

## **'Meeting Construction Targets May Mean Amending Building Contracts'**

Exponential growth in output from the construction industry will be required in order to keep up with increasing demand from the private and public sector in the property market. However, it remains to be seen whether contractors will accept the existing, private and public sector, standard building contracts, or must they be amended to reflect new realities.

The standard form of building contract in the private sector, is that recommended by the RIAI, which has historically placed the balance of responsibility/risks with the employer. This in turn has led to the development of Employer's Schedule of Contract Amendments by employers. In having a more tightly drawn contract which employer claim gives them more influence over the contractor. Hence they are more likely to prioritise such project then would otherwise be the case if there wasn't such an Employer's Schedule of Contract Amendments.

The rapid increase in the cost of materials and labour, and in the supply of materials, which have been exacerbated by the pandemic and BREXIT has further highlighted the vulnerability of contractors. In a fixed price contract, the contractor is at risk where costs overrun and although the standard RIAI contract makes allowance for price variations, many contracts are amended to shift risk for cost increases to the contractor. Hence, contractors are finding contracts potentially uneconomical and are looking for opportunities to challenge them.

Problems are also arising where the completion of buildings is delayed, due to the late delivery of key building components, as factory production has been slowed by the pandemic and BREXIT. Again, the contractor in private sector contracts is at risk of bearing the additional costs.

However, last year a new private sector form of contract was launched by bodies including the Construction Industry Federation (CIF), Engineers Ireland with the objective of achieving a fair allocation of risk between the parties, to promote sustainability and efficiency in the industry.

### **Private Sector Contract (PSC)**

This Contract and its associated Form of Agreement and Schedule were jointly launched and published 15 September 2020 by CIF, Engineers Ireland and SCSI.

The general approach of the PSC is set out within the preamble. Specifically, the second part of the preamble sets out basis of the contract.

It is envisaged these contracts are most suitable for medium to large scale building or civil engineering works, where the design of the project has been provided by the employer i.e. the client.

The PSC is based on the employer-designed public works contracts and have been drafted with the objective of achieving a fair and balanced allocation of risk between the parties in order to promote long-term sustainable efficiency in the Irish construction industry. Specifically, it notes that risk has generally been allocated to the party best able to bear and manage it.

The idea being to use the overall structure of the public works contracts but re-balancing the risk.

The PSC includes similar additions to those used to supplement and amend the RIAI form including provisions for compliance with BCAR, sectional completion, digital information modelling, programme and progress reporting, clarity and flexibility in risk allocation with delay and compensation events, which are listed together and a structured mechanism for dealing with changes and claims.

However, there are a number of areas where the PSC deviates from public works contracts:

#### **i. Specialists**

The PSC accommodates three kinds of client-selected subcontractors:

- specialists already working for the client when the main contract is awarded: their contracts are transferred ('novated') over from the client to the main contractor. These are called **novated specialists**.
- specialists selected before the main contract is awarded, and identified in the main contract. These are called **named specialists**.
- specialists selected after the main contract is awarded, and plugged-into the main contract subsequently. They are called **nominated specialists**.

The contractor has less responsibility for nominated specialists. Their payments are administered by the client's team and paid to the contractor by adjusting a prime cost sum. The contractor is not responsible for their design but has to obtain a collateral warranty. In contrast, the contractor *is* responsible for novated and named specialists' design. Where a nominated specialist has to be replaced, the client bears the delay and cost consequences.

This reflects the RIAI form, which provides for nomination of subcontractors by the architect, often amended to transfer the risks mentioned above to the contractor.

A client using the PSC may wish to consider bespoke arrangements for managing the risks it retains for traditional nominated subcontractors.

## **ii. Design**

The PSC's full title is *Conditions of Contract for Private Sector Building and Engineering Works Designed by the Employer*.

Clause 8.1.1 provides that the client is responsible for design of the works, except for any part to be designed by the contractor or a novated or named specialist subcontractor.

The PSC makes the client responsible for the 'integration and co-ordination of the design'. This is not stated in most construction contracts, but is probably assumed as part of the primary design responsibility.

The PSC envisages incremental design. Clause 8.1.4 requires the client to give the contractor 'such design information, including criteria and parameters' as are necessary to perform the contract.

## **iii. Fit for purpose**

Clause 8.2.5 of the PSC provides that all items 'provided' by the contractor for the works 'shall also be fit for the purpose for which they are used in the Works.' The implication being that the contractor will be responsible for ensuring the suitability of items designed or selected by the client's design team.

## **iv. Law & government action**

The PSC makes change of law and other legal requirements after the designated date (10 days before tender) a delay and compensation event. A delay result can mean a time extension. A compensation event can mean a price adjustment. Protection here could be sought by limiting this to unforeseeable changes in law.

Delay caused by action of public authorities is a delay and compensation event.

The PSC requires consent for assignment by either party. Clients may want to secure advance consent to certain types of assignment: security, inter-group, possibly to a purchaser.

Commercial developer clients will want to add provision for collateral warranties for lenders, tenants, and purchasers.

**v. Insurance**

The PSC includes an option for requiring the contractor to have professional indemnity insurance. Clause 3.5 requires the client to take out non-negligence insurance. This insures against damage to property (other than the works) when negligence is not proven, for example due to vibration or loss of support.

**vi. Claim and dispute mechanics**

The PSC requires *each party* to notify claims within 28 days after it becomes (or should have become) aware of something resulting in an entitlement. Failure to give timely notice bars the claim.

Under the public works contracts, the employer's representative determines claims in the first instance. A contractor claim not determined within 20 working days is deemed rejected. The decision (or deemed decision) is binding unless a dispute is raised in 28 days. The PSC modifies this by reversing the 'deeming': if the employer's representative fails to make a timely decision, the contractor can ask (again) for a decision within 10 working days, failing which the contractor's claim is deemed to have prevailed in full. The deemed decision is binding if not disputed in 28 days.

Under the PSC, disputes not sent to adjudication can be referred to conciliation, which can result in a recommendation that is temporarily binding.

The PSC is a welcome initiative however it remains to be seen whether users will adopt this new form.

**PSC & Force Majeure**

PSC has followed Public Works Contract (PWC) in that there is no Force Majeure clause as such. However, there is a fundamental difference between the two contracts. Article 4 of the PSC agreement has largely been carried from PWC, however the second sentence has been changed significantly. Where the PWC effectively imposes responsibility for Force Majeure events onto the contractor, in contrast, the new PSC makes provision for force majeure. The responsibility of the Contractor is much narrower and they are not responsible for all risks, whether foreseen or unforeseen.

A Force Majeure clause should be included within the contract to deal with all potential outcomes.

If there is no provision for Force Majeure contained within a contract, the contractor/employer may argue that the contract has been frustrated. There are multiple problems and uncertainties with doctrine of frustration itself and it can be difficult to confirm whether contracts have been frustrated or not. These problems can be avoided by the insertion of a well-drafted Force Majeure Clause.

There are a number of approaches to drafting a Force Majeure clause.

- 1) "Extreme" approach: Seek to exonerate one party and put all risk on the other party when drafting the clause. Unlikely to be accepted, particularly given current climate.
- 2) "Woolly" approach: another approach adopts a more imprecise provision which provides that one party would be entitled to be compensated to the extent and to all the circumstances that one could reasonably expect. This would be preferable to relying on the doctrine of frustration.
- 3) "Formula" Approach: drafting a clause with the following elements;
  - The definition of Force Majeure would include a requirement that neither party contributed in any way to the occurrence of the event and that the contractor could not reasonably have been expected to provide for the event during the tender process.
  - The contractor will absorb a certain % of the actual cost (excluding profit) up to a certain % (e.g. 5%).

- Thereafter the contractor and employer would bear the additional cost caused by the event on a 50/50 basis.
- Additionally, one would also have to have a provision that would provide that if the contractors actual loss was going to go above the figure obliged to absorb (e.g. 5%), that the contractor would have the option to terminate the contract.
- Then one could further provide that if the above option to terminate is exercised, the employer might have the option of negating the termination by accepting that they would meet the actual cost of the works over the figure the contractor was going to absorb.

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