

# New Public Works Contracts: the employer's perspective

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- 1 Conditions of engagement for consultants
- 2 Works contracts – contractor’s perspective
- 3 **Works contracts – employer’s perspective**

- background to the contracts
- some key features
- some issues to consider at tender time
- some administration issues

## Government decided in May 2004 to reform public sector construction procurement in response to concerns about

- cost overruns on public works
- using the negotiated procedure to appoint consultants

- award contracts on a lump sum fixed price as far as possible
- obtain the lump sum on a competitive basis in a tender competition
- increase cost certainty
- rebalance risk so that it is allocated to those best able to manage and control it
- value for money
- more efficient delivery of projects

- **5 new construction contracts**
  - civil works designed by the employer
  - building works designed by the employer
  - civil works designed by the contractor
  - building works designed by the contractor
  - minor works
- **model forms**
- **new arbitration rules**
- **guidance**
- **New conditions of engagement for construction consultants**
- **guidance note 16 & 17**

- project management structure
- project definition
- budget development
- procurement strategy and contract type
  - public works contracts (5)
  - public works contracts guidance
  - arbitration rules
  - model forms
- consultants appointment process and conditions of engagement
  - procurement guidance notes
  - suitability assessment of consultants
  - standard conditions of engagement for construction consultants
- design development and procurement process
  - design process
  - suitability assessment of works contractors
  - procurement guidance
- design cost control procedures
- tender process
  - template public works tender document
- construction process
- construction cost control
- project review
- analysis of outturn costs

wide-ranging reforms will impact on all key stakeholders  
in delivery of capital projects

- clients
- consultants
- contractors

major challenges for everyone



- background to the contracts
- **some key features**
- some issues to consider at tender time
- some administration issues

- new language
- new concepts
- assumption that design complete at tender stage
- significant shifting of risk to contractor
- tighter administration
- very limited scope for additional payment

- new language
  - employer's representative
  - works requirements
  - pricing document
  - change order
  - delay event and compensation event
  
- new concepts
  - programme contingency
  - tendered delay costs

- contract formation
- instructions
- programme
- progress reports
- interim application for payment – certify employment compliance
- notices of claim
- even meetings

- contract sum only adjusted in limited specific circumstances
- risk of errors in quantities - optional
- increased cost
- change in legislation
- utilities
- consents
- liability for (nominated) subcontractor design

- price variation
- compensation event
  - error in quantities (employer option)
  - change order
  - others

.....nothing else

- taking the worst elements of FIDIC, NEC, GC/Works, Australian forms and put them all together

*or*

- bringing Irish public works procurement into the 21<sup>st</sup> century

- background to the contracts
- some key features
- **some issues to consider at tender time**
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- completeness of design – works requirements
- risk allocation
- price variation options
- completion issues
- specialists
- what to ask for in works proposals
- project supervisor
- copyright
- insurance options

- is the design complete?
- contract silent but
  - assumption that design will be complete
  - guidance note – bar bending schedules
  - no Provisional Sums
  - no PC Sums
  - incomplete design offends the lump sum
- if not complete, delay tendering
  - (or use design and construct)

- what you want built
- traditional contract – the complete design
- DB – complete statement of requirements
- matters required by the conditions e.g. whether the contractor is PSCS/PSDP

- traditional: note compensation event #7

There is a factual error in information about the Site or setting-out information in the Works Requirements

- works requirements limit the scope of the works, and require a Change Order
  - e.g. length of piles
- DB: clause 1.7  
contractor is responsible for the works requirements

- interpretative reports
- preliminary safety and health plan
- EIS

- optional compensation events
- programme contingency
- how to treat delay costs
- assumed extra work and delay for tender comparison
- contingency outside the contract

- can result in adjustment to the contract sum
- listed in schedule, part 1K
- some of them are optional as compensation events
- but give time extension anyway
  - except bill discrepancy

- minor works
  - only bill discrepancy
- employer design
  - bill discrepancy
  - unforeseeable archaeology, ground conditions, man-made obstructions or utilities in the ground
  - utility delay in relocating or disconnecting
- contractor design
  - unforeseeable archaeology
  - utility delay in relocating or disconnecting



## Clause 9.4.2

The Contractor has included in the initial Contract Sum and shall include in its programme a contingency for delays to the Date for Substantial Completion of the Works caused by Compensation Events

- employer sets the contingency
- 2 thresholds (1 for minor works)
- only for compensation events (paid time extensions)
- deductions from time extensions
  - all of the first threshold
  - half of the (otherwise paid) delay over the first threshold, up to the second threshold
  - so the delay at the Contractor's risk is *the sum of the 2 thresholds*

- value of additional, substituted, omitted work
- delay cost

- tenderers can be asked to price a daily rate in tender
- if so, can be
  - a single daily rate for the whole job
  - or daily rates for 3 phases (employer must identify)
- must be taken into tender assessment
- alternative is *expenses [excluding profit and loss of profit] unavoidably incurred as a result of the delay*

- add to tendered contract sum
  - tendered delay costs x assumed number of days' compensible delay (on top of programme contingency)
  - tendered “daywork” rates x assumed hours of labour and amounts for plant and materials paid on this basis
- this gives a “comparative cost of tender” for tender assessment only
- assumptions also reveal a contingency

- PV1 proven cost of general round labour and material increases
  - minor works form only has PV1
- PV2 formula fluctuations
  - requires completed appendices
  - appendix 2: assumed % labour, materials, fuel, temporary works, overheads
  - appendix 3: assumed material category weightings (WPI categories)

these are just assumptions for PV2 purposes – not exact
- PV clauses only cover fluctuations after 30 months from contract date (PV1) or 36 months from recovery date (PV2)
  - recovery date is 10 days before tender (designated date) but can be moved forward if contractor delays starting date
- and hyperinflation: 50% month-to-month increase in material cost
- and changes in VAT, PRSI, tariffs, import export licences

- completion date: set or tendered
- sectional completion
- rate of liquidated damages
- can contractor complete early?

- a subcontractor or supplier of a works item named in the contract
- contractor's personnel who are to do design
- contractor's personnel stated in the works requirements to be specialists

- no PC Sums
- employer cannot nominate
- if employer wishes to select, must do so pre-tender
- options:
  - separate contract for specialist works
  - employer selects specialist pre-main works tender and requires contractor to use that specialist (with or without **novation**)
  - assess main works tenderers with their Specialists at tender time
    - employer may specify a list
  - require contractor to submit details under the contract



- closest parallel to nominated subcontractor
- but “nomination” takes place pre-tender for main works
- employer conducts a separate (earlier) competition to select the specialist
  - could be a framework call-off
- details of the specialist(s) are included in the main works tender works requirements
  - will have to include the sub-contract terms
- if employer needs the specialist to start before the main works contract is entered, employer can contract with the specialist directly and subsequently **novate** the specialist to the contractor

- conduct a competition
- avail of exemption for small lots
- non-mandatory notice for non-mandatory “panel”

- employer must specify in schedule from which specialist collateral warranties are required
- and can specify when warranties are required, and payment deduction if not provided

- equivalent to FIDIC contractor's proposal
- new in traditional contracts
- clause 4.13 – contractor's initial management arrangements

including systems, methods, planning and other preparations for providing personnel and resources, programming, recording, consultation, and co-operation, and for flexibility, as referred to in the Contract

- could include:
  - key contractor personnel, nominee PSCS, PSDP
  - elements of outline conceptual design
  - outline traffic/environmental/quality/safety management plans
  - outline programme

- completeness of design – works requirements
- risk allocation
- price variation options
- completion issues
- specialists
- what to ask for in works proposals
- project supervisor
- copyright
- insurance options

- employer is “client” under Safety, Health and Welfare at Work (Construction) Regulations 2006
- works requirements must say whether contractor is to be PSDP, PSCS or both
- may allow a contractor nominee
- must be a competent individual (human being) or body corporate
- contractor may be appointed for a “project” that is bigger than the works
  - this must also be specified in the works requirements

- employer may use contractor's documents (those that are to be given to employer) and works proposals for any purpose in connection with the works
- employer option to require copyright
  - schedule, part 1C
  - if this option is not taken, employer may not use contractor's documents for another job

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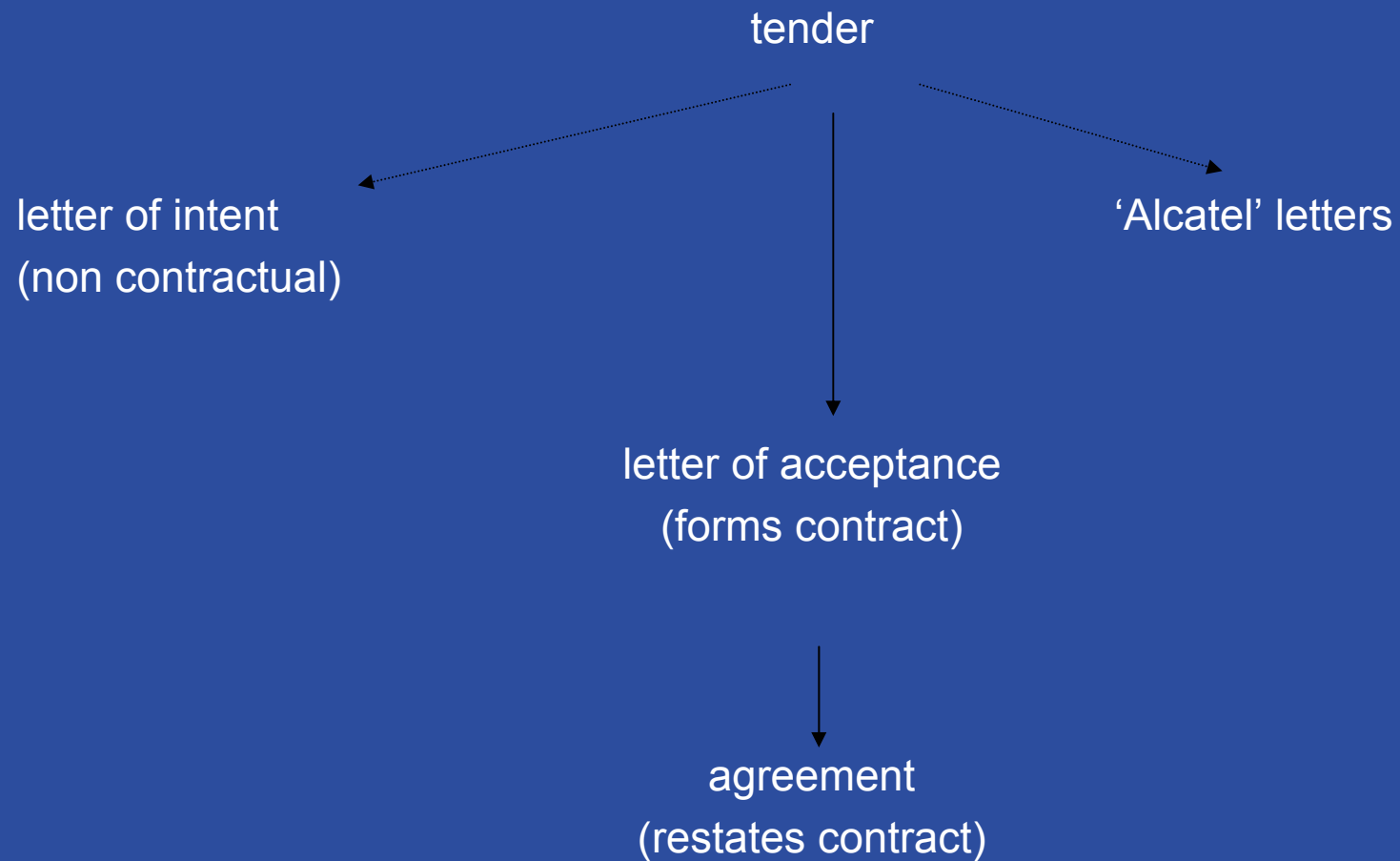


- background to the contracts
- some key features
- some issues to consider at tender time
- **some administration issues**

- forming the contract
- starting
- the employer's representative
- interim payment
- final payment, completion and defects
- dealing with claims

- issuing the letter of acceptance forms the contract
- all steps for contract must be taken before it is issued
  - contracting authority internal approvals
  - funding approval
  - *Alcatel* cooling off period
- it is wise to require at least the bond before issuing it
- once it is issued the competition is over, and the contract can't be awarded to number two
- the date it is issued is the contract date, and time starts running
- include or identify tender addenda and agreed post-tender clarifications in the letter of acceptance
- must be issued to the entity that tendered, pre-qualified

- re-states the contract already formed by the letter of acceptance
- clarifies the documents making up the contract
  - normally a clean “contract issue” of all documents
- sealed by the parties



- tender
- schedule
  - part 1: completed by the employer pre-tender
  - part 2: submitted by the contractor in its tender
- conditions 1-13
  - not amended
- works requirements
  - issued by employer for tender
- pricing document
  - issued by employer for tender and priced by contractor in its tender
- works proposals
  - submitted by contractor in its tender
  - novated design documents

- project supervisor appointment
  - construction stage *or*
  - design process and construction stage
- performance bond
- parent company guarantee
  - when parent helped meet suitability criteria
- insurances
- collateral warranties from specialists
- legal opinion on foreigners' documents

- contractor sets starting date
  - no more than 20 working days after contract date
  - 15 working days noticeworking day = any day not Saturday, Sunday, public holiday, Good Friday
- before starting date, contractor must give the employer, executed:
  - the agreement
  - bond
  - parent company guarantee
  - PSDP/PSCS appointment and safety plan, if applicable
  - insurances
  - collateral warranties
  - legal opinion on foreigners' documents (2.7)
- contractor must start work under the contract on the starting date
  - employer design: must start to execute the works on the site



The Employer shall allow the Contractor to occupy and use each part of the Site described in the Work Requirements as lands made available by the Employer for the Works from a date on or before the latest of the following:

- (1) the Starting Date
- (2) the day after the Contractor has done what sub-clause 9.1 requires the Contractor to do before the Starting Date
- (3) the date stated in the Works Requirements, if any
- (4) the day after the Contractor has submitted its programme according to sub-clause 4.9
- (5) the date stated for work to start on the part of the Site in the Contractor's current programme
- (6) 10 working days (or another period stated in the Works Requirements) after the Contractor has informed the Employer's Representative that it is ready to start executing the Works on the Site **D&B only**
- (7) the date the Contractor actually requires the part in accordance with its actual progress
- (8) 10 working days after the Contractor has obtained all the Consents it needs to start executing the Works on the Site and given copies to the Employer's Representative **D&B only**

**Employer's Representative** means the [architect,] engineer [,quantity surveyor] or other person appointed by the employer as its representative in accordance with the Contract.

- named in the Schedule, part 1A or appointed and named by the Employer promptly after the contract date
- limitations on authority are in the Schedule part 1A
  - match conditions of engagement
- ER may delegate
- employer may replace ER
  - must do so if position becomes vacant

- **instructions**
  - **directions** in accordance with the contract
  - **change orders (variations)** compensation event

**Change Order** means an instruction of the Employer's Representative to change [including add to or omit from] the Works or to change [including impose or remove] constraints in the Contract on how the Works are to be designed or executed

- **objections** to Contractor submissions
- opinions, assessments, determinations, certificates in accordance with the contract
- other communications

- on any matter connected with the works
- must be in writing, except in emergency
- contractor must comply
- contractor can claim that a direction is a change order
- no change order after substantial completion, except concerning defects or outstanding work

- On employer design projects:

The Employer's Representative shall give an instruction that is, in the Employer's Representative's opinion, necessary for the completion of the Works. If, in the Employer's Representative's opinion, it is physically impossible or contrary to Legal Requirements to complete the Works in accordance with the Works Requirements, the Employer's Representative shall give a Change Order. The Employer's Representative shall give an instruction required under this sub-clause 4.5.4 within the time required by sub-clause 4.11.

à la IEl 51(1)

- failure is a compensation event

- at least 10 working days' notice of required instructions, free-issue works items, anything else
- latest date for Employer is:
  - any date in the contract
  - date in current programme
  - date for which first notified
  - date needed for actual progress

- procedure in 4.7 applies when Contractor has to **submit** something to the ER
  - ER has 10 working days to object, but does not have to respond at all
  - contractor must not proceed until the 10 working days has run or contrary to an outstanding objection
  - limited grounds for ER to object: to proceed per the submission
    - would not comply with the contract
    - adverse effect on the employer or public interest
    - impose an obligation on the employer it does not have to bear
    - contrary to legal requirement
    - adverse effect on contractor's ability to comply with the contract
    - or other ground in the contract
- unless Works Requirements specify another procedure
  - such as a certification procedure

## contractor statement

contract value of work, unfixed works items, compensation events, price variation



## ER certificate

10 working days from statement



## contractor invoices



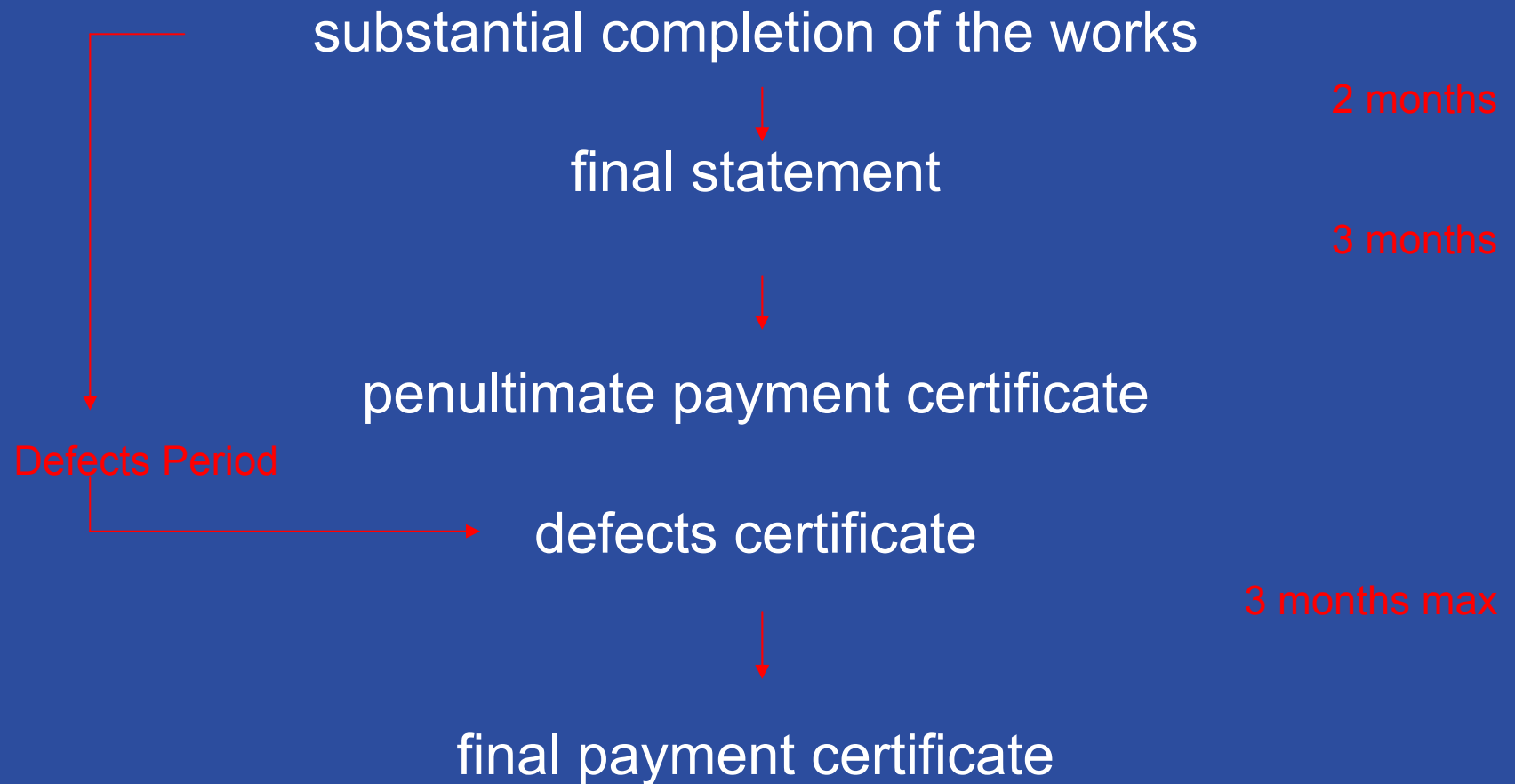
## employer pays

15 working days from invoice



- payment is for full compliance, including construction management, programming, reporting, payment of wages, observing employment requirements. No full payment if no full compliance.
- deductions for:
  - collateral warranty – Schedule, part 1F
  - programme or progress report (15%)
  - estimated amounts owed to work persons
  - no pay if no certificate of compliance with employment requirements ( 5.3.7)
- if still not complied with by defects certificate, contract sum reduced

- interim payment on issue of certificate of substantial completion of a section or the works
- final statement within 2 months of certificate of substantial completion of the works
- penultimate payment certificate within 3 months of statement
  - or 5 months of certificate if no statement
- final payment certificate within 3 months after defects certificate
- final same as penultimate except
  - last retention payment
  - compensation events after substantial completion certified
  - amounts owed by the contractor (e.g. defects)
  - deductions under 11.4



- percentage in schedule, part 1L
- % reduction on substantial completion of a section
- half released on substantial completion of the works
- contractor may provide a bond for the other half
- otherwise, second half is released on defects certificate
- release or reduction: contractor invoices
- employer pays in 15 working days

- defects period specified in Schedule, part 11
- contractor to complete and rectify defects on ER direction as soon as practicable after substantial completion
- causing as little disruption as possible
- ER may extend defects period
  - if work remains outstanding or defects uncorrected or
  - if the contractor has completed work or rectified defects
  - with Employer's agreement, ER may reduce retention when defects period would have expired without the extension
- ER issues **defects certificate** within 20 working days of end of defects period
  - it does not limit employer's rights

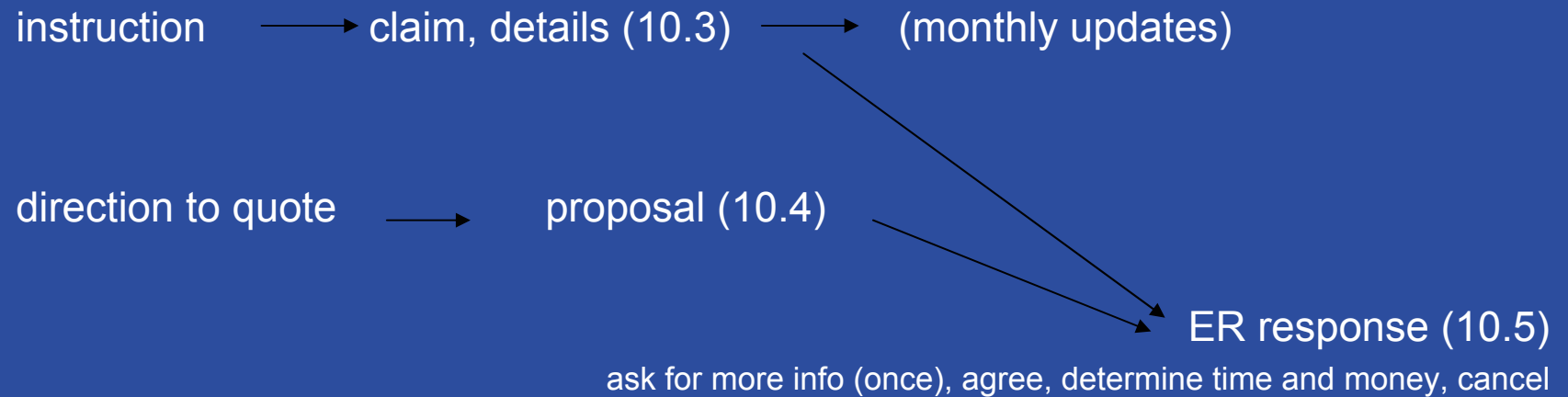
If the Contractor considers that under the Contract there should be an extension of time or an adjustment to the Contract Sum, or that it has any other entitlement under or in connection with the Contract, the Contractor shall, as soon as practicable, and in any event within 20 working days after it became aware, or should have become aware, of something that could result in such an entitlement, give notice of this to the Employer's Representative. This notice must be given according to clause 4.14 and prominently state that it is being given under clause 10.3 of the Contract.

- 20 working days later, contractor must give details of:
  - all relevant facts
  - calculation and proposal of any financial entitlement
  - proposal for use of programme contingency or time extension
- any further information the ER requests

If the Contractor does not give notice and details in accordance with and within the time provided in this sub-clause 10.3, except where the Contractor has been required to and has given a proposal complying in full with sub-clause 10.4 [notwithstanding anything else in the Contract] the Contractor shall not be entitled to an increase to the Contract Sum or extension of time or use of the programme contingency referred to in sub-clause 9.4 [and the Employer shall be released from all liability to the Contractor in connection with the matter].

- If cause of claim has continuing effect, contractor must update the information monthly
  - claim for delay and cost already incurred
  - so far as practicable, proposing a final adjustment
  - anything else the ER reasonably required
- contractor must keep detailed contemporary records
  - ER can direct what records and ask for them





ER can act on its own initiative

- compensation events are for the employer too
- employer or ER notify claim
- contractor has 20 working days to respond
- ER determines in 20 days after response (or time to respond runs)
- employer may deduct from the contractor
  - amounts ER determines due or likely to become due
  - amounts due under any contract
- this procedure applies until defects certificate

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