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DISPUTE RESOLUTION CLAUSES UNDER RIAI & PWC

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Construction Bar Conference Paper

1. I have been requested by the Chairman to deliver a paper on dispute resolution clauses under the Royal Institute of Ireland and Public Works Contracts.

2. The Public Works Contract [PWC]

3. A brief history of the PWCs is that a suite of contracts was introduced in 2007 as part of the Government's Construction Procurement Reform Initiative. The objectives were to achieve greater cost certainty at contract award stage with a view to attempting to get to a point where tender prices and final cost would be the same, award contracts on the basis of a lump-sum fixed-price to the greatest extent possible, rebalance risk under the contract so that there was optimal allocation of risk in favour of the employer, achieve value for money, and achieve more efficient and timely delivery of projects.

4. The first such contract was issued in February 2007 and there have been numerous amendments to the contracts since then resulting in several new versions being issued. If one is advising as regards these contracts it is important to know precisely which version of the contract one is concerned with, and each will bear a reference number and date.

5. From the point of view of the dispute resolution procedures provided in the various contracts there is a very useful document published by the Office of Public Procurement entitled Guidance Note 3.1.1 Dispute Resolution [document reference GN 3.1.1v 1.1 dated 28 June 2016, **Appendix 1** hereto]. If one turns to page 1 there is a table with the various contracts set out which details which dispute resolution

procedures are available in the various contracts. For the purposes of this paper given the time limitations at the conference I will focus solely on the dispute resolution procedures detailed in PW-CF1 to PW-CF4 inclusive.

6. Clause 13 has since 2007 set out the disputes resolution procedures available in these contracts. Basically this has provided that if a dispute arose under the contract either party could refer it for conciliation and if either was dissatisfied with the conciliator's recommendation it could, within 45 days of receiving that recommendation, notify the other party of its dissatisfaction, and either party could then refer the dispute to arbitration. If neither party gave notice of dissatisfaction within the 45 day period the recommendation became binding and conclusive, and both parties agreed to comply with it. If a party failed to comply with the recommendation the other party could refer that failure to arbitration.

7. In the event of the conciliator having recommended the payment of money, even if a notice of dissatisfaction had been given, the party recommended to make the payment was required to make it provided the other party gave the paying party a bond for the amount of the payment. Under Clause 13.2 any dispute which could be referred to conciliation was to be finally settled by arbitration.

8. This dispute resolution provision remained in place up to version 1.10 of the contract dated 27 June 2014.

9. In December 2013 the second review of the workings of the PWCs commenced and in December 2014 the Report on the Review of the Performance of the Public Works Contract was issued. It noted that there were two formal dispute resolution mechanisms provided under the existing contract; conciliation and arbitration. The timescales set out in the contract for the notification of claims were a barrier to the co-operative resolution of differences in that they forced parties into formal dispute measures before they were necessary, and these notification requirements tended to promote an adversarial as opposed to a co-operative relationship. Once a claim was made the employer had a fixed period in which to respond with a determination. If the determination rejected the claim the parties were then in a dispute, and the formal dispute resolution mechanisms provided for in the contract took over until the matter was resolved by agreement through conciliation or the dispute was finally resolved by arbitration.

10. It was pointed out that quite apart from the adversarial relationship which this promoted, claims absorbed a lot of resources both in responding to the individual claims and in putting together the submissions required for the dispute resolution mechanisms provided for in the contract. Considerable costs were also involved in resolving claims by recourse to the specified procedures.

11. As a result of the above it was felt that the dispute resolution mechanisms in the PWCs had to be reviewed and the Report proposed the introduction of a procedure after the point where a determination had been reached by the employer's representative whereby both parties would engage within a specific timeframe to establish whether the matter can be resolved before referral to conciliation. As regards contracts with a value of in excess of €10,000,000, it proposed that a single-person body should be appointed by both parties on consent at the outset of the of the

contract, who would meet with both parties on a regular basis during the contract to encourage engagement and agreement before issues developed into disputes. If a dispute arose the single person would act as conciliator and failing agreement on a given dispute would issue a non-binding recommendation to the parties.

12. Arising out of this review it was proposed that amendments to the existing dispute resolution mechanisms in the Public Works suite of Contracts should be included in the subsequent versions of the contracts, among which was the inclusion of informal dispute resolution methods to reduce the volume of disputes then being referred to the formal procedures of conciliation and arbitration which were provided for in the existing suite of contracts.

13. The first version of PW-CF1 to PW-CF4 which provide for the said amendments was v 2.0 dated 22 January 2016 and this, in Clause 13 provides for the new "Dispute Management Procedure", conciliation and arbitration. The next version was v 2.1 dated 28 June 2016 provided for dispute management procedure, conciliation, arbitration and adjudication. The next, and current version is v 2.2 dated 9 January 2017, and this again provides for the procedures set out in the previous version, v 2.1. I will refer solely to the current version for the purposes of this paper.

14. Dispute Management Procedure:

15. The Dispute Management Procedure is therefore a new dispute resolution process which was not included in the previous versions of the contracts. It envisages the parties engaging in a without prejudice dispute resolution process relating to certain disputes prior to referring the disputes to the more formal mechanism of conciliation. Under clause 13.1 of the contract the disputes which may be the subject matter of this procedure are those which arise out of determinations issued by the Employer's Representative under clauses 10.5.4 and 10.5.5, and the procedure involves the referring of the dispute to the Project Board established at the outset of the contract. In addition clause 4.15.3 should also be adverted to, stating that the project board shall only review disputes referred to it under clauses 10.5.4 and 10.5.5. For ease of reference clauses 10 and 13 of the current contract are in **Appendix 2**.

16. Clause 10.5.4 deals with the situation where the contractor has made a claim under clause 10.3 or a proposal under clause 10.4, following which the employer's representative has made a determination as regards an adjustment to the contract sum, extension of time or use of the clause 9.4 programme contingency, and either the contractor or employer disputes the determination. Clause 10.5.5 deals with the situation where an agreement has been reached between the contractor and the employer's representative as regards the contractor's clause 10.3 claim or clause 10.4 proposal, and then a dispute arises as to whether the ensuing employer's representative's notice of the agreement correctly records the agreed terms.

17. The Project Board is made up of persons nominated by the parties. In Schedule Part 1A of the contract the Employer selects the number of members each party shall nominate to the Project Board, which shall be a minimum of 1 and a maximum of 3 from each party. Schedule Part 3A states that the parties shall agree at a preliminary

meeting of the Project Board the format and procedure by which all disputes referred to it shall be reviewed and agree the schedule of standing meeting dates. The preliminary meeting is to be held before the contract's starting date, and under sub-clause 13.1.2 the Project Board shall meet at least every 60 days unless otherwise agreed in accordance with that provision.

18. Schedule Part 3 A, in relation to the composition of the Project Board states that at least 1 member must hold a construction related role within the Employer's organisation or have a construction related qualification or background relative to the project description, but for the purposes of membership of the Project Board external consultants to the Employer may be named for membership of it. All Project Board members must have authority to negotiate agreements which will be binding on the party they represent. It also states that the neither Employer's Representative nor any member of the design team can be a member of the Project Board. For ease of reference the Tender and Schedule reference FTS1 v 2.2 dated 9 January 2017 is appended as **Appendix 3**.

19. As regards the Contractor's members of the Project Board that part of the Schedule again states that at least 1 member must hold a construction related role within the Contractor's organisation or have a construction related qualification or background relative to the project description. Again external consultants may be named for membership, and all members from the Contractor's side must have authority to negotiate agreements which will be binding on the Contractor. As in the case of the Employer's Representative the Contractor's Representative may not be a member of the Project Board. It is accordingly advisable that members of the Project Board should come from senior management level in the party they represent.

20. At paragraph 1.3 of the Guidance Note the helpful observation is made that the type of person that should be considered for membership of the Project Board would have knowledge and experience of the construction industry, commercial dispute resolution, alternative dispute resolution methods, commercial decision making and commercial negotiation.

21. As already stated, under clause 13.1.1 the sole function of the Project Board is to review disputed Employer Representative determinations under clauses 10.5.4 and 10.5.5 referred to it under 13.1. The hope is that parties will initially refer such disputes to the Project Board and not resort to the more formal procedure of conciliation. The Project Board is not to review disputes arising under other clauses in the contract and this is specifically stated in clauses 4.15.3.

22. The operating procedures by which the Project Board hears and resolves disputes are a matter for the Board, and in accordance with clause 13.1.2(3) all communications between the members of the Project Board shall be without prejudice, including any communications between the Board and the Standing Conciliator. Such communications cannot be relied upon by either party in subsequent dispute resolution proceedings under the contract, other than the signed agreement between the parties which resolves the issue which has been referred.

23. Under clause 13.1.2(1) the Project Board shall meet at least every 60 days to review disputes referred under clause 13.1 and there must be a minimum of 1 member

from each party and a maximum of 3 in attendance. If the Project Board reaches agreement on the referred dispute or disputes the agreement or agreements must, under clause 13.1.2(4), be reduced to writing and be signed by the parties. This agreement is then binding on the parties.

24. If no agreement is reached by the Project Board to resolve a dispute referred to it the Project Board shall notify the parties of this on the next working day after the meeting at which the dispute failed to resolve. Following this either party may refer the dispute to conciliation under clause 13.2 within 14 days of the date of that notification. If this does not happen the original Employer's Representative's determination under clause 10.5 shall be binding. [13.1.2(5)]

25. Conciliation:

26. Conciliation is a voluntary process whereby a neutral third party facilitates negotiations between parties and assists them to reach a settlement. It is similar in many ways to mediation, but the principal difference is that conciliation usually involves the conciliator issuing a recommendation when the matter does not resolve, whereas mediation does not. It is a confidential and "without prejudice" process which either party can withdraw from at any time before settlement is reached. The conciliator has no power to impose a solution on the parties.

27. As already stated prior to the amendments following the 2013 Review the traditional procedures provided for were conciliation, followed by arbitration, if conciliation did not succeed in resolving the dispute. The first version of the PWC for Building Works designed by the Employer following the said review was PW-CF1 V 2.0 was dated 22 January 2016, and this is the version of that contract which first set out the Dispute Management/Project Board Procedure referred to above.

28. This is followed in the current version of that contract, PW-CF1 v.2.2 dated 9 January 2017 which deals with conciliation in clause 13.2. That states that if a dispute arises under the Contract, or where a dispute referred to the dispute management procedure has not been resolved, either party may, by notice to the other, refer the dispute for conciliation.

29. While the word "may" is used and no time limits are specified in clause 13.1.1 one needs to be cautious and bear in mind the time limits prescribed under clauses 10.5.4 and 10.5.5, whereby in the first instance a determination by the Employer's Representative of a Contractor's claim is final and binding on the parties unless, within 28 days after receiving the notice of the determination the contractor or the employer gives notice under clauses 13.1.1 or 13.2.1 disputing the determination and referring the dispute to either the dispute management procedure under clause 13.1 ,or to conciliation under clause 13.2. Clause 10.5.5 contains a similar "final and binding" provision as regards whether an employer's representative's notice of an agreement relating to a contractor's proposal accurately reflects what was agreed.

30. Under clause 13.2.2, except in cases where a Standing Conciliator has been appointed the parties shall, within 10 days of the referral of the dispute to conciliation, jointly appoint a conciliator who is competent to deal with the dispute and who is

independent. If it is not possible to agree on a conciliator there is provision for one being appointed by the body or person named in the Schedule Part 1N. The fee for making the appointment is shared equally.

31. Clauses 13.2.3 and 13.2.4 sets out that details of the dispute and contentions of the parties shall be sent to the conciliator and the other party, and that any documentation and information, together with access to the site and any appropriate facilities shall be provided.

32. Clause 13.2.5 sets out the powers available to the conciliator in attempting to resolve the dispute, and these include meeting the parties separately, considering documents provided by one party not seen by the other, conducting investigating in the absence of parties, making use of specialist knowledge, obtaining technical or legal advice, and establishing the procedures to be followed in the conciliation. As regards procedures a useful document has been issued by Engineers Ireland entitled “Conciliation Procedure 2013 for use with the PWC Suite of Contracts” and a copy of this is at **Appendix 4**.

33. If the dispute is not resolved by agreement within 42 days of the conciliator’s appointment or such longer period as may be proposed by the conciliator and agreed by the parties the conciliator shall make a written recommendation which shall be based on the rights and obligations of the parties under the contract. [13.2.8]

34. If either party is dissatisfied with the conciliator’s recommendation, it may, within 42 days after receiving the recommendation notify the other party of that, stating that the notice is given under clause 13.2 and the reasons for the dissatisfaction. [13.2.9]

35. If the conciliator has failed to give a recommendation within 42 days after appointment either party may give notice of dissatisfaction and thereafter refer the dispute to arbitration under clause 13.3. [13.2.9]

36. Under clause 13.2.10 if neither party gives notice of dissatisfaction within 42 days of receiving the recommendation it shall be binding and conclusive on the parties, and the parties agree to comply with it. If in such circumstances a party fails to comply with the recommendation the other party may refer the failure to adjudication, where the dispute is a dispute relating to payment, or to arbitration under 13.4.

37. If the conciliator has recommended the payment of money and a notice of dissatisfaction is given the paying party shall make the payment recommended by the conciliator provided the receiving party has referred the same dispute to arbitration, and has given a satisfactory bond to the paying party. [13.2.11] This provision was recently commented upon in two judgements of McGovern J in the case of Kellys of Fantane (Concrete) Ltd v Bowen Construction [2017] IEHC 357 and [2017] IEHC 526 dated 1 June and 31 July 2017 respectively, if anyone wishes to read more on the subject.

38. Clause 13.2.12 provides that the conciliation is confidential, except to the extent necessary to enforce a binding and conclusive recommendation.

39. Standing Conciliator:

40. The appointment of a standing conciliator is one of the innovations arising out of the 2013 review. The intention behind the introduction of the concept of standing conciliator was to encourage proper engagement between the parties and to assist them in the avoidance of disputes. The hope was that if there was somebody there to assist the parties to establish agreement on issues before they crystallise into disputes it might be possible to avoid the more formal dispute resolution procedures which will be a drain on the parties' resources.

41. For all contracts which use the Public Works Contracts PW-CF1 to PW-CF4, where the contract sum is in excess of €10,000,000 a standing conciliator must be appointed from the start date until the date of substantial completion, although the parties and the standing conciliator may agree to extend the period.[Schedule Part 1N and MF1.18 Term 4] For all contracts in the €5 million to€10,000,000 range the employer will have the option of requiring that one be appointed. Where one is appointed he/she will fulfil the role of conciliator in all cases.

42. Where a dispute is referred to conciliation under clause 13.2 the standing conciliator is to fulfil the role of conciliator under the contract. [13.2] If the dispute is not resolved within 42 days after the dispute has been referred, or such further period as the parties and the standing conciliator agree, the standing conciliator shall give a written recommendation based on the rights and obligations set out in the contract. [13.2.8]

43. Adjudication:

44. Under SI No.165/2016 the 25th of July 2016 was appointed pursuant to s 12(2) of the Construction Contracts Act 2013 and the Act applies in relation to construction contracts entered into after that date. Entire conferences have been devoted to the operation of that Act and given time constraints it is not my intention to deal with that Act at any length. However it obviously has to be referred to within the matrix of dispute resolution procedures available in this jurisdiction and under the Public Works Contracts.

45. Clause 13 of PW-CF v 2.0 dated 22 January 2016 does not refer to adjudication, but Clause 13.3 of PW-CF v 2.1 dated 28 June 2016 is headed "Ajudication" and specifically refers to that Act presumably in anticipation of it being commenced shortly following that date. Clause 13.3.3 states that if a dispute between the parties is referred to adjudication, any dispute management procedure or conciliation relating to that dispute must immediately adjourn, but in the event that no decision is reached by the adjudicator the parties may continue to resolve the dispute under the dispute management procedure or conciliation from the date the dispute was referred to adjudication. If a decision is reached by the adjudicator the dispute management procedure or conciliation for that dispute is terminated. Clause 13.3.2 provides that where the adjudicator reaches a decision on a dispute referred to him/her under the

Act that same dispute shall not be referred to the dispute resolution procedure or conciliation under the contract.

46. Arbitration:

47. Arbitration is intended to be the final stage of dispute resolution under the Public Works Contracts and is dealt with in clause 13.4 of PW-CF 1 to PW-CF 4. It states that any dispute that under clause 13.2 may be referred to conciliation shall, subject to clause 13.2 be finally settled by arbitration in accordance with the arbitration rules identified in the Schedule to the contract at Part 1N.

47. A copy of those rules is appended in **Appendix 5** together with a copy of the current Tender and Schedule reference FTS1 v 2.2 dated 9 January 2017 in **Appendix 3** and unusual features to be aware of are the second page of the tender which states “we also agree that should a dispute arise under any contract formed by the acceptance of this tender that is referred to arbitration, to the extent permitted by law, under the Arbitration Act 2010 and a sealed offer has not been made, or where a sealed offer has been made and the contractor’s award is greater than the sealed offer, then each party will bear their own costs in relation to the arbitration proceedings”.

48. In addition the current version of the arbitration rules, reference AR 1 v 1.2 dated 24 September 2014 states at 6.3 under the heading “Publication” that the arbitral tribunal must send a copy of each award to the Office of Government Procurement, and that the parties and the Minister for Public Expenditure and Reform are free to make the award public. This flies in the face of the traditional view of arbitration as a private process which is confidential to the parties, and is something to be aware of.

49. The RIAI Contract:

50. There have been a number of editions of the RIAI contracts over the years and for the purpose of this paper I will focus on the “Yellow Form”, being the appropriate contract where quantities form part of the contract.

51. Clause 38 of the 2012 edition is headed “Disputes Resolution” and details the traditional procedures of mandatory conciliation and arbitration.

52. Clause 38 provides:

- (a) *If a dispute arises between the parties with regard to any of the provisions of the Contract such dispute shall be referred to conciliation in accordance with the Conciliation Procedures published by the RIAI [emphasis added]*

If a settlement of the dispute is not reached under the Conciliation Procedures either Party may refer the to arbitration in accordance with Clause 38(b). [emphasis added]

(b) in case any dispute or difference shall arise between the Employer and the Contractor either party shall forthwith give to the other notice of such dispute or difference and such dispute or difference shall be and is hereby referred to the arbitration and final decision of such person of such person as the parties may agree to appoint as Arbitrator and the Award of such Arbitrator shall be final and binding on the parties. [emphasis added]

53. Therefore as can be seen from the above the scheme for dispute resolution in the 2012 edition of the contract envisages recourse to only two dispute resolution procedures, conciliation and arbitration.

54. The next, and current edition of the contract is the August 2017 edition. This has been drafted in a significantly different manner to the previous editions, largely in order to accommodate the effects of the Construction Contracts Act 2013.

55. The new Condition 38 which has been inserted into the contract is headed “Avoiding and Resolving Disputes”, and under sub-heading “Conciliation” and “Conciliation under Condition 38(a)” the following is provided:

(i) *Should any dispute arise in relation to this contract - and it is not resolved by negotiation the parties should enter into Conciliation to resolve such dispute before statutory Adjudication or Arbitration. [emphasis added]*

(ii) *Either party may commence Conciliation by sending a written Request for Conciliation to the other party The provisions in the RIAI Conciliation Guidelines and Procedures document shall apply. [emphasis added]*

The parties are deemed to have agreed to the following provisions with regard to such Conciliator’s Recommendation should the conciliation proceed to the stage that a Recommendation is delivered to each party:

(B) *If neither party rejects the Recommendation in writing within 10 working days the Recommendation shall be deemed to be agreed as a legally binding and enforceable settlement agreement between the parties – in full and final settlement of the issues as referred to and determined by the Conciliator in the Recommendation.*

(C) *If a party decides to reject the Conciliator’s Recommendation*

(D) *..... the Recommendation is deemed to be of no legal effect and the parties are not bound by its terms.*

56. Under the sub-heading “Arbitration” the contract provides the following:

(i) *Should any dispute arise in relation to this contract, either party may refer such dispute to Arbitration [emphasis added]*

(ii) *Either party may commence Arbitration by delivering a written Notice of Arbitration.*

57. An interesting difference in the manner in which Condition 38 of the 2012 and 2017 contract has been drafted is the change from the use of mandatory language in the earlier edition to language and terminology of a recommendatory and permissive nature in the 2017 edition. It is apparent from the extracts above that the Conciliation Guidelines and Procedures may be used as an aid to interpreting Condition 38, and the introduction to the Guidelines states that parties may avail of Conciliation while retaining such rights as they may already have to statutory adjudication under the 2013 Act, or to arbitration or to litigation.

58. Under the heading “The Principles”, the Guidelines state that where the parties’ contract provides for conciliation they are encouraged to avail of that procedure, where negotiation has not resolved the issues, that participation by the parties in conciliation is entirely voluntary and a matter for mutual consent, and that either party may withdraw consent and discontinue participation at any time. Nothing in an agreement to conciliate inhibits a party’s right of recourse to statutory Adjudication, Arbitration, or to litigation, if there is no binding arbitration agreement without first availing of Conciliation, and section 3 of the Guidelines also provides that parties using them agree that each party to a conciliation is bound to maintain confidentiality.

59. Section 6.3 of the Guidelines again sets out that the Conciliation process is one of mutual consent every step of the way, and that it can be terminated by either party at any time, and that the parties participate because they choose to, not because they have to. That section also states that the Recommendation must be reasoned, unless the parties otherwise agree, and shall be based on the legal rights and obligations of the parties under the contract.

60. It is therefore clear from the above that the hope of the RIAI is that disputes should be resolved preferably by way of negotiation, and if that does not work by way of conciliation. Only if neither of the above are successful should the parties have recourse to arbitration or litigation. For ease of reference copies of Condition 38 in the 2012 and 2017 editions of the contract and the RIAI’s Conciliation Guidelines & Procedures, September 2016 Edition have been appended hereto in **Appendix 6**.

Thank you.

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This is a lecture paper only. No liability is accepted in respect of its contents or omissions. Specialist legal advice should be obtained before any decision is taken in respect of any of the matters discussed or referred to in it.