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
Engineers Ireland (Cork)
New Conditions of Engagement
Kevin Kelly

Rochestown Park Hotel
2 October 2007