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Engineers Ireland (Cork)
New Conditions of Engagement
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Rochestown Park Hotel
2 October 2007

Key Features of Conditions of Engagement

- Part of new Capital Works Management Framework
- Same form used throughout public sector
- Fixed price lump sum
 - For well-defined services
 - Over a defined period



Key Features of Conditions of Engagement (cont'd)

- Appointed on basis of quality and price – no fee negotiation
- Focus on fee certainty at all stages
 - Limited increase for delay
 - Competitively tendered rates for additional services
 - Limits on power to issue change orders under works contract
 - Fee correction mechanism
- Copyright on design obtainable – for a price
- Termination at will – even if project ongoing



IEI vs Conditions of Engagement

- Lump sum, fixed price
- Restricted authority
- Termination at will
- Fixed payment for suspension/termination at will
- Copyright/licence to use on multiple projects
- No limit on liability
- No net contribution clause
- No consequential loss exclusion



Clause 1 - Appointment

- Schedules A and B
 - Core conditions will not change
 - Schedules A and B allow for tailoring to particular job
 - Schedule B key for pricing job – technical and management services



Clause 2 - Performance

- Fixed fee covers services in Schedule B. If it is not in the services, it is not in the fee
- Includes all expenses – save for “special disbursements sanctioned in advance by Client” (Clause 9.4-5)
- Standard of care – reasonable skill and care (still room for fitness for purpose but not policy)
- Performance evaluation



Clause 2 – Performance (cont'd)

- Restrictions on authority under works contract
 - Individual change orders
 - Cumulative change orders over 3 month period
 - ‘causing or contributing to reduction in safety, quality, usefulness’
 - Right to management services
 - Advance consultation about financial assessments
 - Acceptance/rejection of value engineering proposal



Clause 2 – Performance (cont'd)

- Liability
 - Explicit inclusion of “knock on” losses caused to other parties working on project
 - Limit of insurance is no limit on liability (NB in context of Clause 3.6)
 - No net contribution clause



Clause 3 - Transfers

- No assignment or subcontracting without consent
- Novation to private sector



Clause 4 – Progress, Periods

- Stage Performance Period vs Total Performance Period
- Can only start each stage when Client gives permission
- No LAD for failure to complete within Stage Performance Period – but breach of contract
- Suspension
 - Whole / partial
 - Fixed payment (demob/remob/special actions)
 - Only if suspended within stage



Clause 5 – Prolongation

- If all float in programme used up such that delay inevitable – inflation on fee for services from date of overrun
 - CPI inflation only
 - No inflation if delay due to consultant's breach or "Special Circumstances" – NB delay to project construction contract



The Three Cs

- Clause 6 - communication
- Clause 7 – co-ordination
 - What Client has to give you
 - Obligation as leader/member of design team
 - “Sign-off” from Client does not relieve responsibility
- Clause 8 – co-operation
 - Co-operation is a contract obligation
 - Co-operation does not imply responsibility
 - Carrot/stick approach



Clause 9 - Payment

- Scheduled fixed fee plus ‘special disbursements sanctioned in advance’
- Conversion of percentage fee to lump sum – percentage x latest budget figure
- Withholding money – under this or any other contract



Clause 10 – Client's Changes

- Must comply with instruction to change services
- Additional services
 - Increased lump sum fee
 - Time charges at competitively tendered rates
 - Client's discretion
- Reduction in services - proportionate reduction in lump sum fee



Clause 11 – Intellectual Property

- Copyright/licence to use
- Licence can cover multiple projects (Schedule A)
- No lien on documents for payment



Clause 12 – Termination

- 3 grounds
 - for substantial breach (for cause)
 - for insolvency
 - at will, even if project continuing
- If for cause – must explain why and what remedial action can be taken by other party
- Sub-consultancy appointments transfer automatically to Client
 - NB not when termination at will
 - Collateral warranty required
 - NB if you are sub-consultant on integrated design team



Clause 12 – Termination (cont'd)

- Compensation
 - Paid fee for work done up to termination
 - For cause/insolvency – terminating party entitled to damages
 - At will – if project continuing, paid scheduled percentage of fee for unworked services for the Stage in which termination occurs



Clause 13 – Law

- Comply with all Irish laws
- NB change in law risk passed to Consultant
 - arguably an additional service



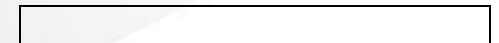
Clause 14 – Disputes

- Default is arbitration
- Client can insert alternative if desired (Schedule A)



Fee Correction Mechanism

- Importance in the public interest of accurate estimating
- Consultant given pre-defined margin of error in producing estimate for construction contract
- If winning bid outside margin of error – over or under – difference between margin of error and actual error deducted from Stage (ii) fee
- E.g., margin of error 10% - winning bid 15% lower than pre-tender estimate – so 5% of Stage (ii) fee deducted



Fee Correction Mechanism (cont'd)

- 3 “outs” for Consultant
 - not due to my contribution
 - only partially due to my contribution – only partial reduction in fee
 - reasonable and justifiable cause – Client has discretion to waive part or all of reduction



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