



**An Roinn Airgeadais
Department of Finance**

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Sráid Mhuirfean Uacht,
Baile Átha Cliath 2,
Éire

Upper Merrion Street,
Dublin 2,
Ireland

Teileafón / Telephone: 353-1 676 7571
Facsimhír / Facsimile: 353-1 678 993
Glao Áitiúil / LoCall: 1890 66 10 10
<http://www.irg.gov.ie/finance>

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Circular 33/06: Construction Procurement Reform – revision of arrangements for the procurement of public works projects and for the engagement and payment of construction consultants

A Dhuine Uasail

1. I am directed by the Minister for Finance to inform you that revised arrangements are being put in place with effect **from 1 January 2007** (*Standard Conditions of Engagement for Construction Consultants*) and with effect from Monday, **19 February 2007** (*new Forms of Construction Contracts for Public Works*) for the procurement of public works projects and for the engagement and payment of construction consultants¹.

Construction Procurement Reform Process

2. The Government decided in May 2004 (S29837) to reform the approach to both procuring public works projects and engaging and setting fees for construction consultants. The reforms are a key value for money initiative to help address concerns about the extent of cost overruns (i.e. the increase in project cost between the tender price accepted and the final outturn cost) on public works contracts and also to develop more client-focused and standardised conditions for the employment of construction consultants.

3. A suite of four new *Forms of Construction Contracts for Public Works* comprising traditional (employer designed) contracts for civil engineering and building works and “design and build” contracts for civil engineering and building works has been developed. A fifth contract was later added to the suite for minor works contracts (traditional approach for building works and civil engineering) valued at €5 million or below. In exceptional circumstances, contracting authorities will be permitted to use the main suite of contracts on public works projects of between €1 million and €5 million. In tandem with the development of the new Forms of Construction Contracts, *Standard Conditions of Engagement for Construction Consultants* have also been developed.

Consultation Process

4. Throughout the development process, the various iterations of the new Forms of Construction Contracts and the Standard Conditions of Engagement for Construction Consultants were examined and cleared by key representatives from the

¹ Construction consultants as defined in Category 12 of Annex IIA of Directive 2004/18/EC on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts of 31 March 2004.

main construction-related government departments and bodies that are represented on the Government Contracts Committee for Construction (GCCC). There was a year-long consultation process with the Construction Industry Federation (CIF) and the relevant professional bodies (RIAI {architects}, ACEI/EI {engineers} and SCS {quantity surveyors}). There was also input from the union side in relation to clauses on employment standards during the talks on *Towards 2016*. This process is now complete.

Core Elements of the Construction Procurement Reforms

5. *Construction Contracts: Fixed Price Lump Sum Contracts and Associated Guidance*

To achieve cost certainty and better value for money outcomes, the new Forms of Construction Contracts for Public Works have been designed to ensure that as much of the costs of public works projects as possible are reflected in the tender price that is subject to a competitive process. For this reason, the costs of identified risks likely to emerge during the construction phase are to be tendered for on a lump sum basis. Inflation risk (in materials and labour) is also to be tendered for competitively on a fixed price lump sum basis for three years, including a six month lead-in time. The contract conditions are designed therefore to provide for optimal risk transfer supported by good quality information (e.g. ground conditions information) to help achieve greater cost certainty, better value for money and timely and more efficient delivery of projects. The guidance material developed for contracting authorities is intended to explain the main features of the new contracts.

6. *Standard Conditions of Engagement for Construction Consultants and Associated Guidance*

Up until now, the contractual conditions for engaging professionals on public works projects were based on bespoke contracts resulting in ad-hoc arrangements across the public sector. The appointment of construction consultants and the fee payment arrangements were based on Department of Finance Circular 11/87: *Public Construction Contracts - Procedures for the Engagement of Consultants and Settlement of Fees* and Department of Finance Circular 24/93: *Professional fees for construction contracts - Revision of Circular 11/87*.

Standardising public sector terms and conditions for construction consultants is necessary to ensure that the same arrangements are applied within the relevant public sector bodies thereby adding greater certainty to the process. The Standard Conditions of Engagement and associated guidance are structured and balanced in a way that incentivises more efficient and effective consultant performance to better protect the public sector client's interest. The Standard Conditions of Engagement and the guidance also change the fee payment mechanism by introducing competitive fee bidding on a fixed price lump sum basis as the norm but allowing (through the quality price ratio) quality to remain an important feature in the award criteria for quality-dependent projects. This removes the current uncertainty regarding the total fee and will help to achieve the Government's core objective of obtaining better value for money from public works projects.

Implementation

7. New Forms of Construction Contracts for Public Works and Guidance Notes

The new Forms of Construction Contracts must be applied to employer designed and “design and build” public works projects in Ireland that are procured directly by a government department, bodies under its aegis, including local authorities or other relevant bodies that provide public services (e.g. schools, voluntary hospitals, etc.).

a) **Contract amendment**

In line with Government policy, the new Forms of Construction Contracts are to be the norm and no amendments should be made to them. In this context, the new Forms of Construction Contracts have been drafted in a way that better protects the public sector client’s interest in order to achieve value for money outcomes from public expenditure on public works projects. However, in exceptional and rare circumstances, consideration can be given to amendments to *non core* elements of the new Forms of Construction Contracts. The request for any such amendments from those bodies required to use the new contracts should be submitted to the GCCC for consideration and approval, as appropriate. Any other public bodies wishing to use the new Forms of Construction Contracts but with amendments, should also submit a request to the GCCC for consideration and approval, as appropriate.

b) **Exemption provisions**

(i) Where the body procuring the public works project is not a government department or a body under its aegis or a local authority or other relevant body that provides public services (e.g. schools, voluntary hospitals, etc) and more than 50% of the funding for the project comes from a source other than the Exchequer, the government department or relevant body, as appropriate, should decide if the new Forms of Construction Contracts will apply. If it is decided not to use the new Forms of Construction Contracts on a particular public works project, the Accounting Officer/Accountable Officer in the government department or the relevant public body must be satisfied that the contract terms in the other contract being used are framed in a manner that seek to protect public funds. They must also be satisfied that the alternative contract conditions include the provisions on *Pay and Conditions of Employment* (i.e. clause 5.3 in the new Forms of Construction Contracts). The rationale for this decision should be documented in an appropriate and transparent manner.

(ii) Commercial semi-state bodies (e.g. ESB, BGE, An Post) are not required to use the new Forms of Construction Contracts on public works projects unless more than 50% of the funding for the project concerned comes directly or indirectly from the Exchequer.

8. The use of the new Forms of Construction Contracts should be encouraged as best practice across the public sector generally. In particular, the provisions on *Pay and Conditions of Employment* (i.e. clause 5.3 in the new Forms of Construction Contracts) must be included in whatever contracts are being used by procuring bodies providing public works.

9. The Standard Conditions of Engagement for Construction Consultants and Associated Guidance supersede Department of Finance Circular 11/87: *Public Construction Contracts - Procedures for the Engagement of Consultants and Settlement of Fees* and Department of Finance Circular 24/93: *Professional fees for construction contracts - Revision of Circular 11/87*. The new procedures must be used to engage construction consultants by government departments, bodies under their aegis, including local authorities or other relevant bodies that provide public services (e.g schools, voluntary hospitals etc.). However, the use of the Standard Conditions of Engagement for Construction Consultants should be encouraged right across the public sector, including commercial semi-state bodies, as appropriate.

The Standard Conditions of Engagement for Construction Consultants will apply as follows:

- (i) To all new construction consultancy contracts awarded on or after **1 January 2007**
- (ii) To new construction consultancy contracts awarded before **1 January 2007** but after the issue of this circular where contracting authorities want to use them following receipt of appropriate training.
- (iii) To existing construction consultancy contracts awarded before **1 January 2007** but only by agreement between the contracting authority and the construction consultant.
- (iv) To the selection of construction consultants made before the **1 January 2007** starting date in respect of construction consultancy contracts awarded after **1 January 2007**.

10. It is intended that the new Forms of Construction Contracts for Public Works will apply as follows:

- (i) To all new public works projects about to begin the planning stage on or after **Monday 19 February 2007**.
- (ii) To all new public works projects where planning has commenced but where detailed tender documents have not been developed by **Monday 19 February 2007**.
- (iii) For those public works projects where detailed development of tender documents has commenced, contracting authorities can elect to use the new Forms of Construction Contracts on or after **Monday 19 February, 2007**.
- (iv) Where a contracting authority, following appropriate training, wants to use the new forms of Construction Contracts on public works projects on a date earlier than **Monday 19 February 2007**.

11. Departments and bodies under their aegis will be required to ensure that the requirements at paragraphs 7, 9, 10 are complied with in full. Departments and bodies under their aegis will also be required to ensure that other relevant bodies that

provide public services (e.g. schools, voluntary hospitals, etc.) comply with the requirements at paragraphs 7, 9, 10. To help departments and bodies under their aegis to use the new contracts effectively, the Department of Finance is conducting centralised training for up to 160 staff (identified by the GCCC) across the public sector. Departments and/or bodies under their aegis will also have to undertake more focused training for their respective sectors. I would refer you to this Department's letter to Secretaries General of 11 September 2006 on this matter.

12. Capital Works Management Framework (CWMF)

The Capital Works Management Framework is being developed and will contain an integrated set of contractual provisions, guidance material and technical procedures covering the public works project lifecycle from inception to final project delivery and review. The structure of this strategic framework is closely aligned with Capital Appraisal Guidelines issued by this Department. The framework is intended to encourage more cost effective delivery of public works projects by introducing a more systematic approach to, among other things, planning (both preparatory and detailed), capital budgeting as well as design cost control. The key elements of the framework will also be available for use in early 2007.

13. Monitoring

The GCCC, comprising representatives from government departments and relevant bodies under their aegis, will conduct on-going monitoring and periodic review of the operation of the new Forms of Construction Contracts for Public Works and the Standard Conditions of Engagement for Construction Consultants and associated guidance. At an appropriate time, a review will be undertaken once there is adequate experience gained in the use of the new Forms of Construction Contract and the Standard Conditions of Engagement for Construction Consultants across the public sector. In line with best practice, a structured approach will be followed during that review process, including engagement with and feedback from, key stakeholders.

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Jim O' Brien
Second Secretary General