

# Liaison Committee for the Construction Industry

---

## Code of Practice for Tendering



## Code of Practice for Tendering

Document Reference CoP\_v1

This Code of Practice is for guidance only. Compliance with this Code of Practice is recommended and specialist advice should be sought if any issues arise.

Copyright © 2021 by The Liaison Committee for the Construction Industry  
Published by the Liaison Committee for the Construction Industry

*All rights reserved. No part of this publication may be reproduced, distributed, or transmitted in any form or by any means, including photocopying, recording, or other electronic or mechanical methods, without the prior written permission of the publisher, except in the case of brief quotations embodied in critical reviews and certain other non-commercial uses permitted by copyright law. For permission requests or to request a hard copy of this Code of Practice, write to the publisher, addressed "Attention: Permissions Coordinator" at the address below.*

Liaison Committee  
Construction House  
Canal Road  
Dublin  
D06 C6T2



The Liaison Committee of the Construction Industry, hereinafter referred to as the 'Liaison Committee' was established by agreement between the Constituent Bodies:

- **Royal Institute of the Architects of Ireland (RIAI)**
- **Society of Chartered Surveyors Ireland (SCSI)**
- **Construction Industry Federation (CIF)**
- **Association of Consulting Engineers of Ireland (ACEI)**
- **Institution of Engineers of Ireland, trading as Engineers Ireland (EI)**

The Liaison Committee is not a legal entity and was established:

- To make recommendations for any amendments to the provisions of the RIAI Blue and Yellow Forms of Construction Contract;
- To make recommendations as the Liaison Committee may consider desirable for the amendment of any other form of construction contract, other than CIF forms of sub-contract unless otherwise agreed, which the Liaison Committee may decide to accept for consideration;
- To make recommendations on practice concerning tendering and contractual procedures (The Practice Notes), and in relation to documentation and to any other matter which may arise from the relationship between members of the Constituent Bodies themselves, or any bodies with ad hoc representations on the Liaison Committee, or with building owners. Such recommendations will not affect any Constituent Body's practice of drafting and publishing its own Practice Notes.

### **Constituent Bodies:**

#### **Royal Institute of the Architects of Ireland**

8 Merrion Square, Dublin 2.

#### **Construction Industry Federation**

Construction House, Canal Road, Dublin 6.

#### **Society of Chartered Surveyors Ireland**

38 Merrion Square, Dublin 2.

#### **Association of Consulting Engineers of Ireland**

46 Merrion Square, Dublin 2.

#### **Engineers Ireland**

22 Clyde Road, Dublin 4.

<b>1. Introduction</b>	<b>1</b>
<b>2. Overview of procurement routes and tendering procedures</b>	<b>3</b>
2.1. Introduction	3
2.2. Tender evaluation team	3
2.3. Competitive and non-competitive tendering	4
2.4. Procurement routes	4
2.5. Tendering procedures under traditional procurement	5
2.6. Confidentiality	6
<b>3. Single-stage competitive tendering (open &amp; selective)</b>	<b>7</b>
3.1. Introduction	7
3.2. The preliminary enquiry and expressions of interest	8
3.3. Open and selective assessments	9
3.4. Assessments for sub-contractors proposed by the contractor	10
3.5. Time for submission of selective assessments	10
3.6. Appraisal of open assessments	11
3.7. Appraisal of selective assessments	11
3.8. Appraisal of proposed sub-contractor assessments	11
3.9. Assessments generally	12
3.10. Notification letters following assessments	12
3.11. Feedback on assessments	13
3.12. Period between selective assessments and the invitation to tender	13
<b>4. The invitation to tender (ITT)</b>	<b>14</b>
4.1. Introduction	14
4.2. Tendering documentation	14
4.3. For information only documents	15
4.4. Method of tender evaluation & evaluation criteria	15
4.5. Financial criteria	17
4.6. Qualitative sub-criteria	18
4.7. Evaluation of qualitative criteria	18
4.8. Tender period	19
4.9. Tender addenda	20
4.10. Tender queries and responses	20
4.11. Requests for extensions of time	20
4.12. Modification of tenders	21

4.13.	Withdrawal of tenders	21
4.14.	Clarification of tenders	21
4.15.	Tender value engineering proposals (VE)	21
4.16.	Exclusion of tenderers	22
<b>5.</b>	<b>Submission and evaluation of tenders</b>	<b>23</b>
5.1.	Introduction	23
5.2.	Late submissions	23
5.3.	Tender evaluations	23
5.4.	Abnormally low tenders (ALT)	24
5.5.	Qualified tenders	24
5.6.	Arithmetical errors	25
5.7.	Cover pricing	25
5.8.	Tender report and recommendation	25
5.9.	Notification to tenderers	25
5.10.	Letters of intent	26
5.11.	Tender validity period	26
5.12.	Letter of acceptance & contract award	27
5.13.	Contract documents	27
5.14.	Disputes	27
<b>6.</b>	<b>Post-tender negotiation</b>	<b>28</b>
6.1	Introduction	28
6.2.	Timing of negotiations	28
6.3.	Records	29
<b>7.</b>	<b>Sub-contractors</b>	<b>30</b>
7.1.	Introduction	30
7.2.	Types of sub-contractors	30
7.3.	Domestic sub-contractors	31
7.4.	Nominated sub-contractors	31
7.5.	Main contractor's programme	32
7.6.	Collateral agreements	33
7.7.	Performance bonds	33
7.8.	Professional indemnity insurance	33

<b>8. Collateral Agreements</b>	<b>34</b>
8.1. Introduction	34
8.2. Collateral agreements between employers and sub-contractors	34
8.3. Collateral agreements between funders and main contractors	34
8.4. Collateral agreements between tenants/leasees and contractors	35
8.5. Assignment of collateral agreements and step-in rights	35
8.6. Limitations on liability	36
8.7. Disputes	36
<b>9. Bonds</b>	<b>37</b>
9.1. Introduction	37
9.2. Performance bonds between the main contractor and the employer	37
9.3. Performance bond between nominated sub-contractors and main contractor	39
9.4. Retention bonds	39
9.5. Advance payment bonds	39
9.6. Parent company guarantees	40
9.7. Conditional and on-demand bonds	40
9.8. Assessments by a nominated person	41
<b>10. Insurance</b>	<b>42</b>
10.1. Introduction	42
10.2. Types of policy and limits	42
10.3. Other types of insurance	43
10.4. Insurance limits, claim bases and periods of cover	44
10.5. Exclusions	44
10.6. Caps on liability	44
<b>11. Retention</b>	<b>46</b>
11.1. Introduction	46
11.2. Retention trust account	46
11.3. Joint retention account	47
11.4. Retention bond	47
11.5. Limit of retention fund	47

<b>12. Building Information Modelling (BIM)</b>	<b>48</b>
12.1. Introduction	48
12.2. BIM standards	48
12.3. Transitional arrangements from PAS 1192 standards	49
12.4. Deciding to include BIM on a project	49
12.5. Information management function	50
12.6. Appointing Party	52
12.7. Lead Appointed Party	52
12.8. Appointed Party	53
12.9. Third party	53
12.10. Invitation to tender	54
12.11. Tender response	55
12.12. Appointment/contract award	56
<b>13. Safety, health and welfare</b>	<b>58</b>
13.1. Introduction	58
13.2. Compliance	58
<b>14. Building Control (Amendment) Regulations - BC(A)Rs</b>	<b>59</b>
14.1. Introduction	59
14.2. BCMS	59
14.3. Date of operation	59
14.4. Application of S.I. No. 105 of 2014	59
14.5. Application of S.I. No. 365 of 2015	60
14.6. Titles, roles and responsibilities	61
14.7. Certification	61
14.8. Documents	62
14.9. Validation and Registration of Certificate(s) of Compliance on Completion	63
<b>15. Nearly Zero Energy Buildings - nZEB</b>	<b>65</b>
15.1. Introduction	65
15.2. nZEB at the design stage	66
15.3. Sub-contractors	66
15.4. Tendering documentation	67
15.5. nZEB additions to open and selective assessments	67

<b>16. Changes in labour and material costs</b>	<b>68</b>
16.1. Introduction	68
16.2. Fluctuations in currency exchange rates	68
16.3. Price and wage variation clauses	68
16.4. Hyperinflation	68
<b>17. Other contract particulars</b>	<b>69</b>
17.1. Designated Date	69
17.2. Dates for possession and completion	69
17.3. Deliverables at completion	70
17.4. Liquidated and ascertained damages (LADs)	70
17.5. Payments and the Construction Contracts Act 2013	70
<b>18. Dispute Resolution</b>	<b>72</b>
18.1. Introduction	72
18.2. Dispute avoidance	72
18.3. Types of alternative dispute resolution	72
18.4. Appointment of neutral third parties	74
18.5. Consumers and ADR	74
<b>19. Consumers and construction contracts</b>	<b>75</b>
19.1. Introduction	75
19.2. Unfair terms	75
19.3. The legislation	76
19.4. Consumer employers	76
<b>Appendices</b>	<b>77</b>



# 1. Introduction

- 1.1 This Code of Practice is agreed by the Constituent Bodies as good tendering practice for private sector building and engineering works. The Liaison Committee recommends that this Code of Practice is used as a guide to tendering and that specialist advice be sought if specific matters arise.
- 1.2 While it is the prerogative of the employer to decide the method of tendering to be adopted, the Liaison Committee is of the opinion that single-stage selective tendering is the most appropriate method of seeking tenders for the majority of building and engineering contracts.
- 1.3 This Code of Practice is not intended for use on public sector projects. The Government Contracts Committee for Construction (GCCC) publishes its own tendering guidance documentation for public sector building and engineering works which can be found online at <https://constructionprocurement.gov.ie>.
- 1.4 While private sector entities are not obliged to follow any specific tendering procedure, the Liaison Committee recommends that this Code of Practice be followed as good practice insofar as is practicable.
- 1.5 This Code of Practice is a revision to the previously published 2006 and 2018 editions.
- 1.6 This Code of Practice will be reviewed on an annual basis by the Liaison Committee, which may make any amendments the Liaison Committee deems required or desirable.
- 1.7 Although this Code of Practice may be used in conjunction with any form of construction contract, it refers in particular to the RIAI forms of construction contract for practical purposes only. Such reference in no way precludes the use of this Code of Practice where other standard, amended or bespoke forms of contract are used, though certain procedures may require modification.
- 1.8 The terms 'client' and 'employer' are used interchangeably throughout this Code of Practice but mean the same thing unless otherwise indicated. The client and/or employer is the procurer of the works and first party named in the construction contract.
- 1.9 The term 'consultant' is used to mean all or any of the following of the client's design team: architect, civil & structural engineer, mechanical & electrical engineer, quantity surveyor, landscape architect, fire consultant; and any other similar consultant as may be appointed by the client.
- 1.10 In this Code of Practice, **tendering documentation** means the complete body of information issued by the client to the select list of contractors as part of an invitation to tender. See **Section 4** for further information.

A **tender** means the offer by a contractor to carry out and complete the work, together with and meeting all other requirements as set out in the tendering documentation and in accordance with the relevant form of construction contract.

**Tender documents** means the complete body of information submitted by a contractor to a client to support its tender and to respond to and meet the requirements of an invitation to tender.

## 1. Introduction

- 1.11 The terminology used in this Code of Practice, although recommended, is for explanatory purposes and other suitable terminologies may be used.
- 1.12 Legislation may be updated from time to time. Any references to legislation (and other similar documents<sup>1</sup>) should be interpreted as those which are most current at the relevant time of reading.
- 1.13 Some sections in this Code of Practice relate to significant subject areas, such as: safety, health and welfare; building regulations; building information modelling etc. Such sections are not a comprehensive guide to or analysis of those subject areas, but instead give a brief overview as they relate to tendering matters. Readers should seek proper and full guidance where possible.
- 1.14 Any reference to 'Ireland' means the Republic of Ireland.

<sup>1</sup> This may include, but is not limited to: Government Acts; Statutory Instruments; Regulations; Orders; Standards; Guidelines; Rules; Practice Notes, Codes of Practice and so on.

## 2. Overview of procurement routes and tendering procedures

### 2.1. Introduction

In construction, tendering is the process by which contractors bid for construction work, typically in response to an invitation issued by or on behalf of clients. Clients issue their requirements, usually in the form of particular instructions, drawings, schedules, specifications, bills of quantities and other documents drafted by their consultants, in a form suitable for pricing by tenderers (contractors who are participating in a tender process). Following an evaluation of all compliant tenders, a preferred tenderer is identified. A client may then choose to award the contract to that preferred tenderer.

Good faith between clients, tenderers and consultants is an underlying foundation of this Code of Practice. The preparation of good quality tendering documentation requires significant work and expenditure by clients as does the preparation and submission of tenders by contractors (who are typically not reimbursed where they are unsuccessful in a tendering process). Trust between clients and tenderers and together with the fairness of the system itself and in how it is administered, is paramount.

As there are a number of procurement routes available for construction projects, it is important for clients to establish the most suitable route at an early stage. This will inform how the project is to progress and will enable consultants to adequately plan their own work at each stage from project initiation to design stages, statutory approvals, construction contract award, completion and beyond.

This Code of Practice primarily concerns itself with the traditional procurement route (specifically single-stage selective tendering). This is where all or most of the design is the responsibility of the client. However, a brief explanation is also given below for design-build and other procurement routes.

### 2.2. Tender evaluation team

Before inviting tenders, it is useful for clients to establish a tender evaluation team to include key design team members and a representative of the client; a minimum of four people is recommended. Candidates for inclusion on an evaluation team should be considered in terms of their expertise, experience, and impartiality. The tender evaluation team should deal with any tender queries and responses, requests for extensions of time and notifications, and these should be directed to a named member of the team. A tender evaluation team may also deal with open and selective assessments (discussed further in **Section 3**).

## 2. Procurement routes and tendering procedures

### 2.3. Competitive and non-competitive tendering

Competitive tendering is the most common form of tendering in Ireland where tenders are sought from two or more contractors whose tenders are then evaluated on a competitive basis. However, it is also possible for a contract to be awarded on a non-competitive or negotiated basis; for example, where one contractor is approached and asked to submit a price for a project, perhaps due to a previous professional relationship with the client or the client's consultants. The tender from that sole contractor may then be accepted or negotiated as the case may be.

This Code of Practice deals exclusively with competitive tendering. The main forms of competitive tendering are: single-stage; two-stage; competitive dialogue and negotiated. Single-stage is discussed in further detail below as it is the most commonly used form of competitive tendering in Ireland. A brief explanation of the other forms is provided.

### 2.4. Procurement routes

#### a. Traditional procurement

In traditional procurement, either all or the majority of the design is the responsibility of the client. The client appoints consultants such as architects and engineers to prepare that design and include it in the tendering documentation. Any design for which the contractor is to be responsible should be clearly set out in the invitation to tender. It is currently the most common procurement route in Ireland and is considered to be more appropriate where clients wish to retain greater control of the design of a project.

#### b. Design-build procurement

Design-build<sup>2</sup> is where the contractor undertakes to both design and construct the works based on what is commonly referred to as the Employer's Requirements<sup>3</sup>. Design-build is considered more appropriate for projects which can be sufficiently described in the Employer's Requirements to enable contractors to accurately price and where less continual engagement by the employer's<sup>4</sup> design consultants in administering the project is envisaged.

The level of design input from the employer is substantially reduced. A contractor may appoint its own design consultants or may, subject to the consent of the employer, engage the design consultants who drafted the Employer's Requirements (if their appointment with the employer has finished).

<sup>2</sup> Design-Build-Operate (DBO), Design-Build-Operate-Maintain (DBOM) are other procurement routes which fall outside the scope of this Code of Practice.

<sup>3</sup> These typically set out the scope of services and specification. The level of detail may vary as the level of design input from the employer varies.

<sup>4</sup> As noted in Section 1, the terms 'client' and 'employer' are used interchangeably in this Code of Practice.

## 2. Procurement routes and tendering procedures

### 2.5. Tendering procedures under traditional procurement

#### a. Single-stage competitive tendering

Single-stage tendering is more suitable for projects where a client's consultants can comprehensively set out the requirements of the client sufficiently so that they can be accurately interpreted and priced by tenderers. Each tenderer submits a single tender for the project and there should be no further interaction between clients and tenderers on cost-related matters prior to the award of the contract.

Single-stage tendering is currently the most common tendering procedure in Ireland and is the primary focus of this Code of Practice. Single-stage tendering can be subdivided into either open or selective tendering (see **Section 3** for more details).

#### b. Two-stage competitive tendering/early contractor involvement

Two-stage tendering (also known as 'early contractor involvement') is typically suited to projects where the Employer's Requirements are not fully known, or it has not been possible or practical to complete the design before inviting tenders. It creates an opportunity for tenderers to offer value engineering solutions which may reduce costs, shorten programme or otherwise be of benefit to the employer. Two-stage tendering is not to be confused with the two phases of single-stage selective tendering, i.e. the assessment phase and the tendering phase (see **Section 3** for more details).

The first stage is to evaluate tenders, usually involving a pricing element, and then admitting the most suitable of them to the second stage of the process. The first stage evaluation typically involves tenderers setting out aspects of their resources and previous experience as well as pricing certain headline items such as preliminaries, overheads and profit. Elements of the design which are sufficiently developed to enable tenderers to price accurately may be included in the evaluation process.

Following the first stage evaluation, tenderers chosen to proceed to the second stage may then work on a collaborative basis with the rest of the employer's team to finalise the details of the project in relation to outstanding aspects of both design and cost. It is possible for different tenderers to offer different solutions. All tenderers must be given equal opportunity, treated fairly and have their innovations and unique solutions maintained confidential.

Two-stage tendering is suitable for complex projects and where early design input from contractors is desirable.

Two-stage tendering is not addressed further in this Code of Practice and specialist advice should be sought.

## 2. Procurement routes and tendering procedures

### c. Competitive dialogue procedure

Competitive dialogue is similar in structure to two-stage tendering but is more appropriate for largescale or infrastructure projects where significant design input is required from specialist contractors. It usually involves a stage where the final design of the client is only fully developed through a dialogue with two or more specialist contractors. The purpose of the dialogue is to ascertain the solution most likely to satisfy the requirements of the client. Considerable resources are required by all parties involved, and as such this procedure should only be used in exceptional circumstances.

Competitive dialogue tendering is not addressed further in this Code of Practice and specialist advice should be sought.

### d. Negotiated procedure

The negotiated procedure is suitable for highly specialised contracts of a technical nature and usually involves negotiation with a single contractor. It is important that the framework of the negotiation is fully and clearly set out at the beginning of the process.

Negotiated tendering is not addressed further in this Code of Practice and specialist advice should be sought.

## 2.6. Confidentiality

All those involved in the tendering process (i.e. clients and their agents, consultants and contractors) must treat all tender information as confidential. This includes details of contractors and their submissions unless express permission to the contrary has been given by the relevant contractor. This duty to observe confidentiality continues throughout the tendering process.

Similarly, contractors receiving tendering documentation from clients must treat this information as confidential and not disclose details to other parties other than what is reasonably required for preparing their tender submission. Priced bills of quantities are of utmost confidentiality as these documents contain commercially sensitive information. The tender documents of unsuccessful tenderers should be either returned to them, made available for collection, or destroyed or deleted within a timeframe which respects data protection legislation or as set out in the conditions of tender.

## 3. Single-stage competitive tendering (open & selective)

### 3.1. Introduction

There are two types of single-stage competitive tendering: open and selective<sup>5</sup>. In open tendering, any contractor may submit a tender once it is aware of the project. Although open tendering can promote competition and participation by SMEs<sup>6</sup>, it is possible that a large number of tenders will be returned, increasing the workload of the evaluation team as well as the aggregate amount of unremunerated work by unsuccessful tenderers. All compliant<sup>7</sup> tenders should be evaluated as the tender process can be costly for unsuccessful tenderers.

Selective tendering involves carrying out an assessment as an entirely separate phase prior to inviting tenders in order to determine the suitability of contractors for a project. Only contractors who are successful in the assessment are subsequently invited to tender. This can help avoid unnecessary tender submissions and the subsequent evaluation of tenders from contractors who are not suitable for the project.

Open tendering may include an assessment that is to be submitted with the tender. Just as with selective tendering, this assessment is used to determine the suitability of contractors for a project, and only the tenders of those successful in the assessment are subsequently opened. The difference between selective tendering and open tendering with an assessment is that with open tendering, the assessment and the tender are submitted together and therefore any contractor who is aware of the project may still submit a tender but it will only be opened and evaluated if they are first successful in the assessment.

In both open and selective tendering, tenders are evaluated using a set of predefined tender award criteria that are developed to suit the project (see **Section 4** for more details). The contract may then be awarded to the tenderer who achieves the highest score.

The choice of open or selective tendering will depend on a number of circumstances and may even come down to the preference of individual clients. Complex projects or projects which require specific expertise will generally benefit from selective tendering. However, even for complex projects, if there is a likelihood of a relatively low number of tenders being submitted, it may be preferable to use open tendering (either with or without an assessment).

<sup>5</sup> Selective tendering is similar to the restricted procedure in public procurement.

<sup>6</sup> Small and Medium Enterprises.

<sup>7</sup> A tender may be considered non-compliant if it does not comply with any conditions set out in the tendering documents, for example if a tender is submitted after the deadline for receipt of tenders. Non-compliant tenders may be rejected.

## 3. Single-stage competitive tendering (open & selective)

### 3.2. The preliminary enquiry and expressions of interest

In both open and selective tendering, clients may issue a preliminary enquiry<sup>8</sup> to contractors requesting them to submit an expression of interest (EOI). Contractors may be approached directly by clients or their agents, possibly due to a previous professional relationship or when clients or their agents are otherwise aware of a contractor's previous experience and track record. Consultants should exercise caution when recommending contractors to clients and, in any event, should consider the scale, nature and complexity of a project if making such recommendations. It can be beneficial to confirm with each contractor if they are in a position to undertake the work before sending them a preliminary enquiry to avoid any unnecessary communications. Alternatively, if clients do not wish to directly approach contractors at this point, they can place a notification together with a preliminary enquiry on a suitable advertisement platform<sup>9</sup> requesting contractors to register an EOI.

Preliminary enquiries and EOIs are non-obliging on both clients and contractors. However, clients who issue preliminary enquiries but who subsequently no longer wish to proceed with the project should remove any advertisements and notify contractors who have submitted an EOI as well as any contractors who were approached directly. Similarly, contractors who submit an EOI but subsequently no longer wish to participate in the tender process should notify clients as soon as practicable - this requirement to notify clients can also be stipulated in the preliminary enquiry. This requirement to notify should continue for both clients and contractors throughout the tender process.

The preliminary enquiry should contain as much project information as is available so contractors can gain a reasonable understanding of its scope and value and thus make a proper judgement as to whether they are in a position to submit a tender for the project. For an example of a preliminary enquiry letter and what information should be included please see Appendix A.

Contractors should be given sufficient time to submit an EOI with a minimum of 5 working days following receipt of the preliminary enquiry. However, a longer duration may be necessary due to the scale, nature and complexity of a project. If interviews are required, regard should be given to the geographical location of contractors and the use of video-telephony should be considered. Although clients are not usually bound to accept the lowest, best-scoring or indeed any tender (unless a statement to the contrary is communicated by the client to the tenderers), it is good practice to highlight this in the preliminary enquiry.

<sup>8</sup> See Appendix A for an example Preliminary Enquiry.

<sup>9</sup> This includes online tender advertisement websites.



## 3. Single-stage competitive tendering (open & selective)

### 3.3. Open and selective assessments

If applicable, assessments are issued to all contractors who either submitted an expression of interest or are otherwise involved in the tender process. In selective tendering, the assessments are issued as an initial and separate phase to the invitation to tender or ITT (see **Section 4** for more details). In open tendering, the assessments are issued together with the invitation to tender and tendering documentation. Assessment criteria typically relate to various subject areas including, but not necessarily limited to:

- a. Contractor details
- b. Financial and economic standing
- c. Technical capability (including educational and professional qualifications)
- d. Previous experience
- e. Health & safety competence
- f. Evidence of insurances
- g. Evidence of membership to trade bodies
- h. Details of any proposed specialist sub-contractors (if requested by the client)

Assessment criteria should be fair, objective, transparent and non-discriminatory. The method of assessment (for example if it is pass/fail or if a weighted assessment will apply) must be outlined to contractors in advance. Any minimum standards that are to be applied should be appropriate to the scale, nature and complexity of the project - otherwise potentially suitable contractors could be unfairly disqualified. Poor drafting of assessment criteria has the potential to disqualify contractors who could in fact be suitable for the project.

Additional assessment criteria or changes to assessment criteria should not be introduced into the process once the following deadlines have passed:

Procedure	Deadline
Open Tendering	10 working days prior to the date for the receipt of tenders
Selective tendering	10 working days prior to the date for the receipt of selective assessment responses

Exceptions to this are where changes are relatively minor in which case a shorter period may be acceptable in limited circumstances. Significant changes to assessment criteria should be avoided; however if this is unavoidable, clients should have regard to the nature of the change and grant a reasonable extension to the relevant period. In some cases, this might exceed the limits in the table above. In any event, clients should seek advice from their consultants in these circumstances.

If there are to be any limits on the number of tenders that are to be opened (in open tendering) or to the number of contractors invited to tender (in selective tendering), consideration should be given for tied placements in the assessments. The criteria for a tie should be identified, for example any contractors within a specified points range, and this should be made known to contractors in advance.

## 3. Single-stage competitive tendering (open & selective)

### 3.4. Assessments for sub-contractors proposed by the contractor

Clients may require contractors to include assessments for proposed sub-contractors for particular specialist sub-contract works packages. This procedure can be used where, for example, a client wants to have some control over the appointment of a domestic sub-contractor for an element of work but does not wish to nominate or novate<sup>10</sup> a sub-contractor whether by separate tender or otherwise. This can perhaps be due to time or budget constraints or simply a client preference. Sub-contractor assessments can be submitted together with contractors' open or selective assessments, or as part of the ITT<sup>11</sup>.

The assessment criteria may be similar to those for the contractor and can be included in both open and selective assessments but should, in any event, be appropriate to the nature, scale and complexity of the relevant sub-contract works package. Clients should inform contractors of the anticipated percentage of project costs allocated to each of the sub-contract works packages, as well as any minimum or maximum number of sub-contractors that are to be proposed. Clients should also confirm if a minimum number of successful sub-contractor assessments is required in order for a contractor to remain in the tender process, for example, if a contractor must have at least two proposed sub-contractors for particular works package be successful in their sub-contractor assessment in order to remain in the process.

Following the award of the main contract, the contractor must appoint one of its successful proposed sub-contractors as a domestic sub-contractor for the relevant sub-contract works package or, in the event that such an appointment is not practicable, appoint a replacement sub-contractor to the acceptance of the client providing reasons as to why the original sub-contractor can no longer be appointed. The client may object to the appointment of the replacement sub-contractor provided such objection is reasonable having regard to the relevant assessment criteria. If it wishes, the client may request an assessment to be submitted for the replacement sub-contractor.

### 3.5. Time for submission of selective assessments

In selective tendering, contractors should be given sufficient time for responding to selective assessments and a minimum of 21 calendar days<sup>12</sup> is recommended. Late submissions should not be accepted, and this should be highlighted to contractors in the preliminary enquiry. Although clients may exercise a reasonable degree of discretion in this regard, such discretion should be treated with caution as it has the potential to jeopardise the equal and fair treatment of all contractors.

A record sheet outlining the date and time responses were submitted and by whom should be compiled. This applies to both hard and soft copy responses. This document should be signed and include details of any witnesses.

<sup>10</sup> See Section 7 for more details on sub-contractors.

<sup>11</sup> This means that: in open tendering, a client can request sub-contractor assessments whether contractor assessments have been requested or not; and in selective tendering, sub-contractor assessments can be requested at either the assessment phase or the ITT phase.

<sup>12</sup> For relatively simple projects where there are unavoidable time constraints this may be reduced to 14 days but this should only be used in limited circumstances.

## 3. Single-stage competitive tendering (open & selective)

### 3.6. Appraisal of open assessments

As noted above, open assessments are submitted by tenderers at the same time as their tender (i.e. in one submission). Assessments can be appraised by clients (or agents on their behalf) either on a pass/fail or weighted basis or a mix of both, however, the method of appraisal must be made known to tenderers in advance (ideally in the preliminary enquiry but no later than in the ITT).

Compliance checks can be made first in order to confirm that tenderers have complied with all the requirements, for example that they have submitted any requested documentation. If any assessment is found to be non-compliant, clients can either request the tenderer to correct the error in a timely manner or disqualify them. Consideration should be given as to whether disqualification is necessary or appropriate where it would result in a low number of compliant assessments. Furthermore, a statement that any non-compliant assessment may be disqualified at the absolute discretion of the client can be included in the ITT. Only the tenders of those who are successful in the assessment are opened.

### 3.7. Appraisal of selective assessments

As noted above, selective assessment responses are submitted by contractors prior to being invited to tender. Assessments can be appraised by clients (or their agents on their behalf) either on a pass/fail or weighted basis or a mix of both, however, the method of appraisal must be made known to contractors in advance (ideally in the preliminary inquiry).

Compliance checks can be made first in order to confirm that contractors have complied with all the requirements, for example that they have submitted any requested documentation. If any assessment is found to be non-compliant, clients can either request the contractor to correct the error in a timely manner or disqualify them. Consideration should be given as to whether disqualification is necessary or appropriate where it would result in a low number of compliant assessments. Furthermore, a statement that any non-compliant assessment may be disqualified at the absolute discretion of the client can be included in the preliminary enquiry. Contractors who are successful in the assessment may then be invited to tender.

### 3.8. Appraisal of proposed sub-contractor assessments

As noted above, assessment responses for proposed sub-contractors can be submitted by contractors at the same time as their own assessment response or as part of their tender submission. Assessments can be appraised by clients (or agents on their behalf) either on a pass/fail or weighted basis or a mix of both, however, the method of appraisal must be made known to contractors in advance (either in the preliminary enquiry or the ITT, as the case may be).

Compliance checks can be made first in order to check that contractors or their sub-contractors have complied with all the requirements, for example that they have submitted any requested documentation. If any assessment is found to be non-compliant, clients

### 3. Single-stage competitive tendering (open & selective)

can either request the contractor to correct the error in a timely manner or disregard that proposed sub-contractor from the contractor's submission. If this results in the contractor having less than the minimum number of proposed sub-contractors, that contractor may be disqualified from the tender process. Consideration should be given as to whether disqualification is necessary or appropriate where it would result in a low number of compliant assessments or tenders, as the case may be. Furthermore, a statement that any contractors with an insufficient number of successful proposed sub-contractor assessments may be disqualified at the absolute discretion of the client can be included in the preliminary enquiry or ITT, as the case may be.

#### 3.9. Assessments generally

It is preferable to have at least three tenders to evaluate in order to create a sufficiently competitive environment. However, it may be the case, either by the assessment process itself or by contractors withdrawing, that less than three contractors remain. Clients should consider if it is wise to continue with the project in such circumstances as value for money may be affected and specialist advice should be sought.

Contractors may be asked to clarify but not materially change their assessment responses or those of their proposed sub-contractors if applicable. All compliant assessments should be appraised, and the appraisal must be carried out by persons competent to do so. The appraisal of assessments should be carried out using the predefined assessment criteria only. Details of other contractors and their assessments should be kept confidential throughout the process, as should the results of any appraisals.

It is important to keep and maintain accurate and detailed records of all assessment appraisals, including assessors' names as well as dates and times the appraisals were carried out.

#### 3.10. Notification letters following assessments

In open tendering, if, following the appraisal of assessments (including sub-contractor assessments), the subsequent evaluation of tenders is expected to last more than 10 working days then tenderers should be advised of their assessment result before any tenders are opened. Otherwise, notification of both the assessment result and, if applicable, the tender result can be issued together.

In selective tendering, notifications of the assessment results (including sub-contractor assessments) should be sent as soon as practicable following the conclusion of the assessment appraisals. Notification letters to all successful contractors should contain a request to confirm their commitment to continue with the tender process and subsequently be invited to tender. For an example of notification letters for selective assessments please see Appendices C and D.

## 3. Single-stage competitive tendering (open & selective)

### 3.11. Feedback on assessments

Although it is not mandatory to provide feedback to contractors, clients should, if requested by a contractor, provide information on their performance or assessment ranking (without revealing the identities of other contractors). This can help unsuccessful contractors improve their performance in the future. Feedback may be requested from both successful and unsuccessful contractors and may include an analysis of the contractor's performance.

#### Example

A selective assessment has a maximum available score of 1000 points with a minimum of 500 points required to succeed. There are six contractors participating, two of whom are unsuccessful, and a successful contractor has requested feedback on their assessment ranking. In this case, the following ranked list could be issued to that contractor:

- Contractor A: successful - 850 points
- Contractor B: successful - 725 points
- Contractor C: successful - 680 points
- **Contractor D (You): successful - 550 points**
- Contractor E: unsuccessful - 475 points
- Contractor F: unsuccessful - 450 points

### 3.12 Period between selective assessments and the invitation to tender

In selective tendering, at least 10 working days should expire between the date of the last letter to contractors notifying them of their assessment result and the date the invitation to tender is issued. This period should be highlighted to contractors in the preliminary enquiry. This gives unsuccessful contractors sufficient time to respond to their notification letter and feedback (if provided) and can provide clients with an opportunity to reconsider a contractor who might have been mistakenly disqualified.

## 4. The invitation to tender (ITT)

### 4.1. Introduction

An invitation to tender is a formal invitation from a client to contractors to submit a tender offer for the works required. The invitation should include sufficient information for tenderers to understand the requirements and enable them to adequately prepare their tenders. The ITT includes a complete set of tendering documentation, typically compiled by the client's consultants. An example ITT letter can be found at Appendix G.

### 4.2. Tendering documentation

Clients should refer to their consultants for the technical requirements of tendering documentation. Tendering documentation may be issued to tenderers in hard or soft copy. Soft copies may be issued using media devices (e.g. USB sticks), email, online file transfer, etc. Hardcopies should be made available for collection rather than posting and the inclusion of duplicate copies should be considered. It is also good practice to mark all such documentation as 'For Tender' or something similar. The following list is a good practice guide as to what should be included in the tendering documentation:

- Any information that was included in the preliminary enquiry if still relevant<sup>13</sup>
- Bill(s) of quantities or a fully detailed pricing document
- Technical design documents<sup>14</sup>
- The Form of Tender<sup>15</sup>
- Instructions to tenderers for the submission of tenders
- Preliminary health and safety plan
- One copy of the relevant statutory consents, or if not obtained at the date of the invitation to tender, a statement as to whether they have been applied for or not
- The intended date for commencement of works
- Open assessments (if using open tendering with assessments)
- Sub-contractor assessments (for both open and selective tendering)
- A list of work items, if any, the design for which the contractor is to be responsible
- A list of any documentation not to be provided with the tender but which will be required from the successful tenderer prior to contract award or date of possession as the case may be, e.g. performance bonds, tax clearance certificates, collateral agreements, evidence of insurances etc.

<sup>13</sup> For a list of such information please see Appendix A.

<sup>14</sup> Technical design documents may include: drawings, schedules, specifications, as well as information relating to H&S, BC(A)R, nZEB and BIM etc.

<sup>15</sup> The form of tender is a document where the employer can stipulate key information about the project such as the project details, insurance requirements, the construction period, key completion dates and rates for liquidated and ascertained damages and where the tenderer can fill in details relating to their offer, including the lump sum for which they are offering to complete the works.

## 4. The invitation to tender (ITT)

After the ITT has been issued, any amendments to the tendering documentation should be kept to a minimum and notified in writing to tenderers promptly, and in any event not later than 10 working days before the last date for the submission of tenders. If significant amendments arise, the closing date for the submission of tenders should be extended to give tenderers reasonable time to assess and price the cost implications of such amendments. Significant amendments should be avoided as these may result in abortive work by tenderers. It should therefore be carefully considered when inviting tenders whether the project has reached a sufficient stage of design development.

### 4.3. For information only documents

'For information only' documents<sup>16</sup> may, at the discretion of the client, be included with the tendering documentation. These documents should be clearly marked as such as should any representations as to their accuracy or completeness. It must also be clearly highlighted if these documents are not to form part of the contract.

### 4.4. Method of tender evaluation & evaluation criteria

The method of tender evaluation should be outlined in the preliminary enquiry however it is recommended to confirm the method in the ITT. Tenders may only be evaluated on a predefined set of award criteria, typically based on either of the following methods:

- Financial evaluation only, or
- Financial and qualitative evaluation

Evaluation of financial criteria may also include a normalisation of costs or comparative cost analysis (see **Section 4.5** below for more details). Tenders evaluated solely on a financial basis should be limited to relatively simple projects. For more complex projects however, the lowest price may not necessarily represent the best value for the client. In such circumstances, qualitative criteria can be used to determine what tender best meets the needs of the client.

Just as with assessment criteria, qualitative criteria should be fair, objective, transparent and non-discriminatory. The relevant method of evaluation (for example if it is pass/fail or if a weighted evaluation will apply) must be made known to tenderers in advance and any required minimum standards should be relevant to the scale, nature and complexity of the project.

Once the ITT has been issued, additional evaluation criteria or changes to evaluation criteria should not be introduced. However, if this is necessary then such changes should only be made no less than 10 working days prior to the date for submission of tenders. Exceptions to this are where any changes are relatively minor in which case a shorter period may be acceptable in limited circumstances. Significant changes to the evaluation criteria should

<sup>16</sup> This might include site survey information, investigation reports, existing underground services and utilities surveys etc.

## 4. The invitation to tender (ITT)

be avoided, however, if this is unavoidable clients should have regard to the nature of the change and grant a reasonable extension to the relevant period. In some cases, this might exceed the recommended minimum of 10 working days. In any event, clients should seek advice from their consultants in these circumstances.

It is for clients to decide on the relevant qualitative criteria with advice from their consultants and this will differ from project to project. Some examples of qualitative criteria are:

1. Management and coordination of works
2. Construction methodology proposals
3. Quality assurance protocols
4. Lifecycle cost and sustainability proposals

It is important that qualitative tender criteria are not a repeat of assessment criteria (if assessments were requested) as this creates an unnecessary duplication of the information being submitted.

The ratio between financial and qualitative criteria can vary and will depend on the priorities and circumstances of the client as well as the nature of the project. For example, using the qualitative criteria above, tenders could be evaluated based on a financial to qualitative ratio of 75:25, and the following tables could be used.

Criteria	Score
Financial criteria	750
Qualitative criteria	250
<b>Total available score</b>	<b>1000</b>

*Fig. 4.4.1 - total available scores for financial and qualitative criteria*

Qualitative Criteria	Weighting
Management and coordination	70
Construction methodology proposals	60
Quality assurance protocols	60
Lifecycle cost and sustainability proposals	60
<b>Total available qualitative score</b>	<b>250</b>

*Fig 4.4.2 - breakdown of qualitative score*



## 4. The invitation to tender (ITT)

In this example, the tenderer who performs best in the financial evaluation would achieve the total available financial score of 750, with the next best tenderer achieving a pro rata score and so on. See **Section 4.5** for further details on the evaluation of financial criteria.

For qualitative criteria, it is for clients and their consultant to determine the most suitable evaluation methodology however, it is recommended that the tenderer who performs best overall in the qualitative evaluation be given the total available qualitative score, with the next highest scoring tenderer achieving a pro rata score and so on (see **Section 4.7** for more details).

In any event, the evaluation methodology for both financial and qualitative criteria must be made known to tenderers in advance and the evaluations are to be carried out entirely separately and independently to each other.

In the above examples, the evaluation is weighted more favourably towards financial criteria than to qualitative criteria, however, depending on the type of project, it may be more appropriate to emphasise the qualitative aspect. It is for clients and their consultants to agree on the most suitable approach.

### 4.5. Financial criteria

The most straightforward evaluation of financial criteria is where the tenderer who submits the lowest price is given the total available financial score (750 using the example in Fig. 4.4.1 above). However, the evaluation may also be done using a normalisation of costs or comparative cost analysis. This is typically done by the quantity surveyor or cost consultant and results in an adjusted overall price based on an evaluation of certain heads of cost, for example:

- Preliminaries
- Overheads
- Profit
- Labour costs/day work rates
- Material costs
- Plant costs
- Rate of delay costs

In addition, financial submissions may need to be adjusted due to calculation errors (including VAT calculations) and any adjustments for permitted options within the tender, e.g. for owner-controlled insurances (see **Section 10** for more details on insurances). In any event, the tenderer who performs best in the financial evaluation is given the total available financial score.

## 4. The invitation to tender (ITT)

### 4.6. Qualitative sub-criteria

Due to the nature of construction, it is common for qualitative criteria to be broken down into sub-criteria relevant to the project. Using the examples in Fig. 4.4.2 above, *Criterion 1 - Management and coordination*, could be subdivided as follows:

- a. Addressing site specific risks, restrictions and covenants in relation to safety, health and welfare
- b. Systems for the management and procurement of specialists
- c. Draft Construction Traffic Management Plan (CTMP) outlining site access, deliveries, sequencing of works, temporary and permanent diversion of services and utilities
- d. Systems for the submissions of contractor proposals and review by the design team
- e. Programming of testing and commissioning procedures including any off-site testing and the delivery of compliance certificates
- f. Methodology for the coordination of certificates of compliance for BC(A)R between all sub-contractors

It can be useful to prescribe word or page limits to contractors for their qualitative submissions as this may help to reduce irrelevant information being submitted by tenderers and ease the workload on the client's evaluation team.

### 4.7. Evaluation of qualitative criteria

Just as with assessment criteria (discussed in **Section 3.3**), qualitative criteria and sub-criteria can be evaluated either on a pass/fail or weighted basis (or a mixture of both) and this must be outlined to tenderers in advance, ideally in the preliminary enquiry but no later than the ITT. For a pass/fail basis, the tenderer either meets or fails to meet the requirement of the relevant criterion, i.e. achieving full marks or zero marks. If a weighted basis applies, this can be achieved in a number of ways and will typically depend on the relative importance of each criterion to the project.

In any event, it is considered good practice to allocate the total available qualitative score to the tenderer who performs best overall in the qualitative evaluation. Using the examples in Fig. 4.4.2 above, if there are 5 tenderers (Tenderer A, Tenderer B and so on), and Tenderer A achieves the highest overall qualitative score, then Tenderer A should be allocated a score of 250, with the scores of all other tenderers adjusted pro-rata.

When all the scores for each criterion (and sub-criterion, if applicable) are added up, if Tenderer A achieves a score of 200 (out of a total available qualitative score of 250) and is the highest scoring tenderer in the qualitative evaluation, then Tenderer A's qualitative score is adjusted up to 250 with a pro rata adjustment applying to the qualitative scores of all other tenderers. For example, if Tenderer B achieves a score of 180 (out of 250), then Tenderer B's score is adjusted to 225, and so on (see Fig. 4.7.1 below for further explanation).

## 4. The invitation to tender (ITT)

Tenderer	Actual qualitative score (out of 250)	Multiplier	Adjusted qualitative score
Tenderer A	200	$200 \times \frac{250}{200}$	250
Tenderer B	180	$180 \times \frac{250}{200}$	225
Tenderer C	170	$170 \times \frac{250}{200}$	213*
Tenderer D	150	$150 \times \frac{250}{200}$	188*
Tenderer E	120	$120 \times \frac{250}{200}$	150

Fig. 4.7.1 - example score adjustment

\*scores have been rounded to the nearest whole number

### 4.8. Tender period

The tender period is the time between the date the ITT is issued and the latest date (and time) for the submission of tenders. Clients should have regard to the scale, nature and complexity of a project when stipulating the tender period and any deadline for the submission of tenders must be clearly stated in the ITT.

In any event, a minimum of 20 working days<sup>17</sup> should be given to tenderers however, larger or more complex projects may require a longer period. If tenderers are requested to include sub-contractor assessments in their tenders (whether for open or selective tendering), an additional 5 working days should be given. If the successful contractor is to be responsible for certain elements of the design as stipulated in the ITT, then additional time should be considered to give tenderers sufficient opportunity to assess these implications and address them in their tender.

Where alterations to standard forms of construction contract have been made, an extended tender period should be considered as this will give tenderers time to seek specialist legal advice in relation to such alterations.

<sup>17</sup> This minimum period applies for open tendering with or without assessments and selective tendering and is subject to any extensions recommended in this Code of Practice.

## 4. The invitation to tender (ITT)

### 4.9. Tender addenda

Clients or their consultants may decide to issue additional information during the tender period. Such information should be limited in scope and used as clarification of tendering documentation already issued. Such addenda information should be issued to all tenderers at the same time and by the same means as the original tendering documentation (i.e. hard or soft copies). It may be necessary to consider an extension to the tender period if the quantity or nature of addenda information is significant.

If an addendum is issued less than five working days prior to the tender submission date, an extension to the tender period should be given to allow tenderers at least 5 working days from the date the addendum was issued to submit their tender. A greater extension may be necessary if the quantity or nature of the addendum information is significant.

### 4.10. Tender queries and responses

If tenderers are permitted to submit queries, this should be stated in the ITT as should the time limits for such queries. A latest date for the submission of queries should be set at no less than 10 working days before the submission deadline. Clients should aim to respond to queries as soon as practicable and in any event no less than 5 working days before the submission deadline. This will allow tenderers sufficient time to address the response in their tender. An extension to the tender period may be required if the nature of the response has the potential to cause significant changes to work already completed by tenderers.

Tender queries and the client's responses should be issued to all tenderers and at the same time. However, it is important that the identity of the originator of each query is not revealed to the other tenderers. Clients should confirm if responses to any queries are to be considered part of the tendering documentation and hence are intended to form part of the contract.

### 4.11. Requests for extensions of time

Clients should seek advice from their consultants if a tenderer (or tenderers) submits a request for an extension of time to the tender period. If requests are first directed to the client's consultant, the consultant should discuss the matter with the client. If it is considered reasonable to grant an extension and the client accepts any consequences (e.g. a later commencement of works and a potentially later than anticipated completion date) then the extension (or part thereof) should be granted to all tenderers. Regard should be given to the possibility of tenderers withdrawing if they feel they have not been given sufficient time to prepare and submit their tender.

If the client does not wish to grant any requests for extensions of time, any response should be communicated to all tenderers at the same time and without revealing the identity of the originator of the request.

## 4. The invitation to tender (ITT)

### 4.12. Modification of tenders

Tenderers may request to submit additional information or to modify or update information already submitted. It is at clients' discretion whether or not to permit this. However, clients should consider if not permitting such information to be submitted might result in tenderers withdrawing from the competition. Clients should not generally grant such requests from tenderers if received after the tender submission date unless that tenderer can demonstrate a legitimate reason for the request, such as new relevant information becoming available. Clients may wish to seek advice from their consultants in this regard.

In any event, it is useful to stipulate in the ITT if such additional information or modifications will be permitted and, if so, what timelines apply. Furthermore, if such an opportunity is granted to one tenderer, equal opportunity should be communicated and granted to all tenderers.

### 4.13. Withdrawal of tenders

Tenderers are permitted to withdraw their tender at any stage prior to contract award. Tenderers should notify clients as soon as practicable after they have decided to withdraw, and no reason needs to be given.

### 4.14. Clarification of tenders

Clients may request, at their discretion, any tenderer to clarify any part of their tender provided this does not change the tender sum or the substance of their tender. If a tenderer does not provide such clarification, their tender may be disqualified provided reasonable notice of such disqualification is given to the tenderer.

### 4.15. Tender value engineering proposals (VE)

It is a matter for clients, with the advice of their consultants, to decide if tender VE proposals are acceptable. This is where tenderers are permitted to submit with their tender an alternative design which may reduce cost, improve quality or be of some other benefit to the client (e.g. shorter construction programme, improved life-cycle costs etc.).

Such proposals should only be submitted on a non-variant compliance basis. In other words, the VE proposal should be a secondary option within the tender, with a compliant tender (i.e. wholly in accordance with the tendering documentation) as the primary option. Clients should stipulate that they are not obliged to accept any such proposals. In addition, it should be made clear that any tenderer submitting a valid VE proposal must accept design responsibility for that VE proposal as well as any further design required as a direct result of that VE proposal.

## 4. The invitation to tender (ITT)

### 4.16. Exclusion of tenderers

If clients, or any of their agents or consultants, become aware of any justifiable reasons for the exclusion of any tenderer (e.g. fraud or convictions relating to safety, health and welfare) at any time they should notify the tenderer as soon as practicable. Clients may wish to provide such tenderers with an opportunity to address the matter and justify their continuance in the tender process. Clients may then, with the help of their consultants, make a purposeful view as to whether or not the tenderer is to be excluded.

Online version

## 5. Submission and evaluation of tenders

### 5.1. Introduction

Tenders should be submitted in the manner set out in the ITT, for example, in hardcopy or softcopy, by post or via an online data environment. Tenders should be kept in a safe and secure place at all times. Once the submission deadline has passed, evaluation should take place as soon as practicable thereafter. It can be helpful to confirm to all tenderers that their tender has been received on time. Tenders should only be opened by designated persons and priced bills of quantities should be treated with utmost confidentiality as they contain commercially sensitive information.

Just as with assessments, a record sheet outlining what date and time tenders were submitted and by whom should be compiled. This applies to both hard and soft copy submissions. This document should be signed and include details of any witnesses.

### 5.2. Late submissions

Generally speaking, late tenders should not be accepted, however, clients may exercise a reasonable degree of discretion when receiving tenders after the deadline. For example, if the lateness was due to some extraneous circumstances beyond the control of the tenderer and the delay was relatively short, it may be considered reasonable to accept their tender. However, such discretion should be treated with caution.

### 5.3. Tender evaluations

As noted above, tenders may only be evaluated against the predefined award criteria and any applicable weighting. Evaluations must be carried out by persons competent to do so. This may require, for example, a quantity surveyor carrying out a comparative cost analysis of the tender sums submitted by each tenderer, an architect reviewing quality assurance protocols, or an engineer inspecting a construction traffic management plan.

A compliance check can be carried out first to determine if each tenderer has submitted all required information. If any tender is found not to be compliant it may be disqualified. However, clients may wish to exercise a reasonable degree of discretion in this regard where, for example, such disqualification would result in a low number of remaining compliant tenders. In these circumstances clients may request non-compliant tenderers to submit any additional information to rectify the compliance issue provided they do not submit any other information which would materially affect their tender.

For financial evaluations, the tender sum submitted by each tenderer must be viewed without opening its priced bill of quantities. Then, as noted in **Section 4**, the highest financial score is given to the tenderer with the lowest price (as may be adjusted by comparative cost analysis or normalisation of costs). If applicable, the qualitative evaluations are also carried out using the prescribed methodology. Evaluation of quality submissions can take a significant amount of time as it may involve reviewing substantial volumes of information. It is important that due care is given to all submissions.

## 5. Submission and evaluation of tenders

Following the completion of all evaluations, the priced bill of quantities (if there is one) of the tenderer who achieves the highest overall score may then be opened and checked for errors. As noted above, this document is to be treated with utmost confidentiality and under no circumstances should any details of the tenderer's pricing be disclosed to any person outside the tender evaluation team except with the express permission of the tenderer. No bills of quantities from other tenderers are to be opened without first seeking permission from the relevant tenderer. Following contract award, the tenders of unsuccessful tenderers must be made available for those tenderers to collect, or otherwise be returned to them.

### 5.4. Abnormally low tenders (ALT)

If one or more tenders is returned with figures significantly below that identified in the latest pre-tender cost/budget estimate (if one has been prepared) but are otherwise compliant, these may be considered abnormally low tenders.

Although clients are not bound to accept any tender, if they wish to consider an ALT it would be wise to contact the relevant tenderer informing them that they have submitted an ALT and ask them to a) substantiate this, and b) confirm that they have made no errors and stand over their tender price. Upon receiving these responses from the tenderer, it is at the client's absolute discretion whether to exclude the tenderer, or not. See Appendices M and N for sample letters in relation to ALTs.

Criteria for ALT (any of the following may apply):

- The tender sum is more than 30% lower than the average price of the remaining tenders;
- The tender sum is more than 10% lower than the price of the second lowest tender;
- The tender sum is more than 10% lower than the pre-tender cost/budget estimate prepared by the quantity surveyor (if one has been prepared);
- The tender appears to be abnormally low for other reasons or otherwise raises a suspicion that the tenderer will not be able to perform the works in accordance with the requirements of the tendering documentation.

### 5.5. Qualified tenders

It may be the case that some tenderers include one or more qualifications with their tender, for example, that their tender is conditional on some other event (e.g. a specific start date or the use of a particular method of construction). Such qualifications should not be accepted, and tenderers should be asked to omit them from their tenders (provided such omission would form an otherwise compliant tender), or withdraw. If those tenderers do not omit the qualification or withdraw, clients may disqualify them from the tender process. If they withdraw or are disqualified, all documentation must be returned to those tenderers.



## 5. Submission and evaluation of tenders

### 5.6. Arithmetical errors

During the tender evaluations, tenderers may be asked to address any arithmetical errors in their tender. They should not be permitted to include any additional information or corrections. Tenderers should be asked to stand over their original offer or withdraw. If tenderers do not stand over their original offer or withdraw, clients may disqualify them from the tender process. If they withdraw or are disqualified, all documentation must be returned to those tenderers.

If the bill of quantities of the preferred tenderer contains arithmetical errors, inconsistencies or incomplete information, this should be brought to their attention. The preferred tenderer in question must be given an opportunity to confirm or withdraw their original offer. If that tenderer neither confirms their original offer nor withdraws, clients may disqualify them from the tender process. If they withdraw or are disqualified, all documentation must be returned to them and the bill of the next preferred tenderer should be opened.

If a tenderer confirms their offer despite the discovery of errors, a written endorsement should be requested from them to that effect.

### 5.7. Cover pricing

Cover pricing is where a tenderer submits an inflated tender sum with the aim of not being successful but without having to withdraw from the process. Clients should be aware of such practice as sometimes contractors may simply not want to lose goodwill with repeat clients. Cover pricing may also be used as a method of increasing tender prices, particularly if more than one tenderer is involved. If clients or their agents suspect this practice they should notify the Competition and Consumer Protection Commission (CCPC).

### 5.8. Tender report and recommendation

Following the completion of the tender evaluations it is good practice for the client's evaluation team to prepare a report on the process for the client outlining the results and identifying a preferred tenderer. The client can use this report to make an informed decision on the award of the contract.

### 5.9. Notification to tenderers

If the client wishes to proceed to the next stage all tenderers are to be notified. Standard notification letters can be found at Appendices P and Q. The preferred tenderer is notified that they have been successful and, if appropriate, subsequently issued with a letter of acceptance. At the same time, unsuccessful tenderers should also be notified of their position and the reasons as to why their tender was unsuccessful. They must also be notified of the intent to award the contract to the successful tenderer (whose identity may then be made known).

## 5. Submission and evaluation of tenders

In any event, all tenderers should be notified of the results as soon as practicable following the conclusion of the evaluation process. If, for any reason, the initial preferred tenderer cannot be awarded the contract<sup>18</sup>, the client may proceed to notify the next best scoring tenderer, and so on until the contract can be awarded. As such, it is advisable not to return any tenders until the award process has concluded. On the conclusion of the award process, any material confidential in nature should then be returned (or made available) to the unsuccessful tenderers, or destroyed.

Tenderers should be notified if the evaluation process is significantly delayed, particularly if the delay will have an impact on the tender validity period.

### 5.10. Letters of intent

Letters of intent are commonly used when a preferred tenderer has been identified but the precise terms of the contract have not been agreed. They are a means of commencing construction work on a project relatively quickly without the necessary effort required for the formal execution of a contract. Letters of intent must be treated with caution. They must be clear that they are letters of intent and that they are not intended to constitute an award of the contract. Clients should seek guidance from their consultants if letters of intent are to be used. This Code of Practice does not recommend the use of letters of intent and advises that formal contract execution (either through contract signing or a suitable letter of acceptance) should take place as soon as practicable.

### 5.11. Tender validity period

The tender validity period is the period for which a tenderer is obliged to stand over their tender. The required tender validity period should be set out as early as possible and in any event no later than in the ITT. 180 days is generally the accepted norm and, save for exceptional circumstances, may be considered a reasonable period in the absence of any such period being stipulated. Tenderers are not obliged to stand over their tenders after the expiry of the tender validity period but may be requested to do so.

If clients or their agents are requesting extensions to the tender validity period, such requests should be made in writing. No tenderer is bound to extend the validity period of their tender but may agree to do so following such requests.

<sup>18</sup> Examples as to why this might be the case are: they submitted a qualified tender and the client does not want to accept the qualification; there is an arithmetical error in their bill of quantities and they cannot stand over their tender sum; the tenderer is no longer in a position to proceed with the project.

## 5. Submission and evaluation of tenders

### 5.12. Letter of acceptance & contract award

Following the conclusion of the tender evaluation process, notifications and any applicable standstill period<sup>19</sup>, if the client wishes to proceed to award the contract, then a letter of acceptance<sup>20</sup> should be issued to the preferred tenderer. This letter forms a binding contract between the client and the contractor. Formal agreement and execution of all contract documents should follow as soon as practicable thereafter.

It can be helpful to remind the contractor of any documentation required prior to commencement on site, e.g. performance bonds, tax clearance certificates, collateral agreements, evidence of insurances etc. as noted in **Section 4.2**.

### 5.13. Contract documents

These typically comprise the tender submission from the contractor, the tendering documentation and, if so stated, any relevant tender query responses or clarifications.

It is good practice to agree as soon as possible the contract documents, as these form the basis of the binding agreement between the parties.

### 5.14. Disputes

Prior to contract award, if a dispute arises between a tenderer and the client, informal dispute resolution procedures such as mediation should be considered.

It should be noted that once a contract has been formally executed, the parties will be bound by any dispute resolution procedures contained therein.

<sup>19</sup> Employers may, at their discretion, wish to invoke a standstill period between the identification of the preferred tenderer and contract award.

<sup>20</sup> A standard form letter of acceptance can be found at Appendix U.

## 6. Post-tender negotiation

### 6.1 Introduction

Once a preferred tenderer has been identified and prior to the award of the contract it is possible to clarify any financial or qualitative matters as well as any other contractual matters. For example, it may be the case that the tender sum of the preferred tenderer exceeds the client's budget. In this situation, the recommendation is to negotiate with that tenderer. Negotiations may review, *inter alia*, the scope and quality of the project as well as construction techniques, for example, choosing precast concrete over in-situ or blockwork construction or indeed other modern methods of construction.

If all tender sums are significantly over budget or the pre-tender estimate (if one has been prepared), clients may wish to negotiate with one or more tenderers prior to identifying a preferred tenderer. Such negotiations should be exercised with caution and a robust framework is advisable in order to ensure that the negotiation process is conducted in a fair and objective manner. Negotiations with more than one tenderer should not be used simply to bring construction costs down post-tender (unless such costs are already significantly over legitimate pre-tender estimates) as tenderers will have already incurred considerable expense in the preparation of their tenders.

### 6.2. Timing of negotiations

Negotiations may only take place prior to the award of the contract as any changes to the scope or quality made post-award must be carried out in accordance with the contract, for example by variations.

If negotiations fail with the original preferred tenderer, the client may, at its discretion and following notification<sup>21</sup> to the original preferred tenderer, proceed to negotiate with the second highest scoring tenderer who thus becomes the new preferred tenderer<sup>22</sup>. If those negotiations fail, then the process may be repeated with the third highest scoring tenderer and so on. If all negotiations fail or if the client chooses not to negotiate, the client may restart the tender process or abandon the project. In the case of a tender restart or project abandonment the client must notify<sup>23</sup> all tenderers as soon as practicable.

<sup>21</sup> A sample notification letter for failed negotiations with the original preferred tenderer is included at Appendix R1.

<sup>22</sup> A sample letter to the next preferred tenderer is included at Appendix R2.

<sup>23</sup> Sample notification letters for tender restart and project abandonment are included at Appendices S and T.

## 6. Post-tender negotiation

### 6.3. Records

It is important that the agreed terms of any negotiation are fully recorded and documented prior to entering into a contract. This might include the revision of technical drawings or specifications as well as changes in scope or quality. Failure to complete this may result in disputes occurring over what is or is not considered a change or variation during the course of the works.

It is possible for the terms of negotiations to be spread across a wide range of documents of multiple authorship, therefore a consolidation of all agreed negotiations can be helpful in clarifying the precise details to all parties. This includes consultants who, despite not typically being a party to the construction contract, may issue documents during the works on the assumption that they are complying with agreed negotiated terms when in fact they could be unknowingly instigating a change or variation.

Online version

## 7. Sub-contractors

### 7.1. Introduction

Sub-contractors (sometimes referred to as ‘specialists’) are generally specialist contractors who possess knowledge, skill and experience in a specific field of construction, such as curtain walling, electrical or mechanical works. Their appointment may be made directly by the main contractor or by another sub-contractor or sub-sub-contractor and so on. Sub-contractors may become involved in a construction project in several ways and this will largely depend on the needs and requirements of the client and on the terms and conditions of the main contract.

### 7.2. Types of sub-contractors

There are several different types of sub-contractors and the way in which they are chosen and appointed can vary.

- a. Domestic sub-contractors are chosen and appointed by the main contractor and with little or no involvement or influence by the client (except in the case of named or novated sub-contractors, see below, or in cases where sub-contractor assessments apply, see **Section 3.4** for more details).
- b. Nominated sub-contractors are chosen by the client to undertake specific works packages, typically for works that are of particular significance to the project or importance to the client. Nominated sub-contracts are usually the subject of a separate tender process. The architect instructs the main contractor (in accordance with the main contract) to appoint that sub-contractor for that works package. During the design stage the client’s consultants should advise as to what works packages should be the subject of nomination. This also applies to any nominated suppliers.

Depending on the specific contractual provisions, the client may retain liability for certain elements in relation to nominated sub-contractors, for example the design of that sub-contractor or the costs associated with re-nomination. Furthermore, the nominated sub-contractor may have greater certainty for payment provisions in the main contract by providing for direct payments from the client to the sub-contractor.

The costs of a nominated sub-contractor’s works package are typically dealt with using prime cost sums (PC sums) where the details of such works packages are identified in the tendering documentation. The main contractor is entitled to add markup and attendances to PC sums (previously referred to as the ‘main contractor’s discount’). This is to account for reasonable profit and preliminaries costs rightfully owed to the main contractor for appointing and managing the sub-contractor.

Mechanical and electrical works are commonly tendered as nominated sub-contracts as their respective percentage value of project costs is often significant. Depending on the nature of the project, mechanical and electrical packages may be subdivided into security, plant, IT and communications etc. with each package the subject of a nominated sub-contract.

## 7. Sub-contractors

- c. Named sub-contractors are similar to nominated sub-contractors in that they are chosen by the client prior to the execution of the main contract to undertake specific works packages. However, depending on the contractual provisions, the main contractor typically retains full responsibility for the design and performance of the sub-contractor (just as it does for any domestic sub-contractor) as well as for any costs associated with re-appointment. This Code of Practice will not deal further with named sub-contractors and expert advice should be sought.
- d. Novated sub-contractors are chosen and appointed by the client during the design stage typically well before the execution of the main contract, to assist with specialist design at an early stage. The contract administrator<sup>24</sup> instructs the main contractor to appoint that sub-contractor for the relevant works package. The novated sub-contractor then, depending on the particulars of the novation agreement, effectively becomes a domestic sub-contractor. Novation procedures are complex as are the contractual provisions that deal with them. This Code of Practice will not deal further with novated sub-contractors and expert advice should be sought.

### 7.3. Domestic sub-contractors

As noted above, domestic sub-contractors are appointed directly by the contractor with little or no involvement or influence by the client. As discussed in **Section 3**, contractor assessments in both open and selective tendering may include an assessment for sub-contractors to be proposed by the contractor. If, at any point during the tender process, the contractor can no longer appoint any of the proposed sub-contractors, the contractor must notify the client as soon as practicable giving reasons as to why the appointment cannot proceed. The contractor may then propose a new sub-contractor to the acceptance of the client who may, in turn, object on reasonable grounds and having regard to the relevant assessment criteria.

### 7.4. Nominated sub-contractors

Nominated sub-contractors can be chosen by clients in the same way as contractors, i.e. by being approached directly, by referral or by requesting responses to an advertisement. The preliminary inquiry and expression of interest procedures may similarly be used. Tenders from nominated sub-contractors may then be sought in the same way as those for the main contract (i.e. on a competitive or non-competitive basis) and the same forms and notification letters may be used provided they are amended accordingly.

<sup>24</sup> In the case of the RIAI Construction Contract, the contract administrator is the Architect.

## 7. Sub-contractors

If tenders for nominated sub-contracts are to be returned prior to those for the main contract, nominated sub-contractors should be asked to include the items of preliminaries (general and special attendances) that are covered by their tender price and what items of preliminaries they expect to be provided by the main contractor. This list should then be issued to tenderers for the main contract no later than 5 working days prior to the tender submission date so the tenderers can include this in their tender price. General and special attendances in respect of works by nominated sub-contractors are as defined in the Agreed Rules of Measurement (ARM) which are current at the Designated Date<sup>25</sup>.

The applicable PC sums must be included in the tendering documentation for the main contract. Contractors should be afforded a reasonable right to object to a nominated sub-contractor or supplier or, in the alternative, clients may insist on the appointment provided suitable indemnities are given to the main contractor against the relevant nominated sub-contractor or supplier. This Code of Practice does not deal with appointments following reasonable objection and expert advice should be sought.

If tenders for nominated sub-contracts are to be returned after those for the main contract, it is helpful to request in the main contract ITT that main contractors outline what preliminaries will be made available to nominated sub-contractors and what, if any, facilities sub-contractors are required to provide themselves, for example site accommodation, storage, waste disposal etc.

Payment provisions in the main contract for nominated sub-contract work will depend on the form of main contract being used but typically, payment certificates under the main contract issued by the architect include amounts due to nominated sub-contractors and a copy of this payment certificate is issued to the relevant sub-contractor. Depending on the contractual provisions, if the main contractor fails to issue payment rightfully due to a nominated sub-contractor, the employer may, at its discretion, pay the sub-contractor directly and deduct any monies due or to become due to the main contractor, as the case may be.

### 7.5. Main contractor's programme

If the main contractor's programme is available before the return of nominated sub-contract tenders, it should be issued to all tendering sub-contractors asking them to confirm that their tender includes for the acceptance of the main contractor's programme. Sub-contractors should be given sufficient time to review the main contractor's programme prior to submitting their tender. This is the preferred method as it requires all tendering sub-contractors to accept the main contractor's programme.

<sup>25</sup> See **Section 17** for an explanation of the Designated Date.



## 7. Sub-contractors

If the main contractor's programme is not available before the return of nominated sub-contractor tenders, the sub-contract tenderers should be requested to confirm that they will accept the main contractor's programme provided it is reasonable. A successful nominated sub-contract tenderer may also object to the main contractor's programme on reasonable grounds however the client may disqualify such a sub-contract tenderer and proceed to contact the next highest scoring sub-contract tenderer and so on.

### 7.6. Collateral agreements

Sub-contracts can be the subject of collateral agreements (sometimes called 'collateral warranties'). These agreements create a contractual link between the employer and the sub-contractor (where otherwise no such link would be in place). The reasons for having collateral agreements can vary according to the needs and requirements of the employer (and any funding agency).

Collateral agreements are discussed in greater detail in **Section 8**.

### 7.7. Performance bonds

Just as with the main contract works, nominated sub-contractors can be required to include a performance bond with their tender (provided such a requirement is stipulated in the sub-contract ITT). Performance bonds are discussed in greater detail in **Section 9**.

### 7.8. Professional indemnity insurance

In addition to any performance bond requirements for sub-contract work, employers may wish to procure additional safeguards depending on the extent of design being undertaken by a sub-contractor, particularly if the main contractor is not liable to the employer for such design, as is commonly the case with nominated sub-contractors. Furthermore, damage due to design of the sub-contractor may occur outside of the effective bonding period or may far exceed any normal percentage of the sub-contract value covered by a performance bond.

In such a scenario, clients may require sub-contractors to maintain professional indemnity insurance over a set period and to a specified limit to cover these liabilities provided such a requirement is stipulated in the sub-contract ITT. Insurances are discussed in more detail in **Section 10**. Specialist advice should be sought in the preparation of PI insurance requirements.

## 8. Collateral Agreements

### 8.1. Introduction

Collateral agreements (also referred to as 'collateral warranties') are agreements which sit alongside another contract, sometimes referred to as the primary, main or principal contract. In the context of construction, collateral agreements are collateral to the main contract between the employer and main contractor. They are required to create a contractual relationship where otherwise no such relationship would be in place, for example between an employer and a sub-contractor or between a funder (funding the employer) and the main contractor.

In some construction projects there can be an intricate web of contractual relationships connecting all the parties together. It is necessary that any requirements for collateral agreements are clearly outlined in the employer's tendering documentation, because securing such agreements later in the process will likely incur additional costs. Furthermore, the exact wording of collateral agreements must be carefully considered as they have the potential to impose significant liability on parties to them. Any party being subjected to a collateral agreement should contact their insurers to confirm they are covered for the liability being imposed on them by the collateral agreement.

In any event, specialist legal advice should be sought where collateral agreements are applicable.

### 8.2. Collateral agreements between employers and sub-contractors

Employers may require collateral agreements with sub-contractors. Such agreements are only necessary where the work of the sub-contractor is of particular importance or significance to the project in terms of financial value or design.

A collateral agreement between the employer and sub-contractor, depending on the wording, can provide for direct recompense to the employer from the sub-contractor for default by that sub-contractor or if, for example, the employer suffers damage as a result of design carried out by the sub-contractor.

Sometimes these agreements can include a benefit for the sub-contractor whereby an employer agrees to early release of retention monies in relation to the sub-contractor's works package or for direct payment by the employer to the sub-contractor in the event of the main contractor defaulting on payment to the sub-contractor. Such arrangements are typically reserved for nominated sub-contractors.

### 8.3. Collateral agreements between funders and main contractors

If the employer is receiving funding for a project, it is possible that the funder will require a collateral agreement between itself and the main contractor in order to protect its interests. Banks, for example, as funders would usually have their own standard form of collateral agreement and the funding agreement it has with the employer would typically require the use of that standard form of collateral agreement. Funders may also require collateral agreements from any sub-contractors with whom the employer has a collateral agreement. Such agreements are beyond the scope of this Code of Practice and specialist advice should be sought.

## 8. Collateral Agreements

### 8.4. Collateral agreements between tenants/leasees and contractors

In large scale commercial developments, it may be necessary for the employer or developer<sup>26</sup> to obtain a lease agreement upon completion of the project, with, for example, a retailer. The lease itself may be an integral part of the funding for the project, for example to repay a loan to a funder. Such a lessee or tenant may require as a condition of its lease agreement with the employer or developer, a collateral agreement with the main contractor or certain significant sub-contractors. This would enable the tenant or lessee to bring an action in contract against the contractor or sub-contractor in respect of defects that might arise after completion, as opposed to an action in negligence, the available damages for which could be limited.

Such agreements are beyond the scope of this Code of Practice and specialist advice should be sought.

### 8.5. Assignment of collateral agreements and step-in rights

Assignment is the process whereby the benefit of a contract is transferred to a third party. It is common for collateral agreements to include provision for the assignment of the benefit of the collateral agreement. For example, where a developer for a shopping centre has a collateral agreement with a specialist mechanical contractor, the developer might require that the agreement can be subsequently assigned to a future tenant (or tenants). Certain tenants might require such assignment as a condition of their lease.

The number of assignments should be clearly stipulated, and excessive assignment rights should be avoided as this can cause significant risk to be transferred to the warrantor. Likewise, any conditions required for assignment should be made clear, for example, if prior written consent of the warrantor is required.

Step-in rights are typically provided where, for example, funding institutions wish to step-in to the shoes of the employer in any of its primary contracts, if, say, the employer was to become insolvent or otherwise breach its loan agreement with the funder. This enables the funder to continue with the project without the involvement of the employer. Step-in clauses can be included in the collateral agreement between the funder and the relevant warrantor.

Assignment and step-in clauses are complex, and any party requiring them or being subjected to them should seek specialist advice and notify their insurers.

<sup>26</sup> Distinction is made here between employer and developer as the developer may own the completed project but is not named as the employer in the contract. Examples of this could be where the employer is a Special Purpose Vehicle (SPV) or joint venture between a developer and funding institution.

## 8. Collateral Agreements

### 8.6. Limitations on liability

It is common for collateral agreements to include a provision limiting the liability of the warrantor (the party who is not the beneficiary to the agreement) so that it will not be liable to the beneficiary for any act or omission that is not a breach of the primary contract<sup>27</sup>. Furthermore, the collateral agreement should include a provision that the warrantor will not be liable to the beneficiary to any level or extent greater than that provided for in the primary contract. This would include any caps on liability or net contribution clauses in the primary contract.

### 8.7. Disputes

All collateral agreements should provide for adequate dispute resolution mechanisms. It may be appropriate to consider similar provisions to the primary contract, e.g. conciliation, arbitration etc. It is unclear whether or not the Irish courts will consider a collateral agreement to fall within the definition of a construction contract under the Construction Contracts Act 2013 and therefore be subject to the adjudication provisions therein. The term “construction contract” is broadly defined in the Act.

<sup>27</sup> In the case of a collateral agreement between the employer and a sub-contractor the primary contract is the sub-contract between the main contractor and that sub-contractor. In the case of a collateral agreement between a funder and a main contractor the primary contract is the contract between the employer and the main contractor.

## 9. Bonds

### 9.1. Introduction

There are many types of bonds that might be required in construction contracts. Bonds are essentially undertakings or covenants by one party (sometimes referred to as a 'surety' or 'guarantor', e.g. a bondsman or a financial institution) to pay another party (sometimes referred to as the 'beneficiary', usually the employer) a specified amount on the occurrence of a specified event, either conditionally or unconditionally and typically following contractual breach or default, e.g. non-performance, by a third party (sometimes referred to as the 'applicant', usually the contractor) to the detriment of the beneficiary.

Bonds are typically for the benefit of employers and although the costs for them are initially borne by the contractor, this is usually reflected in their tender price. Therefore, employers are the ultimate payer for bonds and as such, any bond requirements should be appropriate to the nature, scale and complexity of the project as well as the financial circumstances of the employer. All bonds should be subject to the jurisdiction of the Irish Courts and with industry-recognised bond institutions who are licenced to provide such bonds. The law regarding bonds is complex as are the contractual provisions that deal with them and specialist advice should be sought if bonds are required. Below are some of the common types of bonds encountered in the construction industry in Ireland.

### 9.2. Performance bonds between the main contractor and the employer

Performance bonds are bonds that reimburse employers in the event of non-performance by the main contractor, for example if the contractor was to become insolvent or simply did not continue with the works in accordance with the contract. The amount payable under the bond is restricted to the performance bond limit, typically a percentage of the project value or contract sum and also to the amount of expenses reasonably incurred by the employer as a direct result of the non-performance of the main contractor.

Employers may stipulate in the tendering documentation that performance bonds are required from approved sureties. The limits and conditions of the bond should be clearly set out and consideration should be given to the use of standard forms.

Performance bonds are normally required for all construction contracts with an estimated value in excess of €500,000 (this requirement may be waived in certain, very exceptional circumstances). Below this threshold, a bond may still be required where the employer considers that a sufficient level of financial risk exists which would justify a performance bond. Such decisions may need to be agreed beforehand with any funding agency<sup>28</sup>.

Employers should ensure that forms of performance bonds do not contain unduly onerous or inequitable conditions. They may need to consult their legal advisors on all aspects of the performance bond before awarding the contract.

<sup>28</sup> A funding agency may be, for example, a lending institution providing finance for the project either whole or in part. Lending agreements may require the use of performance bonds and may even stipulate the specific terms of the bond.

The recommended limits of performance bonds are as follows:

Contract sum	Percentage value of performance bond
Less than €15million	12.5%
Over €15million	10%

*Fig 9.2.1 - recommended performance bond values*

Before the contract is signed, employers should be clear when accepting a tender, that such acceptance is conditional on the production of a satisfactory performance bond, on a written request, within the prescribed time period specified in the employer’s tendering documentation.

**All forms of performance bonds should incorporate the following:**

- Provisions permitting variations to the scope of the contract, extensions to the period for completion of the works, indulgences, forbearances or concessions, alterations to the terms of payments, compromises or settlements of disputes without reference to the surety, provided such matters do not materially affect the risk covered by the performance bond.
- The performance bond maximum cover level should generally be reduced to 50%, from the issue of the Certificate of Practical Completion of the project. The risk should remain on cover for a further period of 15 months from the date of issue of such certificate.
- A period of notification to the surety by the employer or its representative of any serious breach of, or default in, any of the terms and conditions of the contract by the contractor, which shall not be less than 3 months.
- An arbitration provision, in the event of a dispute arising between the surety and the employer. The arbitrator to be appointed by agreement, or failing agreement an arbitrator appointed, on the request of either party, by the President for the time being of the Royal Institute of the Architects of Ireland.

### 9.3. Performance bond between nominated sub-contractors and the main contractor

A performance bond may be required by the main contractor with respect to the performance of the nominated sub-contractor to cover the extent of the main contractor's potential losses arising from any breach of the nominated sub-contractor's obligations, which are not recoverable under the main contract. The requirement for such a bond should be the subject of negotiation on a case-by-case basis.

Failure on the part of a nominated sub-contractor to provide such a performance bond may constitute reasonable grounds to sustain an objection to the nomination by the main contractor.

### 9.4. Retention bonds

Employers may require a retention bond as an alternative to deducting retention amounts (discussed in greater detail in **Section 11**) under the contract. The bond is used to protect the employer for the amount that would have otherwise been held in retention. Just as with retention, retention bonds usually reduce in value following practical completion and the expiry of the defects liability period.

Retention bonds will not be discussed further in this Code of Practice and specialist advice should be sought.

### 9.5. Advance payment bonds

Advance payment bonds may be provided for under the contract whereby the employer agrees to pay the contractor for certain elements of work prior to their completion or incorporation in the project. Such elements of work might include where the contractor incurs substantial start-up costs, or where particular materials or goods require large payments by the contractor upfront.

Upon the making of such advance payment to contractors, employers may require an advance payment bond to protect the employer for non-performance of the contractor, for example if the contractor were to become insolvent after such an advanced payment was made but before the relevant work was incorporated into the project. Advance payment bonds are typically on-demand bonds (see **Section 9.7** for more details).

Advance payment bonds will not be discussed further in this Code of Practice and specialist advice should be sought.

### 9.6. Parent company guarantees

Parent Company Guarantees (PCGs) are guarantees by parent or holding companies to protect employers in the event of default or non-performance of a subsidiary company or other commercial entity related to the parent company acting as contractor (e.g. a non-corporate joint venture). Such a subsidiary may also be a corporate joint venture<sup>29</sup> between two or more contractors (one contractor being the primary member and providing the PCG) or a Special Purpose Vehicle (SPV) which is, for example, a company set up specifically for a construction project.

PCGs are similar to performance bonds in that they recompense employers in the event of non-performance by the original contractor but they can also provide a further level of protection by requiring the parent company to step into the shoes of the original contractor and complete their obligations under the contract including remedying any loss or expense incurred by the employer as a result of the original contractor's default or non-performance.

Parent company guarantees will not be discussed further in this Code of Practice and specialist advice should be sought.

### 9.7. Conditional and on-demand bonds

Conditional bonds usually require the beneficiary to demonstrate to the surety that, due to an alleged breach of the relevant contract by the bond applicant, it has sustained loss or damage and that such loss or damage is covered by the bond. For example, if a contractor becomes insolvent and the employer incurs additional costs in reappointing a replacement contractor, the employer must demonstrate what losses it has sustained as a result of the insolvency of the original contractor in order to make a successful call on a performance bond. In addition to this, the employer is only entitled to the actual amount of loss sustained up to bond limit. Therefore, if the bond limit is €500,000 but the employer can only demonstrate relevant losses of €100,000, it will only be entitled to recover €100,000 under the performance bond.

On-demand bonds, to the contrary, do not contain any such preconditions and a simple call on the bond is sufficient provided such a call is not fraudulent and the required format of the call is adhered to by the beneficiary. On-demand bonds are severe contractual instruments and should be treated with caution. They should only be used in very limited circumstances as their misuse has the potential to cause significant financial stress to bond applicants (i.e. contractors) as well as to potentially limit the number of contractors who might tender for a project.

On-demand bonds will not be discussed further in this Code of Practice and specialist advice should be sought.

<sup>29</sup> The legal status of a joint venture or consortium depends on the joint venture/consortium agreement. There are a number of corporate structure options available, such as: a limited company; partnership; Irish Collective Asset-management Vehicle (ICAV) etc. The liability of each member of the JV or consortium in relation to the project may differ and specialist legal advice should be sought.



### 9.8. Assessments by a nominated person

As noted above, under the terms of a typical performance bond, the beneficiary will usually have to *demonstrate* to the surety the actual loss or damage that it has sustained as a result of a breach of the relevant contract by the applicant. However, it is possible for the terms of a bond to simply require an *assessment* of the loss or damage by a nominated person and, consequently, no actual *demonstration* of that loss or damage. In such circumstances, consideration should be given to any matters which might give rise to justifiable doubts as to the impartiality or independence of that nominated person.

Online version

## 10. Insurance

### 10.1. Introduction

Construction involves many risks which have the potential to cause loss of or damage to property or persons. Such loss or damage can have significant financial implications and insurance against those risks therefore plays a fundamental part in both the design and construction of building and engineering works. Insurance in construction protects the insured as well as the party to which the insured would be liable.

As one of the key aspects of construction contracts is the management and allocation of risks, the contractual insurance provisions are important. Similarly, the types and levels of those insurances should be appropriate to the nature, scale and complexity of the project as well as the overall risk profile of the project.

The use of standard forms of construction contract is recommended. In particular, the RIAI Construction Contract 2017 is recommended as the insurance provisions therein have been agreed among the constituent bodies to the Liaison Committee. Specialist advice should be sought when stipulating what types and levels of insurance cover are required and by whom as well as any exclusions that are to apply. In any event, the insurance requirements should be noted in the client's tendering documentation in order for tenderers to review them with their insurance providers, determine if they are in a position to accept them and, if so, reflect this in their tender.

It is not the intention of the Code of Practice to provide any detailed guidance to, or analysis of insurances and specialist advice should be sought.

### 10.2. Types of policy and limits

The types of insurance which might be required in construction will vary greatly from project to project. The standard form RIAI Construction Contract 2017 provides for the following:

**1. Contractors All Risks Insurance (CAR)**

This policy covers loss of, damage to or destruction of the works and ancillary items (defined in Clause 22(a)) from any cause whatsoever excluding the risks identified in sub-clause 23(d)(iii). The 'all' is therefore a misnomer, as it does not cover all risks. It is to be in the joint names of the contractor and the employer.

**2. Public Liability Insurance** (sometimes referred to as Third Party Liability or PL)

This policy covers personal injury to or death of persons as well as loss of or damage to property of third parties (but excludes damage to the works) and is typically grouped with product liability insurance.

**3. Employer's Liability Insurance (EL)**

Employers are legally required to have this insurance which provides cover for compensation which might be required following injury to, illness or death of an employee caused by or during the work they are employed to do. The contractor always takes out Employer's Liability Insurance for its own employees, this is not to be confused with the term 'Employer' under the construction contract.

**4. Motor Insurance**

This is insurance in respect of site vehicles.

## 10. Insurance

The standard form RIAI Construction Contract 2017 provides for either the Contractor or the Employer to take out the CAR and PL insurances. The default is that the Contractor takes out both insurances. When the Employer takes out the PL and CAR it is also known as an 'Owner Controlled Insurance Package' (OCIP).

### 10.3. Other types of insurance

As well as the above, some construction projects may require the following:

1. **Product Liability Insurance** (commonly included in public liability policies) this typically provides cover for loss of or damage to property or for injury to or death of persons arising from defective products supplied as part of the construction.
2. **Professional Indemnity Insurance** (sometimes referred to as PII, Design & Build or Design Construct Insurance) in respect of design liability, both professional and contractors, i.e. main contractor or sub-contractor. This protects the insured from liability arising in cases of professional negligence.
3. **Non-negligence Insurance** for circumstances where an event arises but which is not covered by the normal suite of contractor and professional insurances, such as a collapse of an adjoining structure with unknown defects.
4. **Latent Defects Insurance** (also known as 'Inherent Defects Insurance' and 'Decennial Insurance') this typically covers facade and structural defects for a prescribed period, e.g. 10 or 12 years following completion, and may also be expanded to include building services which would typically be under a separate arrangement.
5. **Environmental Impairment Insurance** (EIL) (also known as environmental liability insurance or pollution liability insurance) can provide cover for liability following environmental damage. The EU Environmental Liability Directive<sup>30</sup> aims to make entities who are responsible for causing environmental damage liable and require them to take necessary preventative or remedial action and bear all related costs. Environmental damage is defined in the directive and includes damage to natural habitats, protected species as well as underground water sources.
6. **Owner Controlled Insurance Policy** (as above, an OCIP may also provide non-negligence insurance as part of the PL package).

<sup>30</sup> Directive 2004/35/EC.

## 10. Insurance

### 10.4. Insurance limits, claim bases and periods of cover

When deciding what types of insurance policy are to be requested from contractors, care should also be taken when deciding on the policy limits. Excessive limits could present financial issues where cover is not readily available at reasonable commercial rates. The scale, nature and complexity of a project should have bearing when deciding on these.

In addition, certain types of insurance may have different claim bases when applying these limits, for example, a limit for a PII policy may apply on an *each and every claim* basis or on an *aggregate* basis. Determining the appropriate basis will depend on the circumstances and this may need to be negotiated on certain projects.

The relevant period of cover, i.e. when cover should commence and when it should cease, also needs to be stipulated. When determining the appropriate cover period clients should have regard to the type of insurance, the relevant main contract limitation period (i.e. 6 or 12 years from completion) and what is commercially available at the time and for any run-off period following completion.

Specialist advice from insurance professionals should be sought when determining these items.

### 10.5. Exclusions

Certain liabilities may be excluded altogether such as loss of profit and other consequential losses. The RIAI, following consultation with the CIF and the SCSI, may publish from time-to-time permitted wordings of the exclusions from insurance cover permitted by sub-clause 23(d) of the RIAI Construction Contract 2017. The contract is deemed to facilitate any such exclusions current at the Designated Date.

If any changes to the list of exclusions in standard forms of construction contract are to apply, this should be clearly highlighted in the client's tendering documentation in order for tenderers to review such changes with their insurance providers, determine if they are in a position to accept those changes and, if so, reflect this in their tender.

### 10.6. Caps on liability

It may be the case on certain projects that limits apply on the financial liability of contractors. Contractual caps on liability are the most common approach to this and may be expressed as a specific figure or as a percentage of some other figure, such as the contract sum. Caps on liability are typically outlined in the contract particulars and referred to in the relevant contract clause. It is important to confirm whether the cap relates to any individual claim or if it is an aggregate amount. For example, if a contractor's PII liability is not to exceed €6million this cap may relate to the total aggregate liability of the contractor for any and all claims made under that policy or it may apply to each individual claim.

Furthermore, it should be outlined if this cap relates to different kinds of loss, e.g. consequential loss, latent defects, and if it is restricted to loss or damage under or in connection with the contract. It should also be outlined if anything is to be excluded from the cap such as loss or damage arising from reckless performance or fraudulent misrepresentation.

If the contractor's liability is to be capped, it is expected that similar provisions are made in the design team appointments in conjunction with net contribution clauses.

Online Version

# 11. Retention

## 11.1. Introduction

When a payment becomes due on interim payment certificates under a construction contract, a percentage is usually withheld by the employer as a means of providing surety against defects and ensuring that the contractor fully completes its obligations under the contract. This percentage is known as the retention and accrues over the course of the contract into the retention fund. The percentage value of the retention can vary and is typically stipulated in the contract particulars. Depending on the contractual terms, half the retention fund (the first moiety) is released to the contractor at practical completion with the remaining half (the second moiety) released on the expiry of the defects liability period provided that the contractor has fulfilled its obligations in relation to the making good of defects and any other obligations.

Retention amounts can be substantial, and it is important that the percentage is appropriate to the value of the project. The Liaison Committee considers the following to be appropriate retention amounts:

Value of contract	Retention
Under €500k	7.5%
€500k - €1million	5%
€1million - €5million	3%
Over €5million	2%

*Fig 11.1.1 – recommended retention percentages*

Due to the requirement for cash flow and financial security within the construction industry, there are some alternatives to retention funds that may be more appropriate in any given project.

## 11.2. Retention trust account

Retention amounts that would normally be withheld by the employer can, instead, be held in trust by the employer. Such an arrangement can provide some protection to the contractor in the event of employer insolvency as depending on the terms of the trust, the amounts therein would not be available in preference to other creditors who would otherwise outrank the contractor. Furthermore, the employer would not typically have access to amounts in the trust except as may be provided for under the contract.

## 11. Retention

### 11.3. Joint retention account

Retention amounts that would normally be withheld by the employer can, instead, be paid into an account, sometimes called the 'Joint Account', set up in the joint names of the employer and the contractor and in accordance with any contract particulars, for example at a specified bank. It is important to establish the details, such as who is entitled to the interest that accrues as well as what is required to make a withdrawal, for example a certificate from the architect as stipulated under Clause 35(g) of the RIAI Construction Contract 2017.

Joint retention accounts can be more attractive to the contractor as they effectively ring-fence retention monies which cannot then be used by the employer for other expenditure.

### 11.4. Retention bond

As discussed in **Section 9**, retention bonds are an alternative means of providing security to the employer in relation to the making good of defects while maintaining cash flow to the contractor. A sample retention bond is included at Appendix V.

### 11.5. Limit of retention fund

In conjunction with the retention percentage, the contract particulars may provide for a lump sum limit of the retention fund, in other words that the total amount withheld on interim payment certificates may not exceed the sum so stated. This can cause confusion if the scale of a project, and thus the contract sum, increases during the contract period. However, it provides some price certainty to contractors who may wish to know their exposure to financial risk in that regard.

## 12. Building Information Modelling (BIM)

### 12.1. Introduction

BIM or Building Information Modelling is a process for creating and organising digital information about buildings and civil engineering works. While one of the key outputs of this process is the information model, BIM extends to the digital description and management of every aspect of the built asset. BIM promotes greater reuse and collaboration for digital information relating to buildings and civil engineering works across the entire project and asset lifecycle.

There have been many reports in the last few decades highlighting the inefficiencies of the construction industry and the costs associated with that inefficiency. The cost of inefficiency is compounded on larger and more complex projects where there are multiple participants. Like many other industries, construction needs to adapt to digital technologies and collaborative ways of working based on internationally recognised standards to remain competitive.

### 12.2. BIM standards

Following the publication of a series of PAS 1192 and BS 1192 documents in the UK between 2007 and 2018, during which time BIM was mandated for publicly funded projects in the UK, the International Standards Organisation commenced the preparation and publication of ISO versions of the UK documents which has unified standards for BIM on a global scale. In Ireland, the ISO standards are published by the NSAI as IS EN standards:

- **I.S. EN ISO 19650-1:2018** - Organisation and digitisation of information about buildings and civil engineering works, including building information modelling (BIM) - Information management using building information modelling - Part 1: Concepts and principles.
- **I.S. EN ISO 19650-2:2018** - Organisation and digitisation of information about buildings and civil engineering works, including building information modelling (BIM) - Information management using building information modelling - Part 2: Delivery phase of the assets.

Irish National Annex to I.S. EN ISO 19650 -2:2018 has been published by NSAI. The Annex primarily deals with file naming and revision control which did not form part of the ISO 19650 standard as common agreement could not be formed on these subjects. There are notable differences between the requirements of the Irish and British National Annex. It is important therefore that the Annex to be implemented on the project is identified at tender stage. If no Annex has been specified in the client's tendering documentation, clarity should be sought from the Appointing Party.

- **I.S. EN ISO 19650-3:2020** - Organisation and digitisation of information about buildings and civil engineering works, including building information modelling (BIM) — Information management using building information modelling — Part 3: Operational phase of the assets.



## 12. Building Information Modelling (BIM)

- **I.S. EN ISO 19650-5:2020** - Organisation and digitisation of information about buildings and civil engineering works, including building information modelling (BIM) — Information management using building information modelling — Part 5: Security-minded approach to information management.

At the time of publication of this Code of Practice, the following standard is under development by ISO:

- **ISO/DIS 19650-4** - Organisation and digitisation of information about buildings and civil engineering works, including building information modelling (BIM) — Information management using building information modelling — Part 4: Information exchange.

For all new projects where BIM is included, it is recommended that BIM is undertaken in accordance with ISO 19650 standards. The PAS 1192 and BS 1192 standards are British Standards and are currently being superseded by ISO 19650 equivalent standards as they are being published. Superseded standards should not be considered for new projects, however, current projects under PAS 1192 or BS 1192 standards can continue to be undertaken in accordance with those standards.

Working to standards, and especially international standards, requires a significant transformation of processes relating to how tendering and execution of work is undertaken. It does however provide significant advantages as it increases the ability to collaborate digitally with other disciplines on projects across geographical boundaries which reduces barriers and increases the quality of information.

### 12.3. Transitional arrangements from PAS 1192 standards

**PD 19650-0:2019** Transition guidance to BS EN ISO 19650 provides information for those familiar with BS 1192:2007+A2:2016 and PAS 1192-2:2013 during the transition to BS EN ISO 19650-1 and BS EN ISO 19650-2. This document covers useful terms and definitions, the role, structure and status, BIM Level 2 and information management maturity, mapping of the standards and the language used in ISO 19650.

### 12.4. Deciding to include BIM on a project

For projects undertaken in accordance with ISO 19650 standards, it is important that ‘Level 2 BIM’ or ‘BIM Level 2’ is not used as these relate to the superseded PAS 1192 standard. The correct term is “**building information modelling (BIM) according to the ISO 19650 series**” or “**BIM according to the ISO 19650 series**”.

Furthermore, it is not sufficient for a client to simply state that BIM is a requirement. BIM according to the ISO 19650 series is a process split into eight sub-processes commencing with the client and an assessment of their information requirements and ending at project close-out.

## 12. Building Information Modelling (BIM)

The sub-processes are<sup>31</sup>:

- 5.1 Assessment and need
- 5.2 Invitation to tender
- 5.3 Tender response
- 5.4 Appointment
- 5.5 Mobilisation
- 5.6 Collaborative production of information
- 5.7 Information model delivery
- 5.8 Project close-out

The sub-processes are listed in order of how they are generally executed. The Appointing Party<sup>32</sup> is responsible for steps 1 and 2. As tendering can occur for design services at the beginning of a project as well as for works contractors, steps 2 to 7 will, for most projects, be repeated for both. The sub-processes are in a logical order of execution and can therefore be aligned with the relevant project work stages.

There is no option within ISO 19650-2 to omit any of the sub-processes or the activities within each sub-process. The standard does however use the phrase “shall consider” to distinguish details of each activity that may be considered for exclusion. On this basis, anyone preparing a schedule of BIM activities should carefully examine all activities with the phrase ‘shall consider’ before omitting them from the process.

### 12.5. Information management function

Unlike the PAS 1192 standard, ISO 19650 standards do not include the role of Information Manager. On Projects where BIM according to the ISO 19650 series is a requirement, all activities within the information management process are to be undertaken by a single ‘**information management function**’, aspects of which are assigned to whichever persons or organisations are best placed to fulfil them.

The information management function spans the entire lifecycle of a project from **Sub-process 5.1 - Assessment and need** up to **Sub-process 5.8 Project close-out** and the responsibilities for each must be assigned to one of the following:

**Appointing Party** - client, owner or employer, developer

<sup>31</sup> The numbering here aligns with that of ISO 19650-2.

<sup>32</sup> See Section 12.5 Information management function below for details of the roles under ISO 19650.

## 12. Building Information Modelling (BIM)

**Lead Appointed Party** - is any organisation that has a direct appointment with the appointing party. In the case of works tendering, it is typically the main contractor<sup>33</sup>.

**Appointed Party** - provider of information concerning works, goods or services, to or through the lead-appointed party. In the case of works tendering, it is anyone appointed by the Lead Appointed Party, such as sub-contractors and suppliers<sup>34</sup>.

The Appointing Party is responsible for nominating individuals from within its own organisation to undertake the information management function on its behalf.

The Appointing Party is also responsible for assessing the competency of the individuals being proposed to undertake the information management function on behalf of the delivery team<sup>35</sup>. Therefore, the ITT should include a request for personal details and professional CVs of the proposed individuals who will undertake the information management function on behalf of the delivery team. Evidence of certification in a relevant subject by an established accrediting body (such as a third level institution, professional or standards body) can be requested as part of an open or selective assessment or as part of the qualitative submission requirements of an ITT.

- |                        |                 |   |
|------------------------|-----------------|---|
| A Appointing Party     | 1 Project Team  | ↔ Information requirements and exchange |
| B Lead Appointed Party | 2 Delivery Team | ⋯ Information coordination              |
| C Appointed Party      | 3 Task Teams    |   |

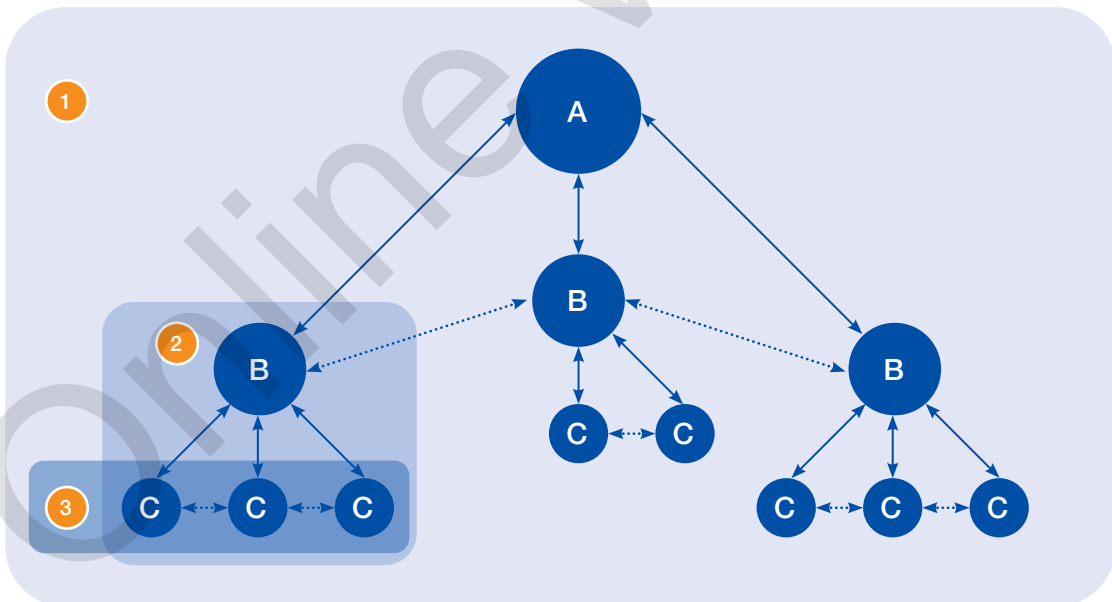


Fig 12.5.1 – Role Diagram

<sup>33</sup> The employer's design consultants may also be Lead Appointed Parties if appointed directly to the employer.

<sup>34</sup> Any sub-consultants to the consultant appointed directly to the client may also be Appointed Parties.

<sup>35</sup> See Fig. 12.5.1 for details on the interaction between parties and teams for the purpose of information management.

## 12. Building Information Modelling (BIM)

### 12.6. Appointing Party

The Appointing Party should ascertain its capability and capacity to undertake the relevant activities for the sub-processes **5.1 Assessment and need**, **5.2 Invitation to tender**, **5.5 Mobilisation**, **5.7 Information model delivery** and **5.8 Project close-out**<sup>36</sup>.

The Appointing Party needs to ensure that an information protocol<sup>37</sup> is included as part of the appointment with the Lead Appointed Party which ensures that specific obligations of the Appointing Party, prospective Lead Appointed Parties and prospective Appointed Parties relating to the management or production of information are included for in the appointment, including the use of the project's common data environment and delivering contractual requirements in accordance with the post-appointment BIM Execution Plan<sup>38</sup>.

### 12.7. Lead Appointed Party

Where a design team or construction professional has a direct appointment with the Appointing Party, they shall undertake the activities of a Lead Appointed Party. Any organisations which are sub-contracted or have sub-appointments to the Lead Appointed Party are an Appointed Party. For example, the main contractor is a Lead Appointed Party, and each sub-contractor is an Appointed Party.

Depending on the procurement strategy for the project, there may be more than one Lead Appointed Party. For example, in addition to the main contractor there may be an enabling works contractor appointed separately by the Appointing Party. In this case, the enabling works contractor is also a Lead Appointed Party.

When preparing their tender, each prospective Lead Appointed Party is responsible for activities identified in sub-process **5.3 Tender response**. Each prospective Lead Appointed Party must outline the resources required as part of its tender, and if successful, the resources required during their appointment, for example, nominating an individual to undertake the information management function who shall in turn prepare a pre-appointment BIM Execution Plan.

In special circumstances where multiple Lead Appointed Parties are required to work in very close collaboration with one another, it is good practice for the authors of the required resources from each organisation to communicate during the information planning stage (especially when developing each delivery team's BIM execution plan). This will drive out potential inconsistencies when finalising their own resources. This should be done via the project's common data environment.

<sup>36</sup> This numbering corresponds to that in ISO 19650.

<sup>37</sup> The information protocol is established at **Sub-process 5.1 Assessment and need**.

<sup>38</sup> The post-appointment BIM Execution Plan is prepared by the entity undertaking the information management function on behalf of the Lead Appointed Party.

## 12. Building Information Modelling (BIM)

Contractors that are requested to take on the role of Lead Appointed Party with a significant number of sub-contractors, should familiarise themselves with each activity in IS EN ISO 19650-2:2018 and ascertain their capability and capacity to undertake the activities. The scope of work is significant when compared to that of an Appointed Party or undertaking the Lead Appointed Party for themselves and a small number of sub-consultants.

### 12.8. Appointed Party

An Appointed Party has no direct appointment with the Appointing Party. Depending on the depth of the supply chain, they may not have an appointment with the Lead Appointed Party, for example sub-sub-contractors are Appointed Parties but are not necessarily appointed directly by the Lead Appointed Party.

Each potential Appointed Party is responsible for relevant activities identified in sub-process **5.3** to **5.7** of ISO 19650-2 which should be documented clearly in the BIM Execution Plan by the Lead Appointed Party. Each Appointed Party shall ascertain its capability and capacity to undertake these activities.

### 12.9. Third party

It is possible for the Appointing Party, Lead Appointed Party or Appointed Party to outsource the information management function to a **third-party** individual or organisation. A scope of services should be established and the use of the information management assignment matrix (IS EN ISO 19650-2:2018 - Annex A) can help with this. However, care should be taken when considering any such third party and any potential conflicts of interest that might arise, for example, where a third party is undertaking the information management function for the Appointing Party and a Lead Appointed Party or Appointed Party.

Embedding information management capabilities into existing roles is preferential to outsourcing as it reduces the dependence of BIM/digital specialists. Where there are identified shortfalls of competencies and experience, these should be addressed by upskilling individuals, or by appointing a third-party specialist to help integrate these capabilities into existing roles.

Care should also be taken not to cross any lines of professional responsibility/liability (e.g. traditional roles of design coordination and construction coordination must continue to remain with the correct party). Checking and coordination and the liability for both must remain with the responsible party under the relevant contract.

## 12. Building Information Modelling (BIM)

### 12.10. Invitation to tender

In either open or selective assessments, tenderers may be requested to demonstrate their capability to deliver in accordance with the ISO 19650 series.

To successfully implement the ISO 19650 series, the Appointing Party or third-party representative, should prepare an Exchange Information Requirements (EIR) document which is a statement of need confirming the types of information required, how different types of information should be structured and exchanged and to what level of information need. These requirements should be aligned to the work stages of the project.

At a minimum, the **EIR** should be included in the tendering documentation and include:

1. Information requirements
2. Level of information need
3. Supporting information
4. Milestone dates
5. Acceptance criteria

The following information may be included as part of the tendering documentation:

**1. Relevant reference information and shared resources** - examples may include:

- a. BIM Execution Plan template
- b. Task Information Delivery Plan (TIDP) template
- c. Sheet templates
- d. Standard library objects
- e. Existing asset information

**2. Project information delivery milestones** - in accordance with the project's plan of work.

**3. Project's information standard** - information standards for the project - examples may include:

- a. Exchange of Information
- b. Structuring and classification of information
- c. Method of specifying level of information need
- d. Use of information during the operational phase

## 12. Building Information Modelling (BIM)

### 4. Project's information production methods and procedure - examples may include:

- a. Capture of existing asset information
- b. Generation, review or approval of new information
- c. Security or distribution of information
- d. Delivery of information to the Appointing Party

### 5. Project's information protocol.

### 6. Tender response requirements and evaluation criteria (if applicable).

#### 12.11. Tender response

Each prospective Lead Appointed Party and any Appointed Party should familiarise themselves with the Exchange Information Requirements (EIR) and the relevant tender response activities identified in sub-process 5.3 to 5.8 of ISO 19650-2 and ascertain their capability and capacity to undertake these activities.

The prospective Lead Appointed Party shall nominate one or more individuals from within its own organisation to undertake the information management function.

Alternatively, the prospective Lead Appointed Party can outsource some or all of the activities to an Appointed Party or third party - in such cases a scope of services needs to be prepared. Annex A to ISO 19650-2:2018 can be used to assist in preparing a scope of services. As an example, a main contractor could outsource the information management function to a consulting engineer that is a member of the delivery team or to a specialist BIM consultancy organisation, provided that a scope of services is prepared based on activities in ISO 19650-2.

The information management function requires domain knowledge and an ability to execute tasks efficiently and effectively on behalf of a team which is often much wider than the organisation which the individual may work for. The individual(s) undertaking the information management function is responsible for the following ISO 19650-2 tender response activities:

- 5.3.2 Establish the delivery team's (pre-appointment) BIM execution plan
- 5.3.4 Establish the delivery team's capability and capacity
- 5.3.5 Establish the delivery team's mobilisation plan
- 5.3.6 Establish the delivery team's risk register
- 5.3.7 Compile the delivery team's tender response

## 12. Building Information Modelling (BIM)

Tenderers being required to fulfil the role of Lead Appointed Party may be required to include details of the professional qualifications and experience of individuals they intend to nominate for the information management function.

Each task team (i.e. the group of sub-contractors to a Lead Appointed Party) should assess their capability and capacity to deliver information in accordance with the Appointing Party's Exchange Information Requirements (EIR) and the delivery team's proposed (pre-appointment) BIM execution plan.

Any required certification to ISO 19650-2:2018, for example through **NSAI, BSi, BRE** or **Lloyds Register** should be clearly stipulated in the ITT.

### 12.12. Appointment/contract award

It is the responsibility of the Appointing Party to establish the project's information protocol, including any associated license agreements, which will, subsequently and appropriately, be incorporated into the contract. It is also the responsibility of the Appointing Party to ensure that the protocol is included for each Lead Appointed Party and any subsequent parties employed by that party, thus ensuring that the rights and obligations are the same for all project participants.

When preparing the information protocol, the Appointing Party shall consider:

- Specific obligations of the Appointing Party, prospective Lead Appointed Parties and prospective appointed parties relating to the management or production of information, including the use of the project's common data environment
- Any warranties or liabilities associated with information
- Background and foreground intellectual property rights of information
- The use of existing asset information
- The use of shared resources
- The use of information during the project, including any associated licensing terms
- The re-use of information following the appointment or in the event of termination

The UK BIM Framework has published a document titled 'Information protocol to support BS EN ISO 19650-2 the delivery phase of assets'. This Protocol does not refer to any appointment or contract, making it suitable for use in projects in Ireland. Where applicable, BS EN ISO 19650-2:2018 should be replaced with the Irish equivalent standard IS EN ISO 19650-2:2018. Professional advice should be sought to ensure that the protocol does not conflict with the terms set out in the appointment or contract.



## 12. Building Information Modelling (BIM)

The following documents should be included in each appointment with the Appointing Party and managed using change control for the duration of the appointment:

- Appointing Party exchange information requirements
- Project information standard (including any agreed additions or amendments)
- Project information protocol (including any agreed additions or amendments)
- The delivery team's BIM execution plan
- The delivery team's MIDP

The following documents should be included in each appointment with the Lead Appointed Party and managed using change control for the duration of the appointment:

- Lead Appointed Party exchange information requirements
- Project information standard (including any agreed additions or amendments)
- Project information protocol (including any agreed additions or amendments)
- The delivery team's BIM execution plan
- The agreed TIDP

## 13. Safety, health and welfare

### 13.1. Introduction

The most important aspect of design and construction is the safety, health and welfare of anyone who might be affected by the project. This extends not only to occupiers and users of buildings but to construction workers, off-site manufacturers, site visitors, staff, repair and maintenance workers and the general public. The extent to which the safety, health and welfare of a person might be affected by a construction project is broad and those involved in the decision-making have a responsibility in that regard.

This section is not meant to provide a detailed analysis of safety, health and welfare issues. For more information on safety, health and welfare please visit the Health and Safety Authority website at [www.hsa.ie](http://www.hsa.ie).

### 13.2. Compliance

It is recommended that clients, or consultants on their behalf, who invite tenders use the following documents in relation to responsibility for compliance with the safety, health and welfare legislation during the construction stage of a project.

- Assessment questionnaire (Appendix B)
- Contractor's Declaration of Competence (Appendix B1)
- Health and Safety Clauses for Specifications and Bills of Quantities (Appendix E)
- Form of Agreement for Appointment of Project Supervisor for the Construction Stage (Appendix W).

## 14. Building Control (Amendment) Regulations - BC(A)Rs

### 14.1. Introduction

**BC(A)Rs** introduce additional Building Control provisions. These additional provisions apply to:

- The design and construction of a new dwelling
- An extension to a dwelling involving a total floor area of more than 40m<sup>2</sup>
- Works to which Part III of the Building Control Regulations, 1997 to 2014 apply (i.e. developments which require a Fire Safety Certificate).

This is an introductory advice note only and it is not intended to be a formal guidance note. Readers are referred to the DHLGH<sup>39</sup> website and the websites of the constituent bodies for more detailed guidance and Practice Notes.

### 14.2. BCMS

BC(A)Rs introduced the Building Control Management System (BCMS) and its website<sup>40</sup> which facilitates the electronic administration of building control matters by building control authorities as the preferred means of building control administration.

### 14.3. Date of operation

BC(A)Rs came into operation on the 1st March 2014 for applicable projects where the Commencement Notice<sup>41</sup> is submitted on or after that date.

### 14.4. Application of S.I. No. 105 of 2014

S.I. No. 105 of 2014 applies to a limited range of public and privately owned buildings intended for use as first, second or third level places of education, hospitals or primary care centres. It was a transitional arrangement with few practical applications now.

<sup>39</sup> Department of Housing, Local Government and Heritage.

<sup>40</sup> <https://www.localgov.ie/en/BCMS>.

<sup>41</sup> A Commencement Notice is a notification to a Building Control Authority that a person intends to carry out either works or a Material Change of Use to which the Building Regulations apply.

## 14. Building Control (Amendment) Regulations - BC(A)Rs

### 14.5. Application of S.I. No. 365 of 2015

S.I. No. 365 of 2015 commenced operation on the 1st September 2015.

The Explanatory Note to these regulations notes that they amend the Building Control Regulations (the “Principal Regulations”) following a review by Government of the operation of the procedures introduced under S.I. No. 9 of 2014 during its first 12 months in operation.

- a. They provide clarification that an Owner intending to build a dwelling for their own use may take on the role of Builder for building control purposes and sign the statutory forms which must be signed by the Builder.
- b. They are revised to give the owner of works involving the construction of a new single dwelling, on a single unit development, or of a domestic extension, the facility to opt out of the requirement to obtain statutory certificates of compliance signed by a registered construction professional.
- c. An eligible Owner who opts out of the statutory certification process as outlined above is required, prior to the commencement of works, to submit a Commencement Notice accompanied by:
  - A *Declaration of Intention to Opt Out of Statutory Certification* in the regulatory format published
  - Such plans, calculations, specifications and particulars as are necessary to outline how the proposed dwelling or domestic extension will comply with the relevant technical requirements of the Building Regulations; typically: general arrangement drawings; a schedule of compliance documents, as designed or to be prepared at a later date; the online BCMS assessment of the proposed approach to compliance; a Notice of Assignment of Builder and the relevant fee.
- d. The effect of these changes is that the statutory forms of certification signed by builders and registered construction professionals are not mandatory on such qualifying projects.
- e. For the avoidance of doubt, S.I. No. 365 of 2015 does not provide any relaxation to any Owners from the requirements to comply with the technical requirements of the Building Regulations.
- f. The Principal Regulations are also amended to remove the general exemption from building control regulations for works undertaken by a Local Authority within its own functional area.
- g. It is recommended that parties considering availing of the “opt out” relaxations in S.I. No. 365 of 2015 should become familiar with the Regulations and the *Code of Practice for Inspecting and Certifying Buildings and Works* issued by Department of Housing, Planning, Community and Local Government.

## 14. Building Control (Amendment) Regulations - BC(A)Rs

### 14.6. Titles, roles and responsibilities

BC(A)Rs require compliance measures in the design and construction of applicable works up to and including final completion and entry on the BCMS Register (other than for works where the Owner has “opted out” in accordance with the provisions of S.I. No. 365 of 2015).

There are new titles, roles and responsibilities throughout the process.

- **Owner:** the person ultimately responsible for compliance with the Regulations and appointment of competent personnel.
- **Assigned Certifier (AC):** a competent person who is assigned by the building Owner to inspect and certify the building or works concerned, as set out in Part B of the Certificate of Compliance on Completion. The AC may or may not be a member of the Design Team. The emerging practice is that the AC is a member of the Design Team.
- **Designer** (referred to by some in common usage as the **Design Certifier (DC)**): a competent person who has been commissioned by the building Owner to design, in conjunction with others, the building or works described above and to certify such design, as set out in the statutory Design Certificate. A building Designer can serve as the Assigned Certifier.
- **Builder:** the Builder should carry out the works in accordance with the plans and specifications of the professional design team, their specialists and sub-consultants as necessary and have regard to these in accordance with the requirements of the Building Regulations.
- **Ancillary Certifiers:** may be designers, contractors, sub-contractors, suppliers, manufacturers, etc.

### 14.7. Certification

#### Who can act as Design Certifier and Assigned Certifier and sign the relevant Statutory Certificates?

Those on the registers below who are competent in relation to the work involved:

- a. An Architect on the register maintained by the RIAI
- b. A Chartered Engineer on the register maintained by Engineers Ireland
- c. A Building Surveyor on the register maintained by SCSl

“Competent Person” means a person is deemed to be a competent person where, having regard to the task they are required to perform and taking account of the size and/or complexity of the building or works, the person possesses sufficient training, experience and knowledge appropriate to the nature of the work to be undertaken<sup>42</sup>.

<sup>42</sup> As defined in the Code of Practice for Inspecting and Certifying Buildings and Works.

## 14. Building Control (Amendment) Regulations - BC(A)Rs

### 14.8. Documents

The Certificates referred to under Items 1 to 5 and 7 and 8 below are Statutory Certificates which cannot be altered.

1. **Certificate of Compliance (Design) completed by the Design Certifier**
2. **Notice of Assignment of an Assigned Certifier completed by Owner**
3. **Notice of Assignment of a Builder completed by Owner**
4. **Certificate of Undertaking signed by Assigned Certifier**
5. **Certificate of Undertaking signed by Builder**
6. **Preliminary Inspection Plan (PIP)**  
The Inspection Notification Framework (INF) and the Completed Inspection Plan prepared by the Assigned Certifier.
7. **Building Commencement Notice**  
The Commencement Notice is submitted by uploading it to the BCMS website and designating the relevant Building Control Authority on behalf of the Owner. Responsibility for its submission, under BC(A)Rs rests with the Owner and the form must be signed by the Owner. The submission must be accompanied by the statutory certificates 1 to 5 above and the PIP.
8. **Certificate of Compliance on Completion**  
These are to be completed by the Builder (Part A) and by the AC (Part B) certifying in the prescribed form that the finished works comply with the Regulations including all necessary changed or superseded design documents and details of the Inspection Plan as implemented.
9. **Ancillary Certificates**  
Ancillary (both Design and Inspection) Certificates have been developed and agreed between the RIAI, ACEI, Engineers Ireland, and SCSl, to be used by consultants, specialist and unregistered consultants. Specialist and unregistered consultants are consultants who are not entered on any of the registers referred to in BC(A)Rs.  
  
Ancillary Certificates have been developed by the CIF and agreed by the RIAI, ACEI, Engineers Ireland and SCSl, to be used by contractors, sub-contractors, specialist contractors and sub-sub-contractors.

## 14. Building Control (Amendment) Regulations - BC(A)Rs

### 14.9. Validation and Registration of Certificate(s) of Compliance on Completion

It is unlawful to open, occupy or use a building which has not been entered on the Register. Phased completions are provided for.

Two alternative procedures are available for the submission of the Certificate of Compliance on Completion:

#### 10. Standard Procedure

Upon *Completion*<sup>43</sup>, the Assigned Certifier submits the form specified for that purpose accompanied by such table of plans, calculations, specifications and particulars as are necessary to outline how the completed works or building differ from the design submitted with the Commencement Notice.

Should the Building Control Authority fail to validate or reject the Certificate within 21 days, the Certificate will be placed on the Register automatically. If the Certificate is regarded as not being valid by the Building Control Authority, it may reject the Certificate or require the Assigned Certifier to submit a revised certificate or additional documentation necessary to achieve validation.

#### 11. Nominated Date Procedure

The required documentation demonstrating compliance and the Inspection Plan can be submitted to a Building Control Authority on a date falling not more than 5 weeks and not less than 3 weeks prior to a nominated date on which a valid Certificate of Compliance on Completion is intended to be submitted for entry on the Register by the Assigned Certifier.

The Building Control Authority shall at that point begin to consider the submission so that the Authority is in a position to include the details of the relevant Certificate of Compliance on Completion on the Register on the nominated date - provided that a valid Certificate of Compliance on Completion is received by the Building Control Authority on a date not later than the date preceding the nominated date. (Text in Regulation 20F (8)).

#### Note 1

BC(A)RS provide that the Principal Regulations (1997 - 2009) are amended by substituting for the Title of Part IIIA the following: "Part IIIA — 7 Day Notice, Certificates of Compliance, Revised Fire Safety Certificate, Regularisation Certificate, Statutory Declaration and 7 Day Notice Statutory Declaration".

(There have also been changes to Part IIIC, Part IV, Part V, the Second and Third Schedules, and a new Sixth Schedule).

These are complex provisions requiring specialised advice if being considered and they are outside of the scope of this Code of Practice.

<sup>43</sup> Under the RIAI Construction Contract 2017 this would be Practical Completion.

### **Note 2**

Documentation held on file by a Building Control Authority relevant to works or a building included on the statutory register will be accessible to any person who subsequently acquires an interest in the building concerned. (See text in the third last paragraph of the Explanatory Note to the Regulations).

### **Note 3**

Records relating to particulars included on the register may be accessed in accordance with the Freedom of Information Acts 1997 and 2003. The register may be maintained electronically subject to the Data Protection Acts 1998 and 2003.

Online version



## 15. Nearly Zero Energy Buildings - nZEB

### 15.1. Introduction

In 2019, new building regulations<sup>44</sup> came into effect in relation to the energy performance of buildings. This initially only related to new dwellings where construction commenced on or after 1st November 2019, however, they now relate to:

1. New dwellings
2. Major renovation works to dwellings
3. New buildings which are not dwellings
4. Major renovations to new buildings which are not dwellings

As such, practically all new works will be the subject of nZEB requirements with the exception being renovation works which are not major. Major renovation is defined in Technical Guidance Document Part L<sup>45</sup> as “...where more than 25% of the surface area of the building envelope undergoes renovation”. If the figure exceeds 25% then “the energy performance of the whole building should be improved to Cost Optimal level insofar as this is technically, functionally and economically feasible”<sup>46</sup>.

The definition of Nearly Zero Energy Buildings (nZEB) is given in the European Energy Performance of Buildings Directive (EPBD Recast) 2010/31/EU of 19th May 2010 and further detailed in the technical guidance document (TGD) Part L 2017: Non-Domestic and TGD Part L 2018: Domestic as “*Nearly Zero-Energy Building (NZEB): means a building that has a very high energy performance, as determined in accordance with Annex I of the EU Energy Performance of Buildings Directive Recast (EPBD Recast) 2010/31/EU of 19th May 2010.*” TGD Part L 2017 goes on to say that “*The nearly zero or very low amount of energy required should be covered to a very significant extent by energy from renewable sources, including energy from renewable sources produced onsite or nearby.*”

It is not the intention of the Code of Practice to provide any detailed guidance to or analysis of nZEB, but to highlight what needs to be considered when compiling tendering documentation. For further information and guidance on nZEB please visit:

[www.housing.gov.ie](http://www.housing.gov.ie).

<sup>44</sup> S.I. No. 183 of 2019 - European Union (Energy Performance of Buildings) Regulations 2019 and S.I. No. 292 of 2019 - European Union (Energy Performance of Buildings (No.2) Regulations 2019.

<sup>45</sup> Technical Guidance Document L - Conservation of Fuel and Energy - Dwellings (2019) and Buildings other than Dwellings (2017).

<sup>46</sup> Section 2.3.1, Technical Guidance Document L - Conservation of Fuel and Energy - Buildings other than Dwellings (2017).

## 15. Nearly Zero Energy Buildings - nZEB

### 15.2. nZEB at the design stage

At an early design stage, it is important to establish if nZEB is applicable to a project as compliance with the relevant requirements must be demonstrated. If this is not addressed early on, additional costs may be incurred by clients to bring the design into compliance at a later stage.

Additional nZEB requirements such as specific building fabric assumptions (whether by a dedicated Part L report or the inclusion of the preliminary DEAP/NEAP model) should be made explicit and easily identifiable in the client's tendering documentation. Any additional nZEB-related documentation that is required to be lodged as part of a commencement notice must also be included in the tendering documentation, e.g. a Part L Compliance Report and an inspection/supervision plan that takes account of these issues.

Key inputs and assumptions may include, but are not limited to:

1. Elemental U-Values assumed
2. Thermal bridging factors inputted to an energy model
3. Assumed air tightness value inputted to an energy model
4. Efficiencies and energy consumption of mechanical systems

Following award of the construction contract, the contractor should be given the opportunity to comment on the delivery of U-values, thermal bridging, air tightness, DEAP or NEAP model assumptions etc., and provide evidence that it is capable of implementing them.

### 15.3. Sub-contractors

There may be a requirement for some sub-contractors, particularly specialist mechanical, ventilation, sanitary and façade engineering contractors, to provide detailed design services as part of a tender. Particular components may be specified by type or name where necessary, otherwise the thermal resistance properties or U-value of the component and any other environmental performance characteristics must be specifically detailed (EPC, VOC off-gassing, embodied carbon target, materials used in manufacture, etc). Depending on what is specified in the tendering documentation, sub-contractors may be required to undertake specific component testing or analysis (thermal bridge testing etc).

## 15. Nearly Zero Energy Buildings - nZEB

### 15.4. Tendering documentation

Additional nZEB-specific documents to be considered for inclusion in the client's tendering documentation are:

1. Preliminaries
2. Preliminary Health and Safety Plan
3. Tender Drawings and other technical information
4. Specifications and Bill of Quantities (if applicable)
5. Part L Compliance Report – indicating air tightness and testing requirements
6. Preliminary DEAP/NEAP Report
7. Thermal Modelers Report or Building Details package showing thermal bridging values ( $\Psi$ -factors) of details which affect the building thermal fabric
8. Identification of parties responsible for thermal modelling of alternative details
9. Any other documents the client regards as necessary to define the requirements

### 15.5. nZEB additions to open and selective assessments

It may be appropriate to require contractors to provide evidence of previous experience in nZEB or suitable equivalent building projects (e.g. BER A2 or certified Passive House) as part of their open or selective assessments (see **Section 3**).

Assessment criteria specific to nZEB may include:

1. Relevant completed projects
2. Relevant experience and training of key on-site personnel (e.g. trades foremen and project managers)
3. Project-specific nZEB implementation plan
4. nZEB inspection matrix (which can relate to key inspection points as requirements by the BCARs inspection matrix)

As part of open or selective assessments, the client's tender evaluation team may need to consider more onerous levels of onsite testing procedures, samples and supporting evidence (e.g. confirming thermal bridging ( $\Psi$ -factors) compliance) which may be required if contractors are to provide alternative compliance details.

## 16. Changes in labour and material costs

### 16.1. Introduction

During the course of a construction contract, it is possible for the costs of labour and materials to change whether by Government-led action, market rates or otherwise. Construction contracts may provide for adjustments to the contract sum for such changes in labour costs and materials. The date after which such changes may take effect is usually referred to as the 'Designated Date' or the 'Base Date' (see **Section 17** for more details).

The risk of this change occurring should, like any risk in a construction contract, be allocated appropriately. It is common for employers to transfer this risk to contractors, for example by striking out or opting out of the applicable clause in the construction contract. This allocation of risk should then be reflected in the contractor's tender.

### 16.2. Fluctuations in currency exchange rates

Employers' tendering documentation should stipulate that the entire tender price is to be quoted in Euro. Construction contracts can provide for changes in market prices for materials after the Designated Date due to fluctuations in the euro against other currencies and provide for adjustments to the contract sum accordingly.

Where contractors or sub-contractors are obtaining quotations from outside the euro zone for the purpose of preparing tenders they should convert foreign currency quotations into euro at the rate prevailing at the close of business of the European Central Bank on the Designated Date.

### 16.3. Price and wage variation clauses

Such clauses, if applicable, provide for adjustments to the contract sum as a result of increases to wages and costs of materials necessary for the proper execution of the works made after the Designated Date. They also typically include an additional percentage to be added for any increases to permit the contractor to recover an element of profit, which would normally apply.

Price and wage variation clauses apply only to work not yet undertaken but exclude the rectification of defects where the original work was carried out before the applicable date. Consideration should be given to the application of price and wage variation clauses, for example a 6-month construction period may not be appropriate for such a clause due to the relatively short timeline when compared to a 36-month construction period where it can be difficult for contractors to price for this risk.

### 16.4. Hyperinflation

Hyperinflation, as regards construction, is the rapid escalation in the price of construction materials, such as what occurred to steel prices in 2003. Hyperinflation is not normally covered by price and wage variation clauses and as such, subject to the terms of the contract, this risk is typically retained by the employer.

## 17. Other contract particulars

### 17.1. Designated Date

As noted above, construction contracts usually provide for the entry of a specified date, the Designated Date (sometimes referred to as the 'Base Date'). This date is a reference point from which certain changes in law or otherwise might affect the conditions of contract. Depending on the contract, such changes might affect the conditions both before and after the date on which the contract is executed. For example, if a change in the rate of VAT occurs after the Designated Date but before the contract is signed, this may have an effect on the contract sum.

It is important that contracts either stipulate this date or a clear method of calculating it and it should be set at no later than the receipt of tenders for that contract.

### 17.2. Dates for possession and completion

The anticipated dates for possession and completion (or the estimated construction period) should be set out as early as possible (ideally in the Preliminary Enquiry but no later than the ITT) so contractors can determine whether or not they will be in a position to undertake the works. Dates for possession must be reasonable, having regard to the employers' ability to make the site available for possession, and anything which might otherwise delay possession (for example, a delay during the tender period or a delay to securing planning permission). Phased possession may be applicable where the employer can only give possession of part(s) of the site to the contractor on a phased basis. The details<sup>47</sup> of any phased possessions must be outlined in the employer's tendering documentation.

Dates for completion of all or parts of the works must also be reasonable and enable the contractor to complete the works having regard to the nature, scale and complexity. Importantly, due regard to the Safety Health and Welfare at Work (Construction) Regulations 2013<sup>48</sup> should be had as the contractor must be able to undertake the works in a safe manner. If completion of a section or part of the works is to apply, this should be stipulated in the employer's tendering documentation<sup>49</sup>.

<sup>47</sup> Details should include the extent of any areas subject to the phased possession, e.g. using a map or drawing, and the applicable anticipated possession dates.

<sup>48</sup> S.I. No. 291 of 2013.

<sup>49</sup> Just as with phased possession, details should include the extent of any sections and the applicable completion dates.

## 17. Other contract particulars

### 17.3. Deliverables at completion

If there are documents required from the contractor in order to certify completion, it is necessary to outline these in a schedule as part of the contract. This sets out what information the contractor must produce before the building can be certified as complete. Care should be taken when making such lists so they include all the necessary documentation but also that they are not unduly onerous.

### 17.4. Liquidated and ascertained damages (LADs)

Liquidated and ascertained damages, sometimes referred to as liquidated damages, are damages that become payable to the employer in the event that the contractor does not achieve practical completion either of the whole works or a section by the required date. This is subject to any mitigating factors which would normally entitle the contractor to relief from LADs, for example, delay caused by events for which the employer is responsible, e.g. giving late possession of the site.

LADs are not to be penal in nature, in other words they are not to be used to penalise the contractor for late completion but must be a genuine pre-estimate of loss. This means that LADs are to be calculated on the actual losses that the employer would likely suffer as a result of late completion for which the contractor is responsible, for example having to pay rent on another premises.

It is essential that LADs are accurately calculated and adequately reflective of losses that the employer will incur as a result of a delay to completion. The applicable LADs should be made known to tenderers as part of the employer's tendering documentation so tenderers understand the risks to which they will be subject.

### 17.5. Payments and the Construction Contracts Act 2013

The Construction Contracts Act 2013<sup>50</sup> (CCA) came into force on 26th July 2016 and applies to certain construction contracts<sup>51</sup> entered into after that date. It was introduced in response to poor payment practices in the industry and all construction contracts covered by the CCA must now provide for:

- The amount of each interim and final payment or an adequate mechanism for determining those amounts;
- The payment claim date for each amount due or an adequate mechanism for determining it; and
- The period between the payment claim date and the date on which the amount is due.

<sup>50</sup> S.I. No. 34 of 2013.

<sup>51</sup> The Act defines the term 'construction contract' for the purposes of the legislation and some contracts are exempt from the legislation.

## 17. Other contract particulars

If a construction contract between a main contractor and an employer does not provide for such matters, the provisions of the Schedule to the CCA are deemed to apply. If a sub-contract (which includes contracts between a main contractor and a sub-contractor; a sub-contractor and a sub-sub-contractor; and so on) does not contain provisions which are more favourable to the executing party<sup>52</sup> than the Schedule, then the Schedule is deemed to apply.

Section 3(5) of the CCA also prohibits the use of 'pay when paid' clauses, subject to the provisions of Section 3(6). A 'pay when paid' clause is that which *"provides that payment of an amount due under the construction contract, or the timing of such a payment, is conditional on the making of a payment by a person who is not a party to the construction contract"*<sup>53</sup>.

Clients should consider carefully when deciding on payment intervals so they are financially capable of meeting payment claims. Payment intervals might, for example, need to align with payments being received by the employer from a third party funder.

In the RIAI Construction Contract 2017 Edition, Clause 35 deals with certificates and payments and also provides for either two months average payments<sup>54</sup> to be paid into a joint account between the employer and the contractor or a certificate from the employer's bank stating that the employer has sufficient funds to meet the project's cashflow requirements as security for payment to the contractor (this is to satisfy the contractor that the employer has sufficient funds to honour payment certificates).

<sup>52</sup> The executing party is defined in the CCA.

<sup>53</sup> Section 3(5), Construction Contracts Act 2013, S.I. No. 34 of 2013.

<sup>54</sup> Calculated as the tender sum divided by the number of months in the contract period multiplied by two.

## 18. Dispute Resolution

### 18.1. Introduction

Due to the levels of risk in construction and the potential for conflict and financial loss, disputes are, unfortunately, a common occurrence. There are various methods of resolving disputes and each has their own part to play. Choosing the most suitable method will depend on a variety of factors and it can be beneficial to start with less adversarial forms and then, if disputes are not resolved, more escalated procedures can be adopted.

It is important that construction contracts adequately provide for dispute resolution mechanisms and procedures. To this end, there are some elements that need to be considered by employers when preparing tendering documentation.

### 18.2. Dispute avoidance

Prevention is better than cure and the avoidance of disputes is arguably the best course of action. If a construction contract provides for a clear mechanism of dealing with disagreements between the parties, it may be possible to resolve the issue before a formal dispute occurs. Proper communication and cooperation between the parties is key to successful dispute avoidance and should be maintained throughout the life of a construction contract.

### 18.3. Types of alternative dispute resolution

The term 'alternative dispute resolution', or ADR, refers to dispute resolution methods as an alternative to court. The following types of ADR typically involve the appointment of a neutral third party who is to be impartial and independent as regards the outcome of the dispute. One of the advantages of these forms of ADR is that they are private and confidential as opposed to actions in court, which are in the public arena.

#### 1. Mediation

Mediation is a highly effective, voluntary dispute resolution process that the parties enter into freely. The mediator assists and facilitates the negotiation between the parties towards a settlement. Importantly, it is non-binding however, the exception to this is where the parties reach an agreement, the terms of that agreement are recorded in writing, usually by the mediator, and the parties intend for it to be legally binding.

Mediation can be a contractual precondition to pursuing other forms of dispute resolution under the contract. Furthermore, courts can and often do compel parties in a court action to attempt mediation first. Mediation in Ireland is governed by the Mediation Act 2017<sup>55</sup>. Under the Act, solicitors are required to inform their clients about mediation as an alternative form of dispute resolution.

<sup>55</sup> S.I. No. 27 of 2017.



### 2. Conciliation

Conciliation has been used to resolve disputes in construction for many years now and has been largely successful. The aim of the process is to reach an agreement by consent, which can then become binding. This differs from more formal ADR methods where binding decisions are typically imposed on the parties. Reaching an agreement by consent can help maintain professional relationships. In Ireland, if no agreement can be reached between the parties, the conciliator is usually empowered by the contract to issue a recommendation, which is binding on the parties until the matter is subsequently referred to some other form of dispute resolution, e.g. arbitration.

Conciliation is not currently governed by any legislation in Ireland and so it is usually subject to a set of rules issued by an organisation, for example the RIAI Conciliation Guidelines. It is common for conciliators to be confined to deal with matters in strict accordance with the parties' rights and obligations under the relevant contract when issuing a recommendation.

### 3. Adjudication

Statutory adjudication is available at any time to all parties to a construction contract<sup>56</sup>. It is a relatively fast method of resolving disputes and strict timelines apply to the parties and to the adjudicator. There are statutory procedural conditions that need to be met in order for an adjudication to commence.

Construction adjudication in Ireland is governed by the Construction Contracts Act 2013<sup>57</sup> and the Code of Practice Governing the Conduct of Adjudications<sup>58</sup>. The main purpose of the Act is to regulate payments in the construction industry and provide a swift method for resolving disputes relating to payment.

### 4. Arbitration

Arbitration is a judicial process and an award published by an arbitrator has the same effect as a judgment of the High Court. Arbitration can be entered into voluntarily, on an ad-hoc basis or it can be the subject of an arbitration clause in a contract.

Some of the benefits of arbitration over going to court are: arbitration is private (actions in court are open to the public eye); the manner in which the arbitration is carried out is for the parties to decide giving flexibility (subject to any applicable rules) whereas in a court action a hearing date is set by the court and the parties may not be able to change that date; the appointed arbitrator is likely to have specific expertise regarding the subject matter of the dispute; the venue of arbitral hearings can be at a place agreed to by the parties.

Arbitration in Ireland is governed by the Arbitration Act 2010 (which repeals the previous Arbitration Act 1954).

<sup>56</sup> The definition of a construction contract is given in the Construction Contract Act 2013 which also expressly sets out types of contract which are excluded from its remit.

<sup>57</sup> S.I. No. 34 of 2013.

<sup>58</sup> As issued by the Department of Business Enterprise and Innovation.

## 18. Dispute Resolution

### 5. Expert Determination

Expert determination is used to resolve disputes where the expert determiner is required to possess expertise in a particular subject area (a court judge for example may not be familiar with highly specialised terminology used in construction). Technical consultants can often be required to act as expert determiners in disputes where the subject matter is in relation to complicated issues of a technical nature.

Depending on the contractual provisions, the decision issued by the expert determiner can be binding on the parties. Expert determination is not currently governed by any legislation in Ireland.

### 18.4. Appointment of neutral third parties

All of the ADR methods listed above require the appointment of a neutral third party, for example the mediator. It is important that contracts provide for an effective means of appointing such third parties. It is common for contracts to first allow the parties to agree on the appointment or to propose three names where agreement is then to be reached on one (or more) of the six so proposed.

In default of agreement, the contract should identify an appointing body, for example the RIAI or Engineers Ireland. It is important that the name of the appointing body is correctly identified together with any person from that body, such as the President of the RIAI. Furthermore, if no such appointing body is identified, a default appointing body should be listed in the contract particulars.

The RIAI Construction Contract deals with avoiding and resolving disputes. In default of agreement on the appointment of a conciliator or arbitrator, either party may apply in writing to the President of the RIAI (or a Vice-President if the President is not available). For adjudication, in default of agreement, the Construction Contracts Administration Service is the default appointing body.

### 18.5. Consumers and ADR

It may be considered an unfair term to withdraw the right of a consumer to certain legal remedies, such as bringing an action in court. This could be, for example, a contractual requirement to refer a dispute to arbitration and a stay for any court proceedings in relation to that dispute. However, it should be noted that the Competition and Consumer Protection Commission (CCPC) advocates for ADR methods in consumer disputes where possible. See **Section 19** for more details on consumers in construction.

## 19. Consumers and construction contracts

### 19.1. Introduction

In many construction contracts, the client or employer may be a consumer as defined under Irish Law. Under Irish and EU law, consumers are afforded greater protection than other entities who are acting in pursuance of commercial or other purposes.

Consumer contracts are protected by the Sale of Goods and Supply of Services Act 1980 and the Competition and Consumer Protection Commission (CCPC) established in 2014 is the agency responsible for enforcing consumer protection law in Ireland.

The European Union (Alternative Dispute Resolution for Consumer Disputes) Regulations 2015<sup>59</sup> provides for the promotion of independent ADR procedures for consumers. This applies to both domestic and cross-border disputes (within the EU) and to both online and offline sales and services contracts.

### 19.2. Unfair terms

Consumers also have legislative protection against unfair terms in contracts. The EU Unfair Contract Terms Directive<sup>60</sup> requires that “*acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts*”. This directive is given effect in Ireland by the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995<sup>61</sup> as amended by the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2000<sup>62</sup> and the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2013<sup>63</sup>. These regulations only apply where one party to a contract is a consumer and the other is a business, however certain types of contract, such as those for employment, are excluded.

A term will be considered unfair if it is contrary to the requirement of good faith, which requires both parties to act fairly, openly, and reasonably to one another.

If consumers suspect the use of such terms, they should notify the CCPC who may in turn seek a court order preventing the use of contract terms which are deemed to be unfair. Some types of unfair terms might be:

1. Limits or restrictions on liability
2. Restrictions on legal remedies such as the right to bring an action in court<sup>64</sup>
3. The imposition of disproportionate penalties
4. Entire agreement clauses<sup>65</sup>

<sup>59</sup> S.I. No. 343 of 2015.

<sup>60</sup> 1993/13/EEC.

<sup>61</sup> S.I. No. 27 of 1995.

<sup>62</sup> S.I. No. 307 of 2000.

<sup>63</sup> S.I. No. 160 of 2013.

<sup>64</sup> The CCPC promotes the use of ADR for resolving disputes.

<sup>65</sup> This type of clause seeks to outline that the contractual terms between the parties are what is stated in the document in which it appears and nothing else, such as any previous communications, representations or agreements between the parties.

## 19. Consumers and construction contracts

It should be noted that even in the presence of unfair terms, the contract can continue where it is possible to do so when disregarding the unfair term(s).

### 19.3. The legislation

The Consumer Protection Act 2007<sup>66</sup> is the most important piece of Irish consumer legislation and puts the EU Directive on Unfair Commercial Practices into national law. It established the national enforcement body at the time, the National Consumer Agency, however, under the Competition and Consumer Protection Act 2014<sup>67</sup> the Competition and Consumer Protection Commission (CCPC) replaced both the National Consumer Agency and the Competition Authority. The 2007 Act deals with unfair commercial practices and the CCPC is the main body charged with enforcing the Act. For more information please visit [www.ccpc.ie](http://www.ccpc.ie)

At an EU level, the Directive on the Sale of Goods and Associated Guarantees<sup>68</sup> provides further protection to consumers. There are also upcoming developments in consumer law in Ireland particularly in relation to the EU Sale of Goods Directive<sup>69</sup>, the EU Consumer Rights Directive<sup>70</sup> and the Consumer Rights Bill<sup>71</sup>.

### 19.4. Consumer employers

Consumers who wish to undertake construction work as employers, such as those wishing to build their own home, should contact the RIAI for further information and guidance.

<sup>66</sup> S.I. No. 19 of 2007

<sup>67</sup> S.I. No. 29 of 2014

<sup>68</sup> Directive 1999/44/EC as amended by Directive 2011/83/EU, given effect in Ireland by S.I. No. 11 of 2003

<sup>69</sup> Directive (EU) 2019/771 - this will replace Directive 199/44/EC on 1st January 2022

<sup>70</sup> Directive 2011/82/EU as amended by Directive (EU) 2019/2161

<sup>71</sup> Published on 25th May 2015 by the Minister for Jobs, Enterprise and Innovation

The following appendices contain suggested wordings for standard letters and forms and are to be used as a guide. They will require editing to suit a particular project and clients should seek the advice of their consultants in this regard.

Appendix A - Form of Preliminary Enquiry	78
Appendix B - Assessment Questionnaire	83
Appendix B1 - Contractor's Declaration of Competence	89
Appendix C - Notification Letter to Unsuccessful Contractor (Selective Assessment)	90
Appendix D - Notification Letter to Successful Contractor (Selective Assessment)	92
Appendix E - Health and safety clause for Specifications and Bills of Quantities	94
Appendix F - General Conditions and Contract Particulars for Nominated Sub-Contract Purposes	95
Appendix G - Letter of Invitation to Tender (Main Contractor)	99
Appendix H - Form of Tender (Main Contract)	101
Appendix J - Letter of Invitation to Tender (Nominated Sub-Contractors)	103
Appendix K - Form of Tender (Nominated Sub-Contract)	105
Appendix L - Notification Letter to Tenderer re non-compliant tender	107
Appendix M - Letter to Tenderer re ALT (further info)	108
Appendix N - Letter to Tenderer re ALT (eliminate)	109
Appendix P - Notification Letter to Unsuccessful Tenderer	110
Appendix Q - Notification Letter to Successful Tenderer	112
Appendix R1 - Letter to original preferred tenderer following failed negotiations	114
Appendix R2 - Letter to next tenderer following failed negotiations with original preferred tenderer	115
Appendix S - Notification letter to tenderers following tender restart	116
Appendix T - Notification letter to tenderers following project abandonment	117
Appendix U - Letter of Acceptance	118
Appendix V - Retention Bond Guarantee	120
Appendix W - Appointment of PSCS	123
Appendix X - Request to appoint Nominated Sub-Contractor	126
Appendix Y - Payment Certificate Notification to Nominated Sub-Contractors	127

## Appendix A - Form of Preliminary Enquiry<sup>1</sup>

**NOTE:** In addition to any duties a Contractor may take on in the role of PSCS, the Safety Health and Welfare at Work (Construction) Regulations 2013 also impose duties on him/her as a Contractor – Part 3 “General Duties of Contractors and Others”. Tenderers to demonstrate their competence to undertake these duties, and to demonstrate their competence as Contractors to construct and manage the works being tendered, in a separate questionnaire, and sign a separate questionnaire for PSCS and one for the Contractor.

To [ ]

Date [ ]

To Whom It May Concern,

We are authorised to prepare a preliminary list of tenderers for the construction of works described below.

Please indicate whether you wish to be invited to submit a tender for these works. Your acceptance will imply your agreement to submit a wholly bona fide tender in accordance with the principles laid down in the current Code of Practice for Tendering as agreed by the Liaison Committee and not to divulge your tender price to any person or body before the time for submission of tenders.

Please state whether you would require any additional unbound copies of the bill(s) in addition to the copy you would receive; a charge may be applied for extra copies.

You are also required to fill out and return the enclosed ‘Selective Questionnaire’ as well as outlining your competence to fulfil the role of ‘Project Supervisor Construction Stage’ in accordance with the Safety, Health and Welfare at Work (Construction) Regulations 2013 and DHPCLG Code of Practice for Inspecting and Certifying Buildings and Works.

<sup>1</sup> May be used for contractors and sub-contractors.



## Appendix A - Form of Preliminary Enquiry

### Project Information Schedule<sup>2</sup>

1. Project title	
2. Brief description	
3. Site address	
4. Client details	
5. Design team details	Person to whom any queries are to be sent [yes/no]  Person to whom expressions of interest are to be submitted [yes/no]
6. Approx. cost range (Euro)	[ ] to [ ]
7. Estimated construction period (days)	
8. Estimated date for possession	
9. Form of contract  Executed under seal? Yes / No	
10. Bill of quantities method of measurement	
11. Liquidated and ascertained damages (Euro)	[ ] per [ ]
12. Tendering procedure [ Open / Selective ]  With assessment (Open only)? [ Yes / No ]	
13. Assessment criteria	
14. Award criteria	
15. Statutory consents	
16. Bond requirements	
17. Collateral agreement requirements	
18. Specialist work and/or contractor design elements	

<sup>2</sup> If there is insufficient space in the table, reference to another document may be used provided this document is included with the Form of Preliminary Enquiry.



<p><b>19. Anticipated percentage of specialist sub-contract work</b></p> <p>Specialist sub-contractors to be proposed by the contractor or identified by the employer?</p>	
<p><b>20. Maximum/minimum number of tenderers</b></p>	
<p><b>21. BIM requirements</b></p>	
<p><b>22. BC(A)R requirements</b></p>	
<p><b>23. nZEB requirements</b></p>	
<p><b>24. Health and safety requirements</b></p> <p>Contractor required to fulfil the role of PSCS? [ Yes / No ]</p>	
<p><b>25. Particular risks and hazards</b></p>	
<p><b>26. Other ongoing works on the site or in the vicinity</b></p>	
<p><b>27. Estimated issue date for Client's tendering documentation</b></p>	
<p><b>28. Estimated tender period (days)</b></p>	
<p><b>29. Tender validity period (days)</b></p>	
<p><b>30. Exclusionary factors</b></p>	
<p><b>31. AOB</b></p> <p><b>a</b> Interviews will be required. [ Yes / No ] Location for interviews</p> <p><b>b</b> Soft copy documentation will be used throughout. [Yes / No ]</p> <p><b>c</b> Site Inspection [ Yes / No ]</p>	
<p><b>32. Deadline for receipt of expressions of interest</b></p>	

<b>33.</b> Restrictions or special requirements for joint ventures and consortiums, for example if Parent Company Guarantees will be required	
<b>34.</b> Any other details	

Online version

## Appendix B - Assessment Questionnaire

**NOTE:** In addition to any duties a Contractor may take on in the role of PSCS, the Safety Health and Welfare at Work (Construction) Regulations 2013 also impose duties on him/her as a Contractor – Part 3 “General Duties of Contractors and Others”. Tenderers to demonstrate their competence to undertake these duties, and to demonstrate their competence as Contractors to construct and manage the works being tendered, in a separate questionnaire, and sign a separate questionnaire for PSCS and one for the Contractor.

Issued by agreement between the RIAI, SCSi, CIF, ACEI and EI following the introduction of the Safety Health and Welfare at Work (Construction) Regulations 2013.

**SECTION 1 - Information to be completed by the Client for contractors wishing to be selected for tender.**

1. Brief description of the project	
2. Client's details	
3. Design team details	
4. PSDP details	
5. Estimated project value (Euro)	
6. Approx. size (m <sup>2</sup> )	
7. Performance bond requirements (% of estimated project value)	
8. Insurance requirements	
9. Other indemnity requirements	
10. Public liability limit	
11. Form of contract	

<b>12. BoQ method of measurement</b>	
<b>13. Max. no. of tenderers</b>	
<b>14. Location for interviews</b>	

It is the intention of the Client **to appoint / not to appoint** the Contractor as the Project Supervisor for the Construction stage of the project. **[delete as appropriate]**

Unsuccessful applicants will be advised, on written request, if their application has failed because sufficient data was not provided.

It is intended that the recommended Liaison Committee Code of Practice for Tendering should apply on any subsequent tender competition.

Where a Preliminary Safety and Health Plan is required by the Regulations it will be provided.

Signed [ ]

Name [ ]  
(Block capitals)

Title [ ]

Date [ ]

**SECTION 2 - to be completed by the applicant contractor**

Contractor [ ]  
(the Applicant)

Address [ ]

Telephone [ ]

Email [ ]

Contact person [ ]

Legal status [ ]  
(e.g. PLC, partnership, sole trader, joint venture)

Online Version

### Information requirements

**Applicants are to submit the following clearly marked:**

1. A list of comparable projects of a similar size, nature, complexity and/or value in the past 5 years
2. Details of turnover for the past 3 years, per annum
3. A funder confirmation letter stating the applicant's ability to fund the project. (Very large projects only)
4. Applicant's management structure (organisation chart)
5. Management technical resources
6. Plant and equipment resources
7. Applicant's safety, health and welfare policy
8. Applicant's quality assessment / quality procedures policy
9. Trade Registers Certificate e.g. CIF membership, CIRI membership etc.
10. (C2) Tax certificate
11. Statement from insurers that applicant can meet the insurance requirements
12. Statement from bondsman that applicant can meet bond requirements
13. Statement from an 'Operatives' Pension Scheme regarding the applicant's status
14. Applicant to confirm that firm has a Safety Statement
15. Knowledge of construction, particularly in relation to projects of a similar scale, nature or complexity
16. Schedule of relevant staff indicating staff qualifications, training (including safety and health training) and experience
17. Evidence of a functioning Safety Management System
18. Submit Evidence of Regulatory Compliance

**Note: The Architect / Engineer / Project Manager may delete information requirements (1 to 18) not required and may add project specific technical information.**

### Competence to act as Project Supervisor Construction Stage

Information required, please submit clearly marked:

1. Knowledge of construction, particularly in relation to projects of a similar nature or complexity.
2. Schedule of relevant staff indicating staff qualifications, training (including safety and health training) and experience.
3. Safety and Health experience on similar projects:
  - a. Experience of working with and coordinating the activities of different contractors and acting as a liaison between the construction phase and the design function;
  - b. Experience of developing a Safety and Health Plan.
4. Experience in developing and monitoring compliance with Safety and Health Plans;
5. Evidence of a functioning safety management system
6. Evidence of Regulatory Compliance

**Note: Architect/Engineer/Project Manager may delete information requirements (1-6) not required or may add project specific technical information.**

Information should be submitted separately (duplicated if necessary) from the Contractor's Competence List.

### Competence Declaration

The Applicant declares that it is competent to carry out the works described herein and has an adequate working knowledge of the requirements of the Safety Health and Welfare at Work Acts and Regulations current at the signing of this questionnaire and if appointed to do so, is insured and competent to perform the duties detailed in Regulations 16 to 28 inclusive of the Safety, Health and Welfare at Work (Construction) Regulations 2013.

Firm's Safety Officer [ ]  
(where appropriate)

Safety Training [ ]  
(Industry approved)

I hereby confirm that all the foregoing is correct

Signed [ ] Date [ ]

Name [ ]  
(Block capitals)

Title within the Applicant's organisation [ ]

**The Applicant understands that selection is at the sole and absolute prerogative of the client and that there is no obligation on the client to include an application on the tender list arising from the completion and submission of this form. The client undertakes to make all reasonable endeavours to keep the Applicant's data confidential and to treat all applicants equally and fairly.**



### Contractor's Declaration of Competence

**NOTE:** In addition to any duties a Contractor may take on in the role of PSCS, the Safety Health and Welfare at Work (Construction) Regulations 2013 also impose duties on him/her as a Contractor – Part 3 “General Duties of Contractors and Others”. Tenderers to demonstrate their competence to undertake these duties, and to demonstrate their competence as Contractors to construct and manage the works being tendered, in a separate questionnaire, and sign a separate questionnaire for PSCS and one for the Contractor.

The Contractor represents and warrants to the Client that the Contractor has the competence to carry out the Works and has allocated or will allocate sufficient resources to enable it to comply with the requirements and prohibitions imposed on the Contractor by or under the relevant statutory provisions.

In this appointment, competent person, reasonably practicable and relevant statutory provisions are construed according to Section 2 of the Safety, Health and Welfare at Work Act 2005.

Signed [ ] Date [ ]  
*On behalf of the Contractor*

Name [ ]  
*(Block capitals)*

Title within the Applicant's organisation [ ]

In the presence of:

Signed [ ] Date [ ]  
*Witness*

Name [ ]  
*(Block capitals)*

# Appendix C - Notification Letter to Unsuccessful Contractor (Selective Assessment)

To [ ]

The Project [ ]

The Client [ ]

Date [ ]

To Whom It May Concern,

Having reviewed your selective assessment for the above project, we regret to inform you that on this occasion you have not been successful and will not be invited to tender.

The reasons for which you were unsuccessful are as follows<sup>3</sup>:

[ ]  
*(insert reasons here)*

Please see the table below outlining the maximum available scores in the assessment criteria, your scores and also those of the lowest-ranked contractor to be invited to tender.

Assessment Criterion	Maximum available score	Score awarded to your assessment	Score awarded to lowest-ranked contractor to be invited to tender
<b>Total</b>			

*(add rows as necessary)*

<sup>3</sup> Reasons are not required to be given to unsuccessful contractors however such feedback can be helpful.

Appendix C - Notification Letter to Unsuccessful Contractor  
(Selective Assessment)

The above scores were reached as a result of the following:

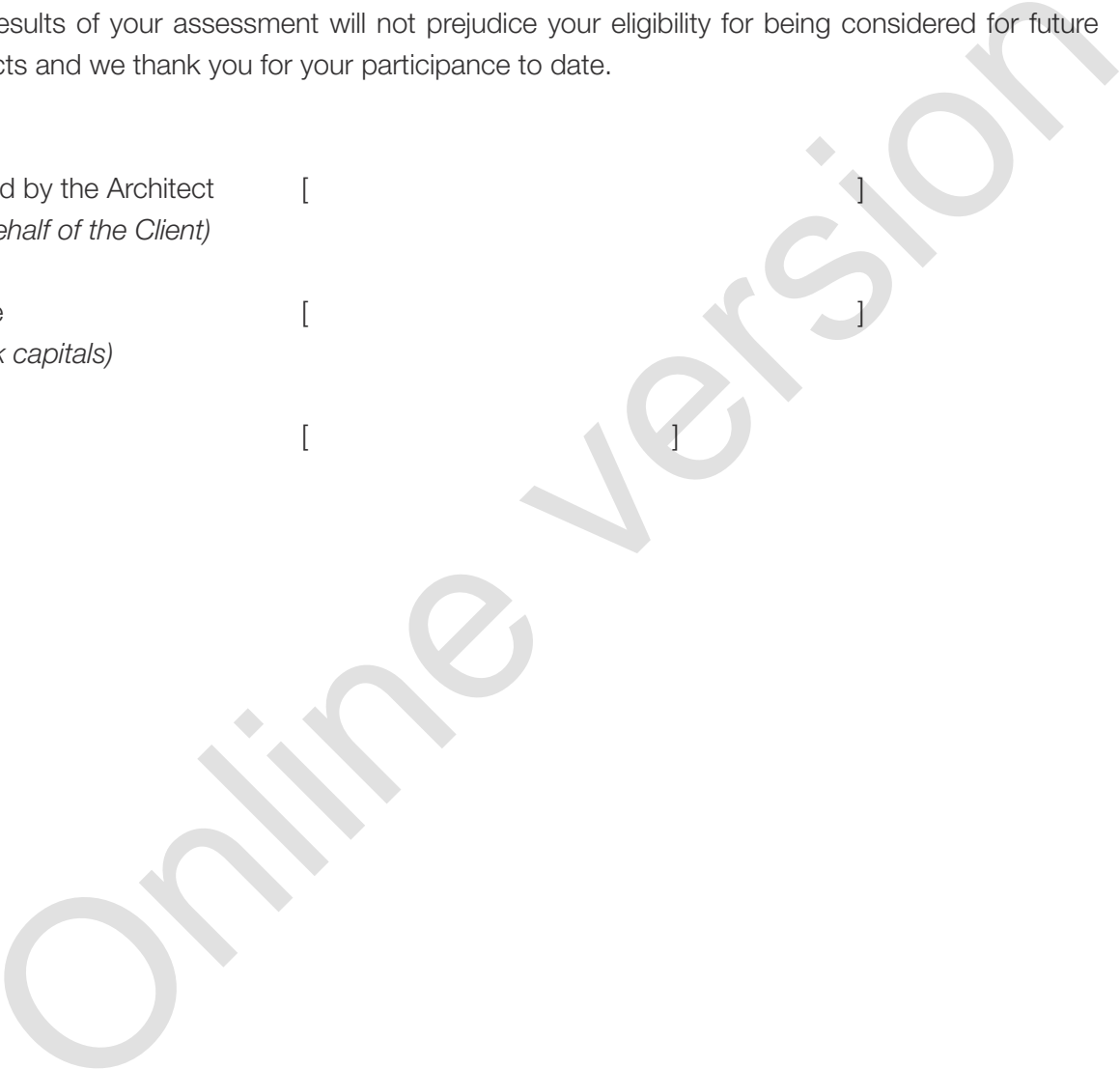
[ ]  
(insert reason)

The results of your assessment will not prejudice your eligibility for being considered for future projects and we thank you for your participation to date.

Signed by the Architect [ ]  
(on behalf of the Client)

Name [ ]  
(Block capitals)

Date [ ]



**Appendix D - Notification Letter to Successful Contractor  
(Selective Assessment)**

To [ ]

The Project [ ]

The Client [ ]

Date [ ]

To Whom It May Concern,

Having reviewed your selective assessment for the above project, we are happy to inform you that on this occasion you have been successful for this stage and will be invited to tender. Please confirm your availability and willingness to continue with the process by return as soon as practicable.

Please see the table below outlining the maximum available scores in the assessment criteria, and your scores.

Assessment Criterion	Maximum available score	Score awarded to your assessment
<b>Total</b>		

*(add rows as necessary)*

## Appendix D - Notification Letter to Successful Contractor (Selective Assessment)

An invitation to tender will be issued to you and the other tenderers in [ ] days. This will contain all the information you require to submit a tender. If at any time you wish to withdraw from the process please contact us as soon as practicable. Withdrawals for genuine reasons will not prejudice your eligibility for being considered for future projects.

Signed by the Architect [ ]  
(on behalf of the Client)

Name [ ]  
(Block capitals)

Date [ ]

Online Version

## Appendix E - Health and safety clause for Specifications and Bills of Quantities

Issued by Agreement between the RIAI, SCSl, CIF, ACEI and EI following the introduction of the Safety Health and Welfare at Work (Construction) Regulations 2013.

It is recommended that additional preliminary clauses are required to be included in tender documentation to take account of the Safety Health and Welfare at Work (Construction) Regulations 2013. Non-exhaustive examples of such clauses are set out below:

1.	The Contractor shall include for complying with the Safety Health and Welfare at Work Acts and Regulations current at the date of tender.
2.	The term “temporary works” shall mean all temporary works of every kind required for the construction and completion of the works; it shall include temporary works to support and ensure the stability of the partially completed permanent works and of adjoining structures and lands, as well as such matters as trench shoring, scaffolding, propping, working platforms, gangways, access stairs and landings.
3.	The Contractor shall be responsible for the design of Temporary Works and the Consultant Architect/Engineer shall be responsible for the design of the permanent works.
4.	The Contractor shall be appointed by the Employer under a collateral agreement to the Main Contract as Project Supervisor for the Construction Stage in respect of the project pursuant to the Safety Health and Welfare at Work (Construction) Regulations 2013. The Contractor shall include all costs for the provision of the services of Project Supervisor for the Construction Stage pursuant to Regulations 16 to 23 inclusive of the regulations.
5.	The Contractor shall include for procuring that the insurance cover required to be obtained and maintained by the Contractor pursuant to Clauses 21 and 23(b) of the main contract shall provide indemnity in respect of any claim for bodily injury or property damage which the Contractor may incur by reason of the performance of the functions and duties of the Project Supervisor for the Construction Stage of the project.
6.	The Contractor shall include for providing all necessary information as requested by the Project Supervisor for the Construction Stage to enable the preparation and completion of the Safety File excluding drawings and specifications which shall be provided by the appropriate members of the design team and relevant Nominated Sub-Contractors.
7.	The Contractor shall include for providing assistance to the appropriate member of the design team (and to relevant nominated Sub-Contractors) in providing the latest issue of construction drawings for inclusion in the Safety File.

Additional clauses may be required for individual projects to take account of particular risks.

# Appendix F - General Conditions and Contract Particulars for Nominated Sub-Contract Purposes

## 1. Main Contract

The accepted Tenderer shall be a Nominated Sub-Contractor under the Articles of Agreement and Conditions of Contract issued by the Royal Institute of the Architects of Ireland in agreement with the Construction Industry Federation and the Society of Chartered Surveyors Ireland 20[ ] Edition where:

- a. Quantities form part of the contract, or
- b. Quantities do not form part of the contract

*(strikeout as appropriate)*

## 2. Sub-Contract

The sub-contract between the Contractor and the Sub-Contractor shall not conflict with the Main Contract and shall be one where:

- a. Quantities form part of the contract
- b. Quantities do not form part of the contract

*(strikeout as appropriate)*

The designated date for the purpose of the Sub-Contract for the Price Variation Clause shall be [ ]

## 3. Main Contract Particulars

<b>Employer</b>	
<b>Lead Consultant</b> <i>[delete if not applicable]</i>	
<b>Architect</b>	
<b>Civil &amp; Structural Engineer</b>	
<b>Services Engineer</b>	
<b>(mechanical, electrical, plant, security, data etc.)</b>	
<b>Quantity Surveyor</b>	
<b>Main Contractor</b>	
<b>Other</b>	

## Appendix F - General Conditions and Contract Particulars for Nominated Sub-Contract Purposes

### 4. Appendix to the Main Contract:

The appendix to the Conditions of the Main Contract is completed as follows (*add/delete as required*):

- a. Clause 1 (a) Designated Date
- b. Clause 22 (b) Percentage for Professional Fees
- c. Clause 22 (b) Cost of Site Clearance
- d. Clause 23(d) (i) Minimum Sum for Employer's Liability
- e. Clause 23 (e) (ii) Minimum Sum for Public Liability Insurance
- f. Clause 28 Date for Possession
- g. Clause 28 and 29 (a) Date for Completion
- h. Clause 29 Liquidated and Ascertained Damages
- i. Clause 31 and 35 (i) Defects Liability Period
- j. Clause 35 (b) Period of Interim Certificates
- k. Clause 35 (b) Time for Issue of Interim Certificates by the Architect
- l. Clause 35 (e) Percentages of Certified Value Retained
- m. Clause 35 (e) Limit of Retention Fund
- n. Clause 35 (g) Joint Account Retention Fund
- o. Clause 35 (h) (iii) Period of Final Measurement
- p. Clause 35 (i) Period of Serving Notice of Arbitration

Any other details of the Main Contract, if required, may be obtained from the Architect or Quantity Surveyor and the Sub-Contractor will be deemed to have made itself familiar with all aspects of the Main and Sub-Contracts which affect its tender.



## Appendix F - General Conditions and Contract Particulars for Nominated Sub-Contract Purposes

### 5. General attendance

The Sub-Contractor shall be provided with General attendance, free of charge. General attendance shall include only:

- a. The use of the Contractor's temporary roads and hardstandings
- b. The use of standing scaffolding
- c. The use of standing power-operated hoisting plant
- d. The provision of temporary lighting and water supplies
- e. Clearing away rubbish
- f. Provision of space for the Sub-Contractor's own offices and for the storage of its plant and materials.

### 6. Special attendance

The Sub-Contractor will be provided with the following special attendances free of charge:

- a. \*Temporary access roads and hardstandings required in connection with structural steelwork, precast concrete components, piling, heavy items of plant - description of traffic to be catered for, width of carriageway, extent of access way to be provided and remedial works to be carried out to the trafficked areas
- b. \*Weatherproof covered storage and accommodation – floor area to be provided together with details of any enhancements required such as minimum eaves heights, lighting levels, power supply requirements, heating, ventilation, water and drainage services and, where a requirement, site location
- c. \*Power supplies giving the phase and maximum electrical loading to be allowed for – the Nominated Sub-Contractor shall be deemed responsible for the provision of transformers and temporary distribution cabling unless otherwise stated in the description
- d. \*Scaffolding the area of elevation or, in the case of ceiling access, the area to be scaffolded. Where access towers are to be provided the number, size and height of the towers shall be stated. The provision of scaffold boards and ladders and of all certification required for safe use shall be deemed to be included
- e. \*Unloading, hoisting and distributing – the size and weight of the items and their destination in the work shall be described

## Appendix F - General Conditions and Contract Particulars for Nominated Sub-Contract Purposes

- f. \*Maintenance of specific temperature and humidity levels – the required temperatures and humidity levels shall be stated. The provision of plant and all necessary fuel/ power supplies shall be deemed to be included. Any restrictions on the use of the permanent mechanical installation of the building shall be stated
- g. \*For all other special attendance items to be provided by the Contractor, the scope of the work required of the Contractor shall be detailed in the description
- h. \*[ ]

*Anything not provided free of charge as above is deemed to be provided by the Sub-Contractor in the tender sum.*

*\*Delete as necessary*

### 7. Other particulars

The Sub-Contractor tenderer will be deemed to have satisfied itself concerning any other particulars which may affect its tender.

### 8. Endorsements

Any conditions appended by the Sub-Contract tenderer to its tender which are at variance with the conditions set out may result in the tender being disregarded.

### 9. Acceptance

The lowest or any tender will not necessarily be accepted. No tenderer will be remunerated for any expense incurred in compiling its tender.

## Appendix G - Letter of Invitation to Tender (Main Contractor)

Contractor [ ]

Date [ ]

Project [ ]

To Whom It May Concern,

Following your acceptance of the Invitation to Tender for the above, we now have pleasure in enclosing the following Tendering Documentation:

- a. Bill(s) of Quantities
- b. Specification
- c. Drawing and schedules as indicated on [ ]
- d. Statutory consents<sup>4</sup>
- e. Preliminary Health and Safety Plan
- f. Form of tender
- g. BC(A)R
  - Preliminary Inspection Plan
  - Preliminary Inspection Notification
  - Preliminary list of certifications

Please also note the following:

1. The Tendering Documentation may be inspected at [ ]
2. The site may be inspected by arrangement with the following person:

Name [ ]

Phone [ ]

Email [ ]

<sup>4</sup> If the relevant statutory consents have not been obtained by the date of the invitation to tender, item (d) shall be omitted and the following shall be inserted in place of item 5: "Application for the relevant statutory consents has/has not been made and the current intended date for commencement of the works is [ ]".

## Appendix G - Letter of Invitation to Tender (Main Contractor)

3. The tendering procedure will be in accordance with the principles of the current Code of Practice for Tendering as published by the Liaison Committee for the Construction Industry.
4. The Employer shall, at the request of the Contractor and prior to the execution of the Agreement, furnish to the Contractor reasonable evidence that it has made financial arrangements to fulfil its obligations under the Contract. Unless and until such reasonable evidence is furnished, the Contractor shall not be required to execute the Agreement or to commence work on the Project.
5. The proposed date for possession of the site is [ ] being contingent upon / not earlier than *[delete as applicable]* the submission of a valid commencement notice under the Safety, Health and Welfare and Work (Construction) Regulations 2013.

The completed form of tender is to be sealed in the endorsed envelope and delivered or sent by registered post to:

Name [ ]

Address [ ]

Not later than [ ] hours on the [ ] day of [ ] 20 [ ].

Tenders will be opened at a specified time or as soon as possible after the time stated for receipt of tender documents and can include tenderers' representatives who may choose to attend.

Please acknowledge receipt of this letter and enclosure and confirm that you are able to submit a tender in accordance with these instructions.

Yours faithfully,  
On behalf of the Client

## Appendix H - Form of Tender (Main Contract)

[This Form of Tender is suitable for use only when a formal contract is to be entered into]

The Project [ ]

The Client [ ]

Date [ ]

To Whom It May Concern,

We, having read the Conditions of Contract and Bill(s) of Quantities delivered to us and having examined the drawings and specification referred to therein do hereby offer to execute and complete in accordance with the Conditions of Contract, the whole of the Works described for the VAT inclusive sum of

€ [ ] (and in words) [ ]  
and within [ ] days from the date of possession.

We agree that, should obvious errors in pricing or errors in arithmetic be discovered before acceptance of this offer in the priced Bill(s) of Quantities submitted by us, these errors will be dealt with in accordance with Section 5 of the current Code of Practice for Tendering as issued by the Liaison Committee for the Construction Industry.

In accordance with the Invitation to Tender, this tender remains open for consideration for [ ] days from the date of the submission of tenders.

Signed on behalf of the Contractor [ ]

Name [ ]  
(Block capitals)

Position in the Contractor's Organisation [ ]

Address of Contractor [ ]

Appendix H - Form of Tender (Main Contract)

Dated this [ ] day of [ ], 20[ ]

Witness 1 Signature [ ]

Witness 1 Name [ ]  
*(Block capitals)*

Witness 2 Signature [ ]

Witness 2 Name [ ]  
*(Block capitals)*

Online version

## Appendix J - Letter of Invitation to Tender (Nominated Sub-Contractors)

The Project [ ]

The Client [ ]

Date [ ]

To Whom It May Concern,

You are hereby invited to submit a tender for the above sub-contract in accordance with the attached conditions and documents. The following documents are enclosed herewith and shall be returned with your tender:

1. Form of Tender
2. General Conditions of Sub-contract
3. \*Drawings and Schedules
4. \*Specification
5. \*Bill(s) of Quantities
6. \*Collateral Agreement
7. \*Pro-forma Bond
8. \*Main Contractor programme
9. Preliminary Safety & Health Plan
10. 10.BC(A)R
  - a. Preliminary Inspection Plan
  - b. Preliminary Notification Plan
  - c. Preliminary List of Certifications

\* *Delete as necessary*

## Appendix J - Letter of Invitation to Tender (Nominated Sub-Contractors)

Tenders shall be returned to the Employer / Architect / Quantity Surveyor / Consulting Engineer / Contractor (*delete as necessary*) before [ ] hours on the [ ] day of [ ] 20[ ], and shall be clearly endorsed on the outside

**“Tender for [ ]”**  
(*insert description of the Project*)

Signed by the Architect [ ]

Name [ ]  
(*Block capitals*)

Date [ ]



The Project [ ]

The Client [ ]

Date [ ]

To [ ]

To Whom It May Concern,

We understand that the materials, goods and work, the subject of this tender, are or will be covered by a Prime Cost or Provisional Sum in the building Contract i.e. Agreement and Schedule of Conditions of Building Contract issued by the RIAI in agreement with the CIF and the SCSI hereinafter referred to as the Main Contract, entered into or to be entered into, by the Contractor and Employer.

We understand that on acceptance of this tender by the Contractor (unless previously withdrawn due to reasonable objection to the Contractor where he/she has not been appointed at the date of this tender) we shall become a Nominated Sub-Contractor under the Main Contract and shall enter into a formal Sub-Contract which shall indemnify the Contractor against the same obligations in respect of the Sub-Contract as those for which the Contractor is liable in respect of the Main Contract. We understand that the Conditions contained in the Main Contract shall override all Conditions to the contrary contained in the Sub-Contract.

We hereby undertake to:

1. Execute and complete the works described in the tender documents and to comply with the Conditions thereof for the sum of € [ ] (exclusive of Value Added Tax).

This sum includes all statutory tariffs, taxes and duties and is exclusive of any commission, trade or other discount, or Value Added Tax.

2. Enter into the Collateral Agreement between Employer and Sub-Contractor issued by the RIAI in agreement with the SCSI and the CIF and drawn up by the Liaison Committee for the Construction Industry.

## Appendix K - Form of Tender (Nominated Sub-Contract)

3. Either:

- a. \*Begin the works at such time as the Contractor may reasonably require but not less than [                  ] weeks from the date of written acceptance of the tender and complete the whole of the work within a total of [                  ] weeks from the date upon which the work is required to be started on site, or
- b. \*Commence and complete the work in accordance with the Contractor's programme.

*\*Delete as necessary*

Signed on behalf of the Tenderer Sub-Contractor [                  ]

Name [                                  ]  
(Block capitals)

Position in the Tenderer Sub-Contractor's Organisation [                  ]

Address of Tenderer Sub-Contractor [                                  ]

Dated this [                  ] day of [                                  ], 20 [                  ]

Witness 1 Signature [    ]

Witness 1 Name [    ]  
(Block capitals)

Witness 2 Signature [    ]

Witness 2 Name [    ]  
(Block capitals)

## Appendix L - Notification Letter to Tenderer re non-compliant tender

To [ ]

The Project [ ]

The Client [ ]

Date [ ]

To Whom It May Concern,

Having reviewed your tender for the above project, we regret to inform you that on this occasion your tender has been deemed by us to be non-compliant for the following reason(s):

[ ]  
*(insert reason(s))*

In accordance with the requirements outlined in the invitation to tender, your tender has been removed from consideration. This will not prejudice your eligibility for being considered for future projects and we thank you for your participation to date.

Signed by the Architect [ ]  
*(on behalf of the Client)*

Name [ ]  
*(Block capitals)*

Date [ ]

## Appendix M - Letter to Tenderer re ALT (further info)

To [ ]

The Project [ ]

The Client [ ]

Date [ ]

To Whom It May Concern,

Having reviewed your tender for the above project, we are of the opinion that the tendered lump sum and/or some of the tendered rates constitute an abnormally low tender with reference to the guidelines outlined in the current Code of Practice for Tendering as published by the Liaison Committee for the Construction Industry.

We therefore request that you provide to us the following supporting documentation so that we may be able to determine if your tender is abnormally low or not:

[ ]  
*(insert as required)*

We reserve the right to request further relevant documentation from you in this regard. Once sufficient supporting documentation has been submitted to us, you will be notified as soon as practicable if your tender will be considered further.

Signed by the Architect [ ]

Name [ ]  
*(Block capitals)*

Date [ ]

To [ ]

The Project [ ]

The Client [ ]

Date [ ]

To Whom It May Concern,

In response to your letter dated [ ] and following review of the supporting documentation enclosed therein, we regret to inform you that your tender is abnormally low for the following reason(s):

[ ]  
(insert reason(s))

In accordance with the requirements outlined in the invitation to tender, your tender has been removed from consideration. This will not prejudice your eligibility for being considered for future projects and we thank you for your participation to date.

Signed by the Architect [ ]

Name [ ]  
(Block capitals)

Date [ ]

## Appendix P - Notification Letter to Unsuccessful Tenderer<sup>5</sup>

To [ ]

The Project [ ]

The Client [ ]

Date [ ]

To Whom It May Concern,

Having evaluated your tender for the above project, we regret to inform you that on this occasion you have not been successful.

The reasons for which you were unsuccessful are as follows:

[ ]  
(insert as required)

Please see the table below outlining the maximum available scores in the award criteria, your scores and also those of the preferred tenderer.

Assessment Criterion	Maximum available score	Score awarded to your assessment	Score awarded to preferred tenderer
<b>Total</b>			

(add rows as necessary)

<sup>5</sup> Send this letter at the same time as that to the successful tenderer, Appendix Q.

The above scores were reached as a result of the following:

[ ]  
(insert reason)

The results of your tender evaluation will not prejudice your eligibility for being considered for future projects and we thank you for your participation to date.

Signed by the Architect [ ]  
(on behalf of the Client)

Name [ ]  
(Block capitals)

Date [ ]

Online Version

## Appendix Q - Notification Letter to Successful Tenderer<sup>6</sup>

To [ ]

The Project [ ]

The Client [ ]

Date [ ]

### SUBJECT TO CONTRACT / CONTRACT DENIED

To Whom It May Concern,

Having reviewed your tender for the above project, we are delighted to inform you that on this occasion you have been successful and identified as the preferred tenderer. Please confirm your availability and willingness to continue with the process by return as soon as practicable but within [ ] days or sooner.

Please see the table below outlining the maximum available scores in the award criteria, and your scores.

Assessment Criterion	Maximum available score	Score awarded to your tender
<b>Total</b>		

*(add rows as necessary)*

<sup>6</sup> Send this letter at the same time as those to unsuccessful tenderers at Appendix P.



## Appendix Q - Notification Letter to Successful Tenderer

Please note that this is not a letter of intent nor a letter of acceptance and it is not the intention of this letter to create a binding agreement. In advance of such an agreement being made, please submit the following by [ ] (*insert date*):

[ ]  
(*e.g. tax clearance certificate, bond details, insurance details, health and safety declarations, collateral agreements etc.*)

Subject to compliance with the above request, the Client intends to enter into a contract with you for the above project. We note that the tender validity period for your tender expires on [ ] (*insert date*).

If, at any time prior to the contract being awarded, you wish to withdraw your tender please contact us as soon as practicable. Withdrawals for genuine reasons will not prejudice your eligibility for being considered for future projects.

Signed by the Architect [ ]  
(*on behalf of the Client*)

Name [ ]  
(*Block capitals*)

Date [ ]

## Appendix R1 - Letter to original preferred tenderer following failed negotiations

To [ ]

The Project [ ]

The Client [ ]

Date [ ]

To Whom It May Concern,

We acknowledge that, following our notification to you dated [ ] (*insert date of notification letter to successful tender*) and subsequent attempted negotiations, we are, regrettably, no longer in a position to accept your tender for the reasons outlined below.

[ ]  
(*insert reasons*)

We will, accordingly, proceed to contact the next best scoring tenderer.

In accordance with the requirements outlined in the invitation to tender, your tender has been removed from consideration. This will not prejudice your eligibility for being considered for future projects and we thank you for your participation to date.

Signed by the Architect [ ]

Name [ ]  
(*Block capitals*)

Date [ ]

## Appendix R2 - Letter to next tenderer following failed negotiations with original preferred tenderer

To [ ]

The Project [ ]

The Client [ ]

Date [ ]

To Whom It May Concern,

Following our notification to you dated [ ] (*insert date of notification letter to unsuccessful tender*) we would like to inform you that the award of the contract to the previously identified preferred tenderer will not proceed and that you are now the preferred tenderer. Please confirm your availability and willingness to continue with the process by return as soon as practicable but within [ ] days or sooner.

Please note that this is not a letter of intent nor a letter of acceptance and it is not the intention of this letter to create a binding agreement. In advance of such an agreement being made, please submit the following by [ ] (*insert date*):

[ ]  
(*insert any document requirements here, e.g. tax clearance certificate, bond details, insurance details, health and safety declarations, collateral agreements etc.*)

Subject to compliance with the above request, the Client intends to enter into a contract with you for the above project. We note that the tender validity period for your tender expires on [ ] (*insert date*).

If, at any time prior to the contract being awarded, you wish to withdraw your tender please contact us as soon as practicable. Withdrawals for genuine reasons will not prejudice your eligibility for being considered for future projects.

Signed by the Architect [ ]

Name [ ]  
(*Block capitals*)

Date [ ]

## Appendix S - Notification letter to tenderers following tender restart

To [ ]

The Project [ ]

The Client [ ]

Date [ ]

To Whom It May Concern,

Following the unsuccessful negotiations with all tenderers, we would like to inform you that we have elected to restart the tender for the above project for the following reason(s):

[ ]

*(insert reason, e.g. all tender sums over budget and negotiations were unsuccessful in rectifying the matter)*

We hope that you choose to participate in this restarted tender. If so, we request that you confirm your availability and willingness to continue with the process by return as soon as practicable but, in any event, within [ ] days or sooner. If not, we note that this will not prejudice your eligibility for being considered for this tender or for the tendering of future projects and we thank you for your participation to date.

Signed by the Architect [ ]

Name [ ]  
*(Block capitals)*

Date [ ]

## Appendix T - Notification letter to tenderers following project abandonment

To [ ]

The Project [ ]

The Client [ ]

Date [ ]

To Whom It May Concern,

Following the failure of negotiations with all tenderers, we regret to inform you that we have elected to abandon the above project for the following reason(s):

[ ]

*(insert reason, e.g. all tender sums over budget and negotiations unsuccessful in rectifying the matter)*

We note that this will not prejudice your eligibility for being considered for future projects and we thank you for your participation to date.

Signed by the Architect [ ]

Name [ ]  
*(Block capitals)*

Date [ ]

## Appendix U - Letter of Acceptance

To [ ]

The Project [ ]

The Client [ ]

Date [ ]

To Whom It May Concern,

With reference to our letter dated [ ] (*insert date of notification letter to successful tenderer*) and to your letter dated [ ] confirming your willingness to continue with the tender process, on the basis of the following documentation comprising the contract documents, we accept your tender:

- This letter of acceptance
- The form of contract
- The technical documentation
- The following post-tender clarifications and/or query responses [ ] (*insert as required*)
- (*add as required*)

The contract sum as per your tender is € [ ] including/excluding (*delete as appropriate*) VAT at the applicable rates.

The following is required as a minimum before you can take possession of the site:

[ ] (*insert as required, e.g. confirmation of insurances, performance bond etc.*)

Please return to us a signed copy of this letter acknowledging receipt as soon as practicable.

Signed by the Architect [ ]  
(*on behalf of the Employer and duly authorised to accept the tender*)

Name [ ]  
(*Block capitals*)

Date [ ]

**Acknowledgement**

We acknowledge receipt of this letter of acceptance on [ ] *(insert date)*.

Signed [ ]  
*(on behalf of the Contractor)*

Name [ ]  
*(Block capitals)*

Date [ ]

Online Version

## Appendix V - Retention Bond Guarantee

Format of Text referred to in Condition 35(f) (1) of the RIAI 2017 Blue and Yellow forms of Construction Contract.

**RETENTION CONDITIONAL GUARANTEE “BOND”**                  Bond Reference No [                  ]

The Parties to this Agreement	Name
The Surety as <b>Guarantor</b>	
The Contractor as <b>Applicant</b>	
The Employer as <b>Beneficiary</b>	

**The Guarantor** understands that the terms of a Contract No: [                  ] (“the Contract”) between the Beneficiary and the Applicant for [                  ] (“the Works”) provides that the Beneficiary may retain retention monies (“the Retention Monies” C.35 (e)) being [                  ]% (subject to the Limit of Retention Fund) as stated in the Appendix to the Contract. The Beneficiary is prepared to release the said Retention Monies secured against a Conditional Guarantee “bond” subject to the terms of this Guarantee.

In consideration of the Beneficiary releasing the second moiety of the Retention Monies to the Applicant, the Guarantor hereby guarantees the repayment to the Beneficiary of an amount up to €                  :00 (in words [                  ]) in the event of a breach of the Contract by the Applicant, as established and ascertained pursuant to and in accordance with the provisions of (or by reference to) the Contract, provided that the Beneficiary’s claim hereunder is received in writing at the Guarantor’s office accompanied by a signed statement by the Beneficiary that:

1. The Applicant has failed to fulfil its obligations under the terms of the Contract; and
2. The Applicant has been advised in writing at least 30 (thirty) days before the date of the Beneficiary’s claim together with details of the obligations of the Contract which have not been fulfilled and of the Beneficiary’s intention to claim payment under this Guarantee “bond”.

The Guarantor shall not be discharged or released by any alteration of any of the terms, conditions and provisions of the Contract or in the extent or nature of the Works and no allowance of time by the Architect (or Employer) under or in respect of the Contract or the Works shall in any way release, reduce or affect the liability of the Guarantor to the Beneficiary under this Guarantee.

This Guarantee “bond” shall remain valid until normal close of business at the Guarantor’s office on the date of issue of the Final Certificate or until [                  /                  /                  ] whichever is the earlier (“Expiry”) subject to any matter of claim in dispute with the Applicant notified to the Guarantor’s office before Expiry. Any claim hereunder must be received in writing at the Guarantor’s office before Expiry accompanied by the Beneficiary’s signed statement as aforesaid.



Appendix V - Retention Bond Guarantee

This Guarantee "bond" shall become operative upon receipt of the Retention Monies by the Applicant. Upon Expiry, this Guarantee "bond" shall become null and void, whether returned to the Guarantor for cancellation or not and any claim or statement received after Expiry shall be ineffective. Note: the liability of the Guarantor is co-extensive with the liabilities of the Parties to the Contract.

This Guarantee "bond" is for the benefit of the Beneficiary named in this agreement and is not transferable or assignable, except by agreement, which agreement shall not be unreasonably withheld.

This Guarantee "bond" shall be governed by and shall be construed in accordance with the Laws of Ireland and shall be subject to the exclusive jurisdiction of the Irish Courts.

---

Name of the Employer as **Beneficiary** (Legal Name):  
 [ ]

**Reg. Office Address:** [ ]

**Co. No. at CRO:** [ ]

---

Name of the Contractor as **Applicant** (Legal Name):  
 [ ]

**Reg. Office Address:** [ ]

**Co. No. at CRO:** [ ]

**Director:** [ ]

**Date:** [ ]

**Director/Secretary:** [ ]

**Date:** [ ]

---

## Appendix V - Retention Bond Guarantee

Name of the Surety as **Guarantor** (Legal Name):

[ ]

**Place of Registration:** [ ]

**Co. Register No:** [ ]

**Reg. Office Address:** [ ]

IN WITNESS whereof the Guarantor and the Applicant have executed and delivered this Guarantee bond as a Deed

*If executed on behalf of the Guarantor by its duly appointed Attorney;*

Executed on behalf of the **Guarantor** by its duly appointed Attorney;

**Attorney**

Name (*Block Capitals*):

[ ]

Signature: [ ]

**Witness**

Name (*Block Capitals*):

[ ]

Occupation (*Block Capitals*):

[ ]

Signature: [ ]

Date: [ ]

Imprint of Seal here:

**OR** *If executed by the Guarantor under Seal*

Executed by duly authorised persons (e.g.; Director, Secretary, Registered Person) present when the Common Seal of the **Guarantor** was affixed hereto

Signature: [ ]

Position: [ ]

Date: [ ]

Signature: [ ]

Position: [ ]

Date: [ ]

Imprint of Seal here:

### 1. Parties to this Agreement

- a. Contractor as PSCS [ ]  
Place of registration  
CRO Register No.
- b. Client [ ]  
Place of registration  
CRO Register No.

THIS AGREEMENT is made the (date) [ ] day of (month) [ ] (year) 20[ ]

### 2. Reciting

- a. By tender of (day/month/year) [ ] ("the Tender") the Contractor has offered to construct [ ] ("the Project") on behalf of the Client.
- b. The Client having accepted the Tender (or any modification thereof) the Parties have entered into an Agreement dated (day/month/year) [ ] ("the Main Contract") by which the Contractor has undertaken to construct the Project on behalf of the Client.
- c. The Client has appointed [ ] as Project Supervisor for the Design Process of the Project.
- d. The Contractor has included in the tender sum (or any modification thereof), for the provision of the services of Project Supervisor for the Construction Stage in respect of the Project pursuant to the Safety Health and Welfare at Work (Construction) Regulations 2013 ("The Regulations").
- e. The Contractor has undertaken in the Tender, in consideration of the acceptance of the Tender (or any modification thereof), to enter into a separate Agreement to the Main Contract to provide the services of Project Supervisor for the Construction Stage pursuant to the Regulations in respect of the Project.
- f. Having satisfied itself as to the Contractor's competence and resources, the Client confirms the appointment of the Contractor as Project Supervisor for the Construction Stage of the Project and the Contractor agrees to accept the appointment.

## Appendix W - Appointment of PSCS

NOW IT IS HEREBY CONFIRMED AND AGREED AS FOLLOWS:

1. The Client hereby appoints the Contractor and the Contractor accepts the appointment as Project Supervisor for the Construction Stage of the Project in accordance with The Regulations.
2. The Contractor represents and warrants to the Client that the Contractor is competent to and will allocate adequate resources to enable it to perform its duties as Project Supervisor for the Construction Stage under The Regulations.
3. The Client shall pay to the Contractor any amount included in the Contract Sum in respect of this service adjusted as necessary in accordance with the provisions of the Main Contract.
4. This Agreement with the Main Contractor is a separate agreement to the Main Contract agreement.
5. The Contractor shall procure that the insurance cover required to be obtained and maintained by the Contractor pursuant to the provisions of the Main Contract shall provide indemnity for the Client in respect of any claim for bodily injury or property damage which the Contractor may incur by reason of the performance of the functions and duties of Project Supervisor for the Construction Stage of the Project.
6. In the event of the employment of the Contractor being determined under the conditions of the Main Contract, the employment of the Contractor under this agreement may also be terminated at the discretion of the Client.
7. In the event of the termination of this Agreement, the Client reserves the right to use documents prepared by the Project Supervisor for the Construction Stage pursuant to and for use under this Agreement without prejudice to any lien on such documents against unpaid sums, provided always that such documents are used solely for the for the purposes of the Project and the preparation of the Safety File.
8. In this appointment, competent person, reasonably practicable and relevant statutory provisions are construed according to Section 2 of the Safety, Health and Welfare at Work Act 2005.

IN WITNESS whereof the Contractor and the Client have executed and delivered this Agreement this [ ] day of [ ] 20 [ ].

**On behalf of Client**

Signed [ ]

Name [ ]  
*(Block capitals)*

Title [ ]

Date [ ]

**Client's Witness**

Signed [ ]

Name [ ]  
*(Block capitals)*

Title [ ]

Date [ ]

**On behalf of Contractor**

Signed [ ]

Name [ ]  
*(Block capitals)*

Title [ ]

Date [ ]

**Contractor's Witness**

Signed [ ]

Name [ ]  
*(Block capitals)*

Title [ ]

Date [ ]

Online version

## Appendix X - Request to appoint Nominated Sub-Contractor

To [ ]

The Project [ ]

The Client [ ]

Date [ ]

To Whom It May Concern,

In accordance with the terms of your appointment for the above project and [ ]  
(insert contract reference clause) we hereby instruct you to appoint [ ]  
(insert name of Nominated Sub-Contractor).

Signed by the Architect [ ]

Name [ ]  
(Block capitals)

Date [ ]

## Appendix Y - Payment Certificate Notification to Nominated Sub-Contractors

Employer [ ]  
(insert name and address)

Architect [ ]  
(insert name and address)

Project [ ]  
(insert title and site address)

Nominated Sub-Contractor [ ]  
(insert name and address)

Date [ ]  
(dd/mm/yyyy)

We hereby inform you that, in accordance with the terms of the Contract dated [ ],  
for the works described as [ ],  
a Certificate for Payment dated [ ] has been issued for presentation to the  
Employer.

The Contractor [ ] has been directed  
that in the said certificate the following amount is due for the carrying on of the sub-contract  
comprising [ ]

Sub-contract total certified to date	Previously certified	Amount included in the said certificate
€	€	€

All amounts are exclusive of VAT. No account has been taken of:

- Retentions which the Contractor may withhold under the terms of the sub-contract, or
- A discount for prompt payment to which the Contractor may be entitled.

Signed by the Architect [ ]  
(Member of the Royal Institute of the Architects of Ireland)

Name [ ]  
(Block capitals)

Date [ ]

