. (1994) Constructing the Team, HMSO.

*“Clients should focus ... on professionalising their procurement practices to reward suppliers who deliver value-based solutions.”*

Constructing Excellence (2009) Never Waste A Good Crisis – A Review of Progress since Rethinking Construction and Thoughts for our Future.

*“The delivery of public capital projects will form a major component of construction sector activity in the period to 2015 and beyond. An effective and efficient procurement process is essential in ensuring that projects are delivered without delay.”*

Forfás (2013) Ireland's Construction Sector: Outlook and Strategic Plan to 2015.

*“The reality is that contractors in a competitive market do not provide, in many cases, at all for such a [programme] 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.”*

Ciarán Fahy & Anthony Hussey, public lecture on “How the public works contracts might be used in the private sector”, 4th July 2013.

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### “Public Procurement in Ireland” Conference hosted by the Construction Industry Federation, 21st March 2013

*“The contracts are inflexible and rigid and do not allow for the inevitable design development or known unknowns. The fact that the contract is predicated on adequate, complete or full design does not and will not reflect the reality of doing business in the sector.”*

Andrew Nugent, then President of Society of Chartered Surveyors Ireland.

*“Smarter public procurement will undoubtedly play a crucial role with regard to fulfilling our energy efficiency targets.”*

Pat Rabbitte, Minister for Communications, Energy and Natural Resources.

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*“Lowest priced tendering is a fundamental problem. It can appear attractive to clients but I’m convinced it causes huge problems like quality of work, reduced competition and more confrontational relationships.”*

Steve Rowsell, UK Highways Agency Head of Procurement 2000 – 2007.

*“We need to raise the bar. We need a plan for action that deals with the extraordinary fragmentation of the industry.”*

Paul Morrell, UK Government Chief Construction Advisor OBE, 2009 - 2012.

*“Current prices are so low as to be unsustainable over time. The words ‘reasonable’ and ‘fair’ have disappeared from contracts.”*

Tim Ahern, NRA 1994 to 2012, Engineers Ireland Committee.

*“Five years ago if there was a dispute the contract was well known to the parties. We now have a series of clauses that have never seen a courtroom.”*

Bernard Gogarty, Smyth & Sons Solicitors.

*“Risk should not be transferred where it cannot be reasonably evaluated. We also think contractors who do the work well should benefit in future tenders.”*

Jonathan Bliss, Department of Education.

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## CIF Annual Conference 2013, 27th September 2013

*“[The] construction sector is a significant barometer of the economy and will play a critical role in the recovery.”*

Robert Watt, Secretary General, Department of Public Expenditure and Reform.

*“Supporting the development of a new construction industry based on highest international standards in quality excellence and trust will be an essential part of the Government’s drive to further reduce unemployment.”*

An Taoiseach, Enda Kenny.

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